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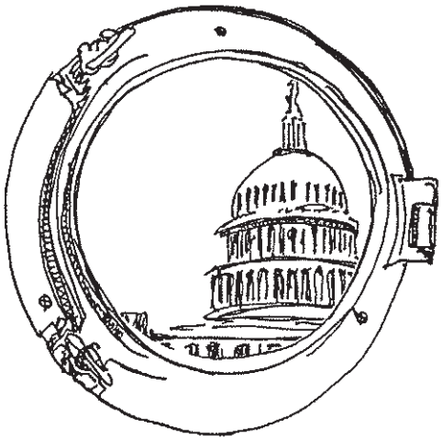

Rolling Ahead

By Bryant E. Gardner

Since late 2012, the roll-on, roll-off ("ro/ro") segment has been under siege by Federal regulators. In September 2012, the authorities raided the offices of the dominant ro/ro carriers, seeking evidence of anticompetitive behavior. Since then, the U.S. Department of Justice and the U.S. Federal Maritime Commission ("FMC" or the "Commission") have entered into plea or compromise agreements with a handful of carriers resulting in well over $100 million in fines, with further action against other members of the alleged conspiracy likely. Additionally, private parties alleging harm from the conduct have launched lawsuits against the carriers in both Federal courts and before the Commission.

The FMC was the first to announce a compromise agreement with the ro/ro carriers when, in December 2013, it said that it had entered into compromise agreements with Kawasaki Kisen Kaisha Ltd. ("K Line") and Nippon Yusen Kaisha ("NYK") pursuant to which the carriers agreed to pay $1.1 million and $1.225 million in civil fines, respectively.[1] Then, in February 2014, the Commission announced a compromise agreement with Mitsui O.S.K. Lines resulting in a $1.275 million fine,[2] and another agreement with Compãia Sud Americana de Vapores ("CSAV") for $625,000 in March 2014.[3] The fines were remarkably large for the FMC, and were premised upon allegations that the carriers had violated provisions of the Shipping Act, including Section 10(a) (46 U.S.C. § 41102(b)), by "acting in concert with other ocean carriers with respect to the shipment of automobiles and other motorized vehicles by ro/ro or specialized car carrier vessels, where such agreement(s) had not been filed with the Commission or become effective under the Act" and related activities. The Shipping Act of 1984, as amended,[4] permits carriers to engage in activity which would otherwise subject the carriers to antitrust penalties, provided the competition-restricting agreements are disclosed to the Commission in filed agreements which have become effective under the Act and are accordingly subject to FMC oversight.[5] Failure to file agreements where

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[1] Federal Maritime Commission Newsroom, *Two Car Carriers Pay $2.3 Million in Penalties*, N.R. 13-19 (Dec. 23, 2013).

[2] Federal Maritime Commission Newsroom, *Mitsui O.S.K. Lines and Affiliates Pay $1.275 Million Penalty*, N.R. 14-01 (Feb. 12, 2014).

[3] Federal Maritime Commission Newsroom, *CSAV Pays $625,000 Civil Penalty*, N.R. 14-02 (Mar. 5, 2014).

[4] 46 U.S.C. Subtitle IV.

[5] 46 U.S.C. § 40307.

required not only exposes the carriers to antitrust sanctions, but also opens them up to Shipping Act penalties. Shipping Act requirements may be enforced by investigations undertaken by the Commission or its Bureau of Enforcement, or by private complaints filed with the Commission seeking cease and desist orders or reparations up to twice the harm sustained as a result of the violation, plus attorneys' fees.

Not to be outdone, the Justice Department began announcing a parade of plea agreements, starting in early 2014. First, Justice announced in February that CSAV had agreed to plead guilty and to pay an $8.9 million criminal fine for involvement in a conspiracy to suppress competition in the ro/ro trades.[6] According to the one-count felony charge filed in the U.S. District Court for the District of Maryland, CSAV engaged in a conspiracy to suppress and eliminate competition by allocating customers and routes, riggings bids and fixing prices for the sale of ro/ro services from at least January 2000 to September 2012. Then in September and December, Justice announced a plea agreement with K Line and NYK arising out of similar alleged conduct from February 1997 to September 2012, and requiring payments of $67.7 and $59.4 million in criminal fines, respectively.[7] Finally, three K Line executives and one NYK executive entered into plea agreements pursuant to which they each agreed to pay $20,000 and serve prison sentences ranging from 14-18 months for their role in the conspiracy.[8] And as is customarily the case, each of the settling defendants agreed with Justice to cooperate with respect to its continuing investigation.

Separately, the ro/ro carriers face a spate of private complaints from the payors and end-users of their ocean shipping services seeking to recover damages for increased shipping costs purportedly incurred because of the anticompetitive conduct. Direct-purchaser and end-payor class-action plaintiffs, including shipping agents, individuals, and auto dealers, filed complaints in May and June 2013 which were consolidated into the U.S. District Court for the District of New Jersey on October 8, 2013 by the Judicial Panel on Multi-District Litigation.[9] The consolidated complaint named numerous ro/ro carrier defendants, including NYK, MOL, Höegh Autoliners AS, K Line, Wallenius Wilhelmsen Logistics AS ("WWL"), Eukor Car Carriers Inc. ("Eukor"), CSAV, and World Logistics Service (USA) Inc.

Piggy-backing off of the U.S. Federal criminal investigations and investigations by authorities in Japan and Europe, the civil plaintiffs alleged widespread anticompetitive practices including price fixing, capacity reduction, customer allocation, and bid-rigging by the ro/ro carriers translating into four counts: violation of Section 1 the Sherman Act,[10] violation of state antitrust laws, violation of state consumer protection statutes, and unjust enrichment. More specifically, plaintiffs described the ro/ro segment as a tight-knit community, highly concentrated, dominated by relationships, and with high barriers to entry and highly inelastic demand for a homogenous or commodity product making the industry ripe for anticompetitive conduct. The complaints alleged numerous specific instances since 2000 during which the defendants met regularly and agreed to layup or scrap vessels to manage capacity; coordinated unified price increases and customer allocations; or agreements not to compete in specific trades. The complaint alleges that from 2001 to 2006, prices increased only 2 percent, but increased 23% during the subsequent six years of the class period, far outpacing demand increases. According to the complaint, these agreements translated into higher prices for the purchase of ro/ro services, which harmed plaintiffs as direct and end-buyers of such services, and which they seek to recover.

Additionally, General Motors LLC ("GM") filed a complaint in the U.S. District Court for the Eastern District of New York against NYK, WWL, and Eukor in June 2015, which was subsequently transferred to the District of New Jersey in June 2015 and became part of the multi-district litigation.[11] The GM complaint differs somewhat from the previously filed class complaints,

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[6] United States v. Compãia Sud America de Vapores, S.A., No. 1:14-cr-00100-GLR (D. Md.).

[7] United States v. Kawasaki Kisen Kaisha, Ltd., No. 1:14-cr-00449-GLR (D. Md.).

[8] United States v. Yamaguchi, No. 1:14-cr-0063-GLR (D. Md.); United States v. Otoda, No. 1:15-cr-00034-GLR (D. Md.); United States v. Tanioka, No. 1:14-cr-00610-GLR (D. Md.); United States v. Tanaka, No. 1:15-cr-00022-GLR (D. Md.).

[9] *In re* Vehicle Carrier Services Antitrust Litigation, Master Docket No. 13-3306 (ES) (MDL No. 2471) (D.N.J.).

[10] 15 U.S.C. § 1. Plaintiffs sought to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for violations of Section 1 of the Sherman Act.

[11] General Motors LLC v. Nippon Yusen Kabushiki Kaisha et al., No. 2:15-cv-0739-ES-JAD (D.N.J.).

insofar as it does not rely upon consumer protection laws, but it includes an additional count for breach of the GM service contract by the carriers, including provisions obligating the carriers to comply with all applicable laws, refrain from corrupt business practices, keep confidential the service agreement information, and provide ro/ro services in an economic manner. Thus, it seeks action against its direct vendors, a subset of the ro/ro carriers at issue in the broader class. Although the GM complaint mostly tracks the fact allegations of the other civil complaints, which presumably root in the Government investigation, it also goes into detailed allegations relating to negotiations and agreements with GM and instances for which the carriers agreed to "respect" one another's business.

On July 23, 2015, counsel for the dealer plaintiffs announced a settlement with K-Line during a hearing before the District of New Jersey. And subsequently, on August 17, 2015, plaintiffs' counsel announced that they had reached a second major settlement with MOL. In making the announcement, plaintiffs' counsel stated: "This is an important day for American consumers . . . This is the second major settlement in a month, demonstrating the strength of our clients' claims. This should send a strong signal to the remaining defendants that it is time to resolve this case."[12]

On August 28, 2015, Judge Salas of the District of New Jersey granted a motion to dismiss filed by the ro/ro carriers, holding that the Shipping Act of 1984 bars Clayton Act claims and preempts state law claims under the theory of conflict preemption.[13] Under the Shipping Act, "[a] person may not recover damages under section 4 of the Clayton Act (15 U.S.C. § 15), or obtain injunctive relief under section 16 of that Act (15 U.S.C. § 26), for conduct prohibited by [the Shipping Act]."[14] The ro/ro defendants argued that the conduct alleged—fixing prices, allocating customers and routes, and restricting capacity—were "prohibited by" the Shipping Act, triggering the statutory bar. The plaintiffs conceded that claims relating to price fixing and market allocation were prohibited by the Shipping Act and thus non-actionable, but argued that agreements to restrict capacity were outside of the purview of the Shipping Act.[15] The court rejected plaintiffs' argument, finding that capacity restrictions are covered in the "Application" section of the Act, which identifies agreements among carriers to "control, regulate, or prevent competition in international ocean transportation" as subject to the Act.[16] Additionally, the court held that because ocean common carriers are prohibited from operating under an unfiled agreement that is required to be filed and effective with the FMC, including capacity restriction agreements, the activity was "prohibited by" the Shipping Act and therefore subject to the Clayton Act bar.[17]

Turning to the state antitrust and consumer protection law claims, the ro/ro defendants argued that Congress intended the Shipping Act to occupy the field and displace state law relating to international maritime commerce or, alternatively, that the state laws conflict with the Shipping Act because they stand as an obstacle to Congress's underlying objectives. Observing that international maritime commerce has traditionally been a field "where the federal interest has been manifest since the birth of the Republic and is now well established,"[18] the court found that the state laws at issue "present a sufficient obstacle to the objectives of Congress" giving rise to conflict preemption.[19] In particular, the court found that the Shipping Act was intended to minimize government intervention and

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[12] PR Newswire, *Japanese Car Shipper MOL Agrees to Settle Class-Action Price-Fixing Claims* (Aug. 17, 2015).

[13] *In re* Vehicle Carrier Services Antitrust Litigation, Master Docket No. 13-3306 (ES), slip op. (MDL No. 2471) (D.N.J. Oct. 28, 2015).

[14] 46 U.S.C. § 40307(d).

[15] *In re* Vehicle Carrier Services Antitrust Litigation, Master Docket No. 13-3306 (ES) (MDL No. 2471), slip op. at 7 (D.N.J. Oct. 28, 2015).

[16] 46 U.S.C. § 40301.

[17] *In re* Vehicle Carrier Services Antitrust Litigation, Master Docket No. 13-3306 (ES) (MDL No. 2471), slip op. at 8. The court also observed that FMC regulations define "capacity rationalization" as "a concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean common carriers on the size and number of vessels or available space offered collectively or individually to shippers in any trade or service," 46 C.F.R. § 535.104(e), and that the regulations further provide that "an agreement that contains the authority to discuss or agree on capacity rationalization" is subject to FMC monitoring requirements. *Id.* § 535.902(a)(1).

[18] *In re* Vehicle Carrier Services Antitrust Litigation, Master Docket No. 13-3306 (ES) (MDL No. 2471), slip op. at 21 (quoting United States v. Locke, 529 U.S. 89, 90 (2000)).

[19] *Id.*

regulatory costs by providing a single avenue of redress, avoiding parallel jurisdiction with the antitrust laws.[20] Counsel for the plaintiffs have indicated they will appeal the decision.[21]

Apparently facing strong headwinds for its antitrust and state law claims in Federal court, five days after Judge Salas' decision, GM filed a 43-page complaint with the Federal Maritime Commission, alleging violations of the Shipping Act, on September 2, 2015.[22] In order to recover reparations under the Shipping Act, the complaint must be filed no later than three years from the date that plaintiffs knew or should have known of the harm alleged.[23] And, according to GM's antitrust complaint filed earlier in the Eastern District of New York, and the consolidated class action complaint of the vehicle dealers, the purported misconduct became widely known on September 6, 2012, when the Government investigation of the ro/ro carriers was first publicly reported.[24]

The GM complaint names NYK, Wallenius, and Eukor as defendants, alleges misconduct from February 1, 1997 through September 31, 2012, and asserts substantially the same facts of bid-riggings, capacity restrictions, rate collusion, and customer allocation as were raised in its court complaint. Although the complaint reads much more like an antitrust complaint than a Shipping Act complaint, which is not surprising given the history, it presents counts of Shipping Act violation. GM alleges that the ro/ro defendants operated under agreements which were required to be filed with the FMC, but which were not, including "agreements between or among ocean common carriers" to "discuss, fix, or regulate transportation rates, or "control, regulate, or prevent competition in international transportation."[25] Additionally, the complaint alleges that the defendants failed to establish, observe, and enforce just and reasonable regulations pursuant to 46 U.S.C. § 41102, shared information in violation of 46 U.S.C. § 41103,[26] refused to deal or negotiate in violation of 46 U.S.C. § 41104 and 41105, and violated Commission regulations by failing to file covered agreements.[27]

Finally, on September 17, 2015, the Federal Maritime Commission announced that Norway ro/ro carrier Siem Car Carriers AS had voluntarily come forward and disclosed certain unfiled agreements with respect to the ro/ro transport of new and used automobiles and other rolling stock in the U.S. trades.[28] The Commission indicated that "In light of the remedial measures undertaken and the voluntary nature of this disclosure, a compromise agreement was reached under which Siem Car Carriers paid $135,000 in penalties."[29]

The ro/ro saga is far from over. It remains to be seen to what extent U.S. and other national authorities will continue to target and reach plea agreements with additional carriers, and potentially target more executives for prison sentences. Additionally, none of the civil plaintiffs have yet been compensated for harms which they allege that they received at the hands of the ro/ro carriers, which damages are potentially very large given the scope of the violations alleged. The class plaintiffs will appeal the dismissal of their claims on the basis of conflict preemption to the Third Circuit. Meanwhile, GM also has its complaint before the FMC, although the ability of additional plaintiffs to lodge claims for reparations under the Shipping Act appears to face potential statute of limitations challenges, if the September 6, 2012 public notice date is true.

Ro/ro carriers and other operators outside of the traditionally scrutinized box carrier segment are on notice that both the Department of Justice and the Maritime

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[20] *Id.* at 26-28.

[21] Kurt Orzek, *International Cos. Escape Vehicle Shipping Price-Fixing MDL*, Law360 (Aug. 28, 2015).

[22] General Motors LLC v. Nippon Yusen Kaisha et al., FMC No. 15-08, slip op. (F.M.C. Sept. 3, 2015).

[23] 46 U.S.C. § 41309(e); Inlet Fish Prods., Inc. v. Sea-Land Serv., Inc., FMC No. 00-03 (F.M.C. Sept. 19, 2001).

[24] General Motors LLC v. Nippon Yusen Kabushiki Kaisha et al., No. 2:15-cv-0739-ES-JAD, slip op. (E.D.N.Y. June 15, 2015) (Complaint for Damages); *In re* Vehicle Carrier Services Antitrust Litigation, Master Docket No. 13-3306 (ES) (MDL No. 2471), slip op. at 65 (D.N.J. Oct. 6, 2014) (Consolidated Second Amended Class Action Complaint).

[25] General Motors, FMC No. 15-08, slip op. at 37 (Sept. 3, 2015) (citing 46 U.S.C. §§ 40302(a) & 41102(b)(1)).

[26] *Id.* at 38.

[27] *Id.* at 38-40. On September 21, 2015, the parties agreed to stay the FMC proceeding pending resolution of the Federal court action. General Motors, FMC No. 15-08, slip op. (Sept. 21, 2015).

[28] Federal Maritime Commission Newsroom, *FMC Collects $135,000 in Penalty Payments*, NR 15-15 (Sept. 17, 2015).

[29] *Id.*

Commission are proceeding apace with their investigation, armed with an increasingly crowded room of cooperating witnesses and a trove of documents. Carriers would be well advised to scrutinize closely their agreements and arrangements, and consider whether they need to follow in the footsteps of Siem Car Carriers by making a voluntary disclosure if there are any unfiled agreements in place.

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