

CONSTRUING THE SKELETON:

What's left of antitrust immunity
and the filed rate doctrine
for motor carriers?

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**SCALIA, J., concurring in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*,
497 U.S. 116, 138 (1991):**

“It may well be ... that ... ‘the skeleton of regulation remains; the flesh has been stripped away.’ * * * But it is the skeleton we are construing, and we must read it for what it says.”

What if anything is left in the regulatory fossil fields that might help a motor carrier avoid antitrust liability?

Current motor carrier carve-outs from ordinary antitrust liability are few and far between

- Immunity for collective ratemaking under 49 USC 13703?
 - Fuhgeddaboutit. *Approvals for all motor carrier collective ratemaking agreements were prospectively terminated by the Surface Transportation Board in Ex Parte 656, effective January 1, 2008.*
 - Exact scope of immunity that existed under section 13703 is still being litigated before 4th Circuit in the *Beach* case (see later slides), but will have no prospective effect.

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- The Filed Rate Doctrine under *Keogh v. Chicago & N.W.Ry.*, 260 U.S. 156 (1922)?
 - “Yes” for motor carriers in “noncontiguous domestic trade” to/from Alaska, Hawaii, Puerto Rico, Guam, etc., because they must file tariffs with STB under 49 USC 13702.
 - “Maybe” for household goods carriers, which must “publish” tariffs under section 13702 but do not file them with STB. Fourth Circuit has this issue in *Beach*.

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- Immunity for carrying out mergers and acquisitions approved by STB?
 - “Yes” for passenger carriers **only** (49 USC 14303).
 - Transaction must be structured to fall within scope of section 14303(a).
 - Same basic body of law applies as with rail mergers.

Current motor carrier carve-outs from ordinary antitrust liability are few and far between

- Agreements between a household goods carrier and its agents?
 - Immune under 49 USC 13907 if agents use the principal carrier's (van line's) operating authority. *Immunity is automatic unless modified or terminated by STB.*
 - Immune as pooling under 49 USC 14302 if agents use their own operating authority. *Application process required; see subsequent slides.*

Current motor carrier carve-outs from ordinary antitrust liability are few and far between

- Agreements between carriers to “pool or divide traffic or services or ... earnings”?
 - **“Yes” for all motor carriers.**
 - Immunity results if agreement is submitted to and approved by STB under 49 USC 14302.
 - Subsections (c)(1) and (2) create expedited timetable and procedures – *but don't read these rules too literally* (see later slides on *Clean Truck* case).

Current motor carrier carve-outs from ordinary antitrust liability are few and far between

- Pooling agreements (cont'd)
 - For household goods carriers, subsection (c)(4) creates a presumption favoring approval if an agreement is similar to those approved by the former Interstate Commerce Commission.
 - **For the great majority of motor carriers seeking some degree of antitrust shelter, pooling is “the only game in town.”**

POOLING: A Recent Development

**STB Docket No. MC-F-21034, *Clean Truck Coalition, LLC – Pooling Application*
(served November 19, 2009)**

- Over objection by the Teamsters, the Board unanimously approved an application by a “clean truck clearinghouse” giving member carriers access to a pooled fleet of over 600 vehicles meeting emissions standards set by ports of Los Angeles and Long Beach.
- *Important practice pointers* emerge from this decision.

POOLING: A Recent Development

- Remember that *motor carrier cases probably account for less than one percent of the Board's docket.*
- The prudent applicant will do well to include, in its application papers, an explicit reminder to the Board about the unique time limits for approval established in 49 USC 14302(c)(1)-(2), and about the HHG criteria in (c)(4) if applicable.
- Under the literal terms of subsection (c)(1), the applicants' only duty is to send the Board their proposed agreement at least 50 days prior to its proposed effective date.

POOLING: A Recent Development

- Under the literal terms of subsection (c)(2), the Board must make two determinations **prior to the effective date**:
 - Whether the agreement is of "major transportation importance," and
 - Whether there is a substantial likelihood that it will "unduly restrain competition."
- Absent at least one of those factors, the Board "**shall, prior to such effective date** and without a hearing, **approve and authorize the agreement**" on "just and reasonable" terms and conditions. *Id.* (emphasis supplied).

POOLING: A Recent Development

- In *Clean Truck*, the Board admittedly missed the 50-day deadline of subsections (c)(1) and (2) (not for the first time, in this observer's experience), and addressed the question of what happens then.
- After the proposed agreement had been before the Board for more than five months, applicants wrote the Board's General Counsel, arguing that their agreement had become effective "by operation of law."

POOLING: A Recent Development

- The Board rejected this argument (slip op. at 3). Despite the literal terms of subsections (c)(1) and (2), it held:

[A] motor carrier pooling agreement is not authorized unless and until the Board issues an order making the requisite findings and determinations under section 14302. Although the statute specifies that the Board should [*sic*] make its determinations under section 14302(c)(2) prior to the effective date of the pooling agreement, the statute does not provide that a Board failure to act by the effective date proposed by applicants results in automatic approval.

POOLING: A Recent Development

- Nonetheless, the approval order was served as a late release eight days after the date of applicants' letter to the General Counsel!

The Pending *Beach* Litigation **(In re Household Goods Movers Antitrust Litigation, No. 10-1047 (4th Circuit))**

- This is a treble-damage antitrust class action alleging a conspiracy to impose excessive fuel surcharges. There, its similarity to other fuel surcharge cases comes to an end because of the unique regulatory environment for HHG.
- The District Court rejected arguments of major van lines and their trade association that the surcharges (i) had statutory immunity under their approved collective ratemaking agreement, and (ii) were protected by the filed rate doctrine of *Keogh v. Chicago & N.W.Ry.*, 260 U.S. 156 (1922). See 2009 WL 4037036 (D.S.C.)

The Pending *Beach* Litigation

- The Fourth Circuit allowed an interlocutory appeal on both issues, which have been fully briefed but not yet argued.
- *Statutory immunity*: The parties have vigorously advanced a series of highly technical arguments about whether the collective ratemaking agreement and defendants' implementation of it satisfied statutory requirements. Because Ex Parte 656 (served after close of damage period) moots these arguments for future cases, time does not permit exploring them here.

The Pending *Beach* Litigation

Filed Rate Doctrine: Two issues are before the Court of Appeals:

- (1) whether the doctrine applies to rates in tariffs that are published, but not filed with a regulator.
 - Numerous non-transportation cases give an affirmative answer – sometimes even when no fixed rates are published at all – if the regulator retains power to determine whether rates are reasonable.
 - Board retains that power with respect to non-filed household goods tariff rates; 49 USC 13701(a)(1).

The Pending *Beach* Litigation

(2) Whether the doctrine applies to a collective moving-industry tariff that set forth a range of potential rates, from which a market-determined price would be selected for each particular movement.

- For one thing, this should not matter since the Board can determine the reasonableness of any and all rates in the range.
- In any event, the fuel surcharges in the tariff were expressed as percentages of base rates, and the percentage applicable when Department of Energy fuel price indices reached a particular level was constant rather than market-driven.

The Pending *Beach* Litigation

- As long as household goods and non-contiguous domestic rates remain subject to a reasonableness standard, the Fourth Circuit's pending determination of the scope of *Keogh* could remain relevant in future antitrust cases against carriers in those sectors.
- Remember that *Ex Parte 656* did not and could not jettison the judicially-created *Keogh* doctrine even though it withdrew the Board-granted collective ratemaking immunities.

CONCLUSION

(With Apologies to the Rolling Stones)

“Shelter” from the antitrust laws is no longer a “gimme” for motor carriers, but still may be available in narrowly-defined circumstances.

Questions are welcomed.

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