

Legal Alert

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QUESTION: WHY WERE RENTAL CAR COMPANIES AND A TOURISM COMMISSION SUED IN AN ANTITRUST CASE?

ANSWER: PASSENGER RENTAL CAR BUSINESSES AND THE CALIFORNIA TRAVEL AND TOURISM COMMISSION WERE SUED FOR ANTITRUST PRICE-FIXING WHEN THEY SUPPOSEDLY CONSPIRED TO PASS HIGHER TAXES ON TO CONSUMERS.

In 2006, the passenger rental car industry in California wanted to change the way it was taxed under California law. Under the legislation, the passenger rental car industry joined other tourism sectors in the California Travel and Tourism Commission. In exchange, the rental car industry agreed to pay an assessment fee which increased the Tourism Commission's budget for promoting California tourism.

So what did rental car companies and the Tourism Commission do wrong?

The California legislation allowed passenger rental car businesses to “unbundle” the fees they charge customers. The fees could then be itemized and billed separately from the base rental rate for cars. The legislation allowed the car companies to “pass on some or all of the assessment to customers.” *Shames v. Hertz Corp. No. 07-CV-2174* (U.S.D. Ct., So. D. Cal. 11/5/12). The plaintiffs said that the Tourism Commission and the rental car industry colluded to raise passenger rental car rates in two ways.

First, the Tourism Commission and the rental car companies agreed to a 2.5% tourism assessment fee that could be added to the cost of car rentals. The 2.5% tourism assessment fee was then paid to the Tourism Commission. The plaintiffs said this amounted to a conspiracy and an agreement to fix rental car prices by passing the 2.5% tourism assessment fee to rental car customers.

The second fee was the already-existing fees paid by car companies to airports for the right to conduct business on airport premises.

These airport concession fees traditionally amounted to 9% of the rental price on cars. When the car businesses were allowed to charge the fee separately from the base rental rate, they passed the 9% concession fee on to customers as a uniform add-on charge. The Tourism Commission was said to have colluded in the price-fixing scheme of raising rental car rates by 9%.

Don't all industries try to shape the ways governments tax them?

Generally, even competitors can work together to try to change legislation affecting their industry. The "*Noerr-Pennington*" doctrine provides immunity for petitioning the government. So the change in California tax laws on the personal rental car industry, by itself, was not the problem.

But don't all businesses pass taxes along to the customers?

Passing taxes along to consumers is almost always legal. If the rental car businesses could show that the decisions to pass the fees on rental cars to the consumers were reached unilaterally and not by agreement among the rental car companies then there would be no problem.

The problem for the rental car industry and the Tourism Commission was the allegations of concerted decision making to collusively charge all rental car customers for the taxes and fees. Each defendant rental car company was permitted to pass the fees along to its customers. They just could not legally all agree to do so together.

So why did the rental car companies and the Tourism Commission agree to settle the case?

The lawsuit was filed in 2007. The parties engaged in extensive discovery producing, organizing, and reviewing 737,000 pages of documents. Twenty-seven depositions were taken all around the country. Subpoenas upon 17 third-parties resulted in the production of 1,200 additional documents. Plaintiffs' experts spent 1,932 hours working on the case and Plaintiffs' lawyers spent 14,506.9 hours working on the case. The rental car companies and the Tourism Commission spent a lot more on expert witnesses, lawyers' fees and costs. Eventually, the combination of dollars and *sense* determines decisions.

What were the settlement terms?

The Tourism Commission agreed to do what it probably had always done to comply with the laws. It agreed to always comply with California's Open Meeting Act. It also agreed not to facilitate concerted decision-making by "businesses on whether and how much to charge

consumers for their respective Tourism Commission Assessment obligations."

The rental car companies agreed to pay rebates or give vouchers to customers who rented cars at California airports from January 1, 2007 through November 14, 2007. Those customers could get cash in the amount of \$2.00 for each day they rented cars with a minimum payment of \$5.00 for those customers who only rented for one or two days. Alternatively, the customers who rented cars for less than eight days could get a free rental car for a day. Those who rented for more than eight days during the period could get vouchers for two free days of car rentals.

The lawyers for the plaintiffs were paid \$5,870,000, including costs of \$746,664!

Don't agree with others to raise or fix prices!

You can petition the legislature or city council to change the way it assesses fees and taxes. You can pass those fees and taxes along to your customers if you choose. You cannot agree with others to pass fees or taxes along to all customers of an industry, however. The concerted decision-making as to how much to charge consumers is the problem!

If your business or industry needs guidance about what may be impermissible anticompetitive actions, please call me.

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