UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:97-CV-709H

GUS "SKIP" DALEURE, JR., et al. PLAINTIFFS

V.

COMMONWEALTH OF KENTUCKY, et al. DEFENDANTS

MEMORANDUM OPINION

Each of the Kentucky local government defendants, Fiscal Court of Jefferson County, Fiscal Court of Grayson County, Fiscal Court of Oldham County, Fiscal Court of Bullitt County, Fiscal Court of LaRue County and Fiscal Court of Franklin County, have moved for summary judgment as to Plaintiffs' Sherman Act claims based on the Local Government Anti-Trust Act and *Parker* immunity, also known as state action immunity.[1] *See Parker v. Brown*, 317 U.S. 341, 352 (1943); 15 U.S.C. § 35. Plaintiffs argue that the Local Government Anti-Trust Act still allows a suit for injunctive or declaratory relief and that state action immunity, does not apply to these Defendants. The Court addresses these arguments in turn.

The Local Government Anti-Trust Act clearly immunizes local governments against damages, interest, costs and attorney's fees otherwise recoverable under the Sherman Act, 15 U.S.C. § 1. *See* 15 U.S.C § 35. Therefore, Plaintiffs' Sherman Act claims for monetary relief against these local government Defendants must be dismissed.

[1]Defendants also adopted all of the arguments made in Gateway Telecom's motion to dismiss. These arguments will be addressed in a later separate opinion.

Whether the Local Government Anti-Trust Act prohibits Plaintiffs' claims for declaratory and injunction relief is less clear. The Sixth Circuit does not appear to have directly addressed the issue. However, the text of the statute and persuasive authority from other jurisdictions suggest that such relief is permissible.[2] No doubt that Congress knows how to bar equitable relief when it sees fit. Had Congress intended to immunize local governments from injunctive relief as well as monetary damages, the text of the statute would have included a prohibition on equitable relief. That it did not chose to do so is persuasive evidence of its intent. The Tenth Circuit and the Fourth Circuit reached the same conclusion when confronted with the issue. *See Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472 (10th Cir. 1990); *Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991).

Defendants contend that the state action immunity doctrine bars the claims for declaratory and injunctive relief under the Sherman Act as well. The state action doctrine immunizes states from anti-trust liability when they act in a sovereign capacity. *See Parker*, 317 U.S. at 352. Since *Parker*, the Supreme Court has strengthened and refined the state action immunity doctrine while struggling to define the "nature and extent of state involvement necessary to establish the exemption." *Hybud Equip.Corp. v. City of Akron,* 742 F.2d 949, 954 (6th Cir. 1984). For instance, local governments are not exempt from antitrust laws merely due to their status as political subdivisions of the state. *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 413 (1978). *Parker* immunity does, however, extend to political subdivisions acting pursuant to a clearly articulated state policy to displace competition. *See Community*

[2]In the Sixth Circuit case Defendants cite, *OPDYKE Investment Company v. City of Detroit*, 883 F.2d 1265, 1269 (6th Cir. 1989), the plaintiffs had already lost their opportunity to assert a claim for injunctive relief. Thus, the Sixth Circuit never decided whether such a claim would be allowable under the Local Government Anti-Trust Act.

Communications Co. v. Boulder, 455 U.S. 40 (1982) and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). This does not require an explicit statement by the legislature or the state supreme court, but it does demand that suppression of competition is a "foreseeable result" of the state's authorization. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991).

While these cases have helped to clarify the proper scope of *Parker* immunity, many questions remain. As a result, the Circuits have not had an easy time consistently applying these general principles to specific circumstances. Their efforts are not always reconcilable nor do the opinions contain much guidance about how to determine foreseeability. Making the task more problematic is the circumstance that courts must determine whether a particular restraint was foreseeable before determining whether that restraint actually violates the Sherman Act. For the moment, the Court must assume that it does. Given these limitations, this Court seeks to apply the existing precedents as best as possible to the unique facts of this case.

The relevant statutes in this case provide a broad authorization to administer, operate and monitor jails, as well as to establish minimum standards for those jails. See K.R.S. 441.025(1); K.R.S. 441.045(1); K.R.S. 67B.050; K.R.S. 441.055, et seq. A broad authorization of power to local governments does not necessarily suggest concurrent approval to restrain trade in the area. State neutrality is insufficient to confer immunity. *See Community Communications Co. v. Boulder*, 455 U.S. 40, 55 (1982). Immunity is appropriate, however, even when the text of the statute is neutral, if the nature of the authorized activity makes it reasonably foreseeable that the local government will restrict competition. The authority to zone, issue finance bonds, and manage waste are examples where the imposition of government authority almost inevitably

requires some restraint of existing private enterprise. *See Riverview Investments, Inc. v. Ottawa Community Improvement Corp.,* 769 F.2d 324 (6th Cir. 1985), *modified* 774 F.2d 162 (6th Cir. 1985) (restricting competition is a logical and necessary outcome of the authority to issue revenue bonds); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073 (1st Cir. 1993) (state statute empowering municipalities to control all solid waste disposal authorizes restraint of trade to accomplish its objectives); *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, 155 F.3d 59 (2nd Cir. 1998) (state authorization of local solid waste management projects necessitated some anti-competitive conduct to operate such systems);*Omni Outdoor*, 499 U.S. at 373 (restriction of competition reasonably foreseeable based on state's grant of zoning authority). Where the state authorizes the local governments to regulate an area traditionally dominated by private competition, these courts have concluded that the state implicitly condones a restraint of trade. Our case does not seem to fall into that category. The authority here is to operate local jails, which, of course, are usually state financed and operated. Therefore, one must conclude that regulating jails is not among the category of activities which inevitably suppresses private competition.

Most services provided in a jail are paid for entirely by the state. For most services the anti-trust laws are not an issue because the state has the right to choose the services for which it pays. Telephone services are somewhat unique because they involve an economic relationship between private individuals and private companies. The state neither operates telephone services nor pays for inmates' phone calls. As such, local government restriction of inmates' calling options presents an interesting issue. This Court must determine whether the state would reasonably foresee a suppression of competition within this unique private economic relationship

when it authorized local government management.

While the statutes authorizing local governments to operate jails do not mention inmate telephone systems, state officials surely knew that local governments would provide telephone service in their jails.[3] To do so, the local officials might reasonably contract for special services from long distance providers. However, it does not reasonably follow that one should expect those contracts to unlawfully restrain competition. The local governments would have many options for providing inmate telephone services. Doing so does not lead naturally or necessarily to a suppression of competition. There is no evidence that the state anticipated that inmate telephone services would be offered in restraint of trade.

Plaintiff alleges that Defendants granted exclusive contracts based on the size of their commission rather than based upon the quality of service or savings to the inmate. Those contracts limited inmate choice of long distance service and raised the cost of phone calls. This type of restraint of trade is fairly attenuated from the state aim of having safe, well run local jails. The restraint is neither necessary nor inevitable to accomplish that state policy. The service and the nature of the restraint each seem tangential to the primary purpose of the state's authorization. Instead, it appears designed primarily to profit local counties. The state has not articulated profit-making as an objective for local jail operation.[4] Defendants have not explained how the type of

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[3]Defendants also point to a Kentucky administrative regulation stipulating that inmates be permitted at least one telephone call per week, paid for by the inmate or the person receiving the inmate's call. 501 K.A.R. 3:140 § 3. This regulation was promulgated by the Department of Corrections, a state agency, rather than the state legislature or supreme court. The Supreme Court has held that state agencies cannot confer state action immunity. *See Southern Motor Carriers Rate Conference, Inc., v. U.S.*, 471 U.S. 48, 62-65 (1985) (State agencies cannot immunize anti-competitive conduct unless the legislature expresses a clear intent to displace competition). Therefore, this Court cannot look to this regulation for an intent not expressed by state statute.

[4]Defendants have implied that a single telephone company might be necessary for security. They have not produced evidence that this is the case, nor does it seem likely given today's technology. Moreover, the fact that counties are alleged to have received up to 55% of the revenue obtained from calls under the contracts provides

restraint alleged here was necessary or foreseeable to operate local jails.

When neither the nature of the activity nor the state policy involved inevitably lead to a restriction of competition, it is difficult to imagine that the state could reasonably foresee that a statute authorizing regulation of a primarily public function would result in a restraint on private competition. Clearly, such a restraint was not specifically contemplated. Nor does an unlawful restraint of telephone services seem to flow logically from the authority to run jails. For all these reasons, this Court cannot conclude that the legislature contemplated a suppression of competition for telephone services when it authorized counties to operate local jails.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN, II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

compelling evidence that the counties sought profit from the contracts rather than a more secure system. If the counties were motivated by security, they could have contracted with a single provider for less expensive services without seeking personal remuneration.

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ORDER

The local government Defendants have moved to dismiss the anti-trust claims based on *Parker* immunity and 15 U.S.C. § 35. The Court has filed a Memorandum Opinion setting forth its analysis of Defendants' arguments on these specific issues. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the motions for summary judgment of Defendants, Fiscal Court of Jefferson County, Fiscal Court of Grayson County, Fiscal Court of Oldham County, Fiscal Court of Bullitt County, Fiscal Court of LaRue County and Fiscal Court of Franklin County, as to Plaintiffs' claims under the Sherman Act are SUSTAINED IN PART and Plaintiffs' Sherman Act claims against these Defendants are DISMISSED WITH PREJUDICE, except for the claims for declaratory and injunctive relief under the Sherman Act.

This is not a final and appealable order.

This _____ day of November, 1999.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record