

The Emerging Legal Landscape Regarding Ticket Sales: What Every Sports/Event Organizer or Venue Needs to Know

Contacts

Anthony J. Dreyer

212.735.3097
anthony.dreyer@skadden.com

Karen Hoffman Lent

212.735.3276
karen.lent@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

Over the last few years, state lawmakers and enforcement agencies have focused increasingly on protecting consumers who purchase tickets to sports and entertainment events. Private actions also have targeted ticket sellers' practices, including a recent lawsuit brought by StubHub against the Golden State Warriors and Ticketmaster challenging their exclusive ticket-sales relationship. Most recently, New York Attorney General Eric Schneiderman issued a 44-page report titled "Obstructed View: What's Preventing New Yorkers From Getting Tickets." In the report, the attorney general purports to have uncovered widespread abuses in how tickets to sports and entertainment events in New York are sold and resold.

On February 24, 2016, Skadden presented a webinar titled "The Emerging Legal Landscape Regarding Ticket Sales: What Every Sports/Event Organizer or Venue Needs to Know." Skadden speakers were partners Anthony Dreyer (intellectual property and sports litigation) and Karen Hoffman Lent (antitrust, sports and complex litigation). Associate Marissa Troiano (antitrust and competition) moderated the discussion.

State Law Overview

Under common law, it is generally accepted that a ticket is simply a limited license to enter a premises, and accordingly a venue operator or event organizer may impose terms and conditions on that ticket and its ticketholder. However, this principle has been supplanted — or at least supplemented — in many states by statutes governing the sale and resale of event tickets. Mr. Dreyer noted that numerous relevant areas of state ticket legislation exist but focused on (i) price caps on ticket resales, (ii) ticket-purchasing software, (iii) paperless ticketing, (iv) service charges and (v) prohibitions on resale. Rather than providing a 50-state summary, he discussed ticketing legislation in five key states: California, Florida, Illinois, Texas and New York.

Price Caps on Ticket Resales

Some states regulate the secondary ticket market by setting maximum resale prices, either as a percentage of face value or a dollar amount. Of the states addressed, Florida and Illinois impose price caps while California, New York and Texas allow tickets to be resold for whatever the market will bear. Notably, both Florida and Illinois law provide exceptions for resellers who satisfy certain statutory criteria. For example, while Florida law prohibits a reseller from charging more than \$1 above face value,

The Emerging Legal Landscape Regarding Ticket Sales: What Every Sports/Event Organizer or Venue Needs to Know

the price cap does not apply to tickets resold through an Internet site that either is authorized by the original seller or guarantees refunds to purchasers if the event is canceled or the purchaser is denied admission for reason other than his own act or omission. Similarly, Illinois law prohibits resale above face value but provides exceptions for the following: resellers who are registered ticket brokers that have permanent business locations in the state, Internet auction services, charitable auctions, and websites whose operators have a business presence and physical street address in Illinois. While Texas takes a laissez-faire approach and has no statewide regulation of ticket resale, municipalities have enacted legislation. Indeed, an Arlington, Texas, ordinance prohibits resale at any price without authorization of the event sponsor, with one exception: An individual may resell a ticket at face value if the sale occurs in either the buyer's or seller's residence and the sale is for personal use by the buyer.

Ticket-Purchasing Software

A growing trend among ticket brokers is the use of automated ticket-purchasing software, or ticket bots, to purchase large blocks of tickets to concerts and major sporting events. California, Florida and New York regulate ticket bots to varying degrees, while Illinois and Texas do not have laws addressing them. However, a bill to make the use and sale of ticket bots illegal is currently pending in the Texas legislature. California and Florida law limit the use of ticket bots, making it illegal to use or sell software to circumvent a security measure, access controls or other measures used to ensure an equitable ticket-buying process. New York law strictly prohibits the use of ticket bots, as it is illegal to knowingly use, intentionally maintain any interest in or intentionally control the operation of automated ticket-purchasing software. While violators in Illinois and New York face civil penalties, those in California may receive up to six months in jail as well as fines.

Paperless Ticketing

Another growing industry trend is the use of paperless tickets, ranging from electronic tickets — which can be easily emailed and thus easily resold — to tickets that require the attendee to swipe the credit card used for purchase in order to enter the venue. New York is currently the only state that has enacted paperless ticketing restrictions. Under New York law, an event operator may employ a paperless ticketing system only if (i) the paperless tickets are freely transferable independent of the event operator or (ii) the consumer is offered an option at the time of initial sale to purchase the same tickets for the same price in a paper or other form that is freely transferable.

Service Charges

Attorneys general — particularly the New York attorney general (NYAG) — and private litigants are increasingly focusing on service, convenience and processing fees that event sponsors and vendors collect. State laws address these charges to varying degrees. California law merely imposes a disclosure requirement — if a ticket seller is charging a service fee, that must be disclosed in any advertising or promotional materials for the event. Illinois law permits a ticket seller to collect a reasonable service charge in return for a service actually rendered. Similarly, New York law limits fees to a reasonable service charge for “special services,” including sales away from the box office and delivery. Although Florida and Texas law are silent on the issue, event operators should be mindful of state consumer protection laws. For example, at least one court in Florida has held that unreasonable or fraudulent service charges are subject to claims under the Florida Deceptive and Unfair Trade Practices Act. *See Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. Dist. Ct. App. 2000).

Prohibitions on Resale

Some states prevent venue operators from imposing limits on where, how and for how much a ticket can be resold. Neither California nor Texas have such laws, and thus resale restrictions generally would be permissible. However, Florida, Illinois and New York do address such prohibitions. Recognizing that original ticket sellers often impose limits on the quantity of tickets an individual may purchase, Florida law makes it illegal to purchase from the original ticket seller with an intent to resell any quantity above the announced limit. Illinois and New York law directly confront terms and conditions concerning resale that event operators seek to impose on ticket purchasers. Illinois law contains fairly broad restrictions, as any term of condition of the original sale of a ticket purporting to limit the terms or conditions of resale is unenforceable, null and void. New York law focuses only on season ticket packages and subscription plans, proscribing any restriction on resale as a condition to purchase the package or plan, retain the tickets for the duration of the package or plan, or retain any contractually agreed-upon rights to purchase future season ticket packages or subscription plans.

NYAG Report

Mr. Dreyer next moved to a discussion of New York Attorney General Schneiderman's report, noting that while it largely focuses on concert sales, many of the findings and recommendations have broader industry implications. He addressed three particular areas of focus: (i) unreasonable service fees, (ii) extensive use of illegal ticket bots by brokers and (iii) the use

The Emerging Legal Landscape Regarding Ticket Sales: What Every Sports/Event Organizer or Venue Needs to Know

of presales and holds by event operators.

Unreasonable Service Fees

Of all the issues addressed by the NYAG, high service fees seemingly have the greatest potential impact on venue operators. In the NYAG's view, many of the service charges imposed within the state do not comply with New York law, which requires that service fees be reasonable and related to the provision of special services, such as sales away from the box office or delivery fees. In support of his belief that service charges within New York are excessive and unreasonable, the NYAG compared service fees associated with tickets to service fees charged for other goods and services on the Internet. Notably, most online retailers, including Amazon and Etsy, charge no "general" fees, so it is unclear what services are covered by fees collected by online ticket vendors that similarly don't have the expenses associated with brick-and-mortar operations.

Mr. Dreyer advised that the risk to event and venue operators is not just an NYAG inquiry or proceeding but a potential class action claim under New York General Business Law § 349. Further, he stated that in order to withstand scrutiny, operators should be sure they can justify the service fees they are charging, and that those fees are for "special services" in accordance with New York law.

Broker Use of Illegal Ticket Bots

By using illegal ticket bots, individuals and brokers are able to conduct tens, hundreds or even thousands of simultaneous automated ticket purchases. In addition to purchasing tickets sold through the Internet, ticket bots monitor and detect when tickets go on sale, search for and reserve tickets, and bypass security measures. The NYAG's investigation found that ticket bots also have been successfully employed on ticket vendors' mobile applications. Use of ticket bots by brokers is rampant and can account for up to 90 percent of traffic to Ticketmaster's website at a given time.

Mr. Dreyer explained that the unstated implication of the NYAG report is that venue operators and ticket sellers are ignoring the use of ticket bots because they do not harm the operators' or sellers' bottom line.

Holds and Presales

The majority of event tickets are not offered to the general public but are instead divided among "holds" and "presales." Holds are tickets reserved for industry insiders, including artists, venues, agents, marketing departments, sponsors, promoters and executives. Presales are advance sales to select groups of fans and cardholders of major banks and financial institutions. In fact,

holds and presales accounted for 16 percent and 38 percent of available tickets for the top-grossing shows in New York between 2012 and 2015, respectively.

Mr. Dreyer noted that while neither holds nor presales violates New York law, the NYAG is concerned with how these practices impact the primary and secondary ticket markets.

NYAG Industry Proposals

Mr. Dreyer explained that there is a common theme throughout the NYAG's report — the belief that the foregoing concerns prevent a majority of sports and music fans from obtaining tickets in the primary market and force the average fan to buy from secondary sites, at largely inflated prices. Correspondingly, the NYAG proposes an array of industry and legislative reforms.

Among the NYAG's proposals are suggested actions to be taken by venue operators and ticket vendors. First, the NYAG urges ticket resale platforms to ensure broker compliance by requiring sellers to provide their ticket reseller license number and monitoring sellers more closely. Additionally, the NYAG believes that industry participants should publicly disclose the allocation of tickets through holds, presales and public sales to reduce consumer confusion. Lastly, the NYAG suggests that ticket vendors not only work with his office toward long-term technological solutions to prevent the use of ticket bots but also independently work toward short-term solutions by analyzing purchase data and investigating resellers.

The NYAG also suggested legislative solutions to the issues addressed in his report. First and foremost, he noted that the industry reforms previously discussed should be mandated. Next, he proposed the imposition of criminal penalties for the use of illegal ticket bots. Additionally, he offered that price caps on resale, which had been eliminated in 2007, should be reinstated. Lastly, he urged the legislature to repeal the ban on nontransferable paperless tickets, noting that paperless tickets have had a clear effect in reducing excessive prices charged on the secondary markets and increasing the odds of fans buying tickets at face value.

Antitrust Implications of Ticketing Law

Ms. Lent discussed key aspects of the NYAG's report related to antitrust law. The NYAG identified two areas of ticket sales that he believes are of concern under the Donnelly Act, New York's antitrust statute: (i) setting ticket resale price floors and (ii) impeding access to alternative or "unofficial" ticket resale platforms. In particular, the NYAG indicated concern about the combined effect of these practices, which could impact the price consumers pay for tickets.

The Emerging Legal Landscape Regarding Ticket Sales: What Every Sports/Event Organizer or Venue Needs to Know

Ms. Lent then moved to a discussion of what constitutes “resale price maintenance” under federal and New York state antitrust law. An agreement is a necessary element of a Section 1 claim under the Sherman Act and under all state antitrust statutes. Therefore, a threshold question in both jurisdictions is whether there is an actual “agreement” between the seller and reseller to adhere to a minimum price, as opposed to a unilateral price floor policy announced by the ticket issuer. Significantly, in *United States v. Colgate & Co.*, the U.S. Supreme Court held that there is no “agreement” for purposes of antitrust law where a seller of goods unilaterally announces a price floor policy. *Id.*, 250 U.S. 300 (1919). Federal and New York state courts consistently have applied this principle to resale price floors announced unilaterally by a seller as a condition of sale, even if the seller declines to do business with those who fail to comply with its resale price floor policy, which has a similar effect to a resale price maintenance (RPM) agreement between seller and reseller.

If there is an actual agreement to maintain a price floor between the seller and reseller, the antitrust laws next examine whether it is an agreement that unreasonably limits competition. Ms. Lent explained that until just under 10 years ago, under federal law, any form of resale price maintenance was considered per se unlawful and was de facto assumed to unreasonably limit competition in violation of the Sherman Act. However, in 2007, the Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, where it held that vertical resale price maintenance agreements should be judged under the rule of reason rather than the per se rule. Under this rule, parties to a resale price maintenance agreement can avoid antitrust liability if they can show that the agreement achieves valid pro-competitive objectives that outweigh any anti-competitive effects of the agreement.

In declining to apply the per se rule, the *Leegin* court discussed several potential pro-competitive effects of resale price maintenance agreements, including:

- **Promoting Interbrand Competition:** Stimulating competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition, or competition among retailers selling the same brand. This in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position against rival manufacturers.
- **Free Riding:** Absent vertical price restraints, sellers may have less incentive to provide the retail services that enhance interbrand competition because discounting retailers can benefit, or get a “free ride,” from retailers who furnish services and then

capture some of the increased demand those services generate.

Ms. Lent explained that in the ticketing context, these types of services could include event promotion, investing in advanced technology to provide security to customers’ financial data and efforts to combat the sale of counterfeit tickets. On the other hand, the *Leegin* court also stated that resale price maintenance can potentially be anti-competitive when a dominant retailer requests it to forestall any innovation in distribution that would decrease costs to consumers. Such anti-competitive concerns are noted in the NYAG’s report with respect to ticket sales.

In the aftermath of the Supreme Court’s controversial decision in *Leegin*, Ms. Lent said, there have been numerous attempts to repeal or limit *Leegin*’s applicability at both the federal and state level. While most states follow federal precedent and use a rule of reason analysis for RPM cases, there are a few notable exceptions:

- **New York:** Subsequent to *Leegin*, a few federal courts in New York have addressed resale price maintenance and have applied the rule of reason while expressly noting that New York state’s highest court has not had the opportunity to examine its treatment of RPM post-*Leegin*. In 2010, consistent with the NYAG’s statements that New York continues to view RPM agreements as pernicious, the NYAG filed suit against Tempur-Pedic in New York state court for establishing a retail pricing policy that it would not do business with any retailer that does not adhere to the suggested retail prices. The NYAG did not assert a federal or state antitrust claim but instead alleged a violation of New York General Business Law 369-a, which states: “any contract provision that purports to restrain a vendee of a commodity from reselling ... at less than the price stipulated by the vendor or producer is unenforceable.” The court found that the pricing policy was not illegal but simply unenforceable under NYGBL 369-a. Ms. Lent noted that it remains unclear how the New York courts will apply the Donnelly Act to resale price maintenance agreements but expects that the current attorney general will argue that per se treatment is appropriate.
- **California:** California courts apply a per se rule to RPM allegations. For example, in *Darush MD APC v. Revision LP*, No. 12-cv-10296 (C.D. Cal. July 16, 2013), the district court dismissed federal antitrust claims but held that vertical price restraints are per se unlawful under the Cartwright Act and therefore allowed state law RPM claims to survive a motion to dismiss. The court reasoned that because there was California Supreme Court precedent holding resale price restraints per se

The Emerging Legal Landscape Regarding Ticket Sales: What Every Sports/Event Organizer or Venue Needs to Know

illegal, it was bound to apply the per se rule unless and until the California Supreme Court rules otherwise and follows federal precedent.

Ms. Lent then noted that other states have enacted or are considering enacting legislation regarding the legality of RPM. For example, in 2009, Maryland adopted a statute that states that “a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.”

Other states have similar legislation pending. For example, Pennsylvania has never had a comprehensive state antitrust law, but in 2013, its officials introduced antitrust legislation that would make minimum resale price maintenance per se illegal under state law.

Ms. Lent then shifted back to the second area of concern identified by the NYAG: practices that impede access to alternative or “unofficial” ticket resale platforms. The report identified examples of practices that would make use of alternative platforms “complicated,” including delaying delivery of tickets and policies that place season ticket holders at risk of cancellation of their ticket subscriptions when they sell on unofficial resale platforms.

Recent private actions have brought claims based on similar restrictions on resale. For example, in 2015, StubHub filed an antitrust lawsuit in the U.S. District Court for the Northern District of California against the Golden State Warriors and Ticketmaster, alleging that the Warriors and Ticketmaster violated federal and California state antitrust law by (i) entering into an agreement to make Ticketmaster the exclusive secondary ticket exchange partner of the Warriors, (ii) as part of that agreement, refusing to allow any other secondary ticket exchange (e.g., StubHub) to integrate technically with Ticketmaster’s primary ticket platform, (iii) contractually requiring that the resale of Warriors tickets be effectuated only through Ticketmaster’s secondary ticket exchange — and enforcing this requirement by canceling or threatening to cancel ticket subscriptions if fans resell their Warriors tickets on a secondary ticket exchange that competes with Ticketmaster (e.g., StubHub), and (iv) engaging in joint marketing activities that mislead consumers into

believing that Ticketmaster is the only safe or effective secondary ticket exchange option they have, or the only one that can be trusted to provide a guaranteed or official Warriors ticket.

StubHub claimed that this conduct caused it to lose approximately 80 percent of its inventory of Warriors ticket sales versus the previous year and sales of Warriors tickets to decrease by 45 percent. It also claimed that Ticketmaster’s fees were 33 percent higher. These allegations fall squarely within the category of conduct about which the NYAG expressed concern — *i.e.*, impeding access to unofficial ticket resale platforms, thereby resulting in increased prices to consumers.

The court dismissed StubHub’s claims because it failed to allege a relevant market in which the Warriors and Ticketmaster had market power, as required to state a claim under the Sherman Act. StubHub’s claims were based on a theory that there are separate product markets for the primary sale of Warriors tickets and the sale of Warriors tickets through a secondary ticket exchange. However, the court found that tickets sold on either platform are reasonably interchangeable by consumers for the same purpose and therefore cannot be in two separate markets. Although the court could have stopped there, it also noted that the primary ticket market is not a relevant antitrust market because the sole products for sale in that market are Warriors tickets sold directly by the team itself. Every manufacturer has a natural monopoly in the production and sale of its own product, and that cannot be the basis for antitrust liability, the court ruled.

Others cases also have challenged alleged resale restrictions as violations of state ticketing laws. In *Olsen et al v. New Jersey Devils, LLC*, filed in the U.S. District Court for the District of New Jersey, the plaintiffs alleged that the Devils breached an express or implied contractual obligation to renew the tickets. Those plaintiffs did not assert antitrust claims of any kind. The Devils filed a motion to dismiss the complaint in late August 2015, which has not yet been decided by the court.

In sum, Ms. Lent explained that state attorneys general and private plaintiffs may use the antitrust laws or other state ticketing laws to target resale price maintenance agreements or restrictions on the resale of tickets.