

# E&I UPDATE

*A publication of the Exemptions & Immunities Committee  
of the Section of Antitrust Law, American Bar Association*

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## MESSAGE FROM THE EDITOR

Welcome to the Fall 2017 edition of the *E&I Update*.

In this edition, we have two excellent articles. The first, by Kristie Xian, takes a close look at the Ninth Circuit's *SolarCity* decision, on which the Supreme Court granted cert earlier this month. Presenting the question of whether denials of state action immunity are immediately appealable under the collateral order doctrine, we at the E&I Committee have been tracking *SolarCity* since it was filed. Stay tuned for further coverage of this important case via our [Connect](#) page.

The second article, by Abraham Chang, summarizes a lively teleconference that our committee hosted in late August on the recent push by a number of newspapers for an antitrust exemption to negotiate collectively with Google and Facebook.

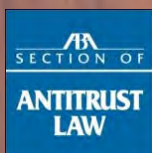
### DISCLAIMER STATEMENT

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Finally, as usual, the newsletter concludes with summaries of exemptions and immunities decisions issued since the last publication of the E&I Update.

Let me close by reminding our readers that our committee is always interested in new volunteers to summarize important judicial and legislative developments, prepare articles for this newsletter, and assist with Section publications. If you are interested in contributing to the E&I Committee, please contact any of the Co-Chairs or Vice-Chairs listed at the end of this newsletter.

Happy Holidays and happy reading from your friends on the E&I Committee leadership.

*Vittorio E. Cottafavi*

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## SUPREME COURT BOUND: ARE STATE ACTION DECISIONS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE?

By H. Kristie Xian<sup>1</sup>

On June 12, 2017, the Ninth Circuit held that denials of state action immunity cannot be immediately appealed under the collateral order doctrine.<sup>2</sup> The Ninth Circuit denied an Arizona utility company, Salt River Project Agricultural Improvement and Power District (“SRP”), the right to pursue immediate appeal of an interlocutory ruling that denied it state action protection. In so ruling, the Ninth Circuit joined the Fourth and Sixth Circuits in a holding that conflicts with previous Fifth and Eleventh Circuit rulings on this issue. This circuit split presumably prompted the Supreme Court to grant certiorari to SRP’s petition in this case, with oral argument expected in early 2018.

### A Brief Primer on State Action Immunity

The state action immunity doctrine first arose in *Parker v. Brown*,<sup>3</sup> the seminal Supreme Court case that immunized certain conduct that would normally violate federal antitrust laws. Under *Parker*, in situations where sub-state actors or private parties act as part of a state regulatory scheme, their otherwise anticompetitive actions may be protected. In a recent state action decision, the Supreme Court recognized that the doctrine exists to protect “the States’ coordinate role in government,” which “counsels against reading the federal antitrust laws to restrict the States’ sovereign capacity to regulate their economies and provide services to their citizens.”<sup>4</sup> Local government entities may displace competition—and avoid antitrust liability—if they act pursuant to a clearly articulated state policy.<sup>5</sup>

### SolarCity: Background and Proceedings Below

In *SolarCity*, the lawsuit rose out of a dispute between a solar panel supplier, SolarCity, and SRP, the only supplier of traditional electrical power in the Phoenix, Arizona area.<sup>6</sup> SolarCity brought Sherman and Clayton Act claims against SRP, alleging that it had attempted to entrench its monopoly power in its territory by instituting a large penalty for customers who generate some of their own power, a pricing structure that significantly disadvantaged solar power providers.

SRP moved to dismiss SolarCity’s action. Crucially, SRP claimed it had authority from the state of Arizona to regulate—including setting prices for—the distribution of

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<sup>1</sup> Associate, Jones Day.

<sup>2</sup> *SolarCity Corp. v. Salt River Project Agric. Improv. & Power Dist.*, 859 F.3d 720 (9th Cir. 2017).

<sup>3</sup> 317 U.S. 341 (1943).

<sup>4</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 236 (2013).

<sup>5</sup> *Id.* at 225.

<sup>6</sup> *SolarCity Corp.*, 859 F.3d at 722. SRP is not only a supplier of power, but also a political subdivision in Arizona. *Id.* at 723.



electricity in its territory. This authority, it claimed, rendered SRP immune from antitrust liability.

The Arizona federal district court denied the motion. In its opinion, the court deemed the question of state action immunity as being inappropriate to resolve at the motion to dismiss stage. SRP appealed, and claimed the district court's order was immediately appealable under the collateral order doctrine.

### **Ninth Circuit Deems State Action Immunity a "Mere" Defense to Liability**

As a matter of first impression, *SolarCity* presented the Ninth Circuit with the question of whether denials of state action protection are immediately appealable under the collateral order doctrine. The Ninth Circuit noted the Supreme Court's "admonition" that the doctrine is a "narrow exception."<sup>7</sup> Among other criteria, the doctrine allows litigants to immediately appeal only "effectively unreviewable" interlocutory orders—that is, orders that protect interests that would be effectively destroyed if vindication had to wait for the conclusion of trial.<sup>8</sup> The Ninth Circuit also noted that the collateral order doctrine applies only to "important" denials of immunities from lawsuits, such as Eleventh Amendment immunity and foreign sovereign immunity.<sup>9</sup> For the Ninth Circuit, these immunities are immunities from suit, and differ from "mere" immunities from liability.<sup>10</sup>

Applying this to the instant case, the Ninth Circuit ruled that SRP could not immediately appeal the lower court's decision. For the Ninth Circuit, like *Noerr-Pennington* immunity, a defense that insulates defendants from antitrust liability for petitioning the government,<sup>11</sup> state action immunity is a defense against liability.<sup>12</sup> In other words, when it comes to immediate appeals, denial of a motion to dismiss based on state action immunity is no different from many other denials of motions to dismiss, such as for failure to state a claim.

### **Circuit Split: Agreement with the Fourth and Sixth Circuits**

The Ninth Circuit decision followed two similar federal Court of Appeals decisions. In *South Carolina State Board of Dentistry v. FTC*, the Fourth Circuit held that the state action doctrine was different from other immunities that fell under the collateral order doctrine.<sup>13</sup> Citing a series of Supreme Court cases, the Fourth Circuit identified three incongruities between immunities from suit—such as qualified and sovereign

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<sup>7</sup> *SolarCity Corp.*, at 724.

<sup>8</sup> *Will v. Hallock*, 546 U.S. 345, 349 (2006).

<sup>9</sup> *SolarCity Corp.*, at 725.

<sup>10</sup> *Id.*

<sup>11</sup> *See E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136-37 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

<sup>12</sup> *SolarCity Corp.*, at 726 ("Consistent with that of the reading of *Parker*, we and the Supreme Court have described state-action immunity as an immunity from liability.") (citing *Patrick v. Burget*, 468 U.S. 94, 95 (1988); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1044 (9th Cir. 2004)).

<sup>13</sup> 455 F.3d 436 (4th Cir. 2006).

immunity – and state action immunity. First, municipalities may invoke the state action doctrine, but they cannot rely on qualified or Eleventh Amendment immunity.<sup>14</sup> Second, unlike qualified and sovereign immunities, the state action doctrine bars all antitrust actions, regardless of the relief sought.<sup>15</sup> And third, antitrust defendants can invoke state action immunity in a lawsuit by the federal government; in contrast, sovereign immunity is no defense to such an action.<sup>16</sup> Ultimately the Fourth Circuit, like the Ninth Circuit, held that state action immunity is not an immunity from trial but a defense to liability, and therefore denials of state action coverage are not collateral orders.

The Sixth Circuit has similarly held that state action immunity is not immediately appealable. In *Huron Valley Hospital, Inc. v City of Pontiac*, after a federal district court denied the City of Pontiac’s motion for summary judgment, the city appealed on the grounds of qualified and/or state action immunity.<sup>17</sup> The Sixth Circuit held that denials of the state action immunity failed the “effectively unreviewable” part of the collateral-order test.<sup>18</sup> The Sixth Circuit determined that state action immunity is not an “entitlement” like other important immunities, such as qualified immunity or absolute immunity.<sup>19</sup> Those immunities allowed immediate appeals under the collateral order doctrine and differ from state action immunity, which is more akin to a defense. Noting that the Supreme Court allowed collateral order appeals in “very few situations,” the Sixth Circuit declined to broaden that group to include denials of state action immunity.<sup>20</sup>

#### **Circuit Spit: Disagreement with the Fifth and Eleventh Circuits**

The Fifth and Eleventh Circuits have both found that state action immunity is comparable to those “important” immunities distinguished by other circuits and therefore denial of its protection is immediately appealable under the collateral order doctrine.<sup>21</sup> In *Martin v. Memorial Hospital at Gulfport*, the Fifth Circuit held that state action immunity shares the same “essential element” of absolute, qualified, and Eleventh Amendment immunities – the “entitlement not to stand trial under certain circumstances.”<sup>22</sup> And since this interest can be vindicated only if evaluated before trial, immediate appeal was proper.<sup>23</sup>

In *Commuter Transp. Systems, Inc. v. Hillsborough Aviation Authority*, the Eleventh Circuit held that state action immunity *is* an immunity from suit, and *is not* merely a defense to

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<sup>14</sup> *Id.* at 446.

<sup>15</sup> *Id.* at 446-47.

<sup>16</sup> *Id.* at 447.

<sup>17</sup> 792 F.2d 563 (6th Cir. 1986).

<sup>18</sup> *Id.* at 567. The court also found that denials of state action protection failed the second prong of the collateral order test – that the order must address a question that is separate from the merits of the underlying case. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 728.

<sup>21</sup> *SolarCity*, 859 F.3d at 725.

<sup>22</sup> 86 F.3d 1391, 1395 (5th Cir. 1996).

<sup>23</sup> *Id.* at 1395-96.

liability.<sup>24</sup> The Eleventh Circuit found state action comparable to qualified immunity, in that both protect officials from “costly litigation and conclusory allegations.”<sup>25</sup>

### **Fifth and Eleventh Circuits’ Focus on Practical Considerations**

In contrast to the Fourth and Sixth circuits, the Fifth and Eleventh Circuits placed far greater emphasis on the practical effects of treating state action immunity as an immunity from suit: the doctrine shielded states from the indignity of private lawsuits. The Fifth Circuit viewed state action immunity as protecting officials from the risks of trial, encouraging officials to take actions with “independence and without fear of consequences.”<sup>26</sup> Characterizing state action immunity as unequal to other immunities would cause distraction from governmental duties and “inhibition of discretionary action.”<sup>27</sup> Likewise, the Eleventh Circuit concluded that the purpose of state action immunity is to avoid “needless waste of public time and money” – both of which must be spent if litigants could not immediately appeal denials of state action immunity.<sup>28</sup>

### **Supreme Court Review**

The Ninth Circuit’s decision in *Solar City* further cemented the already existing circuit split and teed up the state action/collateral order issue for Supreme Court review. Recognizing its departure from the Fifth and Eleventh Circuits, the Ninth Circuit concluded that its ruling—and thus, the Fourth and Sixth Circuits’ as well—had the “better view” of the Supreme Court’s past decisions in narrowing the scope of appealable immunities.<sup>29</sup>

Shortly following the Ninth Circuit’s decision, SRP filed a cert petition with the Supreme Court.<sup>30</sup> SRP framed its argument as one that promoted state sovereignty, arguing that the Ninth Circuit’s decision threatened the “dignity and autonomy” of states and the division of regulatory power between state and federal governments.<sup>31</sup> By allowing the suit to proceed during trial, SRP contended, the Ninth Circuit’s decision did not protect state officials’ “ability to set economic policy without having to worry about being subjected to the prolonged burdens of baseless litigation.”<sup>32</sup> Characterizing the circuit

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<sup>24</sup> 801 F.2d 1286, 1289 (11th Cir. 1986).

<sup>25</sup> *Id.*

<sup>26</sup> *Martin*, 86 F.3d at 1396.

<sup>27</sup> *Id.*

<sup>28</sup> *Commuter Transp. Systems, Inc.* 901 F.2d at 1289.

<sup>29</sup> *SolarCity Corp.*, 859 F.3d at 730.

<sup>30</sup> *SolarCity Corp. v. Salt River Project Agri. Improvement and Power District*, 859 F.3d 720 (9th Cir. 2017), petition for cert filed, 17 U.S.L.W. (Sept. 10, 2017). The Ninth Circuit allowed the case to move forward in the district court despite requests by SRP to stay the proceedings while it pursued an appeal.

<sup>31</sup> *Id.* at 25.

<sup>32</sup> *Id.* at 28.

split as an “entrenched division” with “little to be gained from further percolation,” SRP called on the Supreme Court to provide clarity on this issue.<sup>33</sup>

SRP will get its chance to make these arguments. On December 1, 2017, the Supreme Court granted certiorari on SRP’s petition. The Court is expected to hear oral argument in early 2018.

### **Conclusion**

In all likelihood, the outcome of *SolarCity* will turn on the interpretation of the scope of *Parker*: Will *Parker*’s deference to state sovereignty carry the day; or did *Parker* merely construe a statute, never identifying a “right not be tried”? The Supreme Court seems poised to give us some much-needed guidance on this issue.

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<sup>33</sup>

*Id.* at 3.