

PREPARED STATEMENT OF
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ANTITRUST MODERNIZATION COMMISSION

on

THE STATE ACTION DOCTRINE

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Thank you for inviting me to speak today. I am Maureen Ohlhausen, the Director of the Office of Policy Planning at the Federal Trade Commission. The staff of the Federal Trade Commission is pleased to respond to your request for comments on the state action doctrine. This statement and my responses to questions are those of the staff and do not necessarily represent the views of the FTC or any individual Commissioner.

As you know, in recent years the FTC has been examining certain state and local regulations that may restrain competition. This effort has necessarily entailed a re-examination of the state action doctrine, which was first articulated by the Supreme Court in *Parker v. Brown*.¹

This audience is likely more familiar than most with the basics of the state action doctrine, so I will not dwell on them. I will simply note that *Parker* is rooted in federalism. The Supreme Court reasoned that, in passing the Sherman Act, Congress intended to protect

¹ 317 U.S. 341 (1943).

competition, not to limit the sovereign regulatory power of the states. The Court held, therefore, that regulatory conduct that could be attributed to “the state itself” is immunized from antitrust scrutiny.

This rule, and its objectives, seem clear enough at first, but become substantially less clear when applied to delegations of state authority to private parties. It is clear, for example, that the Sherman Act was not intended to reach the conduct of a state legislature. It is less clear that it was not intended to reach, for example, the conduct of a board of professional licensure, which may be dominated by market participants with a vested financial interest in particular regulatory outcomes.

The Supreme Court provided some guidance on this issue with its 1980 opinion in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*² The *Midcal* case established two important limitations on the scope of state action immunity, both of which are intended to ensure that the conduct at issue is truly that of “the state itself.” First, the proponent of immunity must demonstrate that the conduct in question was in conformity with a “clearly articulated” state policy. And second, the proponent must demonstrate that the state engaged in “active supervision” of the conduct.

Some courts have expanded the protection of the state action doctrine well beyond its original scope. To address FTC concerns with over-expansion, in June 2001, an FTC State Action Task Force began to re-examine the scope of the doctrine. The Task Force was charged with making recommendations to ensure that the state action exemption remains true to its doctrinal foundation of protecting the deliberate policy choices of sovereign states, and is

² 445 U.S. 97 (1980).

otherwise applied in a manner that promotes competition and enhances consumer welfare. The Task Force Report was issued in September 2003.³

The Report concluded that, since *Parker*, the scope of the state action doctrine has increased considerably. Among other possible explanations, the work of the Task Force suggests that steady erosion of existing limitations on the doctrine has been a contributing factor. Both the “clear articulation” and “active supervision” requirements have been the subject of varied and controversial interpretation, sometimes resulting in unwarranted expansions of the exemption.

With respect to “clear articulation,” this trend is best exemplified by the willingness of some courts to infer a state policy of displacing competition from a legislative grant of general corporate powers.⁴ States will often empower subsidiary regulatory authorities to enter into contracts, make acquisitions, and enter into joint ventures. Although it is clear that the exercise of such powers merits no special antitrust treatment in the private sector, some courts have reached the opposite conclusion when the powers are granted through legislation. Thus, for example, some courts have concluded that exclusive contracts are the foreseeable result of the general power to contract.⁵ Still others have concluded that the exclusion of competitors is the foreseeable result of the general power to make acquisitions.⁶

³ Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) (“FTC State Action Report”) available at <<http://www.ftc.gov/os/2003/09/stateactionreport.pdf>>.

⁴ Id. at 26-34.

⁵ See *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1393 (5th Cir. 1996); *Independent Taxicab Drivers’ Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, 613 (5th Cir. 1985).

⁶ See *Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961, 964 (10th Cir. 1987).

With respect to “active supervision,” the problem has been slightly different. Because of a lack of guidance as to what this factor actually requires, it has not functioned as a significant limitation on grants of immunity. In *Midcal*, for example, the Court held that a state must engage in a “pointed re-examination” of regulatory conduct. In *Patrick v. Burget*,⁷ the Court clarified that a state is required to “exercise ultimate control.” And, most recently, in *Federal Trade Commission v. Ticor Title Insurance Co.*,⁸ the Court noted that a state must exercise “independent judgment and control.” Without guidance on how to implement these various verbal formulations in terms of actual state regulatory procedures, the “active supervision” requirement has continued to have a minimal impact.

To address these problems with the state action doctrine, the Task Force Report recommended clarifications to bring the doctrine more closely in line with its original objectives.

These clarifications include:

- Re-affirm a clear articulation standard tailored to its original purposes and goals.
- Clarify and strengthen the standards for active supervision.
- Clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision.
- Encourage judicial recognition of the problems associated with overwhelming interstate spillovers.
- Clarify and strengthen the market participant exception to *Town of Hallie v. City of Eau Claire*.⁹

⁷ 486 U.S. 94, 101 (1988).

⁸ 504 U.S. 621, 634 (1992).

⁹ 471 U.S. 34 (1985).

- Undertake a comprehensive effort to address emerging state action issues through the filing of *amicus* briefs in appellate litigation.

The Commission is not a newcomer to the state action area. The competitive impact of state regulations has long been a focus of the Commission's antitrust enforcement agenda. Continuing this tradition, the Commission's litigating staff, working closely with the Task Force, have filed a number of cases that involve the Task Force's recommendations.

One such example is the case the Commission filed against the South Carolina Board of Dentistry.¹⁰ The complaint there alleges that the Board unlawfully restrained competition in the provision of preventive dental care by promulgating an emergency regulation that unreasonably restricted the ability of dental hygienists to deliver preventive services, including cleanings, sealants, and fluoride treatments, on-site to children in South Carolina schools. The complaint also alleges that the Board's action was undertaken by self-interested industry participants with economic interests at stake. Almost all of the Board members are dentists, and the preventive care in question involves services that both dentists and dental hygienists are trained to perform. Finally, the complaint alleges that the Board's action was contrary to state policy and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition.

In response to the Commission's complaint, the Board filed a motion to dismiss on state action grounds. This argument was ultimately rejected by the Commission, however, which

¹⁰ *South Carolina State Board of Dentistry*, Dkt. No. 9311 (July 30, 2004) (Opinion of the Commission) available at <<http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf>>.

concluded that the Board could not satisfy the “clear articulation” requirement. That decision is currently on appeal to the Fourth Circuit.

The Commission’s recent series of household goods movers cases has also raised significant state action issues. To date, the Commission has filed a total of six cases, alleging anticompetitive conduct by movers’ associations in Indiana, Minnesota, Iowa, Alabama, Mississippi, and Kentucky. The sixth, and most recent, of these – the *Kentucky Movers* case¹¹ – ultimately proceeded to Part III litigation, where Commission staff prevailed before the ALJ. On appeal to the full Commission, FTC staff again prevailed, with the case resulting in a written opinion concluding that the “active supervision” requirement simply had not been satisfied. That case is currently on appeal to the Sixth Circuit.

The sole matter at issue in the *Kentucky Movers* case was whether the Kentucky Association had satisfied the “active supervision” prong. The Association did not dispute the fact that, absent state action protection, its conduct constituted horizontal price fixing in violation of the antitrust laws. Likewise, Complaint Counsel did not dispute the fact that the Association had satisfied the “clear articulation” prong, as Kentucky law expressly contemplates collective ratemaking by household goods movers.

The Kentucky Association consists of 93 competing movers and functions as a tariff filing agent. Under Kentucky law, every mover is required to file a tariff containing its rates and charges, either on its own or through a tariff publishing agent, with the Kentucky Transportation Cabinet (“KTC”). The tariffs established rates for local moves, as well as additional services,

¹¹ *Kentucky Household Goods Carriers Ass’n, Inc.*, Dkt. No. 9309 (June 22, 2005) (Opinion of the Commission) available at <<http://www.ftc.gov/os/adjpro/d9309/050622opinionofthecommission.pdf>>.

such as packing, moving particularly bulky items, and overtime. Once the tariff is filed, the mover must charge the rates therein, and may only offer discounts on those rates with the approval of the KTC. Rather than assisting its members in filing their tariffs individually, however, the Association facilitated collective ratemaking. Any member's proposal for a rate increase was submitted to a majority vote, establishing a collective rate binding on even those members that opposed it.

The record showed that in the ten-year period from 1992 to 2002 alone, the Association had proposed nine general rate increases. The Association also had filed tariff supplements adding new categories of rates – including, for example, higher peak season rates (to which all but two of its members adhered). The KTC had nearly always approved these rate increases in their entirety without any modification. Yet, the KTC employee responsible for the evaluation of the proposed rate increases indicated that he conducted this evaluation based on: 1) his own experience; 2) conversations with movers; and 3) his review of various publications, such as the *Wall Street Journal*. Thus, the type of information that the KTC obtained for its evaluation was only of a very general nature.

The Commission concluded that this process fell far short of satisfying the active supervision requirement. Although the statute that authorized the KTC to establish procedures for collective ratemaking provided that the procedures must “assure that respective revenues and costs of carriers . . . are ascertained,”¹² the Commission found that the KTC had no formula or methodology for determining whether the Association's collective rates comply with the statutory standards, and that while at one time, the KTC had performed “uniform cost studies”

¹² KY. REV. STAT. ANN. § 281.680(4).

and calculated operating ratios for household goods carriers, it had not done so for over two decades. The Commission also found the KTC did not even obtain the data – including the cost and revenue data specified in the statute – that would enable it to assess the reasonableness of the Association’s rates. Finally, the Commission determined that the Kentucky program lacked the procedural elements – such as public input, hearings, and written decisions – that often are important indicators of active state supervision.

Accordingly, in a 5-0 vote, the Commission affirmed the ALJ’s decision on the grounds that, in light of *Midcal*, *Patrick*, and *Ticor*, the KTC had not satisfied the active supervision requirement.

This concludes my prepared testimony. There is certainly more that could be said on the subject, but I have attempted to tailor my remarks to the time allotted. I look forward to your questions.