**-- United States --**

**14 February 2011**

*The attached document is submitted to Working Party No. 2 of the Competition Committee f*
*under item III of the agenda at its forthcoming meeting on 14 February 2011.*

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9. A substantial responsibility for competition law and policy relating to the railroad industry lies with the Surface Transportation Board ("STB"), a "decisionally independent" economic regulatory agency administratively affiliated with the Department of Transportation, and the successor agency to the Interstate Commerce Commission. The STB has authority over mergers and acquisitions, and transactions approved by the Board receive antitrust immunity. In addition, if the STB determines that a railroad possesses "market dominance" over a particular shipment, it has the authority to regulate the rate for that shipment. The STB also has the authority to approve, and thereby immunize from the antitrust laws, certain limited agreements among railroads subject to strict statutory limits. The Division may prosecute railroads for antitrust violations that are not within the STB's jurisdiction, *e.g.*, price-fixing.

10. Congress's stated reasons for giving jurisdiction over mergers and dominant firm rate regulation to the STB are technical expertise and the need to review mergers using a "public interest" standard that takes into account such factors as public benefits, labor conditions, environmental issues, and effects on competition.

11. The differences between STB and Division approaches to competition issues can be seen clearly in the 1996 Union Pacific/Southern Pacific merger, which involved the combination of two of the three major railroads in the Western United States. The Division concluded that the transaction would significantly reduce competition in numerous markets where the number of carriers dropped from two to one or from three to two, and that the remedy proposed by the carriers (granting trackage rights[8] to the third major western railroad) was unworkable and, in any case, insufficient to remedy the harm. The Division also found that the efficiencies claimed did not outweigh the competitive harms. The Division therefore recommended that the STB deny the merger application.[9] The STB did not accept the Division's recommendation, instead giving great weight to the benefits claimed by the carriers. The Board also found that trackage rights were sufficient to replace direct competition where the number of carriers fell from two to one, and that a reduction from three competitors to two was not of concern. Unfortunately, following implementation of the merger, there was a massive service breakdown in the West, resulting in billions of dollars in losses to shippers. In addition, there were numerous complaints that the trackage rights were ineffective in replacing competition lost because of the merger. In 2001, the STB promulgated new rules for rail mergers that require a stronger showing of public benefits to future major mergers.[10]

12. From 1938 to 1978, air carriers were extensively regulated in the U.S. by the Civil Aeronautics Board (CAB), which had broad powers to regulate entry and exit, rates, mergers, agreements, and methods of competition. The CAB was eliminated in 1985, at which point the U.S. Department of Transportation (DOT) took over its remaining regulatory responsibilities (*e.g.*, fitness to provide service, ownership, advertising), including several relating to competition. The Division has enforcement authority under the antitrust laws, while the DOT has concurrent explicit authority to prohibit unfair and deceptive practices and unfair methods of competition;[11] air carriers are exempt from the jurisdiction of the FTC.

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8 "Trackage rights" grant to the trains of a third railroad access over the tracks of the merged railroad, in order to serve shippers adversely affected by the merger.

9 See press release available at http://www.justice.gov/atr/public/press_releases/1996/0673.htm.

10 49 C.F.R. § 1180.

11 49 U.S.C. § 41712.

Keogh – "simply held that an award of [antitrust] damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the [regulatory agency] was the product of an antitrust violation. [29]

**4. State action**

18. In contrast to express and implied regulatory immunities, which involve the relationship between the federal antitrust laws and federal regulatory statutes, the "state action" doctrine involves the relationship between federal antitrust laws and conduct by – or subject to regulation under the laws of – the fifty states. In *Parker v. Brown*,[30] the Supreme Court held that even assuming that "that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a[n anticompetitive price-] stabilization program," there was "no hint" in the Sherman Act's language or history "that it was intended to restrain state action or official action directed by a state." Thus, while "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,"[31] the state agricultural marketing program at issue in that case did not violate the antitrust laws.

19. Subsequent Supreme Court decisions have developed distinctions among actions by a state acting in its sovereign capacity, which are not subject to the federal antitrust laws, and actions by subordinate state entities or private parties claiming "state action immunity." For example, municipalities, the Court has held, are not sovereign, and they may claim "state action" immunity from the Sherman Act for particular conduct only if they can "demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'"[32] "The principle of freedom of action for the States, adopted to foster and preserve the federal system," the Court noted,[33] led to the two-part test, announced in tn/StyleSpaLMCID 16 ÞBDC220.0015 T90(0)-3.rTc77 T6 0 0(./LBo

requirements of the state action doctrine were satisfied. The Court made it clear that, acting alone, the subordinate state agencies could not immunize private anticompetitive conduct. Only the state legislatures could articulate the requisite policy to displace competition.[40]

21. The most recent state action case to reach the Supreme Court is *FTC. v. Ticor Title Ins. Co.*,[41] decided nearly twenty years ago. In *Ticor*, the FTC ruled that title insurance companies had fixed prices for title searches and examinations, thereby violating Section 5(a)(1) of the FTC Act, which prohibits "unfair methods of competition," as well as Section 1 of the Sherman Act. The Supreme Court explained 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."[42] It therefore held that in order to establish "active supervision" where prices or rates are set by private practices, subject only to a possible veto by the State, the party claiming immunity must show "that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme,"[43] and that such a showing had not been made in this case.

22. Aside from clear state entities, a question has arisen as to the status of certain 'hybrid' organizations that have characteristics of both state actors and private organizations. For example, the FTC recently issued a complaint, in the matter of *The North Carolina Board of Dental Examiners*,[44] alleging that a state regulatory board consisting of persons with a financial interest in the subject matter regulated by the board was not entitled to state action protection of its anticompetitive acts because it did not satisfy the 'clear articulation' nor the 'active supervision' prong of the Doctrine.

## 5. Competition advocacy and participation in regulatory proceedings

23. The agencies have a long history of competition advocacy directed at the elimination or circumscribing of exemptions from the antitrust laws. In recent remarks on antitrust immunities, AAG Christine Varney explained that

> *the changing dynamics of many industries coupled with the increasing analytical rigor that courts and antitrust enforcement agencies apply should alleviate the concerns that have been cited by advocates of exemptions. Free market competition is a fundamental and core principle of this country. As the bi-partisan Antitrust Modernization Commission recognized, just as private constraints on competition can be harmful to consumer welfare, so can government restraints. Thus, the use of such restraints should be minimized.*[45]

24. AAG Varney has testified on the express statutory immunity for the "business of insurance" contained in the McCarran-Ferguson Act, 15 U.S.C.§§ 1011 *et seq.*:

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40 Id. at 62-63.

41 Supra note 33.

42 Id. at 634-34.

43 Id. at 638.

44 See http://www.ftc.gov/os/adjpro/d9343/index.shtm.

45 Christine Varney, Antitrust Immunities (June 24, 2010), available at http://www.justice.gov/atr/public/speeches/262745.htm.

the repeal or rejection of CON laws. In 2008, for example, the agencies issued a joint statement to the Illinois Task Force on Health Planning Reform regarding CON laws.[56] The agencies argued that these laws: undercut consumer choice, stifle innovation, weaken the ability of markets to contain health care costs, impede the efficient performance of health care markets by creating barriers to entry and expansion, and create opportunities for existing competitors to exploit the CON process to thwart or delay new competition, i.e., the laws can facilitate anticompetitive agreements among providers and the CON process itself may be susceptible to corruption.

30. Other FTC advocacy examples in this area include a letter to Louisiana state policy makers recommending rejection of proposed legislation that would impose costs on dental offices that bring dental services directly to underserved children in a school setting;[57] and a letter to the Georgia state policy makers advising rejection of a proposal that would prohibit dental hygienists from providing basic preventive dental services in public health settings except under the indirect supervision of a dentist, because the proposed amendments were likely to raise the cost of dental services in Georgia and reduce the number of consumers receiving dental care.[58]

*5.3.2 Legal Services*

31. In recent years, the agencies have engaged in competition advocacy at the state level to oppose occupational and professional licensing requirements that unnecessarily restrict competition. Such restrictions often are protected under the state action doctrine from challenges under the antitrust laws. For example, some states require that all real estate closing services be performed by licensed attorneys, prohibiting non-attorneys from competing to provide these services. The Division and the FTC have jointly taken the position that such restrictions unduly restrict competition and reduce consumer welfare without providing any offsetting benefits that consumers value. The agencies have submitted advocacy letters or briefs opposing such restrictions to several state legislatures (which pass laws defining the profession of law), state bar agencies (which formulate rules on the practice of law for court approval), state courts (which implement and oversee rules on the practice of law), state bar associations (which are private organizations of lawyers licensed to practice in the state), and the American Bar Association. The agencies have also submitted amicus curiae briefs outlining their views in two state litigation proceedings. Since the agencies began their competition advocacy efforts in this area, several states have rescinded, modified, or rejected provisions that would prohibit non-attorneys from competing with attorneys to provide real estate closing services, although some states have rejected this position.[59]

*5.3.3 Real Estate*

32. In recent years, the agencies have engaged in both enforcement activities[60] and competition advocacy to oppose unnecessary restrictions on competition in the provision of real estate brokerage services. The emergence of new Internet-based and other innovative business models in this industry have led some traditional realtors and their various trade associations to urge state lawmakers and regulators to

56 Available at http://www.justice.gov/atr/public/comments/237351.htm.

57 See http://www.ftc.gov/os/2009/05/V090009louisianadentistry.pdf, press release available at http://www.ftc.gov/opa/2009/05/ladentistry.shtm.

enact legislation or regulations that would block or impede these new forms of competition from the market. For example, a number of states have considered so-called “minimum services” rules, which require that real estate brokers provide a prescribed package of services, regardless of whether the consumer actually wants all of the services in the p0026