

California v. Safeway: Antitrust Risks of Employer Mutual Aid Assistance Agreements

August 1, 2011

On July 12, in *California v. Safeway*,¹ the Ninth Circuit Court of Appeals, sitting en banc, held that a mutual strike assistance agreement among four supermarket chains was subject to challenge under the “rule of reason” standard. The court held that a revenue-sharing provision of the agreement at issue was not protected by the nonstatutory labor exemption to the antitrust laws, but overturned a prior decision that had summarily condemned the agreement under the so-called “quick look” standard. The more lenient rule-of-reason standard requires courts to consider the full competitive impact of a challenged agreement, taking into account the collective bargaining context of the agreement. Companies considering mutual strike assistance agreements should carefully consider the antitrust risks of such agreements, structuring those agreements to minimize their antitrust risks.

Background

The case arose from a 2003 collective bargaining negotiation between the United Food and Commercial Workers (UFCW) union and a multiemployer collective bargaining unit composed of three Southern California supermarket chains. Faced with threats of selective strikes, the three supermarkets and a related supermarket whose labor agreement was set to expire entered into a mutual strike assistance agreement. The agreement stated that the supermarkets would lock out union employees within 48 hours of a strike and included a revenue-sharing provision (RSP) that required the supermarkets to pool revenues earned during a strike and share them according to prestrike market shares. The RSP was intended to level the negotiating playing field by blunting the effects of whipsaw tactics by the union. By its terms, the agreement would only take effect upon the commencement of a strike or lockout and would automatically terminate two weeks after the strike or lockout ended.

The unions struck one of the employers in early October 2003, and the other two employers locked out their UFCW employees within 48 hours of the start of the strike. In response to the lockout, the unions picketed all companies until late October when, in a demonstration of their whipsaw tactics, the unions pulled pickets from one of the companies in an effort to increase pressure on the others. Pursuant to the agreement, the supermarkets shared revenues earned during the period of the strike.

1. View the full court opinion online at <http://www.morganlewis.com/pubs/CaliforniaVsSafewayOpinion.pdf>.

The state of California sued the supermarkets, alleging that the RSP violated federal antitrust law. In rulings on separate motions for summary judgment by the grocers and California, the district court held that the RSP was not immune from antitrust scrutiny under the nonstatutory labor exemption and that the legality of the RSP would be evaluated under the rule-of-reason standard. That standard requires consideration of the actual competitive effects, both procompetitive and anticompetitive, of a challenged agreement. Under the rule-of-reason standard, agreements only violate the antitrust laws if their anticompetitive effects outweigh their procompetitive benefits. That holding resulted in judgment for the supermarkets because the state stipulated that it would not seek to establish liability under the rule-of-reason standard.

A three-judge panel of the Ninth Circuit reversed the district court decision in 2010. The appellate panel upheld the district court's holding regarding the nonstatutory labor exemption, but it held that the RSP was a naked market allocation agreement subject to condemnation under the so-called quick-look standard for antitrust liability. Agreements evaluated under the quick-look standard are presumptively illegal, and the defendant bears the burden of establishing that the procompetitive benefits of the agreement clearly outweigh the agreement's presumed anticompetitive effects. The panel remanded the case to the district court to enter judgment for the state.

The parties then sought en banc review. In a decision issued July 12, a divided Ninth Circuit held that (1) the nonstatutory exemption did not protect the RSP from antitrust scrutiny, but (2) the agreement should be evaluated under the full-fledged rule-of-reason standard rather than the quick-look standard.

The En Banc Decision

The court held that the nonstatutory labor exemption did not apply to the RSP because, in its view, the RSP did not relate to the core subject matter of collective bargaining, namely wages, hours, and working conditions. The agreement was, according to the court, directed at maintaining the status quo in the retail grocery market rather than directly influencing the labor market. The court also considered it significant that one of the parties to the RSP was not a member of the multiemployer bargaining unit. As noted in a dissent authored by Chief Judge Kozinski, the court's holding that the nonstatutory labor exemption does not apply to the RSP puts it at odds with the Second Circuit's decision in *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir. 1963), and the D.C. Circuit's decision in *Airline Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 502 F.2d 453 (D.C. Cir. 1974), which held a strike insurance plan and mutual aid pact, respectively, both of which closely resembled the RSP in this case, were exempt from antitrust challenge.

The court upheld the panel's ruling that the RSP is not exempt from antitrust challenge pursuant to the nonstatutory labor exemption, but it overturned the panel's determination that the agreement could be condemned under a quick-look standard. The en banc court held that the RSP did not appear to be the type of agreement that would always or almost always tend to restrict competition and thus should not be presumptively illegal under the antitrust laws. Because the RSP was of limited duration, there were other significant competitors in the market, and it was entered into to aid legitimate collective bargaining activities, the court held that the quick-look standard, with its presumption of antitrust illegality, was inappropriate in this instance. According to the court, "in light of the novel circumstances and uncertain economic effects of the RSP," the agreement must be analyzed under a full rule-of-reason analysis. The en banc court concluded its opinion without expressing an opinion about the legality of the RSP under the rule-of-reason standard, but the state's stipulation in the district court that it would not pursue a case under the rule-of-reason standard effectively resolved the case in the supermarkets' favor.

Implications

The en banc decision in *California v. Safeway* raises issues for employers contemplating the use of mutual strike assistance agreements among members of a multiemployer bargaining unit. By declining to apply the nonstatutory labor exemption and embracing a full rule-of-reason analysis, the Ninth Circuit signaled that agreements like the RSP will be subject to antitrust scrutiny but are not presumptively illegal. The legality of such agreements will be determined by the competitive context of the specific agreement, including the nature of the collective bargaining negotiations involved. Companies should have such arrangements reviewed by antitrust counsel and should be careful to document the procompetitive aspects of the agreements.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Harry W. Burton	Labor & Employment	202.739.5105	hburton@morganlewis.com
Sean P. Duffy	Antitrust	202.739.5603	sduffy@morganlewis.com
J. Clayton Everett, Jr.	Antitrust	202.739.5860	jeverett@morganlewis.com
Jonathan C. Fritts	Labor & Employment	202.739.5867	jfritts@morganlewis.com
Stephen Paul Mahinka	Antitrust	202.739.5205	smahinka@morganlewis.com

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