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Client Alert Commentary

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Ninth Circuit Nixes Immediate Appeals of Denials of State Action Immunity

Decision from largest judicial circuit establishes majority position that denials of state action immunity are not immediately appealable collateral orders.

On June 12, 2017, the US Court of Appeals for the Ninth Circuit held that a defendant cannot immediately appeal a finding that the defendant lacks immunity from federal antitrust law under the state action doctrine. *See SolarCity v. Salt River Project Ag. Improvement & Power Dist.*, No. 15-17302, 2017 WL 2508992 (9th Cir. June 12, 2017). This decision tips the scales in a circuit split between the Fourth, Sixth and now Ninth Circuits — which do not allow immediate appeals — and the Fifth and Eleventh Circuits, which do.

Background: State action immunity and the collateral order doctrine

The state action doctrine (or state action immunity) arose from the principle that the federal antitrust laws were not "intended to restrain state action or official action directed by a state."[1] For that reason, "the antitrust laws confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity."[2] But state action immunity extends beyond the state itself. A state board or agency that is controlled by active participants in an industry may also be immune if its restraint of competition is clearly and affirmatively expressed as state policy and the state actively supervises that policy.[3]

Antitrust defendants often raise the state action defense early in litigation in an effort to avoid the expense, delay and inconvenience of discovery and trial. In some courts, a defendant may consider immediately appealing a district court's decision to deny a motion to dismiss rather than waiting until the end of the litigation. The timing of an appeal may be significant to both parties. An immediate appeal gives a defendant a second chance to avoid liability before discovery, and when a defendant's other defenses are weak, it may postpone an inevitable unfavorable result. The average federal appeal in 2016 took seven months to resolve, and cases in the Ninth Circuit lasted an average of 15 months.[4] On the flipside, for a plaintiff that claims it is being unlawfully excluded from a market, the passage of time can cause substantial hardship.

In most cases, a defendant may appeal only after a final decision is entered terminating the litigation. But the "collateral order doctrine" enables a party to immediately appeal a non-final decision that is conclusive, resolves an important issue completely separate from the merits, and would be effectively unreviewable if the defendant waited until after the litigation ended to appeal.[5] Denials of some

"particularly important immunities" fall within the collateral order doctrine, including Eleventh Amendment immunity, absolute immunity and qualified immunity.[6]

Courts have mixed views, however, on whether the collateral order doctrine applies to state action immunity orders. In the Fifth and Eleventh Circuits, antitrust defendants can use the collateral order doctrine to immediately appeal an unfavorable state action immunity ruling.[7] For those courts, as with other types of immunities, the interests of avoiding waste of public resources, distraction of public officials and indignity to state sovereignty motivate allowing immediate appeals.[8]

The Fourth, Sixth and now Ninth Circuits view state action immunity differently and do not permit immediate appeals.[9] Those courts see the state action doctrine as a defense from antitrust liability, rather than a shield from the burdens of litigation.[10] This view extends from a belief that state action immunity exists because the antitrust laws, as written, do not reach states or their officers and agents; the immunity is not based on a concern about burdening public officials.[11]

SolarCity: defendants cannot immediately appeal a denial of state action immunity

SolarCity sells and leases rooftop solar-energy panels to Phoenix-area homeowners that also purchase traditional electric power from the Salt River Project Agricultural Improvement and Power District (the Power District). The Power District sought to dissuade homeowners from using solar energy by drastically raising traditional electricity prices for homeowners that also generate solar energy. SolarCity responded with a federal antitrust lawsuit alleging illegal monopolization and a conspiracy in restraint of trade. The Power District moved to dismiss on the ground that its price increases are immune from the antitrust laws because the Power District is a political subdivision of the State of Arizona. The district court disagreed.

The Power District immediately appealed to the Ninth Circuit, invoking the collateral order doctrine. SolarCity challenged the appeal. It argued that the court had no jurisdiction to review the district court's order because the state action doctrine is too intertwined with the substance of an antitrust claim to be a "completely separate" collateral order and because the defendant could always reassert the defense in an appeal after final judgment.[12] The Department of Justice filed an amicus brief agreeing with SolarCity.[13]

Joining with the Fourth and Sixth Circuits, the Ninth Circuit held that the collateral order doctrine does not allow appeals of decisions rejecting the application of state action immunity. The court began with the admonition that the collateral order doctrine is a "narrow exception."[14] The court then found that state action immunity is only a defense to liability and does not protect defendants from lawsuits altogether. Thus, the narrow collateral order doctrine need not extend to denials of state action immunity because defendants may re-raise the defense after the litigation ends.[15] The court was not persuaded by the Fifth and Eleventh Circuits' contrary opinions, which were concerned with protecting state-affiliated defendants from the burdens of discovery and trial until their immunity defense has been fully resolved. The Ninth Circuit discredited those opinions as failing to "grapple with the Supreme Court's persistent emphasis that the collateral order doctrine must remain narrow."[16]

Another win for federal antitrust enforcers

This ruling is another success in federal antitrust enforcers' long-running campaign to narrow the scope of the state action doctrine. In the early 2000s, the Federal Trade Commission (FTC) concluded that courts were applying the doctrine too broadly and protecting private actors that restrained competition without meaningful state involvement.[17] In 2015, the FTC succeeded in narrowing immunity when the Supreme Court held that the state action doctrine only shields nonsovereign actors that are controlled by market participants when a clear and affirmatively expressed state policy to restrain competition exists, and the

state actively supervises that policy.[18] Just last month, the FTC relied on that decision in its first antitrust complaint against a state board since the FTC's win at the Supreme Court.[19]

The Department of Justice also has advocated for limiting state action immunity, and Makan Delrahim, President Trump's nominee to lead the Antitrust Division, recently expressed his view that "immunities from the antitrust laws" should be explicitly enacted by Congress, "not impliedly from the courts."[20]

State action immunity after *SolarCity*

Businesses that are contemplating filing suit against a state program or state board under the antitrust laws should find encouragement in *SolarCity*. The opinion changes the calculus for defendants that lose motions to dismiss or summary judgment based on the state action doctrine. In the majority of circuits that have considered the issue — the Fourth, Sixth, and now the Ninth — immediate appeals will not be permitted.

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Endnotes

1 *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

2 *North Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015).

3 *Id.*; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

4 Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics (Sept. 30, 2016), Table B-4, http://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2016.pdf.

5 *See Will v. Hallock*, 546 U.S. 345, 349 (2006).

6 *SolarCity v. Salt River Project Ag. Improvement & Power Dist.*, No. 15-17302, 2017 WL 2508992, at *3 (9th Cir. June 12, 2017).

7 *See Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996); *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986).

8 *See Martin*, 86 F.3d at 1395-96; *Commuter Transp. Sys., Inc.*, 801 F.2d at 1289.

9 *See South Carolina State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 441 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986).

10 *See South Carolina State Bd. of Dentistry*, 455 F.3d at 441; *Huron Valley Hosp.*, 792 F.2d at 566-67.

11 *See South Carolina State Bd. of Dentistry*, 455 F.3d at 444.

12 *See* Appellee's Response Brief at 16-20, SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., No. 15-17302, 2017 WL 2508992 (9th Cir. June 12, 2017) (No. 48), 2016 WL 3101315, at *16-20.

13 Brief for the United States of America As Amicus Curiae Supporting Plaintiff-Appellee at 12-17, SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., No. 15-17302, 2017 WL 2508992 (9th Cir. June 12, 2017) (No. 60), 2016 WL 3208041, at *12-17.

14 *SolarCity*, 2017 WL 2508992, at *3.

15 *Id.* at *4-5.

16 *Id.* at *7.

17 *See* F.T.C., Office of Policy Planning, *Report of the State Action Task Force* (Sept. 2003).

18 *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1111.

19 See Admin. Complaint, In the Matter of La. Real Estate Appraisers Board, Dkt. No. 9374 (F.T.C. May 31, 2017), https://www.ftc.gov/system/files/documents/cases/d09374louisianareappraiserscomplaint.pdf; *see also* Press Release, F.T.C., *FTC Challenges Louisiana Real Estate Appraisers Board Regulations that Restrict Competition* (May 31, 2017), https://www.ftc.gov/news-events/press-releases/2017/05/ftc-challenges-louisiana-real-estate-appraisal-board-regulations (referring to this action as "the first such Commission complaint against a state board since the Supreme Court decision in *North Carolina Dental*").

20 Makan Delrahim Confirmation Hr'g Tr. 16, Senate Committee On The Judiciary Hearing On Judiciary Nominations, Bloomberg Government Transcripts (May 10, 2017).