

ANTITRUST AND DUE PROCESS: STATE REGULATION OF OCCUPATION LICENSING

II. The New "State Action" Doctrine */

A. The Exemption

The so-called antitrust state action "exemption" or "immunity" doctrine had its genesis 39 years ago in the U.S. Supreme Court's decision in Parker v. Brown, 317 U.S. 341 (1943). In Parker the Supreme Court held that an anticompetitive marketing program adopted by a state legislature and implemented and enforced by state officials was beyond the purview of the Sherman Act. The Court reasoned that:

Nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51. Over the years, the terms "exemption" and "immunity" have come to be used as shorthand expressions for the Parker holding that Congress did not intend the Sherman Act to prohibit anticompetitive restraints imposed by states in the circumstances of that case.1/

For 32 years following Parker the Supreme Court consid-

ered no further state action immunity cases. During that period it was generally presumed that the doctrine exempted from antitrust scrutiny virtually all actions undertaken by governmental entities. Since 1975, however, the Court has heard a series of 7 state action cases in 8 years. As a result of the decisions in those cases it is now clear that not every anticompetitive restraint imposed by a governmental entity qualifies for antitrust immunity. Rather, an entity's anticompetitive activities seemingly may qualify for a state action exemption only when such conduct constitutes either: (i) the action of the state itself in its "sovereign" capacity; or (ii) action by an agent or instrumentality of the state in "furtherance or implementation" of state policy.^{2/}

1. Action of the state itself as sovereign

The anticompetitive conduct of a governmental entity apparently constitutes the action of the state itself only when the entity is the top echelon (i.e., legislature, supreme court, governor) of one of the three co-equal branches of state government and therefore is the repository of all the power of the state in the particular subject-matter area involved. Even in such situations, however, certain additional requisites seemingly must be met in order for the action to be undertaken in the state's "sovereign" capacity so that antitrust immunity exists. Specifically, the restraint

must be "clearly articulated and affirmatively expressed" as part of a comprehensive policy by the top-level entity (such as the state legislature) to displace competition in the particular subject-matter area (like the practice of a profession) with regulation or monopoly public service, and the policy must be "actively supervised" by that entity as policymaker or, presumably, by its delegatee (such as a state occupational licensing board). See Bates v. State Bar of Arizona, 433 U.S. 361 (1977).^{3/}

In order to be "clearly articulated and affirmatively expressed," such a legislative competition-displacement policy must be "forthrightly stated" and "clear in its purpose" to permit the anticompetitive restraint. Similarly, in order for "active supervision" to exist in such a situation, the legislature or its licensing board delegatee must play an active role in setting that policy and in controlling and pointedly re-examining its application. See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).^{4/} See also New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).^{5/} Absent those requisites, immunity apparently will not be found to exist even for restraints directly imposed by the state legislature.

2. Action by state agents or instrumentalities in furtherance or implementation of state policy

a. Governmental entities

Where anticompetitive conduct is engaged in by a lower-echelon state entity, such as an occupational licensing board, or by a political subdivision of a state, like a city, a requirement in addition to the foregoing apparently must be met in order for immunity to exist. The actions of the licensing board or city in imposing the restraint seemingly must be undertaken "pursuant to" the competition-displacement policy of the state legislature or other top-echelon state entity. See Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 840, 842 (1982) 6/; City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 413 (1978). 7/ See also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. at 105; New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. at 109.

In order to be undertaken "pursuant to" such a policy, the specific anticompetitive actions engaged in by a licensing board (or a city) must be either expressly or impliedly sanctioned by the state legislature which established the policy. See generally id. Express approval exists when there is specific, detailed legislative authorization for the board's (or city's) anticompetitive actions. See City of Lafayette, 435 U.S. at 413. In order for there to be implied authorization for the particular anticompetitive

actions, however, it must be found from the authority given the licensing board (or city) to operate in the particular subject-matter area that the legislature "contemplated" the kind of actions complained of, see id., so that such actions can be said to be "comprehended" within the powers granted the board (or city) by the legislature. See City of Boulder, 102 S. Ct. at 843.

In light of the preceding, certain minimum requisites appear necessary before the anticompetitive activities of a state occupational licensing board may constitute action by a state agent or instrumentality in "furtherance or implementation" of state policy and so qualify for antitrust immunity. First, the legislature must "clearly articulate and affirmatively express" particular anticompetitive restraints as part of a comprehensive state competition-displacement scheme. Second, the legislature or licensing board must itself "actively supervise" that scheme. Finally, the legislature must either expressly or impliedly "authorize" the board, in implementing the specified restraints, to engage in the particular anticompetitive actions at issue.

b. Private entities

The Supreme Court has never actually held that the anticompetitive activities of private parties can qualify for a state action exemption. In Goldfarb v. Virginia State

Bar, 421 U.S. 773 (1975), the Court found private entities not to have immunity for their anticompetitive actions, and in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), it ostensibly left open the question whether such entities ever could achieve the exemption. Nevertheless, in Cantor the Court did take note of the argument that it would be unjust to hold a private entity in violation of the antitrust laws where the entity did nothing more than obey the command of its state sovereign. Id. at 592.

Assuming arguendo the validity of the latter proposition, certain requisites would appear to be necessary before the anticompetitive activities of a private party could be said to constitute the action of an agent or instrumentality of the state in "furtherance or implementation" of state policy as required in order to achieve immunity. For one thing, in the context of a state occupational licensing board it would seem necessary for the board's anticompetitive activities to themselves first meet the requisites for immunity before private actions resulting from the board's regulation and licensure may qualify for exemption.g/ In addition and more importantly, it would appear that rather than merely being expressly or impliedly "authorized" by the state legislature, the anticompetitive actions of private party licensees must be "required" or "compelled" by that entity. See

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 9/;
United States v. Southern Motor Carriers Rate Conference,
672 F.2d 469, pet'n for en banc reh'g granted (5th Cir.
June 7, 1982).10/ See also Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976).11/

B. The Decisional Trend

In light of the foregoing explication of the case law it is apparent that, beginning with Goldfarb in 1975 and continuing through the present, the recent trend of Supreme Court decisionmaking consistently has been to tighten the standards for state action immunity. Accordingly, the ability of both state occupational licensing boards and private licensees to achieve antitrust exemptions for their anticompetitive activities has been significantly limited. Essentially, the Court has chosen to expand the application of the antitrust laws, which it has termed "policies of signal importance in our national traditions...."12/

The mere fact of exposure of licensing boards to antitrust scrutiny, however, does not mean that they necessarily will be found to be committing antitrust violations.13/ What such exposure does mean is that in general it will be left to neutral and impartial courts to administer, on a case-by-case basis, the fundamental national economic policy established by Congress in the antitrust laws 14/ in order

to make such determinations.

Some view this situation as opening the door to a new period of judicial legislation akin to the "substantive due process" era.^{15/} However, the Supreme Court has long adhered to a "settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies."^{16/} Thus, the courts are no more likely now to engage in judicial legislation under the antitrust laws than they have been for the 92 years since the Sherman Act was first adopted.

C. Prognosis

1. Substantive liability

a. Standards

Because of the increased exposure of licensing boards to antitrust scrutiny, however, it is reasonable to ask what substantive liability standards are applicable to them. The Supreme Court has not expressly resolved that question. Nevertheless, in Boulder the Court pointedly reiterated what it had previously stated in Lafayette: that activities which may seem anticompetitive when engaged in by private entities might take on a different character when undertaken by governmental units.^{17/} In this regard the Court intimated that, although under the rule of reason nothing other than competitive concerns may be considered in evaluating the

legality of private anticompetitive restraints, where govern-
mental anticompetitive action is involved consideration may
be given as well to the public policy reasons for the actions.^{18/}
Indeed, the Court may have been implying more -- that all
governmental restraints should be evaluated under the rule
of reason, even where the challenged action falls into cate-
gories traditionally reserved for per_se analysis.

Regardless how far the Court's implication extends,
governmental entities such as state licensing boards should
take great solace in these portions of the Court's Boulder
and Lafayette opinions. However, in the future such entities
will have to guard against the temptation to couch all of
their even potentially anticompetitive actions in public
policy boilerplate. Otherwise, the more lenient governmental
standard which has now twice been suggested by the Court
could easily become a blind for all sorts of anticompetitive
governmental actions having an asserted, but no real, public
policy justification.

b. Potential for liability

Even aside from the application of different substan-
tive standards, there are additional reasons why governmental
licensing entities are in fact unlikely to be found liable
under the antitrust laws. Generally speaking, in order to
violate section 1 of the Sherman Act -- under which most

anticompetitive governmental actions are challenged -- there must be joint action in the form of a "contract, combination or conspiracy."19/ Of course, anyone can allege a concert of action between a state occupational licensing board and one or more other public or private entities. Proving such joint action, however, is another matter entirely.

Proper governmental decisionmaking is truly unilateral in nature. Thus, when making their own decisions not in concert with any other entity, state regulatory authorities should be able to avoid liability under Sherman 1.20/ The courts simply are not likely to find the requisite joint action other than in instances where there are "under-the-table" deals between a governmental entity and another to disadvantage a third party.21/ It is only when anticompetitive actions are undertaken as the result of a true conspiracy between a governmental agency, such as a licensing board, and one or more entities, such as licensees, to disadvantage competitors that the antitrust laws seemingly will be, and preferably should be, found to apply.22/

Nevertheless, in situations where no "joint action" exists, it might be feared that unilateral governmental decisionmaking could be attacked by private entities under section 2 of the Sherman Act.23/ While it is true that the prohibitions of Sherman 2 against "monopolizing" and

"attempting to monopolize" can be violated by unilateral action, intent is an element of those offenses.^{24/} As noted above, the Supreme Court implied in Boulder and Lafayette that the public health, safety and welfare reasons behind a governmental entity's anticompetitive actions may be taken into consideration in determining the existence or absence of an antitrust violation.^{25/} Consideration of such factors, where they exist, would appear virtually certain to negate the anticompetitive intent necessary to establish an offense under section 2 of the Sherman Act.

Thus, for truly unilateral actions by state occupational licensing boards undertaken for sound reasons of public policy, the risk of actual antitrust liability under either Sherman 1 or 2 is virtually nonexistent.

2. Remedies

Still another issue not expressly resolved by the Supreme Court is that of the remedies available against those few governmental entities which actually may be found liable for violating the antitrust laws. In Boulder the Court noted but failed to confront the question.^{26/} Similarly, in Lafayette the Court expressly avoided deciding the question of remedies but, significantly, there indicated that remedies appropriate in the case of offenses by private parties are not necessarily equally appropriate in the case

of violations by governmental entities.^{27/} In this context, it is noteworthy that Justice Blackmun separately dissented in Lafayette over the potential exposure of governmental entities to treble damage liability, ^{28/} yet he provided the fifth vote in Boulder for a clear majority against immunity. Significantly, in the interim he authored the Court's decision that governmental entities are not liable for punitive damages in civil rights actions.^{29/}

Taken together, the foregoing factors clearly suggest that the Court will find governmental entities such as licensing boards to have nothing more than single damage exposure under the antitrust laws. Indeed, these factors may even presage a holding that governmental entities sued as antitrust defendants will have no damage exposure at all and can only be subjected to injunctive relief.

At first blush, avoiding the automatic imposition of double and treble damages against governmental entities would seem to make some sense because those penalties ultimately must be borne by taxpayers. However, governments frequently face and pay virtually unlimited punitive and consequential damages in the personal injury and contract areas, respectively, and those awards also must ultimately be paid by the taxpayers. Yet, if anything, the policies underlying the antitrust laws would seem to be more important than the

policies underlying torts and contract law.^{30/} Thus, as long as governmental entities continue to face damages of a punitive nature in these other, somewhat less significant areas, the reasons for eliminating the punitive aspect of antitrust damage liability do not appear compelling.

In any event, as in the civil rights area, it would seem essential that governmental entities, including licensing boards, continue to be subject to a minimum of single damage exposure under the antitrust laws in order to assure the continued existence of at least some deterrent influence on their behavior. If all that such governmental entities faced were the prospect of future injunctive relief, they would be free to err with impunity on the side of taking anticompetitive actions. Our fundamental national economic policy of competition ^{31/} would not be well served by such a result.

CONCLUSION

In light of the preceding it is apparent that, notwithstanding the decreased availability of the state action exemption, governmental entities such as state occupational licensing boards are not unduly threatened by the antitrust laws. Actions properly undertaken by such governmental boards can be expected to lead neither to treble damage expo-

sure nor even to substantive antitrust liability. In this regard, it is perhaps significant that apparently no governmental entity has ever paid damages for violating the antitrust laws.^{32/} Additionally, it is worth noting that the high cost of defending complex and protracted litigation is faced by governmental entities every day in the personal injury and contract areas, which seemingly are not as central to important national policies as is the regime of competition embodied in the antitrust laws. Moreover, to the extent that the potential for antitrust litigation can be said to have any "chilling" impact at all on the governmental decisionmaking process, that effect can largely be mitigated by simply having government counsel become as attuned to and as versed in antitrust law as they currently are in numerous other, perhaps less significant, areas of the law.^{33/}

In view of all the foregoing, even in the absence of state action immunity governmental entities today really have "nothing to fear [from the antitrust laws] but fear itself," at least as long as their decisions are truly unilateral in nature and are geared toward public health, safety and welfare concerns rather than economic regulation.

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1/ See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 n. 8 (1978).

2/ See Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 841 (1982).

3/ In Bates the Supreme Court held that restrictions on attorney advertising imposed by the Arizona Supreme Court, the ultimate body wielding that state's power to regulate the practice of law, were immune from antitrust challenge. The Supreme Court found that the restraints were clearly articulated and affirmatively expressed by the Arizona court as state policy and were actively supervised by that court. See 433 U.S. at 362.

4/ Midcal involved California's resale price maintenance scheme for wine. The Supreme Court held that program not to have antitrust immunity even though the state legislature's anticompetitive policy imposing the price restraint was clearly articulated and affirmatively expressed. The Court's decision turned on the absence of active supervision: the state alcoholic beverage control board merely enforced private decisionmaking as to prices and, among other deficiencies, did not itself establish the prices, review their reasonableness or monitor market conditions. See 445 U.S. at 105.

5/ Fox involved California's statutory program under which a manufacturer's existing automobile dealers in a geographic area could protest if the manufacturer sought to establish a new franchise in or relocate an existing franchise to that area. Once an objection was voiced, the statutory scheme required the state board's approval before such establishment or relocation could be implemented. The Court found immunity to exist because the program was a clearly articulated and affirmative expressed system of regulation designed to displace unfettered business freedom in the establishment and relocation of automobile dealerships, and because the board engaged in active supervision by making its own independent decisions based on objective criteria in the statute. See 439 U.S. at 109 & n. 14.

6 In Boulder the Supreme Court held that home rule municipalities' actions and policies are not equivalent to those of a state for antitrust immunity purposes because the Parker exemption is grounded in the dual system of government in this country under which states, but not cities, are sover-

eign. See 102 S. Ct. at 842. Accordingly, in the absence of any state policy on the subject, the Court found no immunity for the city's action in imposing a moratorium on cable t.v. expansion. See id. at 343.

7/ In City of Lafayette the Supreme Court ruled that cities are "persons" subject to the antitrust laws and that they do not automatically have Parker immunity just because they are governmental entities. Consequently, the Court affirmed a remand for a factual determination whether the general statutes there at issue, which empowered cities to operate utilities, also authorized the kinds of anticompetitive actions there alleged.

8/ It would be nonsensical for a board whose own anticompetitive actions are not immune to be able to bootstrap private anticompetitive actions into immunity. Prevention of such a result would not appear to be unfair to private entities for, if in doubt as to their immunity status, they could always seek an advance judicial determination in the form of a declaratory judgment.

9/ Goldfarb involved an attorneys' minimum fee schedule adopted by a county bar association and enforced by the state bar association. Because neither the Virginia Supreme Court nor any statute required the imposition of such fee schedules, they were not "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, and immunity was determined not to exist.

10/ In Southern Motor Carriers, because numerous state statutes authorized, but did not compel, collective ratemaking activity by private entities in the trucking industry, the statutes were held insufficient to confer immunity.

11/ Cantor involved a light-bulb exchange program proposed by a private utility as part of its tariff and merely approved by the state public utility commission in the course of its regulatory oversight. The Court found no immunity because the state was insufficiently involved in the light bulb program and had no essential interest in it as part of the overall regulatory scheme.

12/ City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 400.

13/ See Community Communications Co. v. City of Boulder, 102 S. Ct. at 843 n. 20; id. at 844-45 (Stevens, J., concur-

ring).

14/ See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 406 & n. 32.

15/ See, e.g., Areeda, Antitrust Immunity for "State Action" after Lafayette, 95 Harv. L. Rev. 435, 453 (1981).

16/ Cantor v. Detroit Edison Co., 438 U.S. at 603 (plurality opinion of Stevens, J.).

17/ See 102 S. Ct. at 843 n. 20, citing 435 U.S. at 417 n. 48.

18/ See 102 S. Ct. at 843 n. 20, comparing National Society of Professional Engineers v. United States, 435 U.S. 679, 687-92 (1978) (only net competitive effects may be considered in evaluating legality of private restraints), with Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (anticompetitive effects not necessarily sufficient to invalidate governmental restraints). See also 102 S. Ct. at 844, 844-45 n. 2 (Stevens, J., concurring) (citing Cantor v. Detroit Edison Co., 428 U.S. at 585-92, 591 n. 24, 601 & n. 42, as supportive of differing liability standards for official and private action).

19/ See 15 U.S.C. sec. 1.

20/ See, e.g., Greyhound Rent-A-Car, Inc. v. City of Pensacola, 1982-2 Trade Cas. (CCH) para. 64, 761 (11th Cir. May 18, 1982), Mason City Center Assocs. v. City of Mason City, 671 F.2d 1176 (8th Cir. 1982), aff'g 468 F. Supp. 737 (N.D. Iowa 1979), and Omega Satellite Products Co. v. City of Indianapolis, 536 F. Supp. 371 (S.D. Ind. 1982) (all finding only unilateral governmental action and so no antitrust liability).

21/ Compare cases cited supra note 20 with cases cited infra note 22.

22/ See, e.g., Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D. Tex. 1981), appeal docketed, No. 81-2335 (5th Cir. Aug. 25, 1981), and Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) para. 64, 029 (D. Colo. Oct. 9, 1980), appeal docketed, No. 80-2332 (10th Cir. Dec. 19, 1980) (finding joint action sufficiently proved or alleged, respectively, as a result of nefarious "deals").

23/ 15 U.S.C. sec. 2.

24/ See, e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Griffith, 334 U.S. 100 (1948).

25/ See supra note 18.

26/ See 102 S. Ct. at 843 n. 20.

27 See 435 U.S. at 401-02.

28/ Id. at 442-43.

29/ City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981).

30/ The Supreme Court has termed the antitrust laws the "Magna Carta of free enterprise" and essential "to the preservation of economic freedom and our free enterprise system" United States v. Topco Associates, 405 U.S. 596, 610 (1972).

31/ See Gulf States Utilities Co. v. FPC, 411 U.S. 747, 759 (1973).

32/ Cf. Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 994 (S.D. Tex. 1981) (damage award against city set aside by trial court due to inconsistency in jury's answers to special interrogatories).

33/ Many, if not most, states today have antitrust units in the offices of their attorneys general, and those units generally possess a good deal of antitrust expertise on which state regulatory boards can draw. See generally 4 Journal of Corporation Law 547 (Spring, 1979).
