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 ≠ 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


• *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.

- 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)