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The Inadequacy of Attorney General Oversight as a Guard against Antitrust Liability of Oklahoma Licensing Boards

Mike Davis

"Every contract, combination… or conspiracy, in restraint of trade or commerce among the several States… is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony…"

- Sherman Act, §1

All that is needed to make an otherwise-illegal conspiracy legal under federal law is for the conspirators to convince their state legislature to pass a law requiring a restraint of trade.

Oklahoma licensing boards are part of a bad policy. Licensing does very little to protect consumers while limiting the number of service providers in a given industry. This monopolization raises the prices of important services and effectively redistributes wealth from low-income consumers to higher-income licensees.[1] Worse, licensing limits the ways people are allowed to earn a living. Nevertheless, federal antitrust law, which normally has a great deal to say about practices that limit competition, has a loophole a mile wide.[2] All that is needed to make an otherwise-illegal conspiracy legal under federal law is for the conspirators to convince their state legislature to pass a law requiring a restraint of trade. State legislators have, by and large, happily obliged in the form of licensing schemes, which almost universally involve licensing boards or commissions. Boards regulate everything from the practice of law to the practice of music therapy.

But there is a relatively new wrinkle: licensing boards may face liability under federal antitrust law if they are composed of members of the profession they regulate *and* they are not actively supervised by the state. In 2015, the Supreme Court held that the North Carolina State Board of Dental Examiners could be liable for their anticompetitive actions under federal antitrust law.[3] The board had been issuing cease and desist letters to non-dentist teeth whiteners, even though state law did not indicate that teeth whitening fell under a dentist's scope of practice. The court held that the board was not entitled to immunity from antitrust law for these actions.

So, is there potential for Oklahoma licensing boards to face liability for their anticompetitive practices? In short, yes.

Antitrust Liability Generally

Initially, the Sherman Act was intended to codify common law jurisprudence surrounding unfair trade practices.[4] Acts occurring between two or more parties that work to restrain free trade are illegal. There are two categories of activity that restrain trade: per se violations and those analyzed under a "rule of reason" standard.[5]

Per se violations include such acts as agreeing with competitors not to sell goods below a certain price (price fixing), boycotts organized among competing firms (concerted refusal to deal), and dividing territory with an agreement not to compete in another firm's territory (horizontal market division agreements). The courts have interpreted antitrust laws to ban these activities outright, reasoning that they are so harmful to an economy that no proof of higher prices or anticompetitive effect is needed. All a plaintiff or prosecutor need prove is that an act occurred and that it fits within one of the per se categories.

Those acts that are not *per se* violations but which may still violate federal antitrust law are evaluated under the rule of reason, which, in simple terms, balances the likely anticompetitive and pro-competitive outcomes of the action to determine

Mike Davis *is Research Fellow at the 1889 Institute and is Scholar-in-Residence at the Institute for the Study of Free Enterprise at Oklahoma State University.*

1889 Institute
1401 N. Lincoln Boulevard, Suite 175
Oklahoma City, OK 73104
1889institute.org

This paper, in its entirety, can be found at
www.1889institute.org

whether liability will attach.[6] Examples of activities falling under a rule of reason analysis include mergers, maximum and minimum resale price maintenance, and vertical restraints, among others.[7]

Antitrust law has both criminal and civil components. *Per se* violations are often prosecuted under the Sherman Act, while civil enforcement is far more common for those falling under the rule of reason. Criminal punishment can be as high as 10 years in prison and up to $1,000,000 in fines per violation. Treble damages are available to a private party injured as a result of an antitrust violation.[8] Injunctions and other equitable remedies are also available.

Immunity of State Action from Antitrust

Not every anticompetitive activity falls under the jurisdiction of federal antitrust law. In particular, there is broad immunity for even clearly anticompetitive action by state governments. Federal courts have determined that the principles of federalism override the federal government's interest in preserving a competitive marketplace, so even policies that monopolize a given industry within a state must be suffered. The Sherman Act, and even the later Clayton Act, were passed in an era when the federal government was still one of limited, enumerated powers — that is, federal power was only recognized when there was a specific constitutional grant. In all other instances, the states, or the people, were supreme. In recognition of this, federal courts have immunized acts required by state law or pursuant to state policy. This in spite of the fact that state-granted monopolies are among the most pernicious, tenacious, and durable anticompetitive institutions in existence.[9]

This delicate balance — on the one hand, those policies that have the potential to greatly harm the economy, and on the other, the states' right of self-determination, even to their own detriment — must be closely guarded. Both objects are too important to allow anything but the optimal division. To that end, courts have developed a robust, if complicated, rubric for what qualifies for the exemption. In addition to those who can claim sovereign immunity for their acts, Parker immunity insulates certain agents of the state from certain anticompetitive acts.[10]

Parker immunity takes its name from *Parker v. Brown*, a case involving a California policy of rationing raisin crop output during the depression.[11] The doctrine has been further developed in several subsequent cases, most recently in 2015, when the FTC brought an action against the aforementioned North Carolina Board of Dental Examiners. In general, Parker immunity applies when state policy, usually expressed in statute, requires the anticompetitive activity. So, when a state legislature decides to artificially limit supply or raise prices, "the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism."[12] "The Parker decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."[13]

However, that immunity has been narrowly construed since its inception. As far back as *Parker* itself, the court noted, "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[14] It later elaborated that "while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor."[15]

The court has a two-part analysis to determine whether a given anticompetitive act falls under *Parker* immunity. First, it asks whether "the State has articulated a clear policy to allow the anticompetitive conduct," that is, whether the state has passed a law or regulation that allows the anticompetitive behavior.[16] This analysis has been narrowed significantly over the years, now limited to those anticompetitive acts *required* by state policy. Courts will not allow states to immunize their citizens' schemes from federal antitrust liability simply by saying that certain acts are permissible under state law.[17] Under the supremacy clause, federal law is superior to state law. Rather, for Parker immunity to attach, the state must affirmatively *create* an enforceable anticompetitive policy.[18]

The second step in an analysis of Parker immunity is to ask whether there is "active supervision" of the non-sovereign agents by state actors. A statute specifically requiring gas producers to sell oil at a fixed price would be as unassailable as it would be unwise, since the legislature, acting as sovereign, would be the one requiring oil producers to fix their prices. On the other hand, a statute creating a state board of oil regulation composed of oil industry executives, and giving the board broad authority for regulating the practice of oil drilling, would not be enough sovereign action to immunize subsequent price fixing by the board.[19]

The state must exercise sufficient oversight to ensure that "the anticompetitive scheme is the state's own."

A non-sovereign actor, like a licensing board composed of market participants, must have active supervision by a disinterested government official. This is more than a rubber stamp. The disinterested official must have the power to overrule and reverse the decisions of the private actors they are supervising.[20] This means that something like a non-binding review of a particular action is likely to fall short of the kind of actual oversight federal antitrust law demands.

Lack of Anti-trust Immunity for Oklahoma Licensing Boards

What does this mean for Oklahoma licensing boards? Is there a likelihood that licensing board members could be held civilly liable for their anticompetitive acts? Using the rubric outlined above, we can see whether Oklahoma boards meet the criteria for Parker Immunity.

Sovereign Actors?

Licensing boards are not sovereign actors. The Supreme Court said as much in *North Carolina Board of Dental Examiners*, when it found that the dental board was not entitled to immunity. It

follows that licensing boards with similar structures would not be sovereign actors. Though not explicitly stated in case law, it would follow that only the three traditional branches of government, acting in their traditional capacities, would be sovereign actors. A single executive appointee exercising judicial or legislative power might not qualify. What is certain is that boards like Oklahoma's licensing boards are not sovereign actors. They are, like the dental examiners, more akin to a trade group with the might of government at their backs. They are unelected, politically unaccountable, and have a pecuniary interest in the rules they impose.

There are two components to active supervision: 1) The supervision must be by a disinterested and independent state actor, and 2) The supervisor must have authority to veto the market participant's actions.

Market Participants?

To date, 1889 Institute has analyzed 18 licensing boards, each of which is controlled by active market participants.[21] This seems to be the formula for Oklahoma. There may be some boards that contain a majority of non-market participants, but they would appear to be the exception, not the rule.

While the case law lacks development on the issue of supervision of non-sovereign actors who are *not* market participants, it is quite clear that market participants must be actively supervised if they are to enjoy Parker immunity for their anticompetitive conduct. Most Oklahoma boards fall into this category: unless they are actively supervised, any anticompetitive actions they take that are not *required* by statute are unlikely to be immunized.

Active Supervision?

Since they are non-sovereign actors, comprised of market participants, Oklahoma's boards must be "actively supervised" to receive Parker immunity. Are Oklahoma boards actively supervised? The attorney general reviews any adverse action taken by a state licensing board and offers a written opinion. These Board Supervisory Letters consider questions of both law and fact, distinguishing them from traditional attorney general opinions which are binding unless and until a court sets them aside, but only take up pure questions of law.[22] A 2016 executive order directs the boards to accept and implement any recommendation in these opinions, or risk losing their seat.[23] However, the order does not provide a remedy to a licensee if the licensing board goes rogue.

But, does this constitute active supervision? It likely falls short for four reasons: 1) No single sovereign actor has power to overrule a board decision; 2) The executive order, since it originates with the executive branch, lacks sufficient policymaking authority to make the anticompetitive scheme the state's own; 3) The office of the attorney general has a conflict of interest, since it represents the licensing boards in lawsuits and advises them on legal matters; and 4) The governor cannot force the attorney general to review board actions, potentially leaving agencies with absolutely no oversight.

No Single Sovereign Actor Has Power to Overrule Board Decisions

Neither the attorney general nor any other politically accountable actor has the power to actually overrule a board decision. Instead, it would take multiple actors working together. The attorney general can recommend that the agency modify or rescind the action. But without statutory or constitutional authority, no sovereign actor can overrule a board; the executive order merely makes failure to follow the recommendations grounds for removal. Should the agency decline to follow the attorney general's advice, the appointing authority (usually the governor) has cause to remove the offending board members, but is not required to do so.

Since the legislature created the boards, and gave many of them protection from removal except for "good cause," the governor may not have the authority to determine that failure to accept the attorney general's recommendations constitutes good cause. What good would it do to shield a board from the governor with "good cause" protection, and then vest the governor with power to determine "good cause"? The protection was meant to insulate the board from the governor's influence. It is nonsensical to assume that the governor has inherent power to defeat such protection. However, even assuming that failure to follow attorney general recommendations does constitute good cause, whether by the power of the executive order or not, the current level of supervision over licensing boards is insufficient.

Suppose the appointing authority decides to remove the members and appoint replacements. In most cases those replacements are also required to be active market participants. It may be in their interest to uphold the original board decision. It is unclear from the executive order whether a new board, which did not initiate the offending action, would also be removable for failing to rescind it.

Even if the new board members can be removed, the cycle of appointing and removing market participants might well continue until there are no qualified board members available. At that point, the offending action still has the force of law. This chain of events is not the same as authority to veto, which, regardless of any consequences for board members, would immediately rectify the offending action. If an Oklahoma board refuses to license a qualified out of state competitor, only a new act of the legislature could remedy the situation.

This may be why, in practice, Board Supervisory Letters have the appearance of mere guidance.[24] A typical supervisory letter reviews and summarizes the action as described by the board, and offers a reference to the statute that authorizes such an action. While the letters might often result in a board reversing its position at the attorney general's urging, legally there is considerable distinction between the power to overrule and the power to recommend. For this reason alone the attorney general's supervision likely falls short for purposes of Parker Immunity.

The Executive Order Lacks Policymaking Authority to Make the Anticompetitive Scheme the State's Own

In Oklahoma, the governor is not vested with the state's general policymaking power. That power lies with the legislature. If the state desires anticompetitive policy, such policy must originate from the legislature's authority. If the legislature wants to delegate that authority to a licensing board (assuming such delegation poses no constitutional separation of powers issues), it must ensure the board is actively supervised.

Failure to ensure active supervision may stem from a simple oversight or from indifference, but it may be a conscious decision by the legislature to allow boards to face liability for anticompetitive actions that go beyond the bare requirements of statute. Regardless of how the problem arose, the executive branch lacks authority to resolve it. Yet they have attempted to do so, seizing additional power in the process. The legislature has had several years in which to ratify the executive's scheme, and has, so far, declined to do so.

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The Attorney General Has a Conflict of Interest

Licensing boards are often tasked in statute with referring transgressors to the attorney general for prosecution. The attorney general is also required to represent boards in court, either when a board is not statutorily authorized to hire outside counsel, or when it declines to do so.[25] The nature of this relationship makes the attorney general's office inapposite to the task of actively supervising these boards. It is difficult to serve as both supervisor and legal counsel.

The Governor Lacks Authority to Force the Attorney General to Review Board Actions

Assuming the governor can force agencies to submit their actions to the attorney general for review, nothing in the executive order purports to require the attorney general to review agency actions — that is, the executive order demands the boards submit their actions to the attorney general for review, but does not require the attorney general to review board actions. Even if it did, the power structure of the State of Oklahoma would not allow an executive order to bind the attorney general in such a way. Oklahoma has a divided executive. The attorney general is elected by the same process as the governor, and subject to the same electoral accountability. Since the attorney general does not depend on the governor for his job, only a statute or constitutional provision could bind him to the governor's orders. For purposes of reviewing board actions, no such authority exists.

This leaves licensing board members in danger of being replaced if they fail to follow attorney general recommendations, but nothing in law requires those recommendations to be produced in the first place. A scheme holding licensing board members' seats over their head in order to force compliance with directives that may never materialize falls well short of any meaningful interpretation of "active supervision."

Any one of these reasons alone would be enough to cast doubt on the sufficiency of the active supervision exercised over Oklahoma's licensing boards. Taken together, it seems clear that Oklahoma's licensing boards are not actively supervised.

Potential Liability

Since they are non-sovereign actors, wherein market participants constitute a controlling majority, and they are not actively supervised, most Oklahoma boards are at risk of antitrust liability for anticompetitive conduct that goes beyond the bare requirements of the relevant statute. The boards themselves, and individual board members alike, are at risk of everything from equitable remedies such as an injunctions against certain future actions, civil penalties up to treble damages, and criminal liability.

One solution, is raising the level of the attorney general's involvement from advisory to true active supervision. While such a policy would make licensing board members feel more secure, it would do nothing to improve Oklahoma's economic landscape. Instead, there are ways to cure the liability and improve Oklahoma's economy.

A Better Way Forward

One potential legislative solution would be to change the composition of all licensing boards so that no one who is a practitioner or close relative of a practitioner could serve on a licensing board. This would reduce the boards' exposure to antitrust liability. It would also reduce the appearance of self-dealing, strengthening the trust Oklahomans put in their elected and appointed officials. Having a disinterested board better fits with the claim that licensing is intended to benefit the general public rather than the practitioners of the licensed occupation, while also reducing opportunities for practitioners to engage in the kinds of self-dealing federal antitrust law was designed to prevent. However, this solution does nothing to lighten the burden licensing puts on consumers and would-be practitioners.

The Best Way Forward

Oklahoma has the opportunity to become a leader in replacing Occupational Licensing with something better. The 1889 Institute has outlined a solution to the problem of occupational licensing,

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including a model bill, in its paper *A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing.*[26] It would have the state register multiple private certification organizations, which compete for professionals and the attention of consumers.

Private certification preserves the one and only valuable aspect of licensing, the shorthand information distinguishing competent practitioners from those who fly-by-night, while discarding the market distortions of monopolized industry. The law keeps certifiers honest by allowing competing certifiers to enter the market as they find opportunity. Private certifiers are conditionally given the protection of criminal fraud laws to lower the cost of defending their credentials. Licenses are not eliminated; instead, anyone certified by a qualified certifier is exempted from the relevant licensing laws. Since private certifiers would compete with state licenses, state licensing boards would no longer be anticompetitive, therefore banishing the specter of federal antitrust liability, preserving the important signaling effects of licensing and certification, and freeing entrepreneurs to produce without the weight of the state's boot on their back.

End Notes

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1 *The Need to Review and Reform Occupational Licensing in Oklahoma*, Byron Schlomach, 1889 Institute, September 2016, https://1889institute.org/the-need-to-review-and-reform-occupational-licensing-in-oklahoma/.

2 Federal antitrust law includes the Sherman Act, the Clayton Act, and the FTC act, among others. They are almost interchangeable, and often considered parts of a whole. They are also distinct from the antitrust laws of the several states. For the sake of simplicity, this paper will primarily refer to federal antitrust law as a whole body of law.

3 *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494, (2015), https://supreme.justia.com/cases/federal/us/574/494/.

4 Hartley, James E. *The Rule of Reason*, (United States: ABA Section of Antitrust Law, 1999) 16.

5 There is also a hybrid "quick look" analysis, which is used when an activity is not a *per se* violation, but also shows very little in the way of procompetive effect.

6 Phillip Areeda, Louis Kaplow, Aaron S. Edlin, *Antitrust Analysis: Problems, Text, and Cases*, (New York: Aspen Casebook, 2013), 113-14.

7 Hovenkamp, Herbert J., "The Rule of Reason," *Faculty Scholarship at Penn Law*, (2018), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty_scholarship.

8 Areeda, *Antitrust Analysis*, 46-61, 407-09.

9 Thomas J. DiLorenzo, "The Myth of Natural Monopoly," *The Review of Austrian Economics* Vol. 9, No. 2, (1996): 45, https://cdn.mises.org/rae9_2_3_3.pdf.

10 "For purposes of Parker, non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *Dental Examiner*s, at 101.

11 *Parker v. Brown*, 317 U.S. 341 (1943), https://supreme.justia.com/cases/federal/us/317/341/.

12 *Dental Examiners,* at 101.

"The Parker decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985)

13 *Southern Motor Carriers*, at 56.

14 *Parker*, at 351.

15 *Dental Examiners*, at 101.

16 *Dental Examiners*, at 103.

17 "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980), https://supreme.justia.com/cases/federal/us/445/97/.

18 "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 790 (1975), https://supreme.justia.com/cases/federal/us/421/773/#790.

19 "Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control." *Dental Examiners,* at 115-16.

20 "Our decisions make clear that the purpose of the active supervision inquiry... is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992), https://supreme.justia.com/cases/federal/us/504/621/#tab-opinion-1959037.

"For purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign. Rather, anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws. An antitrust attack falls under Parker only when it challenges a decision of the sovereign and not the decision of the state bar which indisputably is not the sovereign." *Hoover v. Ronwin*, 466 U.S. 558, 591 (1984), (Berger, C.J., Dissenting) (Internal citations omitted) https://supreme.justia.com/cases/federal/us/466/558/.

21 An argument could be made that the State Board of Examiners of Perfusionists is not controlled by active market participants. The board consists of four perfusionists, two doctors, and two lay members. Given that doctors are the primary employer of perfusionists, it would be shortsighted to think they are not active participants in the market for perfusionist services, but since they are not themselves perfusionists, the claim might not be laughed out of court.

22 74 O.S. § 18b (A(5)), https://casetext.com/statute/oklahoma-statutes/title-74-state-government/74-18b-duties-of-attorney-general-counsel-of-corporation-commission-as-representative-on-appeal-from-commission.

23 Okla. Admin. Code § 1:2015-33

24 "For boards made up of members of the regulated profession, certain actions—such as disciplining other members or excluding them from the profession altogether—may have anti-competitive effects. To ensure that this type of action is consistent with the board's statutory authority, the Office of the Attorney General provides written guidance for all such decisions." https://www.oag.ok.gov/board-supervisory-letters.

25 See e.g. 51 O.S.§51-161.1.

26 Byron Schlomach, Christina Sandefur, and Murray Feldstein, *A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing*, November 2018, https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d0kmu3dp_669551.pdf