Court Tosses Antitrust Suit Against State Tourism Agency

By STEVEN M. ELLIS, Staff Writer

The Ninth U.S. Circuit Court of Appeals yesterday rejected claims that the California Travel and Tourism Commission violated federal antitrust law by agreeing with rental car companies to pass tourism assessments on to customers.

A three-judge panel said the commission was shielded from liability for price-fixing allegations under the "state action immunity" doctrine because it acted pursuant to a "clearly articulated state policy."

Consumer advocates sued the commission in 2007, arguing that it and the companies were using a 2006 law allowing the companies to change the way they advertise rates at many airports as cover to charge excessive rates.

Under the law—AB. 2592, which was drafted at the urging of rental car companies, and rushed through the Legislature with three minutes of debate in a late-night session only hours before legislators adjourned for the year—the passenger rental car industry became the fifth tourism category represented on the commission and agreed to pay a high assessment fee, greatly increasing the commission's budget.

The commission is a "nonprofit mutual benefit corporation" created by state legislation in order to expand and develop California's tourism industry. It is governed by 37 commissioners, who simultaneously serve as directors, and chaired by the secretary of the Business, Transportation and Housing Agency. Twelve commissioners are appointed by the governor, while the others are elected by the categories within the tourism industry itself.

In exchange for the commission's increased funding, rental car companies were allowed to "unbundle" fees charged to customers and itemize them separately from the base rental rate, allowing the companies to "pass on some or all of the assessment to customers." The law allowed the companies to remove a 2.5 percent tourism fee

and a 9 percent airport concession fee from their widely advertised base rental rate and bill them as separate costs on each invoice.

San Diego consumer advocate Michael Shames and Gary Gramkow, who travels often for his San Diego footwear business, filed suit, alleging that the agreements between the rental companies and the commission constituted unlawful price-fixing. Represented by five attorneys, including two with the Center for Public Interest Law at the University of San Diego School of Law, they also claimed the commission committed a number of Bagley-Keene Open Meeting Act violations.

U.S. District Judge Marilyn L. Huff of the Southern District of California, however, granted the commission's motion to dismiss for failure to state a claim. Huff found that the commission was entitled to state action immunity from antitrust liability, and declined to exercise supplemental jurisdiction over the Bagley-Keene claim.

She also found that the dismissed claims against the commission were adequately severable from pending claims against the rental companies.

On appeal, the Ninth Circuit affirmed in an opinion by Senior Judge Michael Daly Hawkins.

Assuming that the plaintiffs sufficiently alleged an antitrust violation under the Sherman Act, Hawkins agreed with Huff that the commission's conduct qualified for state action immunity.

Pointing to the U.S. Supreme Court's opinions in *Parker v. Brown* (1943) 317 U.S. 341 and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, Hawkins wrote that Sec. 1 of the Sherman Act generally does not apply to a state's anticompetitive conduct where the challenged restraint is "clearly articulated and affirmatively expressed as state policy," and "actively supervised" by the state itself.

He commented that the commission's conduct was pursuant to a policy clearly articulated in the law allowing businesses to "pass on some or all of the assessment to customers," and said the conduct was reasonably foreseeable given such authorization.

Hawkins also opined that the commission, "[d]espite the mix of public and private interests at play, looking at the totality of the circumstances," possessed enough of the qualities of a state agency to be exempt from the "active state supervision" requirement.

Judges Sidney R. Thomas and M. Margaret McKeown joined Hawkins in his opinion.

The plaintiffs were represented on appeal by Robert C. Fellmeth of the Center for Public Interest Law and Donald G. Rez of Sullivan, Hill, Lewin, Rez & Engel in San Diego. The commission was represented on appeal by W. Scott Cameron and Charles L. Post of Weintraub Genshlea Chediak in Sacramento, and Deputy Attorney General Diane Shaw.

The case is Shames *v. California Travel and Tourism Commission*, 08-56750.