July 2018

Ninth Circuit Holds That State-Action Immunity Does Not Preempt Section I Challenge to Seattle Ordinance Authorizing Collective Price Negotiations by For-Hire Drivers for Uber and Lyft

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In a "gig economy" decision that will please employers but disappoint independent contractors, the Ninth Circuit reversed a district court's dismissal of a Sherman Act Section 1 challenge to Seattle's ordinance authorizing a collective-bargaining process for independent contractors who work as for-hire drivers for "driver coordinators" such as Uber and Lyft. The Ninth Circuit held that the state-action immunity doctrine did not exempt the ordinance from preemption by the Sherman Act, because the State of Washington has not afirmatively expressed a state policy authorizing private parties to price-fix the fees that for-hire drivers pay in exchange for ride referral services from driver coordinators. The court similarly held that the active-supervision requirement for state-action immunity was not met. However, the court afirmed the district court's dismissal of preemption claims under the National Labor Relations Act. The court remanded the case for further proceedings. *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35640, Opinion (9th Cir. May 11, 2018).

Background

On December 14, 2015, Seattle enacted Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (Ordinance). The purpose of the Ordinance is to "'allow[] taxicab, transportation network company, and for-hire vehicle drivers ('for-hire drivers') to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work,' in order to 'better ensure that [for-hire drivers] can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner.'" *Id.* at 9 (quoting Ordinance).

The Ordinance requires "driver coordinators," such as Uber and Lyft, to bargain collectively

with for-hire drivers. A "driver coordinator" is defined as "'an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public.'" *Id.* at 9-10 (quoting Ordinance). The Ordinance establishes an election procedure for a "qualified driver representative" (QDR). If a QDR is selected, the city notifies the driver coordinator, which must give the QDR contact information about its "qualifying drivers." If a majority of the drivers consent to representation by the QDR, the QDR is certified as the "exclusive driver representative" (EDR) for all for-hire drivers for that driver coordinator. At that point, "the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director including, but not limited to, . . . *the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers*; . . . " *Id.* at 11 (quoting Ordinance) (emphasis added).

If an agreement is reached, it is submitted for review for compliance with the Ordinance and other regulations. The agreement becomes final and binding on all parties if the agreement is found to be compliant. If the agreement is noncompliant, it is sent back to the parties for revision. If an agreement is not reached, the matter may be submitted to an interest arbitrator who proposes an agreement for a duration for no more than two years. The proposed agreement is reviewed in the same manner as the original agreement proposed by the parties. *Id.* at 12-13.

The Ordinance took effect on January 22, 2016. The Chamber sued seeking a declaration that the Ordinance in unenforceable and a preliminary injunction blocking it. The Chamber asserted the Ordinance violates and is preempted by federal antitrust laws, and also is preempted by federal labor laws. Before ruling on the City's motion to dismiss, the district court granted the Chamber's motion for a preliminary injunction. Subsequently, the district court granted the City's motion to dismiss, concluding that the state-action immunity doctrine exempted the Ordinance from preemption by the Sherman Act, and that the Ordinance was not preempted by the NLRA. On September 8, 2017, the Ninth Circuit granted the Chamber's emergency motion and enjoined enforcement of the Ordinance pending the appeal.

Analysis

I. State-Action Immunity

The Ninth Circuit held that the Ordinance does not meet the requirements for state-action immunity to apply.

A. Preemption

The court first explained that "the Ordinance may be preempted facially by federal antitrust law if it authorizes a per se violation of section 1 of the Sherman Act, but not if it must be analyzed under the rule of reason." *Id.* at 17. Since the City did not contest that the collective negotiations could constitute a per se antitrust violation unless state-action immunity applied, the court accepted the proposition the collective negotiations would constitute a per se offense but said the parties may address on remand whether the per se rule or the rule of reason applies.

B. Requirements for State-Action Immunity

The Ninth Circuit, citing *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013), reviewed the familiar standards for state-action immunity dating back to *Parker v. Brown*, 317 U.S. 341 (1943), and explained that "[s]tate action immunity is the exception rather than the rule," the Supreme Court has stressed that it is "disfavored," and that it comes under greater scrutiny when a non-state actor invokes it. *Id.* at 19. The court then turned to the Supreme Court's *Midcal* test used to determine whether anticompetitive acts of private parties are entitled to immunity: "First, 'the challenged restraint [must] be one clearly articulated and afirmatively expressed as state policy,' and second, 'the policy [must] be actively supervised by the State.'" *Id.* at 20 (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). For a municipality like Seattle to enjoy state-action immunity, the activities must be undertaken pursuant to a "'clearly articulated and afirmatively expressed' state policy to displace competition." *Id.*

i. The Clear-Articulation Test

The court ruled that the Ordinance failed the first prong of the *Midcal* test because the State of Washington has not "clearly articulated and afirmatively expressed" a state policy authorizing for hire-drivers to price-fix the fees they pay for ride-referral services provided by companies like Uber and Lyft.

The court explained that the issue under the clear-articulation test is "whether the regulatory structure which has been adopted by the state has *specifically authorized the* conduct alleged to violate the Sherman Act." *Id.* at 21 (citations omitted) (emphasis added in decision). The relevant statutory provisions must "'plainly show' that the [state] legislature *contemplated* the sort of activity that is challenged," which occurs where they "confer 'express authority to take action that *foreseeably* will result in anticompetitive effects.'" *Id.* at 21 (citations omitted). The state "must 'clearly intend[] to displace

competition in a particular field with a regulatory structure . . . in the relevant market.'" *Id.* (citations omitted).

The court, after examining the relevant statutes, concluded that they did not "plainly show" that the Washington legislature "contemplated" allowing for-hire drivers to price-fix their compensation, and such an anticompetitive result was not foreseeable. *Id.* at 22.

- The statute allowing political subdivisions of the state to regulate for hire transportation services (Section 46.72.001) was insuficient, because "it is silent on the issue of compensation contracts between for-hire drivers and driver coordinators." *Id.* at 22-24.
- The statute allowing regulation of for-hire vehicles (Section 46.72.160) was insuficient, because to the extent it concerns "rates charged for providing for hire vehicle transportation service," that refers to rates charged to passengers and not the fees Uber and Lyft charge their drivers. *Id.* at 25-26. "[T]here is no state statute expressly authorizing private parties to price-fix the fees for-hire drivers pay for use of Uber, Lyft, and Eastside's ride-referral services." *Id.* at 30.

In explaining the constraints the Supreme Court has placed on trying to make the "clear articulation test" more flexible, the Ninth Circuit emphasized that "it is not our role to make policy judgments properly left to the Washington state legislature. Instead, we must tread carefully in the area of state-action immunity, lest 'a broad interpretation of the doctrine . . . inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction,' or 'a broad application of the doctrine . . . impede states' freedom by threatening to hold them accountable for private activity they do not condone 'whenever they enter the realm of economic regulation.'" *Id.* at 31 (citation omitted). Accordingly, the court held the clear-articulation requirement for state-action immunity was not satisfied. *Id.*

ii. The Active-Supervision Requirement

The court next held that the Ordinance did not meet the "active-supervision" requirement for state-action immunity.

The court started with the Supreme Court's recent explanation, in *North Carolina State Board of Dental Examiners v. FTC*, that "[t]he active supervision requirement demands . . . 'that state oficials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.* at 32 (quoting, 135 S. Ct. 1101, 1112 (2015)). "[W]here, as here, 'state or municipal regulation by

a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists.'" *Id.* (citations omitted). The court concluded that the active-state supervision requirement was not met because it was "undisputed that the State of Washington plays no role in supervising or enforcing the terms of the City's Ordinance." *Id.* at 34. The court rejected the City's argument that "State" supervision includes supervision by municipalities, such as the City, when private actors are involved.

To the contrary, "[t]he Supreme Court has stated repeatedly that active supervision must be 'by the State itself.'" *Id.* at 35 (citing *Midcal*, 445 U.S. at 105). "[W]e hold that in this case, in which private actors exercise substantial discretion in setting the terms of municipal regulation, 'active state supervision must be shown.' . . . Because the distinction between states and municipalities is of crucial importance for purposes of state-action immunity, we reject the City's invitation to treat the two entities interchangeably." *Id.* at 36-37 (citations omitted). The court ruled that the Ordinance did not satisfy the active-supervision requirement.

II. The Ordinance Is Not Preempted by the NLRA

The court next held that the Ordinance is not preempted by the NLRA under either *Machinists* or *Garmon* preemption.

Machinists preemption "forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because left "to be controlled by the free play of economic forces."'" *Id.* at 37 (citations omitted) (quoting, *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976)). The Chamber argued that the Ordinance is preempted under *Machinists* because Congress chose to exclude independent contractors from the NLRA's definition of "employee," implicitly preempting local labor regulation of independent contractors. *Id.* at 38. But the court concluded that "[n]either case law nor legislative history supports the Chamber's argument that Congress's choice to exclude supervisors from the definition of 'employee' in § 152(3), on its own, has implicit preemptive effect" as to local regulation of independent contractors. *Id.* at 45. Accordingly, the court rejected the Chamber's *Machinists* preemption argument.

"*Garmon* pre-emption forbids States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" *Id.* at 38 (citations omitted) (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)). The Chamber argued that *Garmon* preempts the Ordinance "because the Ordinance 'requires local oficials and state courts to decide

whether for-hire drivers are employees under the NLRA," a determination the Chamber contended is within the exclusive jurisdiction of the NLRB." *Id.* at 46. The court rejected this argument because (1) the Ordinance expressly disclaims any such determination, and (2) the Chamber did not make "any showing or set forth any evidence showing that the for-hire drivers covered by the Ordinance are arguably employees subject to the NLRA."*Id.* at 48. Thus, the court held that the Ordinance is not preempted under the Chamber's theory of *Garmon* preemption.

Conclusion

The Ninth Circuit's decision is important not only in the context of the "driver coordinator" industry, but more generally in any industry that relies heavily on independent contractors. It underscores that collective price negotiations by independent contractors may constitute a per se violation of the antitrust laws, and also makes clear that municipal regulations authorizing collective negotiations by private actors will not, standing alone, enjoy state-action immunity. Of course, as is so often the case, the last word has yet to be heard: on May 17, 2018, the Ninth Circuit granted Seattle's motion to extend for 31 days the deadline for filing its petition for rehearing or rehearing *en banc*.