State Action Doctrine Protects Wisconsin Tavern Owners' Agreement To Cut Back On Drink Specials

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The City of Madison, Wisconsin is home not only to the University of Wisconsin but to a plethora of taverns. Concerned that university students were spending too much time in local bars and consuming too much alcohol, the University of Wisconsin (as universities with strong social science departments are want to do) obtained a grant to conduct research into the best ways to reduce binge drinking in the campus area.

As a result of its research, UW began pressing the City to impose conditions on new and existing holders of liquor licenses aimed at reducing the use of drink specials, which UW concluded were resulting in high-volume and dangerous drinking by its students. Under pressure from UW, the City began consideration of an ordinance that would bar all drink specials after 8:00 p.m. any day of the week. The tavern owners balked when they learned of the proposed ordinance, saying it was overbroad, impinged on their businesses and would not reduce binge drinking on campus. When the City warned that it would pass the ordinance unless the tavern owners took some voluntary action to address the problem of excessive drinking on campus, the tavern owners announced that they would not offer drink specials on Friday and Saturday nights after 8:00 p.m. As a result of this "voluntary" agreement among the tavern owners, local bars stopped selling multiple drinks for the price of one drink and drinks with multiple shots of liquor on Friday and Saturday nights.

Smelling a *per se* violation of the antitrust laws, a group of UW undergraduate and law students filed a class action complaint in Wisconsin state court. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, Wis.Cir. Ct., Dane Cnty., No. 04CV 000923. The action alleged that the voluntary cut-backs amounted to nothing more than a conspiracy to fix prices and reduce alcohol sales amongst competitors and sought damages in the form of the difference between prices before and after the taverns decided to stop offering drink specials on the nights in question.

From an outsider's perspective, the plaintiff's case seemed like a strong one. It has long been a central tenet of antitrust law, after all, that courts are not to examine the reasons underlying competitors' joint decisions to restrain output or fix prices. Thus, no matter how benevolent the motives of the tavern owners (i.e., whether they were truly interested in reducing binge drinking or just bowing to pressure from the City and university), they normally would be liable under the antitrust laws for their conduct.

Somewhat surprisingly, the Wisconsin state court dismissed the action, granting summary judgment to the tavern owners. The court found that the tavern owners' decision to forego Friday and Saturday night drink specials did not violate the antitrust laws under the "unique facts" of the case. According to the court's analysis, the City's regulation of liquor licenses "impliedly repealed" the antitrust laws governing the conduct of local tavern owners. The court found that the actions of the tavern owners were protected under the so-called state action doctrine because the tavern owners were merely "settling" a political dispute with the City and acceding to its "irresistible regulatory force" by voluntarily adopting the two-day ban on drink specials rather than finding themselves subject to a broader ban via ordinance.

The decision in this case is notable in several respects. First, despite the long history of precedent stating that courts are not to listen to justifications for agreements among competitors to fix prices or restrict output, this case illustrates that some courts may consider such justifications when they touch on public safety issues. Viewed

from the perspective of the antitrust laws, the tavern owners' agreement not to offer drink specials would seem designed solely to increase the price of drinks sold on Friday and Saturday nights and thereby increase the profits of local taverns to the detriment of their consumers. Nowhere in its decision, however, did the court characterize the voluntary ban on drink specials in this manner. Rather, even while alluding to evidence suggesting the ban might prove ineffective in reducing binge drinking, the court repeatedly emphasized that the ban was adopted in response to the City's and UW's increased efforts to deal with the problem of alcohol abuse amongst university students.

Second, the court's decision broadly interprets the doctrine of implied repeal of the antitrust laws. As a general rule, courts are not to interpret local regulation of an industry as impliedly repealing the antitrust laws for that industry unless the court concludes that enforcement of the antitrust laws would "disrupt" or be "repugnant to" the regulatory scheme. In this case, the City of Madison had a regulatory scheme similar to that of other municipalities governing liquor licenses. Before granting new or relocated liquor licenses, it was apparently the City's practice to obtain the voluntary agreement of licensees to limit the number and type of drink specials they would offer. However, there appears to have been no ordinance or other legal requirement that required licensees to refrain from offering drink specials. The court's ruling that the City's regulation of liquor licenses immunizes tavern owners from antitrust scrutiny, therefore, effectively means that the City's informal practice of demanding that applicants agree to limit their drink specials is part and parcel of a pervasive "regulatory scheme." Considering Madison's City Council apparently never adopted an ordinance limiting or banning drink specials, the court clearly had to stretch to reach this conclusion.

Finally, the court's conclusion that the voluntary ban on drink specials should be viewed as akin to a "political settlement" between the tavern owners and the City represents a broad reading of the *Noerr-Pennington* doctrine. Under *Noerr-Pennington*, private parties' joint efforts to influence legislative, administrative or judicial processes is immune from antitrust enforcement, even if the laws or processes in question have an anticompetitive effect. While the City clearly had threatened the tavern owners with legislation mandating limits on drink specials, no such legislation was ever passed. Moreover, it also appears that the City did not initiate any administrative or adjudicative process against the tavern owners when they initially balked at limiting drink specials. The court's conclusion that the owners' joint decision to voluntarily refrain from offering drink specials on Friday and Saturday nights is protected activity under the *Noerr-Pennington* doctrine, accordingly, is dubious and would appear to sanction activity that is otherwise a *per se* violation of the antitrust laws.

Corporate clients are cautioned not to read too much into this one notable case. That having been said, inside counsel ought to be asking the question whether joint activity with competitors that otherwise might be viewed as anti-competitive could be justified using some of the arguments advanced by the City's tavern owners. If the activity under consideration arguably is being taken in order to protect the public good and with the blessing of state regulators, perhaps it may pass scrutiny even though it ends up restricting consumer's options or raising prices as did the decision of local tavern owners to stop offering drink specials to UW students.

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