

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Sports Tickets: Revocable Licenses or Rights to Resale?

Recently, ticketing policies for sporting and other events have been receiving increased attention in both the media and legal spheres. In January, the New York State Attorney General announced an antitrust investigation into the NFL Ticket Exchange's enforcement of price floors. In February, the New York Yankees announced a ban on print-at-home tickets to prevent fraud and counterfeiting, which was met with vocal fan opposition. Most recently, in March, fans of the Minnesota Timberwolves filed a putative class-action lawsuit against the team for instituting a similar ban on paper tickets, claiming that the team's official ticketing platform fixed resale market prices and severely inhibited their ability to resell tickets.

Historically, courts have viewed an event ticket as a revocable license to attend an event, with no absolute right to sell or transfer that license.¹ Despite the rapid growth of the so-called "secondary market" for resale of tickets and restrictions implemented in response, challenges to resale restrictions have resulted in court opinions confirming the historical view that tickets are mere licenses to attend rather than property to resell.

Common Resale Limitations

Although New York's Arts and Cultural Affairs Law (ACAL) protects certain rights of season ticket holders, notably those provisions do not extend to non-season tickets.² Common resale restrictions allowable under the law include price floors, policies limiting resale to one "official" platform, and bans on the use of non-digital (paperless) tickets.

Resale Price Floors. Resale price floors, also referred to as "retail price maintenance" or "RPM," are agreements which prevent tickets from being sold for lower than a specific dollar amount or percentage of face value. Federal case law on the issue of RPM is robust, and while a few states have adopted or proposed statutes limiting the use of RPM, most states rely on



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federal precedent. The most recent authority on RPM is the Supreme Court's 2007 decision in *Leegin Creative Leather Products v. PSKS*, which held that RPM agreements should be analyzed under the rule of reason.³ Prior to this holding, RPM was deemed per se illegal under §1 of the Sherman Act.⁴

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After *Leegin*, Maryland enacted a *Leegin* repealer, which dictates that RPM is per se illegal.⁵ Conversely, Kansas expressly adopted a rule harmonizing its antitrust laws with federal precedent and stating that RPM may be a reasonable restraint of trade.⁶ Turning to post-*Leegin* case law, California courts have held that RPM is per se illegal under California's antitrust statute, the Cartwright Act.⁷ A New York Supreme Court decision held that RPM is not an "illegal act," however it is still unclear whether such policies are per se illegal under the Donnelly Act.⁸

Limitations to 'Official' Resale Platforms. Some policies have been alleged to push consumers to specific "official" resale platforms. Specifically, these policies typically include delayed delivery of PDF versions of tickets unless purchased on official platforms and policies that place season ticket subscriptions at risk if a season ticket holder sells on an unofficial resale platform. However, dismissals of

recent lawsuits appear to confirm that such policies are not viewed as anticompetitive by the courts.

In November 2015, the U.S. District Court for the Northern District of California dismissed a suit brought against the Golden State Warriors and Ticketmaster by StubHub.⁹ The suit was instituted in response to a policy by which resale of Warriors tickets was only allowed through Ticketmaster's secondary Ticket Exchange. In its complaint, StubHub alleged that the Warriors' policy violated §1 of the Sherman Act as illegal tying, coordinated agreements and acts to limit competition, and exclusive dealing, as well as §2, specifically as conspiracy to monopolize and attempted monopolization.

The court held that StubHub failed to allege a relevant market in the primary and secondary sale of tickets because tickets bought in either alleged market were reasonably interchangeable. It further held that the alleged primary ticket market could not be the basis of an antitrust violation since the Warriors had a natural monopoly over the direct sale of its own tickets.

In January of this year, a San Francisco 49ers season ticket holder voluntarily dismissed a putative class action against the team and Ticketmaster.¹⁰ The plaintiff had alleged that a new policy which restricted fans' access to PDF tickets until 72 hours before game time unless sold on a Ticketmaster-operated exchange restricted the ability of ticket holders to resell on the "secondary market." The plaintiffs' antitrust claims included alleged violations of §§1 and 2 of the Sherman Act.

In their motion to dismiss, the 49ers and Ticketmaster pointed to the StubHub decision, arguing that the alleged primary and secondary markets are not independent and that a single team's tickets are not a "market" for the purposes of antitrust analysis.

Non-Transferrable Paperless Ticketing. Paperless ticketing policies, like those recently instituted by the Yankees and Timberwolves, only allow admission with non-transferrable digital tickets and presentation of identification and the credit card used to buy the ticket. These policies are cited as an important anti-scalping measure, because they prevent the sale of counterfeit or

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fraudulent tickets. New York is the only state that currently restricts paperless ticketing, only allowing such policies if the tickets are freely transferable or the buyer has the option to buy the tickets in another, freely transferrable form at the same price.¹¹

The paperless ticketing policy at the root of the lawsuit against the Timberwolves involved the Timberwolves' restriction of resale of electronic tickets to an official digital-only ticketing platform, Flash Seats. Plaintiffs in that case allege that the platform impedes their ability to resell tickets, because it forces them to sell tickets at no less than 75 percent of face value, with the Timberwolves getting a 15 percent cut of the fees collected. Antitrust claims were brought under Minnesota's Antitrust Act on the basis that the Timberwolves intentionally monopolized the "secondary market" for ticket sales. The case is currently pending in a state court in Minnesota.¹²

Attorney General Report

The Office of the New York State Attorney General recently released the results of an investigation into the concert and sports ticket industry, analyzing practices that it believes prevent consumers from accessing and reselling tickets.¹³ The report made several findings and recommendations intended to protect ticket buyers and their ability to resell in the secondary market.

First, the report concluded that, in the first instance, holds and pre-sales for industry insiders such as venues, artists, and promoters reduce the number of tickets available to the general public. Further, the members of the general public are unable to buy tickets from the pool available to them due to bulk purchases by brokers, who typically use "bots" to purchase a majority of tickets for a given event. Ticket bots are software programs that automate the process of searching for and buying tickets on vendor platforms. Specifically, bots conduct multiple searches at the instant tickets are released for sale, reserving tickets within seconds.

Next, bots use false purchaser information to buy hundreds of tickets in moments. As The New York Times reported, bots have been used to buy over 60 percent of tickets for popular events.¹⁴ Notably, the Arts and Cultural Affairs Law makes it unlawful to knowingly use, own, or control ticketing bots, punishable with a penalty of no less than \$1,000 and no more than \$5,000.¹⁵ Moreover, a broker caught using a bot must forfeit all profits from sale of tickets acquired through bots and all bot equipment. The report recommended going beyond these civil penalties and imposing criminal penalties for bot use.

Beyond the face value of a ticket, the report stated that many ticket sales include additional fees for unclear purposes. These fees average 21 percent of the face value of a ticket and

were found to be higher when associated with event tickets as compared to other online purchases. Often, the fees are negotiated between vendors and venues, and include per-ticket convenience or service charges and per-order processing fees.

The Attorney General report suggested that excessive service charges constituted evidence of abuse of monopoly power. Currently, the ACAL requires that service charges be "reasonable" and linked to "special services, including but not limited to, sales away from the box office, credit card sales or delivery."¹⁶

Regarding restraints of trade, the AG cited concerns with resale price floors and limitations on using unofficial platforms for resale, particularly in conjunction with each other. The report found that limiting resale to official platforms could be used to police minimum resale pricing policies. Interestingly, the report recommended repeal of

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New York's paperless ticketing law. The report called the New York law, a section of ACAL, a de facto ban on non-transferrable paperless ticketing, since brokers' option to request resalable tickets erodes the function of a non-transferrable ticket. Non-transferrable paperless tickets, the report stated, "appear to be one of the few measures to have any clear effect in reducing the excessive prices charged on the secondary markets and increasing the odds of fans buying tickets at face value."

Since paperless tickets cannot be used for admission without presentation of identification and the purchasing credit card, brokers cannot resell at great multiples without taking burdensome steps, such as walking the end purchaser to the admissions gate of the event. Therefore, New York's de facto ban on paperless ticketing may in fact be facilitating high mark-ups to consumers who purchase from brokers. The report found that the potential for abuse of paperless ticketing did not justify a complete ban, and that the Legislature should consider what safeguards are necessary to mitigate competitive concerns while still allowing for non-transferrable paperless ticketing.

Ultimately, the Attorney General report recommended that the Legislature (1) mandate industry reforms, including requiring professional sellers to comply with New York's broker licensing provisions, public disclosure of allocation of tickets for holds and pre-sales, and addressing the bot

epidemic; (2) end the ban on non-transferrable paperless tickets; (3) impose criminal penalties for bot use; and (4) cap permissible resale markups.

Going Forward

Limitations on ticket resale, although unpopular with brokers, at this point have not faced antitrust liability. Case law indicates that retail price floors and limitations on resale of tickets on unofficial platforms currently are not viewed as anticompetitive restraints of trade, although the Attorney General report argues otherwise when the two policies are used in conjunction. And while no definitive decisions have been filed regarding the use of non-transferrable paperless ticketing, the AG report cited such policies as procompetitive through their ability to reduce heavy mark-ups in the secondary market.

Despite the growing "secondary market" for tickets, the AG report's findings, coupled with the dismissal of recent lawsuits challenging limitations on ticket resale, suggest that the long held view that tickets do not include a right of resale may still be applicable today.

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1. See, e.g., *People v. Waisvisz*, 582 N.E.2d 1383, 1386 (Ill. App. Ct. 1991).

2. A.C.A.L. §25.30(a), (b); A.C.A.L. §25.30 ("A ticket is a license, issued by the operator of a place of entertainment, for admission to the place of entertainment at the date and time specified on the ticket, subject to the terms and conditions as specified by the operator.")

3. *Leegin Creative Leather Products, v. PSKS*, 551 U.S. 877 (2007).

4. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

5. MD. CODE ANN., Com. Law §11-204(b).

6. KAN. STAT. ANN. §50-163.

7. *Darush MD APC v. Revision LP*, No. 12-cv-10296 (C.D. Cal. July 16, 2013).

8. *People v. Tempur-Pedic International*, 916 N.Y.S.2d 900 (Sup. Ct., N.Y. Co. 2011).

9. *StubHub v. Golden State Warriors*, No. 3:15-cv-01436 (N.D. Cal. Nov. 5, 2015).

10. Jeff Zalesin, "Ticket Holder Drops Resale Suit Against 49ers, Ticketmaster," LAW360, (Jan. 14, 2016) <http://www.law360.com/articles/746878>.

11. A.C.A.L. §25.30(c).

12. *GLS Cos. v. Minnesota Timberwolves Basketball LP*, No. 27-cv-16-2816 (Minn. Dist. Ct., filed March 3, 2016).

13. New York State Attorney General, *Obstructed View: What's Blocking New Yorkers from Getting Tickets* (2016).

14. Ben Sisario, "Concert Industry Struggles With 'Bots' That Siphon Off Tickets," NYTIMES, (May 26, 2013) <http://www.nytimes.com/2013/05/27/business/media/bots-that-siphon-off-tickets-frustrate-concert-promoters.html>.

15. A.C.A.L. §25.24.

16. A.C.A.L. §25.29.