

Grocers' Revenue-Sharing Deal Deserves More Than a Quick Look, Ninth Circuit Holds

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A revenue-sharing agreement among grocery stores, designed to help the stores weather targeted strikes by employees during labor strife, is not shielded from antitrust scrutiny by virtue of the non-statutory labor exemption, but neither is it so obviously anticompetitive to merit condemnation under a "quick-look" analysis, an *en banc* panel of the U.S. Ninth Circuit Court recently held. *California ex rel. Harris v. Safeway, Inc.*, No. 08-55671 (9th Cir. July 12, 2011).

The case stems from labor negotiations in 2003 involving three large supermarket chains in Southern California (Albertson's, Ralphs and Vons). These three supermarkets had collective bargaining agreements with a union that were set to expire, and formed a multi-employer bargaining unit to negotiate. A fourth chain, Food 4 Less, had a separate contract with the same union that was due to expire several months later, and also joined the employers' group.

In anticipation of "whipsaw" tactics, by which a union exerts pressure on one employer in a multi-employer bargaining unit through selective strikes or picketing, Albertson's, Ralphs, Vons and Food 4 Less (hereafter "Defendants" or "Grocers") entered into a Mutual Strike Assistance Agreement ("MSAA"). The MSAA provided that, if one party to the agreement was struck by the union, the other Grocers (minus Food 4 Less) would lock out their employees within 48 hours.

The MSAA also included a revenue-sharing provision, providing that in the event of a strike or lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15 percent of those excess

revenues to the other Grocers. The 15 percent figure was designed to estimate the grocers' incremental profit. Slip Op. at 9288. The MSAA dictated that the revenue-sharing period would end two weeks following the end of the strike or lockout.

Negotiations broke down, and the unions began to strike. The union ultimately focused its picketing efforts on Albertson's and Vons only.

During the strike, the state of California sued, alleging that the MSAA's revenue-sharing provision violated Section One of the Sherman Act. Both sides moved for summary judgment. California claimed the revenue-sharing provision was a per se violation of Section One. The Grocers claimed the MSAA was immune from antitrust scrutiny under the non-statutory labor exemption, which limits an antitrust court's authority to pass judgment on trade restraints in a labor context. When the District Court denied both motions, the parties stipulated to an entry of final judgment for Defendants, and both sides appealed. California agreed not to pursue the theory that the MSAA violated Section One under a full-blown rule-of-reason analysis, and Defendants agreed not to pursue the various affirmative defenses they had pleaded, except the non-statutory labor exemption.

The original three-judge panel held that the agreement need not be tested under a rigorous "rule of reason" analysis. *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171 (9th Cir. 2010). The panel instead subjected the MSAA to a new "quick-look-plus" analysis, under which the court considered the history of judicial experience with profit-sharing arrangements, along with the circumstances and details of the MSAA, and applied "rudimentary economic principles" to determine its likely anticompetitive effects. The panel concluded that the MSAA was indeed likely to have an anticompetitive effect. The court also rejected the Grocers' argument that any reduction in competition would be outweighed by the reduced cost of labor that would result from its enhanced bargaining position. The panel held that "driving down compensation to workers is not a benefit to consumers cognizable under our laws as a 'pro-competitive' benefit." *Id.* at 1192. The Court further held that the MSAA was not shielded from antitrust analysis by the non-statutory labor exemption.

The Ninth Circuit voted to rehear the case *en banc*. The resulting opinion, authored by Judge Ronald M. Gould, first affirms the district court's finding that the MSAA is not

exempt from antitrust analysis under the non-statutory labor exemption. The Court analyzes the argument under *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), in which the U.S. Supreme Court held for the first time that the non-statutory labor exemption may extend to an agreement solely among employers. The *Brown* court held that an agreement among a group of NFL teams, following an impasse in bargaining with the players' association, to unilaterally impose terms and conditions from the lapsed collective bargaining agreement, was a well-recognized procedure in the collective bargaining process and thus exempt from antitrust review.

The en banc panel finds that the Grocers' revenue-sharing agreement was fundamentally different from the NFL teams' post-impasse agreement exempted in *Brown*, in every way that matters. Revenue-sharing is not an accepted practice in labor negotiations, with a history of regulation from the realm of labor law, the Ninth Circuit held. Slip Op. at 9298. The revenue-sharing agreement does not play a significant role in collective bargaining, nor is it necessary to permit meaningful collective bargaining. It does not relate to the "core subject matter of bargaining," like wages, hours and working conditions, the court held. The revenue-sharing agreement did not restrict a labor market, but rather a "business" or "product" market. Notably, the *en banc* court backs away from the more categorical statements made by the original three-judge panel on this point, and expressly stops short of announcing "a strict rule [that] the non-statutory labor exemption can only arise in a case involving restraint of terms directly relating to labor" *Id.* at 9300.

In short, the Ninth Circuit rejects the Grocers' contention that *Brown* immunizes employers' use of "economic weapons" to advance their position in a labor dispute. Such a holding, the court said, would also immunize blatant price-fixing agreements, as long as the resulting profits were useful to employers during a strike, the court said. *Id.* at 9299.

The Court then proceeds to analyze the merits of California's Sherman Act claim, focusing initially on the state's claim that the challenged restraint is per-se illegal. The Court quickly dismisses California's attempt to characterize the revenue-sharing agreement as a market-allocation agreement, and instead focuses on the state's claim that the MSAA is a profit-pooling agreement, identical to those previously condemned by the U.S. Supreme Court as per-se illegal.

Defendants offered two defenses for their revenue-sharing agreement. First, they argued that the agreement was, by its terms, effective only for a limited and unknown duration. As a result, Defendants argued, the Grocers retained incentives to compete during the revenue-sharing period, in order to retain customers and best position themselves for the inevitable, post-strike return to competition as usual. Second, Defendants argued that the revenue-sharing agreement did not include all participants in the relevant markets, and a sufficient number of groceries remained outside the agreement to impose competitive discipline. The *en banc* majority found that these factors sufficiently distinguished the MSAA from other profit-pooling agreements described in the cited case law, such that per-se treatment would be inappropriate. *Id.* at 9311.

The *en banc* court also held that these same concerns precluded the "quick look" analysis endorsed by the original three-judge panel. *Id.* Given its limited duration and the existence of significant, external competitors in the market, it is unclear what competitive effects the MSAA would have, the Ninth Circuit said. While the revenue-sharing provisions might arguably lessen the Grocers' incentives to compete, the limited duration of the agreement and the presence of other competitors made it far from obvious that the grocers actually would refrain from competing, rendering the "quick look" mode of analysis inapplicable.

In so holding, the *en banc* panel again backed away from a broad holding from the original three-judge panel. Defendants had argued that their revenue-sharing agreement had pro-competitive benefits in the form of lower prices for consumers, which resulted from the grocers' ability to negotiate lower labor costs. The original panel rejected this argument categorically: "driving down compensation to workers is not a benefit to consumers cognizable under our laws as a pro-competitive benefit." The *en banc* panel did not endorse this view, but rather found that the issue need not be resolved, given its finding that California failed to meet its burden to show that the revenue-sharing was obviously anticompetitive. Slip Op. at 9313 n.17.

Chief Judge Alex Kozinski dissented in part from the majority opinion, joined by judges Richard C. Tallman and Johnnie B. Rawlinson. Kozinski states the court need not have ruled on the nonstatutory labor exemption, and thus the court's "groundbreaking" ruling on that issue is an advisory opinion beyond the scope of its jurisdiction. Further, Judge

Kozinski writes that the majority likely reached the wrong conclusion on the labor issue, through an overly restrictive reading of *Brown*.

Judge Stephen Reinhardt also dissented in part, joined by judges Mary M. Schroeder and Graber. Judge Reinhardt, author of the Ninth Circuit's original opinion, disagreed with the majority's conclusion that the dispute required a full-blown rule of reason analysis. Rudimentary economics dictate that the revenue-sharing agreement can have only anticompetitive effects, Reinhardt writes. The agreement's limited duration and the presence of other competitors might reduce that anticompetitive effect, but cannot eliminate it altogether.

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