Game On! Federal Appeals Court Revives Antitrust Challenge to Seattle's Gig Worker Union Organizing Ordinance

Insights
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If you've been following the legal fight over Seattle's 2015 proposal to permit ride-sharing drivers who work for companies such as Uber and Lyft to organize and form the country's first gig economy unions, you might feel like you have been watching a tennis match. At first a court granted a preliminary injunction to block the ordinance from taking effect in April 2017, but a few months later the court dismissed a legal challenge and cleared the way for the ordinance to eventually take effect. But just today, before the law could become official, the 9th Circuit Court of Appeals revived a challenge filed by the U.S. Chamber of Commerce to the ordinance on antitrust grounds, sending the case back down to the lower court for further action.

The stakes are high in this hard-fought legal battle over the first-ever law in the nation to create a gig worker union. Today's decision is a positive development for gig economy businesses who would rather not have a union representing the independent contractors that perform work for their platforms.

How We Got Here
By way of background, the City of Seattle became the first jurisdiction to pass a law aimed at unionizing ride-sharing drivers in 2015. This is significant because these workers are typically classified as independent contractors (and therefore excluded from the right to organize under federal labor law). The controversial ordinance has been embroiled in legal challenges for several years now.

Initially, a federal district court in Washington granted a preliminary injunction blocking key portions of the ordinance. However, the same court later dismissed the underlying lawsuit brought by the U.S. Chamber of Commerce and others, which claimed that it violated federal antitrust laws and was preempted by federal labor law. The lower court's August 2017 decision found that Seattle's law remained valid because the state had delegated certain authority to enact certain anti-competitive restraints to the city, known as the "state action doctrine."

The U.S. Chamber of Commerce and other challengers appealed that ruling to the 9th Circuit Court of Appeals, which heard oral argument in February. The Federal Trade Commission and the U.S. Department of Labor also filed friend-of-the-court briefs, arguing that the ordinance should be overturned.

The 9th Circuit's Decision

The 9th Circuit issued its decision today, overturning the lower court's dismissal of a claim that the ordinance violates, and is preempted by, federal antitrust law because it sanctions the price fixing of ride-referral service fees by private "cartels" of independent contractor drivers.

As discussed by the court, federal antitrust law generally prohibits illegal price-fixing arrangements, where private parties come together to raise, depress, or fix prices in an otherwise competitive marketplace. However, there is an important exception to the federal anti-trust law, known as the "state action doctrine." Under this doctrine, states are allowed to regulate their economies and impose certain market restraints as an act of government.

The federal courts use a two-part test to evaluate whether this "state action doctrine" will save the otherwise anticompetitive actions of private parties. First, the challenged activity must be one "clearly articulated and affirmatively expressed" as state policy. Second, the policy must be "actively supervised" by the state.

In applying this test to the Seattle ordinance, the court ruled that it failed in both parts. First, the court held that the State of Washington has not "clearly articulated and affirmatively expressed" a state policy authorizing private parties to price-fix the fees for-hire drivers pay to companies like Uber or Lyft in exchange for ride-referral services. Second, the court held that the ordinance does not meet the "active supervision" component of the state-action doctrine, noting that the State of Washington plays no role in supervising or enforcing the terms of the ordinance.

In an interesting part of the decision that is likely to be quoted far and wide in gig economy cases in the future, the court stated:

Tellingly, Uber and Lyft did not exist when Washington statutes were enacted. The very concept of digital ridesharing services was probably well beyond the imaginations of lawmakers two to three decades ago, much less foreseeable. But the fact that technology has advanced leaps and bounds beyond the contemplation of the state legislature is not, on its own, the dispositive factor in our holding today. Digital platforms like Uber and Lyft have become 'highly interconnected with modern economic and social life,'...and present novel challenges and contexts for regulation. Nevertheless, it is not our role to make policy judgments properly left to the Washington state legislature.

As a result, the court remanded the federal antitrust claims to the district court for further proceedings.

Game, Set...Match?

This likely isn't the end of the story. This decision will likely be appealed and heard by a full *en banc* panel of the 9th Circuit in the next year or so. And *that* decision could then be appealed to the U.S. Supreme Court.

In addition, the 9th Circuit (in the language quoted above) was basically inviting the Washington state legislature to act. The court hinted that the "state action doctrine" analysis could be different were this a state legislative proposal rather than a municipal ordinance. Will the Washington state legislature respond? Only time will tell.

But if you plan on continuing to follow this case, you might want to consider some good neck exercises in the near future. The judicial back-and-forth is likely to continue for quite some time.

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