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

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, raising prices of important services and redistributing wealth from low-income consumers to higher-income licensees. Worse, licensing limits the ways people are allowed to earn a living.

Federal antitrust law, which normally outlaws practices limiting competition, has a big loophole: an otherwise-illegal conspiracy becomes legal if conspirators convince their state legislature to pass a law requiring a restraint of trade. State legislators frequently oblige in the form of licensing boards, which regulate everything from the practice of law to the practice of music therapy.

But 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.

Immunity of State Action from Antitrust

Most of the activities undertaken by Oklahoma licensing boards would violate federal antitrust law, if not for the exception that antitrust doesn't apply to anticompetitive activities are done under the auspices of state law.

In *Parker v. Brown*, the U.S. Supreme Court carved out what is now known as Parker immunity, which exempts state officials pursuing state policy directives from federal antitrust liability. The doctrine has recently been further developed when the FTC brought an action against the North Carolina Board of Dental Examiners.

The court uses a two-part analysis to determine whether a given anticompetitive act falls under Parker immunity. First, are anticompetitive acts required by state policy? For Parker immunity to attach, the state must affirmatively *create* an enforceable anticompetitive policy, not merely approve anticompetitive activities. Many anticompetitive activities undertaken by Oklahoma licensing boards are required by state law.

Second, do state officials undertake "active supervision" of non-sovereign agents? A licensing board composed of market participants must be supervised by a disinterested government official with the power to overrule and reverse the decisions of the private actors they supervise.

In Oklahoma, 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. A 2016 executive order directs the boards to accept and implement any recommendation in these opinions, or risk losing their seat. However, the order does not provide a remedy to a licensee if the licensing board goes rogue.

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.

A Better Way Forward

The legislature should 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

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the boards' exposure to antitrust liability, and the appearance of self-dealing.

The Best Way Forward

Oklahoma could become a leader in replacing Occupational Licensing with something better. The 1889 Institute has outlined a solution to the problem of occupational licensing, in its paper *A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing*. 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. Since private certifiers 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.