



STATE ACTION IMMUNITY DEFENDING THE STATE

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State Attorney General

- Antitrust Enforcement (federal and State antitrust laws)
- Represent the State, State agencies, State officials, State licensing/regulatory boards

Maryland's Licensing Board Counseling Program

- Each Board is represented by AAG in the Department of Health & Mental Hygiene
- Each AAG at DHMH is tutored by the Antitrust Division on state action
- Each Board is counseled as needed by the Antitrust Division

Licensing Boards

- Created by statute, powers enumerated in statute
- Board members appointed by Governor
- Board members are competitors of the licensees they regulate
- Consumer members



Midcal Test

- Licensing Boards are quasi-state agencies
- Clear Articulation (is the authority set forth in the Board's enabling statute; how explicit must it be)
- Foreseeability test apply to Boards; what is the standard
- Active Supervision?

Overlapping Licensed/Certified Professions

- Physical Therapists; Chiropractors; Massage Therapists; Personal Trainers
- Dentists; Dental Hygienists; Oral Surgeons; Plastic Surgeons
- Psychologists, Professional Counselors; Psychiatrists
- Dietitians; Nutritionists
- Physicians; Physician Assistants; Nurses; Anesthetists

Board Actions

- Licensure requirements; education, experience, examinations
- Out-of-State Licensees
- Regulations governing subspecialties, practice limitations
- Advertising restrictions
- Delegation of Board authority to non-State organization
- Disciplinary proceedings

Statutory Authority

- If the authority is not explicit, it must be reasonably contemplated
- Boards must record all actions in minutes; meetings are open
- Board counsel is present at all Board meetings
- If the law is inadequate, it must be amended by the Legislature
- Regulations are not law for “clear articulation” test

Antitrust Prosecutor as Defense Counsel

- State accused of violating Sherman Act, *TFWS, Inc. v. Schaefer, et al*, 242 F.3d 198 (4th Cir. 2001)
- State liquor laws required:
 - ◆ no volume discounts
 - ◆ price filing (post and hold)

State Action Defense

- State officials; State agency; statute clearly articulated anticompetitive scheme; affirmatively expressed as State policy
- No allegations of private parties colluding or jointly setting prices
- 4th Cir. held no immunity because no active supervision
- Preemption test articulated but not applied

Conclusion

- State licensing boards must pass the first prong of *Midcal*
- Authority need not be explicit in all respects, but must be reasonably contemplated by the board's statute
- Boards must be counseled by the State
- Challenges to State law as a *per se* violation of the antitrust laws should not be confused with challenges to state agencies or private parties