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JetBlue-Spirit Ruling Casts Uncertainty Over Airline Deals

By **Linda Chiem**

Law360 (January 17, 2024, 8:44 PM EST) -- A Massachusetts federal court decision blocking JetBlue and Spirit Airlines' proposed merger sends a chilling message to dealmakers contemplating airline combinations, joint ventures or code-share agreements, raising questions about what airline industry growth strategies wouldn't trigger antitrust enforcers' alarm bells, experts say.

After a monthlong trial that **wrapped up** in December, U.S. District Judge William G. Young **ruled Tuesday** that JetBlue Airways Corp.'s proposed **\$3.8 billion acquisition** of Spirit Airlines Inc. raised too many competition concerns and ran afoul of the Clayton Act. The U.S. Department of Justice and several states claimed the **"presumptively illegal" merger** would **hurt cost-conscious consumers**.

The decision is a blow to low-cost carrier JetBlue, which in 2022 **swooped in** and thwarted Frontier Group Holdings Inc.'s previously announced **planned merger** with the ultra-low-cost carrier Spirit, setting its sights on creating what would have been the fifth-largest U.S. airline.

But Judge Young was unpersuaded by JetBlue and Spirit's promises to become a formidable rival to the nation's so-called Big Four legacy carriers: United Airlines, Delta Air Lines, American Airlines and Southwest Airlines. In the end, Judge Young declined to allow JetBlue to "gobble up" Spirit for fear that budget-minded travelers would be saddled with higher fares and fewer seats on popular routes.

Experts told Law360 that the decision forces the airline industry to reexamine or get far more creative with their growth-seeking pursuits. It also underscores that the usual promise by airlines of mergers past to give up routes or airport slots aren't enough to overcome the Biden administration's aggressive stance against further consolidation, and whose efforts blocked a different JetBlue deal last year.

Judge Young delivered a detailed and thoughtful ruling that delved deep into airline industry economics — one that found that "there are no 'bad guys' in this case," experts say. Ultimately, the merger "would likely incentivize JetBlue further to abandon its roots as a maverick, low-cost carrier," and the loss of Spirit as a standalone carrier would "eliminate one of the airline industry's few primary competitors that provides unique innovation and price discipline," according to the opinion.

"That even-handed approach carries throughout the whole decision," according to Foley & Lardner LLP partner Benjamin Dryden, vice chair of the firm's antitrust and competition practice group.

The opinion is surprising in many ways, Dryden said, because the court rejected the government's argument that the merger was presumptively anticompetitive based on concentration statistics alone. The court instead found both that competitive entry was likely and that combining JetBlue with Spirit would create more vigorous competition with the Big Four airlines, according to Dryden.

"Normally, any of those findings would suggest a judgment for the defendants. But that's not what the court did," he noted. "Instead, the court was moved by the government's arguments about the experience of the 'average Spirit consumer' — a college student or a large family that can only afford to fly on an ultra-low-cost carrier — and held that this segment of the market would be harmed by losing Spirit as an independent alternative."

The judge understood why the companies thought it made sense from a business perspective to

merge, and that a combined JetBlue-Spirit would, in fact, put more pressure on the large, legacy carriers, according to Bilzin Sumberg partner Scott Wagner.

"However, he found that the potential harm to consumers — namely, the loss of Spirit as a true low-cost, aggressive-pricing carrier — outweighed any pressure the proposed combined company would put on the legacy carriers," Wagner said.

The decision was largely expected, particularly after another Massachusetts federal judge last May **struck down** JetBlue's code-sharing agreement with American Airlines covering Boston and New York as illegal and anticompetitive. JetBlue **pulled out** of the so-called Northeast Alliance in July, leaving American to **appeal the ruling** on its own to the First Circuit. That case is pending.

University of Houston Law Center professor Darren Bush said, "It is nice to see the DOJ consistently halt further degradation of competition in the airline industry," particularly after years of consolidation have resulted in "loss of service, poorer service, and in many routes, lack of choice."

"The decision and the renewed tenacity of the DOJ in airline markets will hopefully keep aspirations of further mergers permanently grounded," Bush said.

The Justice Department, which was joined by Massachusetts, New York, California, Maryland, New Jersey, North Carolina and the District of Columbia, claimed it pinpointed some 150 routes or markets where JetBlue and Spirit both fly and where the deal would have anticompetitive effects, making a combination presumptively illegal. Many of Spirit and JetBlue's overlapping routes are to and from Boston, Los Angeles, New York City and San Juan, Puerto Rico, as well as routes from Florida and Latin America.

JetBlue agreed to give up a number of Spirit gates, takeoff and landing rights, and some related ground facilities at four airports: Boston's Logan International, New Jersey's Newark Liberty International, New York's LaGuardia, and Florida's Fort Lauderdale-Hollywood International.

Ultra-low-cost carrier Frontier **agreed to acquire** Spirit's 22 slots, six gates, and the associated ground facilities at LaGuardia, according to the ruling. Allegiant, another ultra-low-cost carrier, **agreed to pick up** Spirit's two gates and associated ground facilities at Boston's Logan Airport; Spirit's 43 runway authorizations, two gates and the associated ground facilities at Newark; and five of JetBlue's gates and the associated ground facilities at Fort Lauderdale.

But there wasn't any commitment to replace Spirit's capacity on all routes it would stop serving should the merger be consummated, nor was there any requirement that Frontier or Allegiant maintain a particular level of service from the divested airports, according to the ruling.

"The court acknowledged the commitments made by JetBlue to divest certain assets to other low-cost carriers, but seemed skeptical that the competition that would be lost by the merger would be reconstituted due to the divestitures," Cornell University Law School professor George Hay said. Judge Young enjoined the proposed merger of JetBlue and Spirit "as it currently stands as agreed to by the defendant airlines on July 28, 2022." The judge appeared inclined to preserve the ultra-low-cost segment of the market that offers no-frills, unbundled fares.

The proposed JetBlue-Spirit combination wasn't nearly as big as past mergers of legacy airlines, such as the 2013 combination of American Airlines and US Airways that created the world's largest airline by fleet size. Before that, United Airlines and Continental Airlines agreed in 2010 to their own behemoth merger. JetBlue's plan was to absorb the Spirit brand, similar to what happened in the most recent major airline merger in 2016, when Alaska Air Group **acquired** Virgin America.

As JetBlue and Spirit consider whether to appeal Tuesday's decision, some experts said the carriers may "have some compelling arguments."

Foley & Lardner's Dryden said an appeal is always difficult, especially when the district court prepares such a thoughtful opinion, but the carriers might "have a fighting chance."

"In considering the parties' entry defense, the court focused on whether other 'ultra-low-cost carriers' would take on the affected flight routes. But the court never found that 'ultra-low-cost carriers' are a

distinct antitrust market," Dryden noted. "To the contrary, the court held (and the government agreed) that the relevant market is 'scheduled air passenger service' overall, without any separate segmentation for ultra-low-cost carriers.

"Additionally, even though the court described the parties' divestiture commitments in detail, these commitments did not significantly factor into the court's analysis of the government's case-in-chief. This runs counter to the recent trend of courts to fully consider divestiture commitments in evaluating a transaction's competitive effects," Dryden said.

But Judge Young's ruling makes it challenging for any airline joint venture or merger to be pushed through, according to Kesselman Brantly Stockinger LLP partner Abiel Garcia.

"The airlines are going to have to fight to justify any sort of merger or joint venture going forward, because the court really took into consideration not only the overall marketplace, but really did a deep dive on each specific route," Garcia said.

"Any adviser to the airline industry would do well to read this opinion and see how the courts are currently seeing the industry ... [which] as a whole is constrained not by anything that they can really control in the short term — i.e. lack of planes, lack of pilots, which, if I'm an investor in said industry, worries me," Garcia added.

Cornell's Hay pointed out that the opinion "is silent on what this court would do if two classic low-cost carriers — e.g., Spirit and Allegiant — would propose to merge. In that case the merged firm would likely remain a classic low-cost carrier but perhaps a stronger one."

"As for other mergers, it's pretty clear that any merger between the current legacy carriers would be DOA," Hay said. "JetBlue is somewhat unique among the low-cost carriers because in many respects, it resembles the legacy carriers more than the classic low-cost carriers, so allowing it to swallow up Spirit does risk the possibility that JetBlue would use the increased capacity to look even more like the legacy carriers than like a traditional low-cost carrier."

The recently announced proposed merger between Alaska Airlines and Hawaiian Airlines will likely be **put through the wringer**, even though they have fewer overlapping routes and have promised to keep their distinct brands.

Dryden said Tuesday's ruling "will certainly be front of mind for the parties in the proposed Alaska-Hawaiian transaction, as it sets a precedent those parties will need to be prepared to distinguish. That said, I trust that the DOJ will evaluate that merger based on the unique competitive dynamics at issue in that transaction."

Bilzin Sumberg's Wagner agreed that the Alaska-Hawaiian proposal "was always going to be subject to in-depth analysis, [but] it will face even greater scrutiny as a result of the JetBlue-Spirit decision."

"That said, given that Hawaiian is largely a regional airline in financial distress, I think the acquisition will ultimately be approved," Wagner said.

--Additional reporting by Chris Villani. Editing by Robert Rudinger.