

# Antitrust Considerations for Regulating the Practice of Law

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# Summary

- State Supreme Court acting in legislative capacity is always (*ipso facto*) exempt from federal antitrust liability.
- State bar is not *ipso facto* exempt, even where constituted as a state agency.
- Conduct of state bar is exempt where Supreme Court is real party in interest, or *Midcal* conditions are satisfied.
- Absence of exemption  $\neq$  antitrust violation.

# Antitrust Basics

- Antitrust law addresses restrictions on competition that harm consumers.
- FTC Act and Sherman Act do not prohibit all self-regulation of a profession.
  - Ethics rules
  - Discipline
- Antitrust targets
  - Monopolization
  - Agreements that harm competition

# Agreements Raising Antitrust Issues

- Restraints on competition (collusion)
  - Minimum fees (*SCTLA; Goldfarb*)
  - Salaries; no-poaching
  - Market division; client allocation
  - Restrictions on advertising and solicitation
  - Restrictions on innovative/desired services
- Exclusion of actual or potential competitors
  - Admission requirements
  - Discipline/license revocation
  - Defining boundary of profession; unauthorized practice of law

# Antitrust Basics

Antitrust law distinguishes among:

- Intra-firm restraints
- “Naked” restraints
- Restraints ancillary to a legitimate collaboration

# State Action Doctrine

- *Parker v. Brown* (1943): Federal antitrust laws do not reach actions of the State acting as sovereign. Legislature is sovereign.
- *Bates v. State Bar of Arizona* (1977): A state Supreme Court acting in a legislative capacity also is sovereign.
- *Hoover v. Ronwin* (1984): Conduct of state bar incidental to the Supreme Court's exercise of its sovereign authority is exempt.

# *Hoover v. Ronwin* (1984)

- Unsuccessful candidate for admission to legal practice sued members of Committee established by the Arizona Supreme Court to administer bar admissions process.
- Allegation that Committee adopted a grading formula designed to limit the number of lawyers in the state.
- Committee had discretion in administering and grading the bar exam, and in making recommendations to the Court.
- BUT, Court specified subjects to be tested, approved grading formula, and retained sole authority to grant or deny admission to practice of law.

# State Action Defense

- *Midcal* (1980): State action defense is available for the discretionary conduct of private parties where
  - Clear articulation
  - Active supervision
- *Town of Hallie* (1985): Municipality need not satisfy the active supervision requirement.

# *North Carolina State Board of Dental Examiners v. FTC (2015)*

- State Dental Board controlled by dentists
- Statute prohibits a person from engaging “in the practice of dentistry” except with a license issued by the state Dental Board; statute specifies acts constituting the practice of dentistry (1935).
- Modern teeth whitening techniques developed decades later.
- Board decided that teeth whitening was exclusive to dentists; directed non-licensed persons to cease and desist.

# *North Carolina State Board of Dental Examiners v. FTC (2015)*

“[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action immunity.”

# Who is an “active market participant”?

- Includes
  - a person licensed by the board
  - a person who provides any service that is subject to the regulatory authority of the board
- When is determination made
  - E.g., temporary suspension of license
- Method of selection not determinative

# Clear Articulation Requirement

- Defendant must show that the alleged anticompetitive conduct was taken pursuant to a “clearly articulated and affirmatively expressed . . . state policy” to replace competition with regulation. *Midcal*, 445 U.S. at 105.

# What constitutes “active supervision”?

- Supervisor must in fact review substance of decision, not merely procedures followed.
- Supervisor must have the power to approve, modify, or veto.
- Inquiry is flexible and context-dependent.

## Elements

- development of an adequate factual record
- a specific assessment of how board’s action comports with substantive standards established by the state legislature
- a written decision on the merits

# What are the required criteria of review?

- Substantive review
- Supervisor is not required to employ an antitrust/consumer welfare standard
- Supervisor should ensure that decision is in accord with the State's chosen policy
- Legislature cannot defer to the policy preferences of the Board
- A determination only that the Board has acted within its statutory discretion is insufficient

# Who may act as supervisor?

- Independent official: Supervisor may not be an active market participant?
- Potential supervisors:
  - Administrative agency or state official
  - Legislature
  - Court

# Active Supervision

- Q: What is being supervised?  
A: The exercise of policy discretion by market participants.
- Q: Why is supervision necessary?  
A: The antitrust court cannot trust that the actions of market participants further state policy.
- Q: What is the purpose or function of supervision?  
A: To ensure that the restraint at issue advances state policy, as opposed to private interests.
- Q: Why is this distinction important?  
A: Antitrust enforcement defers only to policy preferences of the state.

# *Noerr* Defense

- Bona fide (non-sham) efforts to petition or persuade the government to take actions that have the effect of harming competition are generally immune from antitrust liability.
  - *Lawline v. American Bar Ass'n* (7th Cir. 1992)