Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC
2011 WL 5865901 (D. Colo., Nov. 23, 2011)

Introduction

For a private party's alleged anticompetitive conduct to be immunized from antitrust scrutiny under the state action immunity doctrine, the conduct must be clearly articulated and affirmatively expressed as state policy. To meet this requirement and invoke antitrust immunity, a defendant must prove that its challenged conduct was at least a foreseeable result of state legislation. At issue in *Auraria* was whether an agreement creating a residency requirement between a privately-owned apartment complex and a university was a sufficiently foreseeable result of state legislation such that the legislation can be considered a clear articulation of state policy to displace competition in the relative student housing market.

Background

Campus Village Apartments, LLC ("Campus Village") and University of Colorado Denver ("UCD") entered into an agreement whereby most freshmen and international students were required to reside at Campus Village during their first two semesters of enrollment at UCD. In order to fund the construction of its facilities, Campus Village issued $50 million in revenue bonds through the Colorado Educational and Cultural Facilities Authority ("CECFA"). Auraria Student Housing at the Regency, LLC ("Auraria"), a competitor of Campus Village, claimed that the residency agreement constituted a conspiracy to monopolize the city's student housing market in violation of Section 2 of the Sherman Act. Auraria alleged to have lost business from students who were required to reside at Campus Village. Campus Village moved to dismiss Auraria's Sherman Act claim, arguing that it was shielded from liability by the state action immunity doctrine because its agreement with UCD was authorized by a clearly articulated state policy contained in the legislation that creates CECFA.

Law and Discussion

Under the state action immunity doctrine, qualifying state and local government regulation is exempt from federal antitrust scrutiny. The Supreme Court extended this doctrine in *Midcal* to immunize alleged anticompetitive conduct of a private party if a two-part test is met: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the policy must be actively supervised by the State.[1] In *Town of Hallie*, the Supreme Court modified the *Midcal* test for cases involving municipalities, which need only satisfy the first prong of the *Midcal* test by demonstrating action pursuant to a clearly articulated and affirmatively expressed state policy.[2] The district court in *Auraria* found that the *Town of Hallie* test, i.e., the first prong of the *Midcal* test, was the appropriate application.[3] Accordingly,

[1] *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).
[2] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985).
[3] The court reasoned that the *Town of Hallie* test would clearly apply if UCD had been named a defendant, and the fact that Auraria named only a private defendant and chose not to bring action against UCD should not change the application of the test. The court noted that even if the *Midcal* test were applied, the second prong—active supervision by UCD—would have been met because UCD had overseen the residency requirement by, among other things, sending letters to students to enforce compliance with the restriction.

the court assessed whether the agreement between Campus Village and UDC that created the residency restriction was one clearly articulated and affirmatively expressed as state policy to displace competition.

Pursuant to Tenth Circuit application of the *Town of Hallie* test, in order to trigger antitrust immunity, a defendant must establish "that its challenged conduct was *at least* a foreseeable (if not explicit) result of state legislation."[4] Campus Village argued that its agreement with UCD was a foreseeable result of the legislation that creates and empowers CECFA, the entity through which Campus Village had issued bonds to construct its facilities. That legislation gives CECFA broad powers to issue bonds, as well as to designate agents to enter into contracts for the management and regulation of facilities.[5] Pursuant to that legislation, Campus Village argued that it qualified under the statute as a designated agent of CECFA to enter into contracts such as its agreement with UCD. Campus Village thus contended that the grant of power by the Colorado legislature to CECFA rendered its agreement with UCD adequately foreseeable.

The district court disagreed, however, finding that the legislation was a broad and general legislative authorization that failed to indicate a sufficiently clear articulation of a policy to displace competition. Simply put, no specific statute supported a state policy authorizing CECFA loan recipients to enter into exclusive agreements to better ensure that the loan is repaid. Thus, the agreement between Campus Village and UCD was not adequately foreseeable based on the legislature's grant of broad and general powers to CECFA. The court accordingly denied Campus Village's motion to dismiss Auraria's Sherman Act claim, holding that Campus Village was not entitled to immunity from antitrust liability based on the state action immunity doctrine.

Conclusion

Auraria provides insight into whether courts are likely to invoke the state action immunity doctrine to defeat claims against private parties when the alleged anticompetitive agreement involves a municipality. Although *Midcal* and *Town of Hallie* set forth the clearly-articulated-state-policy requirement, *Auraria* sheds light on just how "clear" legislative articulation must be. Specifically, *Auraria* echoes and endorses the Tenth Circuit's ruling in *Kay Electric*, in which the court reconciled the various standards that the Supreme Court had set out over the years with regard to foreseeability. In doing so, *Auraria* reinforces a line that courts are likely to draw in declining to find that conduct is a foreseeable result of broad and general legislative authorizations.

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[4] *Kay Electric Cooperative v. The City of Newkirk, Oklahoma*, 647 F.3d 1039, 1043 (10th Cir. 2011) (emphasis in original); *See also Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502, 1507 (10th Cir. 1991) ("there must be a clearly articulated and affirmatively expressed state policy to displace competition," rather than a mere "neutral" expression of state policy).
[5] *See* Colo. Rev. Stat. § 23-15-107(1).