Recent Court Decisions

Contributed by
Frank P. Darr
Assistant Professor
The Ohio State University

Title Insurance Examination Fee Setting May Not Fall Within State Action

FTC v. Ticor Title Ins. Co., 60 U.S.L.W. 4515 (S.Ct. 1992).

The Federal Trade Commission filed an administrative complaint charging title insurance companies with horizontal price fixing in setting fees for title searches and examinations. In each of four states, Connecticut, Wisconsin, Arizona, and Montana, a rating bureau set uniform rates. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. An administrative law judge held that the rates had been fixed in all four states, but that the anticompetitive activities were entitled to state-action immunity in Wisconsin and Montana. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the state (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. The Supreme Court rejected the formulation of the immunity offered by the Court of Appeals and upheld the decision of FTC.

To support its decision, the Court began by reviewing the policy for state action immunity. The state action immunity is based on notions of federalism. Federalism protects limited state action to subject discrete parts of the economy to additional regulation. To justify the immunity, however, the defendant must show that the state intended the immunity and implemented it. These requirements are designed to limit state action to particular anticompetitive acts that advance state regulatory purposes. In particular, the second requirement of active supervision assures that private parties' actions will advance state purposes.

The Supreme Court then rejected the lower court's formulation of the requirement of supervision. The lower court found that the requirement was satisfied if the state program was staffed and funded, was assigned the duty to supervise, was afforded means of judicial enforcement, and provided some basic level of activity. In these cases, however, this formulation was inadequate since the states exercised only the right to veto an agreement reached through the rating bureaus. Under these circumstances, the defendants must show that the states took the necessary steps to determine the specifics of the rates. The mere potential of state supervision was not enough. The Court added that the requirement of action in fact was necessary since the charge was horizontal price fixing by the insurers. Since the state agencies did not take any apparent action to review the filings, the Court concluded that the state immunity defense was not available.

Two dissenting opinions stressed that the majority opinion failed to describe the level of state activity that would suffice. Further, the dissenters suggested that the majority's approach would reduce the flexibility of state regulation as more companies chose to file individually to avoid the perception of price fixing.

Medical Device Amendments Preempt State Product Liability Claim

Slater v. Optical Radiation Corp., Case No. 91-1544 (7th Cir., decided Apr. 22, 1992) (Lexis, genfed lib.)

The Seventh Circuit in the first appellate case raising the issue decided that a products liability claim alleging defective design of a medical device subject to an FDA experimental exemption was preempted. The Medical Device Amendments of 1976 amended the Food, Drug and Cosmetics Act of 1938 and gave the FDA comprehensive authority over medical devices. One of the provisions forbids states from regulating medical devices in any manner concerning safety or effectiveness different or in addition to that provided by the agency. Pursuant to the act, the FDA in 1977 issued regulations providing for an exemption for investigations of intraocular lenses. The lenses are implanted in the eyes of persons who have had surgery for cataracts. After signing a waiver required by the regulation, Slater, the plaintiff, had a lens made by the defendant, Optical Radiation, implanted in his eye after cataract surgery. The treatment failed, apparently due to the design of the lens, the lens was removed, and Slater suffered additional permanent damage to his eye. He sued, but the trial court dismissed the case on the theory that it was preempted by the amendments. On appeal, the Seventh Circuit Court of Appeals agreed.

In the appeal, Slater conceded that he could not argue for a different level of testing but urged that the claim based on defective design was not preempted since the regulations did not specify a particular design. The court rejected that argument. Since the device was experimental, the regulation could not dictate the design. An effective and safe design was the desired outcome of the experimental exemption. Therefore, the rules could relate only to the procedures and these would preclude the claim.