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Antitrust: Major League Baseball's Exemption from Antitrust Law Upheld

City of San Jose v. Commissioner of Baseball, No. 14-15139 (9th Cir. Jan. 15, 2015).

The Ninth Circuit has upheld a lower court's dismissal of San Jose's challenge to Major League Baseball's long-time exemption from antitrust laws, disagreeing with San Jose's contention that franchise relocation issues are not encompassed within the exemption.

Major League Baseball ("MLB") mandates that every league team play home games within a designated operating territory. For the Oakland A's this territory comprises Alameda and Contra Costa counties in California. The Oakland A's ownership, however, believes it would be more profitable to move from Oakland to San Jose--a move San Jose welcomes. MLB has not been very supportive of this move though and, four years after creating a relocation committee, there has been no decision on the matter and none is on the horizon. Because this committee was formed, however, the A's remained hopeful, entering an option agreement with San Jose that gave the team the ability to buy six parcels of land. But because the MLB has not acted on the request, the A's have been unable to perform under the contract.

San Jose, seeing MLB's foot-dragging as an attempt to prevent the A's from relocating in order to preserve the Giant's monopoly in the city, filed suit against MLB alleging violations of antitrust law. The district court dismissed the case, relying on MLB's age-old exemption from antitrust law. San Jose appealed, claiming the district court erred because the exemption does not apply to franchise relocation.

HELD: The Ninth Circuit affirmed the lower court, holding that the MLB's exemption from antitrust laws covers baseball franchise relocations.

DISCUSSION: The court noted that the exemption originated in the 1920s when the Supreme Court held that baseball games did not fall under the Commerce Clause. With the end of the Lochner Era the Court altered the rationale for baseball's exemption from antitrust law, relying on Congressional acquiescence – e.g. Congress knew baseball was exempt from the Sherman Antitrust Act and failed to change that through legislation. In *Flood v. Kuhn*, 407 U.S. 258 (1972) the Supreme Court upheld the exemption again, relying on the arguments that reliance had developed based on the longstanding existence of the exemption and that any changes in the law should originate from Congress, not the judiciary.

San Jose's first argument was that the *Flood* precedent only applied to the particular clause of the baseball exemption at issue in that case, e.g. it encouraged the court to limit that case to its facts. However, the court pointed out that in *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974) it had already rejected such an approach, and declined to do so again.

In the alternative, San Jose argued that the court should remand the case so the lower court could determine whether the "unique characteristics and needs" of baseball warrant its exemption from antitrust law under *Flood*. The court pointed out that this argument was derived from one single, isolated sentence in *Flood* and that nothing in the rest of the opinion suggested that the Supreme Court's decision was based on a fact-sensitive analysis as San Jose was trying to frame it. The bulk of the rationale in *Flood* was instead related to *stare decisis* and Congressional acquiescence, which for the Ninth Circuit meant the case exempted antitrust laws to the same extent as the Supreme Court's earlier cases had. To prove the point, the court dug further into the Congressional acquiescence history. It noted that in the 1998 Curt Flood Act, Congress withdrew baseball's antitrust exemption for the narrow, specific issues surrounding labor, while *explicitly* leaving the exemption in place for franchise relocations. This doomed San Jose's argument.

http://cdn.ca9.uscourts.gov/datastore/opinions/2015/01/15/14-15139.pdf
(last accessed Feb. 11, 2015).

Employment: Where Hiring Panel Manipulated 51-Year Old Candidate's Scores and Considered Retirement Eligibility, Pretext Must Be Evaluated

Hilde v. City of Eveleth, No. 14-1016 (8th Cir. Feb. 5, 2015).

The Eighth Circuit has reversed a lower court grant of summary judgment to a Minnesota municipality in an ADEA action, finding that, where the city's hiring board lowered a 51-year old candidate's scores to create parity for a 43-year old candidate

and favorably considered the younger man's seven years until reaching retirement age, further inquiry was needed into the question of pretext for age discrimination.

In 2012 the Eveleth, Minnesota police chief announced his retirement. The city provided for a three-member commission to hire the next chief, using a three-part assessment wherein candidates are scored for years of service, training and employment, and the interview.

The commission recruited both internally and externally and ultimately had four candidates. One was LeRoy Hilde, an officer in the town for 29 years and Eveleth's only police lieutenant, the second-highest rank in the force. Hilde had served as the acting chief, had an associate's degree in law enforcement and had completed all advanced training available. The outgoing chief called him the "right choice" for the job. Another contender was Timothy Koivunen, a detective with the city of Virginia, Minnesota. He had 18 years on the job and a bachelor's degree in criminal law.

Before the final stage of the hiring process (the interview) Hilde had a years-of-service score of 65 (the highest possible) and Koivunen had one of 28. With regard to training and employment, Hilde had a score of 9 out of 20 (the lowest among the group) and Koivunen had 15. The commissioners could not explain why they gave Hilde a 9 out of 20, but said they gave Koivunen 15 because of his four-year bachelor's degree. Thus, prior to the interviews, Hilde led Koivunen by a large margin -- 74 to 43. After the interviews, however, the candidates were tied. Koivunen received a perfect score on the interview, and the original score for Hilde had been reduced by the commissioners retroactively.

Hilde was 51 years of age, while Koivunen was 43. Being 51 made Hilde immediately eligible for retirement under Minnesota law, which is triggered automatically at age 50. According to the retiring chief, the commissioners were looking for someone to hire "long-term" and he thought "Hilde's potential retirement date probably did come into consideration." One commissioner said the retirement eligibility "might have" been a factor in the commission's decision.

Hilde sued the city under the Age Discrimination in Employment Act, arguing he was passed over for the chief job because of his age. The district court granted summary judgment to Eveleth, holding Hilde did not establish a prima facie case, in part because Koivunen was not "substantially" younger than Hilde.

HELD: The Seventh Circuit reversed, holding Hilde did establish a prima facie case and that there were genuine issues of material fact about whether the city's proffered reason for not hiring Hilde was pretextual.

DISCUSSION: Hilde established the necessary three elements of his prima facie case: that "he was (1) over 40 at the time of the challenged decision, (2) not hired (or promoted), and (3) qualified for the job." Thus the parties' dispute was whether the city's proffered reason for not hiring him was legitimate and nondiscriminatory, or pretextual.

The city first tried to side-step this factual morass by arguing that Hilde's retirement eligibility was unrelated to age. This argument stems from Supreme Court precedent wherein the Court pointed out that in some instances age and retirement are divorced from each other, thus employers do not violate the ADEA in these special cases. (For example, sometimes retirement is linked to years of service, or seniority and taking this factor into account in a hiring decision in these cases is entirely unrelated to an individual's age, and thus not a violation of the ADEA). However, since Minnesota law allowed Hilde to retire at age 50, the court held "his age was not analytically distinct from his retirement eligibility," and rejected the city's first argument.

The city also argued that retirement eligibility is evidence of an employee's lack of commitment, and thus is a legitimate concern for an employer. The court flatly rejected this argument, holding "[t]o assume that Hilde was uncommitted to a position because his age made him retirement-eligible is age-stereotyping that the ADEA prohibits." Since the commission figured this stereotype into its decision and failed to provide evidence that they doubted his commitment to the job for any reason except his age, the court found it did not judge Hilde on his merits, but rather on his age.

Next the city asserted its legitimate, nondiscriminatory reason for hiring Koivunen was simply because he was the most qualified and "obviously a superior candidate." However, the Circuit Court found the evidence refuted the city's argument. For one, before the interviews Hilde was the most qualified candidate – or so his scoring showed. Hilde's scores after the interview were manipulated, unlike any other candidate and in contradiction to the city's own policy. And the commissioners were unable to explain his unreasonably low scores for training and employment (despite the fact that he had the highest score for years-of-experience) and the interview. Put simply, the court saw no "overall objective disparity between Hilde and Koivunen's qualifications to support the city's argument."

Finally, the court addressed the lower court's decision that an eight-year age gap between the candidates was insignificant and "doomed" Hilde's case. Eighth Circuit precedent has assumed without deciding that even a six-year gap is substantial under the ADEA. Because the commission appeared to factor in Hilde's retirement eligibility and simultaneously thought Koivunen would stay in the job longer because he could not retire for a minimum of seven years, the court found the age gap "substantial." It reversed the lower court.

http://media.ca8.uscourts.gov/opndir/15/02/141016P.pdf (last accessed Feb. 11, 2014).

False Claims Act: Audits Filed With Governmental Agencies Have Not Been "Publicly Disclosed" and Do Not Bar *Qui Tam* Claims

United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District, No. 13-2345 (4th Cir. Feb. 3, 2015).

The Fourth Circuit has held that audit reports revealing impropriety by local and federal government entities were not "publicly disclosed" merely because they were filed with selected government agencies and could be accessed by the public upon specific request; therefore, the bar against *qui tam* actions which are based on "publicly disclosed" data did not apply.

In February 1995 a severe storm caused flooding in North Carolina, culminating in some counties asking the United States Department of Agriculture ("USDA") to help cover cleanup and recovery costs. Graham and Cherokee counties entered into a cooperative agreement with USDA, making the counties' respective Soil and Water Conservation Districts ("SWCD") responsible for implementing the programs locally. The SWCDs hired independent contractors to perform the recovery and cleanup work, which they then paid with money from the USDA program.

Karen Wilson worked at the Graham County SWCD and, as the program was implemented, began to suspect fraud involving both her colleagues at SWCD and those at the United States National Resources Conservation Service, which helped implement the program. Wilson voiced her concerns in a letter to a USDA special agent. The Graham County SWCD was audited and the audit report detailed several problems at that SWCD. Not satisfied with the local audit, Wilson wrote a second letter to a second USDA agent. The USDA then issued its own audit report, finding impropriety at the county SWCD as well, much of which Wilson had told the special agents. The USDA and local audits were distributed to a limited number of governmental agencies.

In 2001 Wilson filed a False Claims Act ("FCA") *qui tam* action alleging that fraudulent invoices were filed with the United States government through the recovery and cleanup program. The case went up to the Fourth Circuit and to the Supreme Court and, ultimately, Wilson filed a third amended complaint in the district court, which formed the basis of this appeal. The district court, on remand from the Supreme Court, dismissed her claim based on the FCA's jurisdictional bar which prohibits *qui tam* claims based on information publicly disclosed. Specifically, the district court held that the USDA and the local audit reports had both been publicly disclosed. Wilson appealed.

HELD: The Fourth Circuit reversed the lower court, holding that only disclosures made to the public at large or within the public domain have significance for purposes of the FCA jurisdictional limit, not reports that are merely publicly accessible.

DISCUSSION: The FCA requires that claims brought by relators (those bringing *qui tam* actions) be dismissed if they are based on public disclosures, unless the relator

qualifies as an original source. Thus, to affirm the lower court, the appellate court had to make three findings: "that (1) all relevant reports had been publicly disclosed, and (2) Wilson based her claims on those public disclosures, and (3) Wilson was not the original source of her claims." The Fourth Circuit stumbled on the first of these required findings.

The lower court held that the distribution to government officials of the USDA report and the local audit amounted to a public disclosure because it put the government on "notice" of the issues in the claim. The lower court based this holding on a Seventh Circuit decision, *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009), wherein the circuit held that disclosing information to a "competent public official" sufficed to trigger the FCA's jurisdictional bar. The appellate court, on this issue of first impression for the Fourth Circuit, fell in line with the five circuits that have disagreed with the Seventh on this issue – the D.C., 1st, 9th, 10th, and 11th. For one, the Circuit Court noted the plain language of "public disclosure" requires some disclosure "outside the government" because the government "is not the equivalent of the public domain." The court noted to find otherwise would "equate the government with the public."

Next, it pointed out the history of the FCA supported this interpretation: when it was passed after the Civil War there was no limit on source information for *qui tam* actions; it was later limited to information not in possession of the government; and then, finally, in 1986 limited to relators with information not publically disclosed. Last, the court held that the fact that the reports were disclosed to both state and local agencies did not change the outcome because, again, no information was disseminated beyond the government realm.

The court also addressed the counties' claim that the reports entered the public domain because they were available to the public via public records requests. The Fourth Circuit found this argument meritless, stating that to "equate eligibility for disclosure with disclosure itself does more than merely place the cart before the horse; it places the cart before a horse that may never follow." Thus, the Circuit Court ruled that the lower court erred in interpreting the "public disclosure" jurisdictional bar for FCA *qui tam* actions and remanded the case.

http://www.ca4.uscourts.gov/Opinions/Published/132345.P.pdf (last accessed Feb. 11, 2015).

Search and Seizure: No Consent Where Officer Looks Into House Window and Informs 14-Year Old That Police Are Going to Search

Vinson v. Vermilion County, No. 12-3790 (7th Cir. Jan. 27, 2015).

Where an officer approaches a home without a warrant, looks into the window, and informs a 14-year old girl inside he has to conduct a search, no consent has been given and the Fourth Amendment has been violated, according to the Seventh Circuit.

In June 2009 a fourteen-year-old and a nine-year-old were alone after school at their Vermilion County, Illinois home. As the teenager was heading back into the house after checking the mail, two cars pulled into the driveway and three males exited. The teenager, frightened, walked into the house and locked the door after making sure her brother was inside. She called her mom at work. While she was on the phone one of the men peered through the window, telling her he was a police officer and "had to conduct a search of the house." The teenager complied and the two kids watched as the officers searched the garage and around the curtilage of the dwelling. Finding nothing of consequence, they left.

Brent and Brandy Vinson, the homeowners, sued Vermilion and Champagne Counties and the individual officers, alleging violations of their Fourth Amendment rights. The district court held the Vinson's claim was vague and indefinite, failing to meet the standard of *Iqbal*. While the court acknowledged the Vinsons' claims that an officer peered in the window and entered the backyard, it noted the teenager "consented" to the search. It dismissed the case and the Vinsons appealed.

HELD: The Seventh Circuit reversed the lower court, holding the teenager could not have consented to the search since the officer did not ask for permission to conduct a search.

DISCUSSION: The parties did not dispute that a search protected by the Fourth Amendment had occurred at the Vinson residence; rather they argued about whether the child had consented to the search. While the Circuit Court agreed that it is possible for a plaintiff to plead him- or herself out of court by including in the complaint facts that create an impenetrable defense, such was not the case here. The complaint alleged that the officers made a statement – they "had" to search the house – not that they sought permission to do so and were then granted it by the teenager. Moreover, the court noted since that statement was made when the officer was already peering in the window, the Fourth Amendment may already have been violated prior to the statement, such that even if it was a request, it was too late. The court also pointed out that the teenager did and said nothing that indicated consent, and that her going into the home and locking the door were more akin to the actions of a person not consenting to having the strangers at the home.

The court also took issue with the defendant's repeated statements that the officers were looking for "large items, and that there was no need to disturb small personal

items in order to search for the larger ones." The court found this "entirely irrelevant." If the officers were on a public street or even at the front door and the objects (in this case lawnmowers) were in plain sight, then the court conceded there might not have been an illegal search. However, the officers entered the curtilage and went inside the garage, areas well within the protections of the Fourth Amendment, making the visualization plainly unlawful without a warrant or an exception to the constitutional prohibition.

The court also took issue with the defendantS' statement that the plaintiffs should have described the specific window through which the officer peered when he demanded to search the home. It held no such level of detail is required – not under *Iqbal* and not under FRCP 8. Ultimately, the court characterized this as "behavior for which the average citizen might call the police, not the kind of behavior one would expect from the police" and said "[m]ost parents would want their fourteen-year-old daughters to call the police if an unknown man approached the house and stared at the teen through a window. No one needs a description of that window to know that something is terribly amiss in that behavior."

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D01-27/C:12-3790:J:Rovner:aut:T:fnOp:N:1491402:S:0 (last accessed Feb. 11, 2015).

Sovereign Immunity: Municipality's Purchase of Liability Insurance Without Express Preservation of Sovereign Immunity Constitutes Waiver

Argonaut Great Central Insurance Company v. Audrain County Joint Communications, No. 13-3252 (8th Cir. Feb. 11, 2015).

Where a county 911 call center which monitored private alarm services purchased a liability insurance policy without expressly preserving the call center's state entity sovereign immunity, the county waived such immunity and is susceptible to legal action.

Audrain County (Missouri) Joint Communications (ACJC) provided 911 call center services for residents and also monitored police and fire calls for Q Security, a private firm whose alarm panels were located at ACJC. When lights in the Q Security alarm panels (needed to identify the specific customer issuing the alarm) ceased functioning, ACJC did not replace them or notify Q Security of the problem. A grocery business protected by Q Security was subsequently broken into, triggering an audible alarm at the ACJC facility but ACJC personnel could not discern the source due to the non-functioning lights--and took no action. The thieves then set fire to the grocery store, setting off another alarm; again the ACJC monitors took no action due to the absence of data. By the time passersby noticed the smoke and called the fire department, the grocery store had sustained $2 million in damage.

Argonaut Great Central Insurance, who insured the grocery store, paid the store's claims and was assigned its rights to seek compensation. Argonaut sued ACJC for negligence, asserting that ACJC had waived sovereign immunity because it purchased an insurance policy or in the alternative, ACJC was not entitled to immunity due to its gross negligence in ignoring obvious alarms.

ACJC responded that it had retroactively reformed its insurance policy to preserve the call center's sovereign immunity.

The district court held that ACJC had not presented evidence of a reformed insurance policy, and that ACJC therefore waived immunity, both under common law and under Missouri statute.

HELD: On appeal, the Eighth Circuit affirmed, denying ACJC's claim of sovereign immunity.

DISCUSSION: Section 537.610 of the Missouri Revised Statutes states that political subdivisions of the state "may purchase liability insurance for tort claims[] made against the state or the political subdivision" and if they do so "[s]overeign immunity for the state of Missouri and its political subdivisions is waived . . . to the maximum amount of and only for the purposes covered by such policy of insurance[.]"

Insureds can modify their insurance policies to override this waiver; however such agreements must be express. Given the absence of an actual reformed policy, "ACJC had to present evidence that it and its insurer had a pre-existing agreement to attach the sovereign immunity endorsement to the Policy and made a mutual mistake when they failed to do so." This ACJC could not do. It failed to demonstrate a pre-existing agreement by clear, cogent, and convincing evidence. The testimony showed ACJC never "discussed sovereign immunity, or even thought about immunity, when it sought a policy from an insurance broker."

http://media.ca8.uscourts.gov/opndir/15/02/133252P.pdf (last accessed Feb. 11, 2015).