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MARKET CONDITIONS PREVENTING THE SALE OF ANCILLARY SERVICES BY INTERMEDIARIES CONSTITUTE "UNFAIRNESS" UNDER 49 U.S.C. § 41712

August 2011

Issue: Whether the inability of GDSs to price and sell ancillary services in connection with basic air transportation that they are authorized to sell constitutes evidence of an "unfair or deceptive practice" within the meaning of 49 U.S.C. § 41712.

Conclusion: The jurisprudence that has developed over the meaning of "unfair or deceptive practice" at the FTC leaves little doubt that systemic impediments to what should be a readily available facility for comparison shopping and efficient transactions are evidence of an "unfair or deceptive practice" that the Department can and should redress pursuant to the authority conferred by 49 U.S.C. § 41712.

INTRODUCTION AND BACKGROUND

Global Distribution Systems play a vital role in the marketing and sale of air transportation. Airlines almost universally have entered into agreements with GDSs through which they sell air transportation across their systems. Thousands of brick-and-mortar ticket agencies, online ticket agencies (OTAs), and other third-party sellers are able to access fares, seat availability, and other critical information from hundreds of airlines and other travel providers, and to make bookings, thanks to the convenience and efficiency afforded by GDSs. More than 50 percent of travelers today purchase their travel through such GDS-served agencies, relying for each transaction on the content and technology made available by GDSs.

Prior to the unbundling of air fares, GDSs represented a tool that clearly enhanced airline competition by facilitating effective comparison shopping by travelers. Since the unbundling of air fares, however, comparison shopping has become far more difficult – even through GDSs. Because GDSs today are not receiving dynamic, "transactable" information about ancillary services and fees associated with the air transportation they are authorized to sell, they are not able to quote, let alone sell, an "all-in" air fare – *i.e.*, a price for air transportation that includes any of the fee-based extras that a traveler may want – early boarding, checked or carry-on

baggage, premium seating, etc. Consequently, retail outlets relying on GDS technology -- whether brick-and-mortar agencies or OTAs – are unable to assist consumers as they have done in the past with a straightforward listing of optional itineraries and their respective prices. The net result is that consumers are likely to be driven back to individual airline websites, thereby making comparison shopping so difficult and time-consuming that it will become a far less effective discipline on price than in the past. Inevitably, because comparative pricing information will not be easily accessible, consumers will frequently pay more for air transportation than they would have paid in a more transparent, more competitive commercial environment.

The Department is well aware of this worrisome development. It said, in its Final Order issued last April in Docket No. DOT-OST-2010-0140, "Enhancing Airline Passenger Protections": "The Department's goal to protect consumers from hidden and deceptive fees and to allow consumers to price shop for air transportation in an effective manner remains paramount." Importantly, the Department prescribed what it characterized as a "partial solution" to the proliferation of ancillary fees in its Final Order. Specifically:

- U.S. and foreign carriers must disclose on their websites information about changes in baggage fees or allowances and to list all of the airlines' fees for optional services.

- Carriers and ticket agents who operate a website must provide information on the first screen in which the ticket agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can go to access these baggage fees.

- Carriers and ticket agents must include on e-ticket confirmations information about the free baggage allowance and the applicable fee for the first and second checked bag and carry-on.

That partial solution can be expected to prevent the worst-case scenario – where a consumer is left without any notice whatsoever of additional fees that may be charged in connection with the air transportation being purchased. Thanks to the requirements set forth in the Final Order, consumers must now be alerted to the likelihood that the price charged for a ticket is probably not the full price that will have to paid for the journey. As the Department knows, however, its new disclosure requirements necessarily fall short of achieving the Department's avowed goal: "allow[ing] consumers to price shop for air transportation in an effective manner…." Accordingly, the Department indicated that it would address in a separate rulemaking the following question: Whether it is in the public interest to require carriers to provide information on ancillary fees to those GDSs through which they make their base fares available "as a reasonable way, if not the best way, to ensure consumers can easily comparison shop for air fares."

For the reasons discussed below, in an environment increasingly characterized by opaque pricing, facilitating efficient, "apples-to-apples" comparison shopping – particularly through the powerful GDS technologies currently available – should be treated by the Department as an essential ingredient in its effort to maintain optimal competition in the market for air transportation. There can be no doubt, moreover, that the Department has ample authority under 49 U.S.C. § 41712 to redress the inherent unfairness visited on consumers by a market where effective comparison price shopping is difficult or impossible.

DISCUSSION

A. FTC Precedent: "Unfairness"[1]

The language of 49 U.S.C. § 41712(a) – notably its reference to "unfair or deceptive practices" – is derived from Section 5 of the Federal Trade Commission Act.[2] Accordingly, although air transportation is explicitly carved out of the FTC's jurisdiction,[3] the FTC's interpretation of the statutory language has important implications for DOT's analysis in the current context.

The FTC's jurisprudence surrounding the concept of unfairness has evolved over many years. A 1964 summary of the factors considered by the Commission in deciding whether an act or practice was "unfair," for example, cited: (1) "whether the practice . . . offends public policy as it has been established by statutes, the common law, or otherwise'; (2) "whether it is immoral,

[1] This discussion is limited to the FTC's experience in applying its "unfairness" policy. Because the Commission's precedents under that policy so clearly buttress the Department's authority to address the kinds of impediments to informed consumer choice that are presented here, it is not necessary to consider whether the circumstances in issue represent "deception" as well Moreover, "The unfairness theory . . . is the Commission's general law of consumer protection, for which deception is one specific but particularly important application." *Int'l Harvester Co.*, 104 F.T.C 949, 1064 (1984). Even a cursory review of the Commission's published policy regarding deceptive practices, however, would suggest that "deception" as defined by the Commission is very clearly one consequence of GDSs' inability to include ancillary services in the air transportation that they are otherwise authorized to sell. The Commission's policy says: "First, there must be a representation, omission or practice that is likely to mislead the consumer. . . . Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. . . . Third, the representation, omission, or practice must be a 'material' one. *The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service.*" FTC, Policy Statement on Deception (1983), appended to *Cliffdale Assocs.*, 103 F. T. C. 110, 174 (1984) (emphasis added). Importantly, scienter need not be proved in order to establish deception within the meaning of the statute. A practice can be found to be deceptive even without evidence showing that there was an intent to deceive consumers. *See FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

[2] 15 U.S.C. § 15. The original language of Section 5 referred only to "unfair methods of competition." The 1938 Wheeler-Lea amendment, 52 Stat. 111, added the phrase "unfair or deceptive acts or practices." The amendment was explicitly intended to make clear that Congress, through Section 5, charged the FTC with protecting consumers as well as competitors.

[3] 5 U.S.C. § 45(b).

unethical, oppressive, or unscrupulous;" and (3) "whether it causes substantial injury to consumers . . .."[4]

By 1978, however, the Commission had decided that the need to identify unscrupulous behavior as a prerequisite to acting against unfairness in the market was too limiting, and that prevailing market practices, even when *not* the product of unscrupulous behavior, could create an ambient unfairness in the market that was actionable under the Commission's Section 5 authority.

Thus, for example, in considering whether to issue a new rule governing the marketing of eyeglasses in 1978, the Commission was faced with an array of restrictions on the advertising and sale of eyewear and related services. The restrictions had been imposed both by state governments and professional associations and were defended by proponents as necessary to protect the public from substandard service providers. Ophthamologists typically transmitted prescriptions directly to opticians, for example, without making them available to their patients. The advertising of eye examinations was widely forbidden. As a result, patients were effectively denied the ability to price shop. The Commission did not attempt to characterize the restrictions as the product of unscrupulous or unconscionable behavior, but merely recognized the extent to which they compromised competition in the market for ophthalmic goods and services.

Following a lengthy proceeding, the Commission issued a rule that facilitated more effective price shopping by consumers.[5] The Commission based the new rule on a more contemporary and relevant interpretation of "unfair acts or practices" within the meaning of Section 5 of the FTC Act. Thus, the Commission wrote:

> "Economic and social development creates new problems which require new answers, and time and thought bring new insights into the nature of trade regulation problems and the efficacy of possible remedies.
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> . . . .
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> "The Commission's authority is not limited only to practices which are subject to general public condemnation. It has a more general mandate to consider, in the Court's phrase, 'public values.' [Citing *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).] *In a complex economy, consumer injury can be caused by intricate chains of interaction among many participants, and the Commission is not prevented from acting simply because it is difficult to pinpoint the blame*."[6]

Later in the same order, the Commission wrote that only two essential inquiries were "appropriate for this matter." The first was "[w]hether the acts or practices result in substantial harm to consumers." The second was "[w]hether the challenged conduct offends public policy."

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[4] Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking, 29 Fed. Reg. 8324, 8354 (1964).

[5] Part 456 – Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992 (1978).

[6] *Id.* at 24000 (emphasis added).

Dealing with the second question first, the Commission noted that the Supreme Court in two then recent decisions[7] had held that the consumer's right to receive price information is protected by the First Amendment. "We regard this as an authoritative declaration of general public policy in this area," the Commission wrote. "Even if the consumer's right to receive information were not so clearly protected by the Constitution," the Commission continued, "we think its importance is sufficiently established by other sources, including a number of Federal statutes."[8]

As to the first issue -- whether the lack of pricing information injures consumers -- the Commission said that "if price information is not available, or if it can be obtained only at high cost, consumers are deprived of the opportunity to satisfy their needs at the lowest available price. . . . This consumer injury, coupled with the specific public policy in favor of providing information to consumers, is sufficient to support the rule."[9]

The Commission concluded its discussion of the legal authority upon which it based its new rule by commenting on the requirements of a free market. Competition is obviously an essential prerequisite to a functioning free market, the Commission wrote, but it was not the only one. "There are a number of other factors involved, such as availability of information, [and] a lack of excessive transaction costs . . .. [Citation omitted.] [10]

Finally, the Commission said: *"Acts or practices which cause consumer injury by creating, exploiting, or failing to alleviate market imperfections other than a lack of or threat to competition can be unfair within the meaning of Section 5."*[11]

Two years later, in a letter to the leadership of the Senate Commerce Committee, the FTC summed up its policy under the "unfairness" language.[12] It recited the three factors that earlier cases had listed: (1) Whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous. As in the Eyeglass Rule, the major emphasis was on the first two factors. The third was all but dismissed as a factor. "The [third] test," the Commission wrote, "has proven . . . to be largely duplicative. Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as

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[7] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).

[8] 43 Fed. Reg. at 24000-01 (citing, *e.g.,* Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (1977); Fair Packaging and Labeling Act, 15 U.S.C. §§ 145 *et seq.* (1976); and Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 *et seq.* (1976)).

[9] 43 Fed. Reg. at 24001.

[10] *Ibid.*

[11] *Ibid.*

[12] FTC Policy Statement on Unfairness, December 17, 1980 ("Unfairness Policy"), available at http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.

well. The Commission has therefore never relied on the third element . . . as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the first two."[13]

Expanding on the concept of "injury" for this purpose, the Commission listed three factors:[14]

- First, the injury "must be substantial." In most cases, the Commission wrote, "a substantial injury involves monetary harm...."[15]
- Second, "the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces." The Commission said that it "will not find that a practice unfairly injures consumers unless it is injurious in its net effects."
- Third, "the injury must be one which consumers could not reasonably have avoided."

The Commission's elaboration of the third factor is particularly relevant to the Department's consideration of how best to maintain effective competition for air services:

> "[I]t has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[16]

The 1980 Unfairness Policy Statement remains current.[17] Indeed, the determination to address unfairness visited on consumers by "obstacle[s] to the free exercise of consumer decisionmaking" – even where no unscrupulous "culprit" is likely to be implicated – has been central more recently in FTC initiatives to eliminate unjustified impediments to e-commerce. In October 2002, the Commission held a workshop to evaluate possible anticompetitive barriers to e-commerce in a number of industries. It subsequently issued two staff reports. The first, in July 2003, examined barriers to e-commerce in the sale of wine.[18] A second report, in March 2004,

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[13] "The Unfairness Policy Statement repudiated [the] third criterion previously advanced as a basis for an unfairness determination....: that the conduct be 'immoral, unethical, oppressive, or unscrupulous.'" ABA Section of Antitrust Law, *Consumer Protection Law Developments* (2009) (*"ABA Review"*), at *60*.

[14] Unfairness Policy.

[15] Elaborating elsewhere on the substantiality of harm, the Commission has held that the injury is substantial if it causes "severe harm to a small number of people" or "small harm to a large number of people." *Int'l Harvester Co.*, 104 F.T.C. 949, 1074 (1984).

[16] Unfairness Policy.

[17] [T]he FTC's doctrinal approach to unfairness has been reasonably consistent since its 1980 policy pronouncement, which marks the beginning of the current period of FTC unfairness enforcement." *ABA Review* at 60.

[18] "Possible Anticompetitive Barriers to E-Commerce: Wine" (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf.

explored barriers to e-commerce in the sale of contact lenses.[19] In both cases, the Commission was not hunting for villains; instead, it analyzed conditions in the market, including industry practices, state regulations, and other factors to ascertain whether conditions were visiting unfairness on consumers. In both cases, the answer was yes. The Commission staff found that impediments to the flow of information – even when the product of state regulation – were restricting consumer choice and raising prices without an adequate public interest justification.

The predicate for both reports, again, was the Commission's authority under the "unfairness" language. The contact lens report was unequivocal in this regard. "The Commission . . . has authority under its unfairness jurisdiction," the report said, "to regulate marketing practices that cause or are likely to cause substantial consumer injury, which is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition."[20]

B. Applicability to the "Transactability" Issue

As the GDSs have indicated to the Department, the inability of GDS-driven outlets to quote fees for, and sell, ancillary services – at least those relating to booking, boarding, baggage and seats – will engender increased search/transaction costs for the consumer, and ultimately higher prices generally as competition diminishes with the elimination of effective comparison shopping

If agents do not enjoy the ability to sell ancillary services as part of the air transportation they are authorized to sell, there will be an increase in consumer confusion and search costs, as well as lost buying opportunities for consumers. In fact, many consumers will likely be misled about which services can be purchased in connection with the flights they buy and which of those services can be purchased from which source. Again, the comparison shopping that ensures the sustainable and robust marketplace would remain largely beyond reach.

Without transactability, even the disclosure requirements already established are likely to diminish in value to a great many consumers. Because brick-and-mortar agencies will want to avoid disclosing the limited scope of their selling authority, for example, many of the passengers who buy tickets from agencies are likely not to understand that they might have bought a more desirable seat, or purchased advance boarding, or saved money by paying baggage fees in advance. Accordingly, those passengers will clearly be injured by a major "obstacle to the free exercise of consumer decisionmaking" – the inability of any entity to facilitate a simple comparison of prices.

For consumers purchasing travel through online travel agencies, the likelihood of being prevented from comparison shopping is equally high. The likely adverse consequences should be clear: Upon discovering that they cannot purchase ancillary services at an online ticket agency, consumers will likely migrate to an airline site where the ancillary services are available for purchase. By the time they get there and make the same selections, given the dynamism of

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[19] "Possible Anticompetitive Barriers to E-Commerce: Contact Lenses" (March 2004), available at http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf.
[20] *Id.* at 15.

ancillary fee pricing, the charges might well be higher, or the particular service – *e.g.*, a seat upgrade – might have sold out.

It is fair to say that consumers generally have an expectation of being able to purchase what is, or appears to be, held out for sale online. Lack of transactability in the leading e-commerce segment of travel would defy that expectation, and bear more than a faint hint of bait-and-switch. Ironically, consumers are more than likely to direct their anger and mistrust at agencies that cannot sell what they can display, even though that deficiency in agency inventory is attributable to factors beyond their control. The burden of unfairness would thus be borne not only by consumers, but by the agencies to which the consumers turn to make informed travel decisions.[21]

With the means for efficient comparison shopping rendered unavailable, the increased search/transaction costs attributable to the inability of GDSs to perform their traditional function will not be trivial or speculative, but fully measurable by economists. They should readily fall within the concept of "monetary injury," the FTC touchstone for substantial injury.

As noted earlier, the FTC unfairness analysis also requires that the injury not be outweighed by any offsetting consumer benefits produced by the withholding of transactability. The unfairness must be found to be injurious, in other words, in its "net effects." Opponents will argue that avoiding the fees charged by GDSs for facilitating transactions involving ancillary services will produce net benefits for consumers in the form of lower prices. The alleged savings are highly questionable, however, given the significant costs airlines incur in connection with direct distribution. Even if the avoidance of incremental GDS fees did produce a non-trivial cost savings to the airlines, however, recent events make clear that consumers are unlikely to share in those savings.[22] Indeed, the more likely impact of avoiding GDS distribution of ancillary services would be an *increase* in the price of air transportation, not a decrease, thanks to the virtual impossibility of effective comparison shopping in such circumstances.

The third leg of the FTC test for injury is that it be an injury that the consumer could not reasonably have avoided. As noted above, the FTC unfairness policy targets conduct that "may prevent consumers from effectively making their own decisions [and] that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making" such as "withhold[ing] or fail[ing] to generate critical price or performance data . . . leaving buyers with insufficient information for informed comparisons. . . . Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market."[23]

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[21] In fact, the primary reason online travel agencies became involved in this issue was the spike in complaints directed at them from consumers about their inability to find ancillary service fees on their sites and the unpleasant surprises that ensued at airports when consumers encountered significant upcharges, *e.g.*, for baggage.

[22] By allowing the airline ticket tax to lapse, Congress furnished airlines a rare opportunity to reduce prices to consumers by 7.5% with no loss of revenue, and thereby to increase demand. Most airlines chose instead to raise prices immediately by the same 7.5% across the board.

[23] Unfairness Policy.

The Commission thus described perfectly the inevitable consequence of a market in which some elements of air transportation can be compared and purchased efficiently via state-of-the-art online technology, while other elements can neither be compared very easily nor purchased through that same technology. Consumers thus will be denied the ability to make fully informed choices and in many cases will be prevented from purchasing some desired ancillary services in a timely and cost-effective way. Most important, these "obstacles to the free exercise of consumer decision-making" – making comparison shopping all but impossible -- will seriously compromise the quality of airline competition in the United States.

CONCLUSION

The inability of GDSs to quote and sell ancillary services through the appointed agency network for the airlines falls well within the scope of the Department's authority to redress unfair and deceptive practices. Consumer confusion, increased search costs, lost opportunities, sub-optimal choices, and higher real prices are virtually certain to occur if the expanding and shifting array of ancillary services remain unobtainable from the firms that account for more than half of air travel sold in the United States. The Department therefore should exercise its authority to require that airlines provide GDSs with tranasactable information on their ancillary services and fees.

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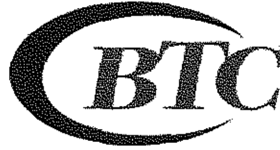

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Inaccurate Assertions About Transparency and Transactability of Airline Fees

October 4, 2011

During the course of extensive discussions and debate at the U.S. Department of Transportation (DOT), on Capitol Hill and elsewhere concerning the transparency and transactability of airline fees, a number of inaccurate assertions have been made concerning market power and negotiating leverage among industry participants. Notwithstanding that the disclosure and transactability of airline fees is a matter of fairness to and protection of individuals and businesses who purchase tickets, these assertions have persisted by those who would like to divert the debate away from consumer welfare.

Following is a set of the most common assertions as well as common sense responses that demonstrate that the question of disclosure of airline ancillary fees is first and foremost about enabling consumers to view and dynamically and immediately compare and purchase the services for which fees are charged as they have for decades with airline fares.

INACCURATE ASSERTION 1

The debate about ancillary fee disclosure and transactability is simply a commercial dispute between airlines and GDSs.

Facts

- DOT's statutory responsibility is to ensure consumers are treated neither unfairly nor deceptively. (49 U.S.C. 41712)

- About 50% of all airline consumers depend upon, and make air travel bookings in, the neutral indirect distribution channel, i.e. via travel agencies.

- Consumer groups -- AirlinePassengers.org, Association of Airline Passengers, Consumer Action, Consumer Federation of America, Consumer Travel Alliance, Consumers Union, National Consumer League, USPIRG -- strongly support a DOT requirement that airlines share fee data with GDSs and have weighed in on the DOT Docket, or in letters.

- Booking fees are a tiny fraction of the average blended domestic U.S. and international airline ticket prices, whereas a typical airfare can be increased by 40 - 50% or more from the base fare by the addition of ancillary fees.

Bottom Line

Whatever commercial interests might be at stake are trumped by the interests of consumers. DOT's responsibility is to ensure that consumers are not held hostage to airline decisions that deprive them of ready access to fee information, and thus to the full and comparative cost of airline travel.

INACCURATE ASSERTION 2

GDSs are able to secure access to ancillary fees from airlines through the conventional negotiating process.

Facts

- GDSs negotiate with airlines for access to inventory and fares, among other things. However, with some limited exceptions airlines refuse to provide full ancillary fee content to GDSs and to major corporations to enable the some 50% of consumers who purchase air tickets through third parties to view, comparison shop and purchase tickets from agents or other vendors of their choice. The process for providing the fee data to GDSs and agencies is already in place through the airline-owned ATPCO system, but U.S. airlines overwhelmingly refuse to populate the ATPCO system with fee information.

- Some GDS/major airline agreements will not be renegotiated until 2013.

- Airlines' most valuable customers - major corporate purchasers of commercial airline services – have unsuccessfully endeavored since 2008 to secure ancillary fee data from their airline suppliers.

- If the issue could be resolved through market forces and negotiations with airlines, it would have been resolved already.

Bottom Line

The negotiating process between and among airlines and GDSs is at an impasse; a market failure has led to a prolonged period in which airlines have not only refused to provide their unbundled fee data, but some airlines have acknowledged the value of withholding it as a bargaining tool. DOT should respond to this market failure now by adopting a pro-consumer disclosure rule because access to basic fee information should not be held hostage to a market that it is not working.

INACCURATE ASSERTION 3

GDSs wield undue market power and don't have sufficient marketplace competition.

Facts

- Major U.S. airlines have acknowledged that they have attained substantial discounts off their booking fees since 2005. For example, American Airlines stated in a 2010 filing with DOT in the Consumer Protection II proceeding that its domestic booking fees (accounting for the vast majority of its bookings) have fallen by 34 percent between 2005 and 2009.

- GDSs have lost market share for several years to airline direct sales; the three GDSs now collectively account for fewer than 50% of airline bookings in the U.S. versus over 75% several years ago.

- Direct connect technologies, which allow for GDS bypass, present a further important competitive challenge to GDSs.

Bottom Line

The general downward trend in booking fees, coupled with a loss of GDS market share relative to the direct channel, undermines any claim that GDSs lack strong competition or have undue market power. No GDS is an "essential facility" with which each airline is forced to deal. "Essential facility" is an antitrust term of art for a certain kind of monopoly. Since there are three GDSs, none is a monopolist. Airlines will retain many powerful negotiating tools and competitive options even if required to share their fees with GDSs. A pro-consumer fee disclosure rule will serve the public interest, but not significantly alter the market dynamics between airlines and GDSs.

INACCURATE ASSERTION 4

GDSs do not have the modern technology airlines need to merchandise and sell their products the way they choose.

Facts

- GDSs are capable of handling the most complex airline transactions on terms defined by airlines themselves.

- GDSs have worked with airlines and airline-owned intermediaries like ATPCO, ARC and IATA to establish technical standards for the distribution of their products, including ancillary offerings. These standards support the rapid and broad availability of ancillaries while maintaining the operating efficiency of travel agencies.

- The technical standard that GDSs have embraced provides a great deal of flexibility for airlines to tailor variables such as origin and destination of the trip, flight number, day of

week, booking class, fare basis, seat location, corporate ID, and travel agency. Offers can also be tailored based on a traveler's frequent flier status as well as other traveler attributes.

- Since pricing for an ancillary product can be associated with booking class and fare basis, airlines can yield-manage ancillary fees in the same way they yield-manage base fares.

- GDSs have implemented and continue to implement innovative ways of distributing new airline product offerings.

    - Sabre recently implemented a comprehensive solution based on ATPCO and ARC technical standards for the advance sale of Air New Zealand's baggage product. This solution gives agencies the ability to shop, book, price, pay and otherwise fulfill Air New Zealand's baggage offering in a way that is complementary to agencies' existing efficient workflows and processes. This was the first implementation of an EMD-based (Electronic Miscellaneous Documents) fulfillment solution with ARC.

    - In addition, Travelport announced in 2009 that it is able to book any service from the Air Canada a la carte menu. These services include among others, lounge access, pre-paid on-board cafe vouchers, checked baggage and seat assignment.

    - Amadeus is currently displaying ancillary fees on behalf of two European airlines and several additional European airlines will be displaying their ancillary fees through the Amadeus system for European travel agencies by the end of the year. Amadeus receives the fee information through ATPCO and offers an EMD solution for the fulfillment of ancillary fee transactions.

- GDSs can communicate with an airline system using a variety of protocols, including XML, depending on an airline's preference.

Bottom Line

GDSs are well positioned to provide airlines and travel agencies with efficient solutions for the display and sale of all airline services, including ancillaries.

INACCURATE ASSERTION 5

Through restrictive contracts with travel agents, GDSs are preventing competitive distribution systems and concepts such as Farelogix and Direct Connect from getting traction in the market.

Facts

- The largest travel agencies use multiple GDSs in their operations. In the U.S. marketplace, 62% of GDS bookings are made by agencies that use multiple GDSs.

- A typical GDS contract with mid-sized and larger travel agencies is for a period of years. A significant portion of those agreements are up for renewal each year.

- These agencies frequently negotiate a significant "cushion" into their GDS agreements, whether in terms of volume, GDS bookings share, or both.

- GDS agreements typically define bookings share as "GDS bookings share" - thus bookings through an airline direct connect are not in any way discouraged by the booking share calculation methodology.

- Volume commitments, if any, are typically tied to upfront cash payments (e.g., a signing bonus), and if the agency falls short of the volume commitment, usually the contract simply calls for a pro-rata refund of the upfront bonus.

- Many agencies have no GDS booking share or volume commitments.

Bottom Line

GDS contracts are not a barrier to entry for travel automation providers. Every year, there are significant opportunities for these providers to compete for agency business. Business moves to where innovation and value exist. Farelogix and Direct Connect will succeed or fail based on whether or not they meet the needs of travel agencies and the consumers they serve.

INACCURATE ASSERTION 6

Since GDSs host computer reservation systems for many airlines, they are able to discourage or even prevent airlines from using Direct Connect or other new technologies.

Facts

- There is significant competition in the airline system hosting business (including from companies that do not operate a GDS). A GDS company would likely lose significant hosting business if it were to compromise its hosting services as asserted.

- There is no known case of a GDS host refusing to enable an airline's use of direct connector any other technology.

- There are several cases where GDSs have helped enable airline use of direct connect technology:

    - Travelport with Southwest and Air Canada

    - All three major GDSs in the United Kingdom with EasyJet

    - TAM and Gol in Brazil with multiple GDSs

- A number of GDS airline customers are independently using direct connect:
    - AirTran (Concur)
    - AerLingus (Concur)
    - Interjet (Concur)
    - Virgin Blue (Concur)
- There exist no contractual impediments to GDS-hosted airlines' ability to use direct connect.

Bottom Line

Utilizing a GDS to host an airline's computer reservation system does not bar that airline from attempting to establish a direct connect relationship with travel management companies, either contractually or functionally.

INACCURATE ASSERTION 7

A mandate from DOT to airlines to disclose fees through GDSs will reduce airline negotiating leverage, raise distribution costs and ultimately cost consumers more.

Facts

- Access to ancillary fees is just one of numerous items negotiated and agreed to before GDSs and airlines can conclude a contract.
- GDS distribution costs to airlines have declined consistently since deregulation of the GDS industry segment. Marketplace developments point to that trend continuing as direct-to-consumer sales make up a growing percentage of the air travel market.
- Transparency and comparison shopping provide for competitive price discipline to be applied to base fares. This same discipline is currently absent for unbundled fees.
- For bargaining leverage airlines use access to the full complement of advantages they offer through their own channels, including access to the lowest priced fares (e.g., web fares), freedom from channel surcharges and protection of GDS subscribers against discriminatory application or withholding of other terms, such as commissions, waivers and favors.

Bottom Line

The biggest threat to consumers in this connection is their current inability to conduct meaningful comparison shopping. Any increase in the price of air travel attributable to the nominal costs of selling ancillary services would pale next to the impact of the market's failure to discipline prices through effective competition in the absence of full

fee disclosure via GDSs. Any posited consumer harm from the loss of airline bargaining leverage would have to be measured against the economic harm that flows from consumers being treated unfairly and misled about the all-in price of a ticket, and disabled from meaningful comparison shopping and purchasing in order to determine the best price ticket and travel value.

INACCURATE ASSERTION 8

The government does not intervene in other industries for the purpose of facilitating side-by-side comparison shopping.

Facts

- For most consumer products and services, prices are far more straightforward and transparent than for commercial air travel in the new era of unbundling.

- The Internet and online shopping have engendered greater pricing transparency for most goods and services, thereby facilitating more efficient comparison shopping than at any time in history -- with the ironic and counterintuitive exception of commercial air travel, an early pioneer in the effective use of electronic distribution.

- DOT's truth-in-advertising regulation -- while necessarily more granular given the increasingly complex nature of the marketing and pricing of air services -- is predicated on principles established at the Federal Trade Commission (FTC) and applied to all other industries as a central feature of U.S. competition policy.

- During the past decade, the FTC has targeted particular industries where impediments to enjoying the pricing transparency and consumer choice typically facilitated by e-commerce have been discovered. Examples are retail wine sales and contact lenses.

Bottom Line

Contrary to the assertion, government efforts to enhance pricing transparency have long been a pivotal feature of U.S. competition policy as applied to all industries.