

**Antitrust Modernization Commission Hearings
Summary of Immunities and Exemptions: The State Action Doctrine**

September 29, 2005

The Antitrust Modernization Commission held hearings on September 29, 2005 in order to analyze the issue of antitrust immunities and exemptions. The panel represented members of the legal profession with varying perspectives on the issue. The hearings focused primarily on whether the State Action Doctrine and the “active supervision” prong of the doctrine should be clarified or changed. In addition, the panelists were asked to weigh in on the FTC State Action Task Force’s 2003 Report, which recommended clarification and re-affirmation of the doctrine.

The State Action Doctrine is rooted in the principles of federalism and shields certain anticompetitive conduct by the state from federal antitrust scrutiny when the conduct is: 1) in furtherance of a clearly articulated and affirmatively expressed state policy and 2) actively supervised by the state. The 1992 Supreme Court decision in *FTC v. Ticor Title Insurance Company* addressed the “active supervision” prong of this doctrine, holding that a party claiming antitrust immunity must demonstrate that state officials exercised “sufficient independent judgment and control so that the details of the [regulation are] . . . the product of deliberate state intervention.”¹ In effect, the question that sparked most debate and uncertainty was related to the second prong – the level of state participation.

The panelists differed on whether the State Action Doctrine should be clarified; and if so, on how to go about bringing more clarity to the issue. At the conclusion of the discussion, only one thing was evident: the application of the State Action Doctrine lacks a clear standard because of the fact specific nature of the inquiry, particularly with respect to the level of state supervision. While the panelists could not come to a consensus about the State Action Doctrine, they looked at the remedial issue as an area which could be further explored and updated.

The following discussion attempts to summarize each panelist’s written testimony along with the views expressed at the hearing. In addition, this document highlights the significant questions and points raised by the AMC as well as the panelists’ responses.

I. Summary of Written Testimony From the Panel

- A. Maureen K. Ohlhausen, Director of the Office of Policy Planning at the Federal Trade Commission, presenting the findings of the FTC State Action Task Force 2003 Report.

Maureen Ohlhausen presented the viewpoint of the FTC Staff with respect to the State Action Doctrine and explained the findings and recommendations of the FTC Task Force which was commissioned to reexamine the scope of the doctrine. The FTC Report, issued in 2003, concluded that the scope of the doctrine had been increased and that opposing applications of the

¹ 504 U.S. 621, 634 (1992).

doctrine in the lower courts signaled the necessity of providing further guidance, clarification, and re-affirmation to the doctrine.

The FTC Task Force recommended the following approach: 1) re-affirmation of the clear articulation standard tailored to its original purposes and goals, 2) clarification and strengthening of the standards for active supervision through FTC consideration of three elements: the development of an adequate factual record (including notice and opportunity to be heard), a written decision on the merits, and a specific assessment (both qualitative and quantitative) of how private action comports with the standards of the state legislature; 3) clarification of the criteria for identifying the quasi-governmental entities that should be subject to active supervision; 4) encouragement of judicial recognition of the problem associated with interstate spillovers; 5) strengthening of the market participant exception for a municipality which competes in the market; and 6) undertaking a comprehensive effort to address emerging state action issues through filing amicus briefs in litigation.

B. John C. Christie, Jr. An attorney from the law firm Wilmer, Cutler, Pickering, Hale and Dorr L.L.P. whose practice focuses on advising and defending state action clients from the reach of the antitrust laws.

John Christie argues that in the decade after the Supreme Court decided *Ticor*, the judicial record does not suggest any change to the current State Action Doctrine is warranted. Although the case marked neither victory nor clarification and has left lingering uncertainties about how to apply the doctrine, Christie stands firm in his conviction that the best approach is to “grin and bear” the uncertainties and let the issue further define itself through the courts and development of the common law. He believes that the Commission should not take any action with respect to the state of the doctrine and finds the FTC Task Force’s recommendations unworkable.

While he notes that there are significant problems and unresolved questions in the *Ticor* holding, Christie maintains the impossibility of enunciating any other “active supervision” standard that comports with the *Ticor* holding, principles of federalism and the variety of state regulations. He concludes that the Commission should not act, but rather let the courts apply the elements of the doctrine to each particular set of facts. While Christie is troubled by the difficulties in advising and defending clients under the doctrine as it stands, he does not agree with other alternatives. He mentioned that the First and Third Circuit holdings, finding that “basic activity” by the state satisfies the third prong, may be adequate to satisfy the state’s regulatory requirements.

C. Robert M. Langer. An attorney at the law firm Wiggin & Dana in Hartford, Connecticut, Langer has served in a wide variety of capacities including as a state antitrust enforcer for over 20 years and as an adjunct law professor.

Bob Langer focused his position statement mainly on the enactment of a Market Participant Exception to the State Action Doctrine in order to remedy what he sees as a “serious enforcement gap in the antitrust laws.” The lack of a Market Participant Exception to the State Action Doctrine under the federal antitrust laws coupled with the presence of a Market

Participant Exception under the Dormant Commerce Clause, leaves the states unconstrained by both the antitrust laws and the Commerce Clause when states venture into markets to compete with private businesses. Langer believes that to immunize state conduct when a state's activities transcend regulation into outright market participation would in effect subvert the spirit of the antitrust laws. In addition, he finds that the Eleventh Amendment, which limits private suits against the state, would not limit the federal government from enforcement of the antitrust laws against the states.

In addition, Langer seems to take particular issue with the remedial issue in *Ticor*, as opposed to the actual holding. He finds that where a court determines that a state has failed to fulfill its statutory mandate and where the regulated body acting in the state has no hand in the state failing to adequately supervise the conduct, the regulated entity should only be subject to injunctive relief and not treble damages. It is on this issue that he most actively argues for change.

D. Carlton A. Varner. An attorney at the law firm Sheppard, Mullin, Richter & Hampton in Los Angeles, California, who has litigated and advised clients on State Action issues since the 1970s and has served as Chair of the Exemptions and Immunities Committee of the ABA Antitrust Section.

Carlton Varner focused primarily on the first prong of the State Action Doctrine as the key issue ripe for clarification. He states that the "active supervision" requirement can be clarified by the courts through a strengthening of the first prong of *Midcal*.² Because a state must clearly intend to displace competition, he believes that the State Action Doctrine is better articulated by strengthening the "clear articulation" prong; in clarifying this element, the doctrine may be improved without changing the "active supervision" prong. He maintains that immunity should not be available unless the legislature or Supreme Court has given the local government entities the authority to displace competition.

In his position paper, Varner also discusses in great detail the Local Government Antitrust Act of 1984 ("LGAA"), which bars damage claims against local governments and private individuals based on official action. Passed in 1984 because of concerns that "clear articulation" and "active supervision" were too ambiguous, the LGAA bar on damage claims is too broad and injunctive relief is not a sufficient deterrent to anticompetitive conduct by local governments. Since "active supervision" in the 1985 case *Town of Hallie* was held to no longer apply to local governments, Varner maintains that Congress should further investigate whether the LGAA is still justified and necessary and perhaps impose a strong clear articulation and a single damage remedy. Varner believes in narrowly construing exemptions and immunities to the antitrust laws.³ Because local entities are not sovereigns, and immunity for them is not justified by principles of federalism, he questions the appropriateness of allowing local governments a great degree of immunity, especially given the substantial role they play in the economy.

² *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980).

³ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-48 (1985).

II. Highlights from Panel Questions and Answers

A. *Why should we keep looking at case law like John Christie concluded? What about codification?*

Christie: The problem in trying to draw a line is how to embrace “active supervision,” and articulate something that includes and excludes the proper regulatory behavior.

Langer: I think that codification of the first prong is do-able. With regard to codifying “active supervision,” that is less clear. If there was federal codification, it seems likely that states would look to the federal law for interpretations of the doctrine.

Ohlhausen: The third component of the FTC Task Force proposal has resulted in much criticism that the component takes an approach that is strictly procedural and does not focus enough on substantive issue. However, I think that a procedural test is a good test to determine that the state is involved enough because it looks at both the qualitative and quantitative aspects and goes toward the “spirit of what the state legislature is doing.”

Varner: I am back and forth on the issue of codification, and think that codification on precise issues like a Market Participant Exception might be possible.

B. *I want to assess the empirical aspect. Bob Langer has suggested remedial relief for private parties simply following the regulation. What are your opinions on this?*

Langer: It is fundamentally unfair if private parties are faced with damages.

Christie: In the early days of *Ticor*, there was legislation introduced in Congress to protect parties from treble damages if parties followed the regulation. The bill died in committee in 1985.

Ohlhausen: My personal view is that this probably makes sense.

C. *If Congress could constitutionally say when State Action impacts other states then there would be no state action immunity?*

Langer: Yes. They have the plenary power to do that if they decide to.

Varner: Spillover needs to be at substantial level (about 50% or more). However, Constitutionally, I think the answer is “yes” because the Commerce Clause probably trumps the Tenth Amendment.

D. *What concern if any do you have about state sovereignty with spillover? Do you need 50% test or can it be limited to local activity?*

Varner: Most anything has spillover effects, so 50% is probably reasonable.

Q: How would you determine increase?

Varner: By units/dollars, and the definition of product.

Q: Is there any analogy to other law?

Langer: There is a large Dormant Commerce Clause body of law on what constitutes an “undue burden,” which could be analogized to spillovers.

Q: How could you construct a spillover standard?

Ohlhausen: A standard could be based on the benefits to the state which require a restriction on interstate competition?

E. *With regard to the Market Participant Exception, what would you recommend to create an exception outside of immunity for the market participant?*

Langer: To the extent that the Market Participant Exception to the Dormant Commerce Clause applies and states are unrestrained in that regard, states should be limited by the antitrust laws.

Varner: I prefer the Market Participant Exception but I think there are antitrust issues there. The Areeda/Hovencamp approach sounds reasonable, but I don’t think there would be much of an impact. Also, there should be a Market Participant Exception to the LGAA.

F. *What do you recommend this Commission should do?*

Christie: I cannot comprehend an “active supervision” standard which comports with *Ticor* and federalism, and is sufficient to conform with varieties of state regulation. I think we should wait for the law to develop and second, I think we should consider the First and Third Circuits’ idea that “basic activity” is okay to satisfy the “active supervision” prong.

Langer: You can consider codification, but on the “active supervision” prong, the common law still needs to develop because of the fact-specific nature of the inquiry.

Ohlhausen: Speaking personally, I think there is a benefit to having clear rules to reduce problems and create some kind of FTC safe harbor.

Varner: It would be very difficult to codify “active supervision,” and codification would engender just as much confusion as the existing standard. *Ticor* is about as good of a standard as you can get. If we strengthen the “clear articulation” prong, then we may reduce the need to codify “active supervision.”

Q: So that is one vote for codification, one vote against, and two to do nothing.

G. Why shouldn't the Commission say “active supervision” is “I know it when I see it” and accept that standard and then recommend legislation which recognizes problems for participants and problems of common law?

Christie: I agree with that. There may be some practical issues in getting less than treble damages passed.

Langer: The first prong may be codifiable.

Ohlhausen: Personally speaking, I am concerned that this damage issue is going to make it difficult to get anticompetitive state legislation passed.

Varner: I agree.

Q: Do you, the panel, agree that this Doctrine is too hard to deal with so that the only place to go is damage remedy?

Varner: I support the single damages remedy, but I also think a Market Participant Exception is possible.

Christie: I think damages are a good place to focus on.