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Ninth Circuit Finds Grocers' Revenue-Sharing Agreement Must Go Through Full Rule of Reason Check-Out

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Antitrust Litigation & Competition Regulation

Sitting *en banc* and affirming a district court decision, the U.S. Court of Appeals for the Ninth Circuit recently held in ***California ex rel. Harris v. Safeway, Inc.***,[1]that an agreement among four large competing Southern California supermarket ("chains") to **share revenues during a labor dispute was neither protected from antitrust scrutiny under the non-statutory labor exemption nor so inherently anticompetitive as to be condemned *per* se or evaluated under a truncated "quick look" test.** Rather, the agreement -- which reimbursed to a chain targeted by a strike an estimation of the incremental profits, for a limited period of time, on sales that flowed to the other chains in the arrangement as a consequence of the strike -- was subject to traditional rule of reason analysis, balancing any legitimate justifications against any **substantial anticompetitive impacts.**

Dissenting in part, Chief Judge Kozinski (joined by Judges Tallman and Rawlinson) stated that the majority's "groundbreaking" ruling on the inapplicability of the non-statutory labor exemption was "very likely an advisory opinion," and had "no basis in the record, common sense or precedent."

The case arose from circumstances surrounding 2003 labor negotiations between local chapters of the United Food and Commercial Workers (UFCW) union and three of the supermarket chains that, with the union's consent near the expiration of the labor contract, formed a multi-employer bargaining unit to negotiate. Along with the fourth chain (which also had a labor agreement that expired within months), the supermarket chains entered into a **Mutual Strike Assistance Agreement (MSAA).** The MSAA provided that if one of the chains was targeted for a selective strike or picketing **(a so-called "whipsaw" tactic by which unions increase pressure on one employer within a bargaining unit)**, the other chains[2] would lock out all of their employees within 48 hours. As part of the MSAA, the chains also entered into a revenue-sharing provision (RSP), under which any of them that earned revenues during a strike or lockout above their historical shares relative to the other chains would pay 15 percent of those excess revenues to the other chains in order to restore their pre-strike shares.[3]

After negotiations with the UFCW broke down, a strike ensued. Picketing was focused on only two of the chains in the bargaining unit, and lasted for approximately four-and-a-half months. The two picketed chains ultimately were reimbursed under the RSP to the tune of approximately $146 million.

While the strike was underway, the State of California filed suit, claiming that the RSP was an

unlawful restraint of trade under Section One of the Sherman Act. The grocers sought summary judgment on the ground that the RSP was immune from Sherman Act scrutiny pursuant to the non-statutory labor exemption, which shield certain restraints from Sherman Act challenge in order to allow for meaningful collective bargaining. The State also sought summary judgment on the grounds that the provision was unlawful *per se*, or should have been analyzed under an abbreviated (“quick look”) analysis. The district court denied both motions, and the parties pursued a streamlined appeal, after agreeing to a stipulated final judgment for defendants under which the State would not pursue the theory that the RSP was unlawful under a full rule of reason analysis, and the grocers would not pursue their affirmative defenses other than the non-statutory labor exemption.

On appeal to the Ninth Circuit, the original panel (in an opinion by Judge Reinhardt, who dissented in part[4]from the later *en banc* opinion that requires a full rule of reason analysis) considered the history of profit-sharing arrangements and the circumstances and details of the chains’ arrangement, applying a **“quick look” analysis of sorts**, and concluded that the RSP was likely to have an anticompetitive effect. The Ninth Circuit panel rejected the application of the non-statutory labor exemption, and also found that "driving down compensation to workers” as a consequence of the agreement did not constitute “a benefit to consumers cognizable under our laws as a 'pro-competitive' benefit."[5]The Circuit then agreed to hear the case *en banc*.

In the *en banc* decision, the majority declared that “novel circumstances and uncertain economic effects” of the RSP required “open discovery and fair consideration of all factors relevant under the traditional rule of reason test,” thus approving the district court’s original determination of the proper standard. The Ninth Circuit majority acknowledged that application of the full test was “not a simple matter,” but concluded that “[g]iven the limited judicial experience with revenue sharing for several months pending a labor dispute, [it could not be said] that the restraint’s anticompetitive effects are ‘obvious’ under a *per se* or quick look approach.” The court distinguished the RSP from other profit-pooling arrangements subject to stricter scrutiny on the grounds that, by its terms, the RSP (i) was effective only for a limited and unknown duration, thus arguably preserving incentives to compete during the revenue-sharing period; and (ii) did not include all participants in the relevant markets, leaving other competitors in the market who could discipline pricing.

However, the majority then opined that the RSP was not entitled to protection from antitrust analysis under the non-statutory labor exemption. In so doing, the court distinguished the supermarket chains’ RSP from the agreement among a group of NFL teams to unilaterally impose terms and conditions from a lapsed collective bargaining agreement that was considered in the U.S. Supreme Court’s decision in ***Brown v. Pro Football, Inc.*,** 518 U.S. 231 (1996) (holding that the non-statutory labor exemption may extend to an agreement solely among employers). The Ninth Circuit majority determined that revenue-sharing is not an accepted practice in labor negotiations with a history of regulation; does not play a significant role in collective bargaining; is not necessary to permit meaningful collective bargaining; does not relate to the "core subject matter of bargaining" (wages, hours and working conditions); and restricts a business or “product” market, not a labor market.

Because the State of California had stipulated to a dismissal in the event that it did not prevail on a categorical basis under a *per se* or quick look analysis (which it did not), Chief Judge Kozinski wrote in dissent that the majority had in effect written an impermissible advisory opinion, and had gone “out of its way to rule on the **non-statutory labor exemption.**” Chief Judge Kozinski went even further, however, In his view, “all of the relevant *Brown* factors weigh heavily in favor of exempting the RSP from antitrust review.” This was not a case of employers using a labor dispute as a pretext for price-fixing, but rather one of employers responding to union strike tactics, and then only to the degree that the tactics were effectively deployed. According to Chief Judge Kozinski, adding to strikes “the additional threat of antitrust liability -- with its protracted litigation, unpredictable rule of reason analysis and treble damages -- will no doubt force employers to think twice before entering into a revenue-sharing agreement in the future" and, contrary to precedent and policy, force employers "to choose their collective-bargaining responses in light of what they predict or fear antitrust courts, not labor law administrators, will eventually decide."[6]

With the Ninth Circuit having effectively elevated the antitrust laws over the labor laws, one might postulate a fair chance of a petition for certiorari being accepted by the U.S. Supreme Court in this case implicating significant questions of both law and public policy. Unfortunately, in light of the stipulated dismissal, such review may have to wait, as the grocery chains may lack standing, let alone incentive, to seek it here.

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[1]Nos. 08-55671, 08-55708 (9th Cir. July 12, 2011).

[2]The fourth chain, which was not in the original multi-employer bargaining unit, was not required by the MSAA to engage in the lockout.

[3]The RSP would be in effect until two weeks following the end of a strike or lockout, and it required the chains to submit weekly sales data for an eight-week period prior to the strike or lockout to a third-party accountant.

[4]Judges Schroeder and Graber joined in Judge Reihardt's partial dissent.

[5]*California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1192 (9th Cir. 2010).

[6]*Quoting Brown*, 518 U.S. at 247.

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