STATE OF WISCONSIN

SUPREME COURT

2005AP001063

Nic J. Eichenseer,

Plaintiff,

Brian Dougherty and Eric B. Stener
on behalf of themselves and all other similarly situated persons,

Plaintiffs-Appellants-Petitioners,

v.

Madison-Dane County Tavern League, Inc.;

(*Caption continued – next page*)

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY
HONORABLE ANGELA B. BARTELL PRESIDING

Non-Party Brief of the American Antitrust Institute

Peter C. Carstensen
720 Orton Court

Madison, WI 53703
(608) 255-5931

Counsel for the American Antitrust Institute.

(*Caption continued*)
Amy's Café, Inc.; The Angelic Brewing Company, LLC; Brothers of Wisconsin, Inc., d/b/a Brothers; Oscar, Inc., d/b/a Buffalo Wild Wings Grill & Bar; Bull Feathers, Inc.; Zapel, Inc., d/b/a City Bar; Wisconsin Ventures, Inc., d/b/a Club Amazon and the Church Key; Kollege Klub, Inc.; Schooners Bar & Grill, Inc., d/b/a Lava Lounge; The Church Key, d/b/a Mad Dog's Pub & Pizzeria; B.A.T., Inc., d/b/a Madhatters; Orbut of State Street, Inc., d/b/a Mondays; Nitty Gritty, LLC; Paul's Club, Inc.; Plaza Tavern and Grill, Inc.; The Pub, Inc.; The Red Shed, Inc.; Spices Restaurante, Inc.; State Bar & Grill, LLC; State Street Brats, a Limited Partnership; Stillwaters, Incorporated; Vintage, LLC, d/b/a Vintage Spirits & Grill; Wando Ventures, Inc.; The Bull Ring of Madison, Inc., d/b/a the Irish Pub;
and Does 1 - 50,

Defendants-Respondents,

Secura Supreme Insurance Company,

Intervenor.

TABLE OF CONTENTS

Page

[pages were correct as filed- are off in this version. Sorry.]

TABLE OF AUTHORITIES

Cases

Page

Statutes

AAI recognizes the need for elected officials to consider policies to reduce the problems associated with excessive drinking and binge drinking. If a legislature has expressly authorized policies that are inherently anticompetitive, and the community implements those policies in an appropriate way, such lawful regulation should not provide a basis for an antitrust challenge.1

This case, based on the allegations assumed to be true, concerns an agreement by a group of bars to restrict their competition during Friday and Saturday evenings by eliminating "drink specials." A horizontal agreement to raise prices above the level that would otherwise exist in a competitive market, absent an exemption from antitrust law, would be per se illegal under both federal and

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1 Counsel for AAI published an "op-ed" essay in the Wisconsin State Journal , April 4, 2004, available at http://www.madison.com/archives/read.php?ref=/wsj/2004/04/04/0404030171.php, explaining why the allegations, if proven, could constitute a violation of antitrust law.

Counsel, as a professor, informed several students of the potential for an antitrust claim after a meeting with one of petitioners' counsel. One of those students subsequently decided to become a named plaintiff although that individual is not part of this appeal.

Wisconsin antitrust law.2 *See, e.g., Catalano v. Target Sales*, 446 U.S. 643 (per curiam, 1980) (beer distributors' agreement to eliminate discounts held per se illegal); *State v. Waste Management of Wisconsin, Inc*., 81 Wis. 2d 555, 261 N.W.2d 147 (1978) (price fixing and market allocation are per se illegal).

Thus, the central question on appeal is whether an agreement among competing bars to restrict competition with respect to "drink specials"3 is exempt from antitrust law when no official city body had approved the agreement. The Legislature in the section of the Statutes regulating alcoholic beverages neither expressly authorized regulation of the pricing of drinks nor exempted any agreements among bars related to the price of drinks from antitrust law. Wis. Stat. ch. 125 (2005-06). Therefore, this Court must decide whether (1) ch. 125 implicitly includes the right to regulate pricing policies for bars and (2) whether an agreement among bars to implement such a policy is both within the scope of any authority to regulate prices and can trigger an exemption from antitrust law when approved only informally.

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2 Various defenses could exist on the merits including the theory advanced by the University of Wisconsin that there was in fact no agreement among the bars to eliminate competition, but only unilateral acquiescence to the demands of city officials. In addition, even if there were a violation, the question of damages and whether this claim is appropriate for class action treatment would remain. AAI takes no position on any of those issues.

3 The theory justifying the agreement was that raising the cost of drinks on weekends would reduce consumption and so reduce problems stemming from excessive drinking. This theory proved to be incorrect, and problems resulting from excessive drinking increased rather than declined. Petitioners' Appendix, A-Ap 85-86. Hence, any future regulation raising prices to reduce excess drinking may well be "arbitrary." *County of Milwaukee v. Williams*, 2007 WI 69, ¶ 31, ___Wis. 2d___,___N.W.2d ___.

AAI's primary concern is that this Court adopts appropriate standards to govern the determination of whether an implied exemption from antitrust law exists since such standards affect a wide variety of situations in which competitors may claim that an agreement among themselves restricting competition is exempt because of a link to some regulatory system.

I. EFFECTIVE ANTITRUST LAW REQUIRES STRICT CONSTRUCTION OF ANY CLAIM OF THE RIGHT TO AUTHORIZE ANTICOMPETITIVE AGREEMENTS RESULTING IN IMPLIED EXEMPTIONS FROM ANTITRUST.

Wisconsin follows Federal antitrust law. *Conley Pub. Group, Ltd. v. Journal Commc'ens,* 2003 WI 119, ¶¶ 17-29, 256 Wis. 2d 128, 665 N.W.2d 879. Federal law is clear that implied exemptions are disfavored, *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2391 (2007) ("clear repugnancy" must exist between the regulatory system and antitrust before a court should imply an exemption); *Nat'l Gerimedical Hosp. & Gerentology Ctr v. Blue Cross of Kansas City,* 453 U.S. 378, 388 (1981) and all exemptions should be construed narrowly. *Union Labor Life Ins. v. Pireno,* 458 U.S. 119, 126 (1982). The reason for this is that competition is basic public policy both in federal and Wisconsin law. Wis. Stat. § 133.01(2005-06) ("competition [is] the fundamental economic policy of the state"). Moreover, regulators must "preserv[e] and promot[e] . . . the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature." *Id.* The Wisconsin Legislature has explicitly balanced the public interests in regulation and competition. Courts should not impute any exemption except when essential to implement a clear legislative goal of another regulatory system.

This Court has adopted such an analysis when construing exemptions. *Town of Hallie v. Chippewa Falls*, 105 Wis. 2d 533, 539-540, 314 N.W.2d 321 (1982) ("the test [is] . . .whether the legislature intended to allow municipalities to undertake such actions. . . . [T]he legislative enactments dealing [with this issue] . . . convince[ ] us that the antitrust laws do not apply to the … alleged conduct."). The opinion also holds that: "a city

may [not] ignore the state antitrust law in all cases merely by relying on its home rule powers." *Id*. at 540.

Consequently, this Court rejected the claim of a group of ambulance services that their market allocation scheme, expressly approved by Milwaukee, had an implied exemption from antitrust law. *American Medial Transport of Wisconsin v. Curtis-Universal*, 154 Wis.2d 135, 452 N.W.2d 575 (1990). The general grant of home rule power, like the general grant of authority to regulate liquor licenses, does not imply a legislative authorization for an agreement among competitors restricting competition even if there is a public interest justification.

Federal courts have similarly distinguished between the activities that express or implied exemptions do and do not protect. The Seventh Circuit, for example, rejected the claim of state action immunity4 by a group of optometrists who had refused to provide the information necessary to allow patients to use mail order sources. *Hardy v. City Optical, Inc.*, 39 F.3d 765 (7th Cir. 1994). The Court concluded that the limited information the state required be disclosed did not establish a policy of excluding competition from the mail-order providers. *Id.* at 770. Similarly, in *First American Title Ins. v. Devaugh*, 480 F.3d 438 (6th Cir. 2007), the Court held that Michigan's statutes gave registrars of deeds the right to impose certain limits, but it found the state had not authorized their agreement to foreclose competition in other ways and consequently those agreements lacked state action immunity. *Id.* at 445-454. A federal court applying Wisconsin law rejected a claim of state action immunity

4 The first requirement for state action immunity from federal antitrust law is that the state law shows a specific intent to preempt competition. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 (1980).

for an agreement creating a monopoly service provider based on the authority of counties to operate airports. *Cedarhurst Air Charter v. Waukesha County*, 110 F. Supp. 2d 891 (E. D. Wis. 2000); *see also, Kentuckiana Med. Ctr. LLC v. Clark County*, 2006 U.S. Dist. LEXIS 3298 (S.D.Ind., 2006) (county lacked authority to regulate hospital competition).

This Court has recently held that, although § 133.01 does not provide a general basis for interpreting regulatory statutes, it does require the scrutiny of any agreement potentially subject to antitrust law to ensure that it was no more anticompetitive than necessary to accomplish the Legislature's goals. *County of Milwaukee v. Williams*, 2007 WI 69, ¶ ¶ 46 – 52, __ Wis. 2d___, ___ N.W.2d __ (¶ 48: "the section applies in circumstances in which parties assert violations of antitrust law.").

Nothing in the text of ch. 125 expressly permits cities to authorize an agreement among taverns to regulate the pricing of drinks. Indeed, the Legislature has provided detailed regulations governing competitive practices whose overall policy is to retain the economic independence of individual licensees. Wis. Stat. §§ 125.33, 125.34. The opinions below contend that the Legislature had a goal of reducing the risks associated with excessive drinking, but do not identify specific statutory provisions that confer price regulatory authority. The statutory provision relied upon, Wis. Stat. § 125.10(1), explicitly requires that a city "enact" its "regulations". Madison's informal approval of the agreement does not conform to the clear requirements of this section – the Madison city council *did not enact* this price fixing "regulation." Moreover, § 125.10(1) is similar to the grant of general authority in *American Medical*, *supra*, and *Cedarhurst*, *supra*, that the courts found insufficient to authorize anticompetitive agreements.

The Court of Appeals interpreted ch. 125 to "contemplate[ ]-and expressly direct[ ]-that regulation is to supersede competition in the retail sale of alcohol beverages in Wisconsin." *Eichenseer v. Madison Tavern League,* 2006 WI App. 226, ¶ 15, 725 N.W.2d 274. This standard can be read to permit any price fixing or market allocation among competing bars if they receive some kind of regulatory approval. This can not and should not be the law with respect to the sale of liquor or in any other business where there is some regulation. The Legislature has not authorized either price regulation or agreements among bars to restrict competition.5 If it had, the Legislature would have expressly defined a price regulation system to determine prices.

If the regulator lacks the authority to regulate prices, it can not exempt from antitrust law an agreement among bars to do the same thing. The issue here is not whether the Legislature has a goal of reducing the harms from excessive drinking; rather the question is whether it has authorized a specific means, an agreement among competitors to restrict competition, to accomplish that goal. The provisions of ch. 125 do not support such a conclusion. *Hardy, supra*; *First American Title Ins., supra*.

II. IF A REGULATOR MAY CONFER AN IMPLIED EXEMPTION FROM ANTITRUST LAW, THAT ACTION MUST BOTH BE FORMAL AND INCLUDE APPROPRIATE SUBSTANTIVE STANDARDS, PUBLIC OVERSIGHT AND ENFORCEMENT TO PRESERVE THE FUNDAMENTAL GOALS OF COMPETITION.

5 Pricing policy might nevertheless be a factor that could be considered in granting or renewing permits to operate specific bars, and price effects might be a consequence of legitimate regulations properly enacted.

Assuming a regulator has authority to approve an agreement among competitors exempting it from antitrust law, the question then becomes what actions are required to confer such a discretionary exemption. There are two components to this question: 1) is formal action by an official body a prerequisite to an exemption and 2) regardless of the form of the grant, does an exemption require specific content?

A. FORMAL APPROVAL IS REQUIRED.

Wisconsin legislative policy clearly favors competition. Wis. Stat. § 133.01 (2005-06). Consequently, there should be a careful, transparent process of public review and explicit approval before any private agreement restricting competition can claim an exemption from antitrust law.

The Court of Appeals found that pressure from the City led to the agreement although only two out of 19 members of the city council agreed to suspend efforts to impose formal regulation in response to the agreement. 2006 WI. App. 266, ¶¶ 3, 18. Neither the council nor its licensing committee took any official action with respect to the agreement. *Id.* ¶ 18. Moreover, the purported informal approval clearly did not include the standards, supervision and controls necessary to make the agreement an official action of the City. Allowing such ad hoc, informal actions to constitute the grant of antitrust immunity poses grave danger to competition and the public interests that anticompetitive regulation is to serve, as well as the public interest in preserving representative government. If powerful individuals on city councils can confer an antitrust exemption, this creates serious risks of abuse and even corruption.

This Court in the *Williams* case has recently emphasized that Wisconsin's antitrust law imposes strict

standards on any claim of exemption from that law based on an implied exemption. 2007 WI 69 at ¶ 52. A formal review provides the basis for a public discussion of the merits of the exempted agreement, how to test its effect on both prices and the public interest goals it is to serve, any limits on its duration, and the supervision of its implementation. For these reasons, § 125.10(1) requires such a process before a city can "enact" any "regulation" of bars.

B. Any Exemption from Antitrust Law Requires Appropriate Substantive Standards, Public Oversight and Enforcement.

Regardless of the method of approval, there must be a substantive content to the grant of an exemption. The justification for the exemption is the public interest and approval should include a review of the merits of the anticompetitive agreement. The informal process involved in this case included no assessment of the costs or benefits of the restraint, no examination of less restrictive alternatives, and no definition of the scope or duration of the restraint. The City did not adopt criteria for determining its success or failure, nor did it establish any mechanism to gather data, oversee the actual practices of the bars, or review disputes relating to the agreement. Moreover, the City had no power to enforce the agreement or to determine whether bars were even adhering to it.

If a regulator is going to confer an antitrust exemption on an agreement among competitors, it must undertake pro-active supervision. The case of *Patrick v. Burget*, 486 U.S. 94 (1988), illustrates this requirement for supervision. Oregon authorized local medical groups to exclude doctors from the practice of medicine to protect the quality of health care. Because these regulators were competitors of the excluded doctors, an obvious risk of

anticompetitive actions existed. The Supreme Court condemned the Oregon statute because it failed to provide any review of the merits of the decisions by the local medical groups. Similarly, although New York had authorized local governments to exclude competition in electrical inspection, the Second Circuit rejected state action immunity because the village had not supervised the prices or services of the protected inspector. *Electrical Inspectors, Inc. v. Vill. of East Hills*, 320 F.3d 110 (2nd Cir. 2003).

Any grant of immunity must include standards, oversight, and review processes necessary to ensure the resulting restraints serve the public interest. In this case, no regulator set the terms of the restraints, their duration, or provided oversight or enforcement. The city's failure to take formal action as required by § 125.10(1) to ratify the agreement, and its failure to impose requirements necessary to ensure that the agreement in fact served the public interest means that this agreement should not be exempt from antitrust law.

III. WISCONSIN SHOULD NOT CREATE IMPLIED EXEMPTIONS FROM STATE ANTITRUST LAW THAT ARE LIKELY TO EXPOSE WISCONSIN BUSINESSES TO FEDERAL ANTITRUST LIABILITY.

Finally, the Court of Appeals' method of implying exemptions from state antitrust law is inconsistent with the state action exemption in federal antitrust law. Federal law imposes two tests: first is there a clearly articulated state policy to preempt competition? Second is there active supervision of any agreement or conduct involving private businesses? *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

The Court of Appeals decision suggests any time the Legislature imposes a significant amount of regulation that fact combined with any informal approval insulates any anticompetitive agreement among firms subject to such regulation from state antitrust law. This method of imputing legislative intent to preempt competition does not satisfy the first requirement of state action immunity. *Hardy*, *supra*; *First American Title Ins.*, *supra*; *Cedarhurst*, *supra*; *Kentuckianna*, *supra*. Thus, even if this method is now the Wisconsin rule for implied exemption from state antitrust law, it will not foreclose stricter scrutiny under federal law.

The second prong in state action calls for active supervision of any private agreement granted an exemption. The federal cases such as *Midcal*, *supra*, *FTC v. Ticor Title Ins.*, 504 U.S. 621 (1992) (state action immunity rejected because Wisconsin's insurance commissioner did not provide active oversight), and *Patrick*, *supra*, require that the regulator actively oversee the specific conduct so that it serves the public interest and not just private interest. The Court of Appeals in this case found active supervision of the implementation of the agreement based on its conclusion that the City was the

"effective decisionmaker" with respect to creating the agreement. 2006 WI App 226, ¶¶ 21, 22. This is an incorrect interpretation of federal law. *Midcal*, *supra*, and *Ticor*, *supra*, teach that a clear intent to eliminate competition is not the same as supervising the resulting conduct. The city never adopted any standards to govern this agreement nor did it provide any formal oversight or enforcement. Consequently, this agreement fails the second prong of the state action exemption.

The Court of Appeals standard for implying the existence of an exemption means that an exemption from Wisconsin antitrust law would not provide state action immunity. Businesses may find themselves liable under federal law despite an exemption from state antitrust law. Stricter standards, aligned with federal law criteria, will ensure that antitrust immunity under Wisconsin law remains consistent with immunity under federal law.

CONCLUSION

It is important that sympathy for the defendants in this case not result in a Wisconsin standard that implies an antitrust exemption that defeats fundamental state and national policy in favor of competition. The best judicial strategy is to insist on a clear authorization for the specific regulation and an irreconcilable conflict between the commands of antitrust and the regulatory goals of the Legislature. Moreover, when any exemption exists that could authorize anticompetitive agreements among firms, the regulator must act in a formal way to grant an exemption that includes all necessary elements to define the substantive goals that the private agreement is to achieve, the nature of public oversight, and enforcement.

Dated this 25th day of June, 2007.

Respectfully submitted,

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Peter C. Carstensen
Wisconsin Bar # 1025845
720 Orton Court
Madison, WI 53703
(608) 255-5931
Counsel for the American Antitrust Institute