Ninth Circuit Holds That the Collateral-Order Doctrine Does Not Allow an Interlocutory Appeal of a Denial of a Motion to Dismiss Based on State-Action Immunity

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On June 12, 2017, the Ninth Circuit held that the collateral-order doctrine does not allow an immediate interlocutory appeal of an order denying a motion to dismiss based on state-action immunity. *SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District*, 2017 WL 2508992 (9th Cir. June 12, 2017). In so holding, however, the Ninth Circuit acknowledged a split among the courts of appeals, which could provide the Power District with a basis for a petition for a writ of *certiorari*.

Background

SolarCity sells and leases rooftop solar-energy panels, which allow customers to reduce the amount of energy they buy from suppliers, including the Power District. SolarCity alleges that, to prevent SolarCity from installing more panels, the Power District adopted a new pricing structure under which any customer who obtains power from his or her own system must pay a prohibitively large penalty. SolarCity alleges that after the new rates took effect, solar panel retailers received 96% fewer applications for new solar-panel systems in the Power District's territory.

Solar City sued the Power District, asserting that it violated the Sherman Act and the Clayton Act by attempting to maintain a monopoly over the supply of electrical power in its territory. Based on the fact that it is a political subdivision of Arizona, the Power District moved to dismiss under Rule 12(b)(6) arguing, among other things, that it is immune from liability under the federal antitrust laws based on state-action immunity. The district court denied the motion and declined to certify an interlocutory appeal, but the Power District appealed nonetheless.

The Ninth Circuit's Analysis

The Power District argued that an order denying state-action immunity is immediately appealable under the collateral-order doctrine. The Ninth Circuit briefly summarized the state-action doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943), explaining that it "counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens" and that it "also protects local governmental entities if they act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." 2017 WL 2508992, at *3 (citing *FTC v. Phoebe Putney Health Systems, Inc.*, 133 S. Ct. 1003, 1007 (2013)).

The Ninth Circuit explained that under the collateral-order doctrine, an interlocutory order —such as an order denying a motion to dismiss—can only be appealed (1) if it "conclusive," (2) it addresses a question that is "separate from the merits" of the underlying case, and (3) that separate question raises "some particular value of a high order" and evades effective review if not considered immediately. All three requirements must be

satisfied for the ruling to be immediately appealable. "The Supreme Court has repeatedly emphasized that these requirements are stringent and that the collateral-order doctrine must remain a narrow exception. *Id*. at *2 (citations omitted).

The Power District argued that the denial of a motion to dismiss based on state-action immunity is immediately appealable in the same way that the collateral-order doctrine permits an immediate appeal of a denial of a motion to dismiss based on other immunities (e.g., Eleventh Amendment immunity and foreign sovereign immunity, among others). The Ninth Circuit disagreed, reasoning that other immunities that are immediately appealable are immunities from being sued, not immunities from liability. The Court then explained that both it "and the Supreme Court have described state-action immunity as an immunity from liability." *Id*. at *4 (citations omitted). Accordingly, an order addressing state-action immunity is analogous to orders denying motions to dismiss under the *Noerr-Pennington* doctrine and statutory preemption, neither of which is immediately appealable. "In sum, because the state-action doctrine is a defense to liability and not an immunity from suit, the collateral-order doctrine does not give us jurisdiction here." *Id*. at *5 (footnotes and citations omitted).

The Court then rejected the Power District's two counterarguments. The Power District argued that because state-action immunity has constitutional origins, an order denying its application is immediately appealable. The court disagreed, explaining that, for example, *Noerr-Pennington*immunity is grounded in the First Amendment but an order denying its application is not immediately appealable. *Id*. at *5. The Power District also argued that an immediate appeal was necessary to avoid litigation that would distract government officials. The court rejected this argument based primarily on *Will v. Hallock*, 546 U.S. 345 (2006), in which the Supreme Court held that federal agents in a *Bivens* case could not immediately appeal an order denying their motion to dismiss on the ground that review was necessary to prevent distraction to the government: "the possibility of mere distraction or inconvenience to the Power District does not give us jurisdiction here." *Id*. at *6 (footnote omitted).

The Circuit Split

The last section of the Ninth Circuit's decision—approximately one-fourth of its entire opinion—addresses an acknowledged Circuit split. The Fourth and Sixth Circuits have held that an unsuccessful assertion of state-action immunity fails the second and third parts of the collateral-order test outlined above, and therefore is not immediately appealable. But the Fifth and Eleventh Circuits have held that an unsuccessful assertion of state-action immunity is comparable to an unsuccessful assertion of qualified immunity for government officials or of Eleventh Amendment immunity, both of which are immediately appealable. The Ninth Circuit found the analysis in the Fourth and Sixth Circuit decisions to be more "persuasively and thoroughly reasoned" in light of "the Supreme Court's "persistent emphasis that the collateral-order doctrine must remain narrow." *Id*. at *7 (citations omitted).

Next Steps

On June 20, the Power District filed a motion to stay issuance of the mandate for 90 days so it can file a petition for a writ of *certiorari*.