No. 11-1569

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AURARIA STUDENT HOUSING AT THE REGENCY, LLC,

,

v.

CAMPUS VILLAGE APARTMENTS, LLC,

.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(JUDGE WILLIAM J. MARTINEZ)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE ON THE LACK OF JURISDICTION

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TABLE OF AUTHORITIES

FEDERAL CASES

MISCELLANEOUS

STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in whether an order denying a motion to dismiss an antitrust claim under the "state action" doctrine of , 317 U.S. 341 (1943), is immediately appealable under the collateral order doctrine. Courts have dismissed immediate appeals from such orders in prior enforcement actions for lack of appellate jurisdiction. Order,

, No. 11-1984 (6th Cir. Feb. 23, 2012),

(Mar. 20, 2012); , 455 F.3d 436 (4th Cir. 2006),

STATEMENT

1. Auraria Student Housing at the Regency, LLC (Auraria) and Campus Village Apartments, LLC (Campus Village) operate apartment complexes near the University of Colorado Denver (UCD). A10-A11. In 2006, UCD adopted a rule requiring most first-term freshmen and international students to reside at Campus Village for two semesters (the residency restriction). A15.

Auraria sued Campus Village for, among other things, conspiring with UCD to monopolize "the rental of off-campus dedicated student housing apartment community facilities to first-time UCD freshmen and international students" in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. A31.[1] According to the complaint, Campus Village was funded by $50.365 million in revenue bonds issued by the Colorado Educational and Cultural Facilities Authority (CECFA), and UCD had agreed with Campus Village to the residency restriction to ensure Campus Village sufficient occupancy to meet its payment obligations on the bonds. A16, A18.

[1] Auraria also brought several state law claims that are not at issue in this appeal.

2. Campus Village moved to dismiss the antitrust claim on state

the Sherman Act that Congress sought to condemn state-imposed restraints of trade. The state action doctrine does not create a right to avoid trial like qualified or sovereign immunity. Orders denying protection do not satisfy the second and third "stringent" conditions for review under the collateral order doctrine, , 546 U.S. 345, 349 (2006), because state action issues are not completely separate from the antitrust merits and are not effectively unreviewable on appeal from a final judgment. The Fourth and Sixth Circuits have squarely so held. , 455 F.3d 436 (4th Cir. 2006), , 549 U.S. 1165 (2007);

case is adjudicated." , 546 U.S. 345, 349-51 (2006) (quoting , 516 U.S. 299, 305 (1996); and ., 337 U.S. 541, 546 (1949)); , 130 S. Ct. 599, 604-05 (2009).

The "requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."

entitled to a single appeal, to be deferred until final judgment has been entered," , 511 U.S. at 868. Moreover, "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." , 130 S. Ct. at 605 (quoting , 449 U.S. 368, 374 (1981)).

For these reasons, the Supreme Court has repeatedly emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" , 130 S. Ct. at 609 (quoting , 546 U.S. at 350); , 624 F.3d 1330, 1334 (10th Cir. 2010) ("In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the

‘not expansion by court decision,’ as the preferred means for determining whether and when prejudgment orders should be immediately appealable.” , 130 S. Ct. at 609 (quoting , 514 U.S. at 48); (discussing relevant amendments to the

a clearly expressed state policy" to displace competition.

, 471 U.S. 34, 40 (1985). The doctrine also protects private parties when the challenged restraint is "'clearly articulated and affirmatively expressed as state policy'" and the policy is "'actively supervised' by the State itself."

, 445 U.S. 97, 105 (1980) (quoting

, 435 U.S. 389, 410 (1978) (plurality op.)).

Whether an order denying a motion to dismiss an antitrust claim under the state action doctrine of is immediately appealable as a collateral order is an issue of first impression in this Circuit. The Supreme Court's stringent test for the collateral order doctrine, however, makes clear that such orders are not collateral.

determinations are not "completely separate from the merits of [an antitrust] action." , 546 U.S. at 349. Nor are they "effectively unreviewable on appeal from a final judgment." The state action doctrine is a defense to antitrust liability, not a right to avoid trial. And like any other defense to liability, the denial of the state action defense is reviewable after final judgment.

1. State action issues are not completely separate from the antitrust merits.

An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"

, 437 U.S. 463, 469 (1978) (quoting

, 371 U.S. 555, 558 (1963)). That is the case with state action determinations because "[t]he analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred."

, 792 F.2d 563, 567 (6th Cir.), , 479 U.S. 885 (1986). In particular, the state action and antitrust merits determinations typically both require substantial factual inquiry into the challenged conduct and its surrounding circumstances.

, 455 F.3d 436, 442-43 & n.7 (4th Cir. 2006) (the state action inquiry is "inherently 'enmeshed' with the underlying [antitrust] cause of action"), , 549 U.S. 1165 (2007).

Of course, the presence or absence of state action sometimes can be determined without an elaborate inquiry into the antitrust merits. Philip E. Areeda & Herbert Hovenkamp,

§ 2.04b, at 2-49 (4th ed. 2011) ("many" state action determinations "can be resolved at the summary judgment stage or earlier"). But that does not make an issue completely separate from the merits for

fashioning a rule of appealability . . . we [must] look to categories of cases, not to particular injustices" and there was substantial overlap "in the main").

This case is illustrative. Although appellant claims that state action

, 486 U.S. at 528; and , 437 U.S. at 469).[3]

2. State action determinations are not effectively unreviewable on appeal from a final judgment.

An order is "effectively unreviewable" when it protects an interest

orders denying: (1) absolute Presidential immunity; (2) qualified immunity; (3) Eleventh Amendment sovereign immunity; and (4) double jeopardy. "In each case," the Court noted, "some particular [public] value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." at 352-53.

An order denying a motion to dismiss an antitrust claim under the state action doctrine is materially different from these types of appealable collateral orders, because the state action doctrine is a defense to antitrust liability, not a right to be free from suit.

, 792 F.2d at 567.

of statutory silence, as the Court "assumed without deciding that Congress constitutionally preempt state law directing state actors to behave anticompetitively" but saw "no hint" that Congress sought to accomplish that objective through the Sherman Act. , 647 F.3d at 1041-42; , 489 U.S. at 801-02 (holding that an order denying a motion to dismiss an indictment for an alleged violation of Federal Rule of Criminal Procedure 6(e) is not collaterally appealable because "[t]he text of Rule 6(e) contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial").

Appellant is wrong to contend (Br. 45-47) that the purposes of the state action doctrine are undermined by deferring appeals like this one until after final judgment. As appellee notes, several of the Supreme Court and Tenth Circuit cases holding the state action doctrine applicable (including) came on review of final judgments in favor of plaintiffs. Appellee Br. 19-20. The purposes of the doctrine are undermined only when an antitrust court enjoins a state-imposed

restraint or damages are imposed, not by the trial process itself.[4] Indeed, while appellant argues that "broad-reaching discovery" is "peculiarly disruptive of effective government," Appellant Br. 46-48 (citations and internal quotation marks omitted), that is true in many cases in which the state or federal government is a defendant. If an order was rendered "effectively unreviewable" merely because its denial led to additional litigation burdens for the government, the final judgment rule would be drastically reduced in scope.

, 641 F.3d 470, 482 (10th Cir. 2011) (discussing the important purposes served by the "final judgment rule" including "the substantial burden that would be imposed on the courts of appeals by the 'fragmentary and piecemeal review of the district court's myriad rulings in the course of a typical case'" (quoting

, 10 F.3d 746, 748 (10th Cir. 1993))),

, 132 S. Ct. 1004 (2012).

[4] If a court granted a preliminary injunction, that could be appealed immediately regardless of whether an order denying protection is collateral. 15 U.S.C. § 29(a); 28 U.S.C. § 1292(a)(1).

To be sure, this Court has referred to the state action defense as an "immunity." , , 111 F.3d at 1498; , 937 F.2d 1502, 1506-11 (10th Cir.), , 502 U.S. 983 (1991), , 502 U.S. 1082 (1992). But this Court also has recognized that "the term 'immunity' may be a bit strong since the [ ] Court held only that Congress covered state action [in the Sherman Act], not that it ." , 647 F.3d at 1042. As the Fifth Circuit explained in a unanimous en banc opinion, "immunity" is an "inapt" description of the doctrine; the term " immunity" is most accurately understood as "a convenient shorthand" for "locating the reach of the Sherman Act." , 171 F.3d 231, 234 (5th Cir.) (en banc), , 528 U.S. 964 (1999); , 207 F.3d 287, 292 n.3 (5th Cir. 2000) ("[t]hough the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act").[5]

[5] The Supreme Court "did not characterize the state action antitrust doctrine as an 'immunity' in the decision itself." , 455 F.3d at 445. "Indeed, although issued in 1943, it was not

In any event, the Fourth Circuit also has referred to the state action defense as an "immunity," , 242 F.3d 198, 210 (4th Cir. 2001), but nevertheless expressly held that orders rejecting the defense are not collateral. , 455 F.3d at 445-46. As the Fourth Circuit observed: " construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'

3. Appellant's arguments in support of jurisdiction are not persuasive.

a. Appellant argues that this Court should not follow the clear holdings of the Fourth and Sixth Circuits in and that an order denying protection is not collaterally appealable because those decisions conflict with decisions of the Fifth and Eleventh Circuits. Appellant Br. 20, 40-50 & n.7 (citing , 86 F.3d 1391 (5th Cir. 1996); , 801 F.2d 1286 (11th Cir. 1986); , 64 F.3d 609 (11th Cir. 1995)). But the cases relied on by appellant have been undercut by subsequent circuit and Supreme Court precedent and do not persuasively support jurisdiction here.

i. Appellant relies primarily on the Fifth Circuit's decision in , in which the court "conclude[d] that state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" 86 F.3d at 1395. But a unanimous en banc panel of the Fifth Circuit subsequently acknowledged that " immunity is an inapt description, for its

parentage differs from the qualified and absolute immunities of public officials." , 171 F.3d at 234. Even more recently, the Fifth Circuit expressly stated that it is a "misnomer" to call the state action doctrine an "immunity" and held that private parties like appellant cannot immediately appeal an order denying protection.

, 207 F.3d at 291-94 & n.3.

ii. The Eleventh Circuit has held that an order denying a motion for summary judgment on state action grounds is appealable under the collateral order doctrine. , 801 F.2d at 1289-91. But the court's analysis in reaching that conclusion antedated, and is inconsistent with, the Supreme Court's "increasingly emphatic instructions" that the test for satisfying the collateral order doctrine is "'stringent'" and only capable of being satisfied by a "'small,' 'modest,' and 'narrow'" class of cases. , 624 F.3d at 1334 (quoting , 130 S. Ct. at 609; , 546 U.S. at 350; , 514 U.S. at 42; and , 511 U.S. at 868). Indeed, the Eleventh Circuit made no attempt to explain its rationale for declaring that the state action doctrine provides an " rather than a mere a n

, 472 U.S. 511, 526 (1985)). Thus, Eleventh Circuit precedent does not persuasively support jurisdiction here either.[7]

15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, § 3914.10, at 693-94 & nn.85-86 (1992) (finding "more persuasive" than because "there is little to distinguish this defense from many other defenses to antitrust or other claims").

b. Appellant also relies on the government's amicus brief in , No. 10-1018 (S. Ct. Nov. 21, 2011). But involves whether a private attorney has qualified immunity when sued under 42 U.S.C. § 1983, not the collateral order doctrine. The portions of the government's brief cited by appellant (Br. 47-48) are inapposite to the jurisdictional question before this Court because, unlike qualified immunity, the state action doctrine does not prov quo(rises)13(n(p)4.8105 o5(i)11.3

CONCLUSION

The Court should dismiss the appeal for lack of appellate jurisdiction.

Respectfully submitted.

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April 13, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4,235 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

April 13, 2012 /s/ Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on April 13, 2012, I