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Ban on Formula Restaurants Found Constitutionally Suspect; 11th Circuit Requires “Elevated Scrutiny”

Not all news is bad news for owners and operators of multi-unit restaurants and retail chain stores.

In two separate decisions, the U.S. Court of Appeals for the Eleventh Circuit held that one Florida town’s ordinances banning formula restaurants altogether and subjecting formula retail to severe size and frontage restrictions had a discriminatory impact on interstate commerce, and thus had to pass a further “elevated scrutiny” test. *Cachia v. Islamorada*, 542 F.3d 839 (2008) [regarding the formula restaurant ban], and *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (2008) [regarding the formula retail restrictions].

As a result, the formula retail provisions were invalidated, and the court ordered further hearings on whether the formula restaurant provisions could face a similar end.

For multi-unit restaurateurs and chain retailers, these decisions highlight potential chinks in the armor of similar efforts across the country to ban formula businesses.

The ordinance at issue in both cases was enacted in 2002 by the Village of Islamorada, Florida. Citing the desire to remain “a small town community” and to avoid establishments that “diminish the unique character of the Village by offering standardization of architecture, interior design and décor, uniforms and the like,” town leaders passed an ordinance prohibiting formula restaurants “in any zoning district of the Village” and subjecting formula retail uses to size and frontage restrictions so severe as to make them economically unsustainable for regional or national chains.

The Ordinance defines a “formula restaurant” as:

An eating place that is one of a chain or group of three (3) or more existing establishments and which satisfies at least two of the following three descriptions: (1) has the same or similar name, tradename, or trademark as others in the chain or group; (2) offers any of the following characteristics in a style which is distinctive to and standardized among the chain or group: i. exterior design or architecture; ii. uniforms, except that a personal identification or simple logo will not render the clothing a uniform; or iii. has a standardized menu; or (3) is a fast food restaurant.

In both the formula restaurant case and the formula retail case, the court found that while the Ordinance did not “facially discriminate” against interstate commerce, the “practical effect” of the Ordinance was indeed discriminatory. Accordingly, in each case, the burden was shifted to the government to prove that:

- (1) the statute has a legitimate local purpose;
- (2) the statute serves this interest; and
- (3) adequate, nondiscriminatory alternatives are not available.

Based on the record developed in the formula retail case—which originated from the loss of a contract to sell land for a chain drug store—the court determined that while preserving a small town community could be a legitimate local purpose, the Village of Islamorada “has not demonstrated that it has any small town character to preserve.”

The “small town” argument failed based on a number of factors, including the number of pre-existing chain retailers and restaurants allowed in the Village as non-conforming uses under the Ordinance (among them, another chain drug store near the plaintiff’s land), the ability of a locally owned merchant to have a retail store of any size that could similarly detract from the “small town” feel (permissible under the Ordinance), and the ability of national chain retailers to locate in the Village in the unlikely event that they met the severe frontage and size restrictions of the Ordinance.

While the fate of Islamorada’s formula restaurant ban is unresolved as yet, the bar set by the Eleventh Circuit is high. Federal courts have noted in similar cases that “Regulations that facially discriminate or have a discriminatory effect on interstate commerce rarely pass the elevated scrutiny test.”

Should you have any questions about this ruling or any general legal questions pertaining to issues faced by developers and owners of multi-unit restaurants, please contact one of the attorneys on our Multi-Unit Restaurant Industry Team, led by Heather Mallard, or one of our attorneys who practice in the area of land use law, including John Cooke and Anna McLamb. Contact information for these attorneys is as follows:

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