Duff on Hospitality Law

Online Travel Company/Hotel Booking Antitrust Actions are Consolidated in Texas

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First-time contributor and resident litigation expert, Don Scaramastra, has offered to update the status of the much discussed class-action involving online distributors and certain hotel operators, and to discuss antitrust laws related to online distribution. Thank you Don for this informative piece.

On December 11, 2012, the federal Panel on Multi-District Litigation ordered the consolidation of class-action lawsuits alleging that online travel agents and certain hotel chains conspired to impose a resale price maintenance scheme that fixed the retail price for hotel room reservations in violation of federal and state antitrust laws. The MDL Panel ordered these lawsuits to proceed in the U.S. District Court for the Northern District of Texas. Since last summer, over 20 such lawsuits have been filed. This outcome appears to be good news for the defendants, all of whom advocated for the transfer and consolidation of these cases to that district.

You might be wondering what these lawsuits are all about, what "resale price maintenance" (or "RPM") is, and what the antitrust laws have to say about it.

RPM is the practice in which a seller and buyer at one link in a distribution chain agree on the minimum price that the buyer may turn around and resell the product.

RPM has something of a storied history in antitrust law. Under federal antitrust laws, RPM was deemed unlawful just over a century ago. But in the 1930s, Congress enacted a partial "fair trade" exemption from liability. Four decades later, Congress repealed the exemption, returning RPM to its former illegal status. And finally, five years ago, in *Leegin Creative Leather Products v. PSKS, Inc.*, the Supreme Court declared that not all RPM agreements were illegal, only those that imposed an "unreasonable" restraint on trade. And that is where things stand today.

Confused yet? Well, wait ... there's more! RPM is a concern under most if not all state antitrust laws, and many states may reject the Supreme Court's lead and maintain RPM's *per se* illegality. A few states have already rejected *Leegin,* while enforcement authorities in others have loudly denounced the case and proclaimed their intent to pursue RPM as an automatic violation of the antitrust laws. (Many in federal law enforcement have announced their desire to repeal *Leegin* and *Leegin*-repealer legislation has been proposed in but not passed by Congress.) Meanwhile, it's not as though the rest of the world marches to the beat of the same drum. The EU, for example, appears to no longer treat RPM as automatically or *per se* unlawful, but it seems to some to come awfully close. And the impact of all of these different legal

standards is only exacerbated by the increasing ability of business to sell online to customers across borders.

And if **this** isn't enough to leave you scratching your head, here's more. Antitrust law gives greater scrutiny to **agreements** on price than to **unilateral decisions** regarding price. As a result, for nearly a century the Supreme Court has recognized that a seller and buyer may not agree on the minimum resale price the buyer may charge, but the seller may unilaterally refuse to sell to a buyer who resells below a minimum price. If you find it hard to see the difference between saying:

"John, you agree that if you sell our products below $X, we may terminate you,"

and

"John, do whatever you want but if you sell our products below $X, we may terminate you,"

you are not alone. Nonetheless, for nearly a century, antitrust law has seen a difference.

So now you have a little background on RPM, on where it is and where it has been. But where is it going? In *Leegin* the Supreme Court offered some hints, identifying situations where RPM might be unlawful even under its more permissive ruling. RPM might be used to enforce or organize an illegal cartel by the players at one level in the distribution chain (e.g., manufacturers), the Court noted, or it might be abused by a dominant player in the market.

What does any of this have to do with online travel agencies and hotel reservations? According to the plaintiffs, everything. Their complaints allege that major online travel agents (the plaintiffs name Expedia, Orbitz, Hotels.com, Travelocity, Booking.com, and Priceline.com) are (collectively) the "dominant" players with monopoly power in the market for direct online retail sales of hotel room reservations. The complaints allege that these online travel agents each offered "best price" guarantees to their own customers, effectively ensuring that each agent will charge the same price. Finally, they allege that the online travel agents induced major hotel chains to agree to restrict the ability of every online travel agent, including those not part of the scheme, to discount the price of hotel room reservations, which prevented online travel agents who were not part of the scheme from undercutting the prices of those who were. The result, the complaints allege, is that online travel agents stopped competing on price, which caused the price of online hotel reservations to rise over what they would have been in a competitive marketplace.

These cases are in their very early stages. The parties will likely be embroiled in preliminary procedural issues for many, many months to come, only after which will they begin to grapple with the lawsuits' merits. Antitrust cases, particularly attempted class actions like these, are notoriously complex and costly for both sides. So even if the online travel agent cases were to resolve with an "early" dismissal by the Court, this "success" will come to the defendants at mind-boggling expense, with appeals almost sure to follow.

If you have questions about the pending OTA-related litigation or wish to receive more information on resale price maintenance, please contact me or Greg Duff.

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