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United States: Private Antitrust Litigation – Exemptions and Immunities

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Introduction

US law is littered with dozens of immunities and exemptions that limit or preclude the application of antitrust laws. While some immunities and exemptions exist by virtue of legislation, many have been created by federal courts. As a result, determining whether the antitrust laws apply to a particular course of conduct frequently requires consideration of potential exemptions and immunities as well as any developments in statutory or case law. The past year has seen developments in several immunities and exemptions, the most significant being the Supreme Court's ongoing explanation of state action immunity. Other courts are also poised to provide guidance on exemptions for the agriculture and baseball industries. These unfolding developments could affect local governments, businesses, and consumers in the US.

Immunities and exemptions

While modern antitrust theory presumes that vigorous competition does the best job of promoting consumer welfare,¹ for over 100 years the US Congress has been enacting legislation that exempts or limits the application of the antitrust laws for a wide variety of conduct and industry. The Department of Justice recently estimated that 30-odd statutory exemptions exist² – ranging from statutory immunity for teaching hospitals agreeing on resident physician placements³ to joint agreements by professional sports leagues on the sales of sporting event broadcasts.⁴ Often criticised as unnecessary or condemned as special treatment of interest groups,⁵ these exemptions are tolerated as reflecting judgments by Congress about the relative importance of competition and other societal values.⁶

In addition, federal courts have recognised a number of exemptions from antitrust laws, which are usually established for the purpose of avoiding conflicts with principles of federalism or of effectuating legislation enacted by Congress.⁷ These judicially created exemptions can be as wide-ranging as statutory exemptions, but the most common include: the 'state action' immunity for certain actions taken by states or pursuant to their laws;⁸ the 'implied immunity' exemption for conduct to effectuate a regulatory scheme;⁹ the 'filed rate' immunity from antitrust damages actions based on rates or prices set with federal or state regulators;¹⁰ and the *Noerr-Pennington* immunity for certain conduct of private actors in petitioning the government.¹¹ Although these exemptions may appear broad, they are narrowly construed by courts because the Sherman Act itself provides no exceptions¹² and they generally are contrary to the fundamental values of 'free enterprise and economic competition that are embodied in the federal antitrust laws.'¹³ Of all these immunities and exemptions, the Supreme Court's ongoing consideration of state action immunity is perhaps the most significant because of its potential to alter how many government entities function.

State action immunity developments

Courts recognise three situations where state action immunity may exist.¹⁴ First, a US state's own actions 'ipso facto are exempt' from

the antitrust laws.¹⁵ Second, sub-state government entities such as municipalities 'receive immunity from antitrust scrutiny when they act pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition.'¹⁶ Third, private parties may enjoy state action immunity for their conduct as long as they satisfy a two-prong test set out in *California Retail Liquor Dealers Association v Midcal Aluminum, Inc.* First, that the parties' conduct is pursuant to a 'clearly articulated and affirmatively expressed' state policy and second, that their behaviour is 'actively supervised by the State itself.'¹⁷ Not surprisingly, state action immunity controversies often turn on whether sub-state conduct is pursuant to state policy, or whether private parties satisfy the *Midcal* prongs. Two recent decisions provide important guidance for answering these questions, while also narrowing the application of this immunity.

Phoebe Putney

In a brief, unanimous 2013 decision, the Supreme Court ruled that a Georgia state government hospital authority did not qualify for state action immunity because it was not acting pursuant to a sufficiently articulated and expressed state policy. The case, *FTC v Phoebe Putney Health System, Inc.*, involved the Federal Trade Commission's (FTC) challenge of the hospital authority's purchase of a competing hospital, which resulted in alleged monopoly power. The purchase was pursuant to a Georgia law that authorised local governments to create hospital authorities and granted them broad powers, including the power to 'acquire by purchase, lease, or otherwise and to operate projects.'¹⁸ The specific issue before the Supreme Court was whether the powers granted to the hospital authority sufficiently articulated and expressed Georgia's authorisation for the authority to create a monopoly that would otherwise violate the antitrust laws.¹⁹

The Supreme Court determined that Georgia's law did not sufficiently provide for creation of a monopoly by the hospital authority. While acknowledging state legislation need not 'expressly state' an intention for the delegated action to have anti-competitive effects, the Court emphasised that any resulting suppression of competition at least must be 'affirmatively contemplated' by the state legislation.²⁰ The Court expressed concern that a rule allowing any looser application of the clear articulation test would require states to disclaim intent to displace competition to avoid inadvertently authorising anti-competitive conduct.²¹ On this basis, the Court concluded that the broad powers delegated to the hospital authority, despite generally empowering the authority to acquire hospitals, failed to articulate and affirmatively express a specific state policy for the authority to create monopoly power through acquisition.²²

In limiting the application of state action immunity to sub-state entities that are clearly authorised to act anti-competitively, the *Phoebe Putney* decision could have wide repercussions. State governments rely extensively on sub-state entities, such as local government units charged with running airports, transit, sewerage, stadiums, water supply, and gas and electric power. A recent census identified over 37,000 such entities in the US²³ These sub-state

entities often are operated as monopolies, or as if they enjoy immunity from the antitrust laws. Following *Phoebe Putney*, these entities should be extra cautious when taking actions that could restrict competition. They may also find it necessary to curtail conduct that could be anti-competitive, or confirm that the laws delegating their authority clearly articulate and affirmatively state a government policy to displace competition with a regulatory alternative.²⁴

North Carolina Board of Dental Examiners

The Supreme Court is considering another state action case that could further limit the doctrine, and in significant ways. In *North Carolina Board of Dental Examiners v FTC*,²⁵ the Fourth Circuit held that the state action doctrine did not immunise anti-competitive conduct by a state-created professional board mostly comprised of licensed dentists elected by dentists. The FTC accused the board, whose dentist members provided teeth-whitening services, of conspiring to expel competition from non-dentist providers of teeth-whitening services.²⁶ The dental board claimed immunity as a state actor, so the threshold issue was whether the board was a sub-state entity or a private party that had to satisfy *Midcal*'s two prongs.²⁷ The Fourth Circuit concluded, with little analysis, that 'when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor' and required to satisfy both *Midcal* prongs.²⁸ This conclusion effectively decided the case, as the dental board could not meet *Midcal*'s second requirement of active state supervision.

The Supreme Court recently granted the dental board's certiorari petition, presenting the question of whether, for purposes of state action exemption, 'an official state regulatory board created by state law may properly be treated as a 'private' actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.'²⁹ While the Court could resolve the dispute based on the parties' basic arguments,³⁰ the Court may take advantage of the opportunity to address the fundamental issue raised on appeal – consistent with the Court's recent practice of opting to grapple with core issues presented in antitrust appeals.³¹

The core issue in *Dental Examiners* is how to determine, as a matter of fact, whether sub-state entities are 'public' or 'private.' Should the Court make such a determination, precedent suggests that the Court's rationale will exceed the scope of the arguments presented by the parties. The petitioner largely argues the dental board is a state actor because it is an 'official state agency',³² but this argument elevates labels over substance, which is inconsistent with precedent.³³ The respondent's argument emphasises that the dental board is private because it is comprised of market participants elected by other market participants.³⁴ This, however, overlooks the fact that such boards are commonplace in local government and is inconsistent with precedent suggesting elections alone are insufficient to alleviate potential for private self-dealing.³⁵

Whatever the Supreme Court's ruling on *Dental Examiners*, it likely will affect sub-state entities across the US. Many states delegate the regulation of professions to boards consisting of participants in those professions, including regulatory boards for doctors, dentists, chiropractors, nurses, lawyers, architects, plumbers, engineers, brokers and accountants.³⁶ California, for example, claims 31 boards or commissions that could be affected by *Dental Examiners*.³⁷ These entities may find it necessary to review their operations – from nomination or election procedures to processes for identifying and disclosing potential financial interests – to achieve compliance with guidance ultimately provided through *Dental Examiners*. And, if

the Supreme Court further limits the application of the state action doctrine, states may find it necessary to reorganise these entities.

Industry-specific exemptions

While the Supreme Court's pronouncements on state action are likely to have the most widespread effect, recent decisions by lower courts also have potential to alter the status of several other exemptions that are of significant importance to large industries in the US.

Professional sports – baseball exemption

As 'America's pastime,' Major League Baseball (MLB) has become one of the world's prominent sports leagues.³⁸ Since 1922, MLB has operated with a judicial exemption from antitrust law.³⁹ Despite criticism,⁴⁰ the Supreme Court declined to overrule the exemption in two cases⁴¹ on the rationale that the exemption is better addressed by the US Congress.⁴² A district court in California recently reiterated these points in refusing to limit the scope of the baseball exemption.

In *City of San José v Commissioner of Baseball*, San José alleged that MLB's failure to approve a proposed relocation of an MLB club to San José was an unlawful restraint of trade and argued that the baseball exemption is limited to player labour issues.⁴³ MLB argued the entire business of baseball, including club relocation, is exempt from antitrust law.⁴⁴ The district court agreed with MLB, determining that the Supreme Court's trilogy of baseball cases announced a broad exemption for the business of baseball, and that the Supreme Court had referenced labour issues, not for the purpose of limiting the exemption, but simply because that was the alleged restraint at issue.⁴⁵

San José's appeal to the Ninth Circuit is pending, and will be heard on an expedited basis. Presumably, the Ninth Circuit will uphold the baseball exemption, as it has previously done when asked to overrule it.⁴⁶ The Supreme Court, if it accepts any further appeal, may be more receptive to San José's arguments – Justice Alito questioned the exception⁴⁷ and *Phoebe Putney* reflects a strong predisposition to limit exemptions. A judicial reversal of the Court's baseball exemption still appears to be a long shot, however, given the Court's prior deferral to Congress and the fact that Congress thereafter considered but declined to repeal the exemption in full.⁴⁸

Agriculture – Capper-Volstead immunity

The Capper-Volstead Act, enacted in 1922,⁴⁹ provides agricultural cooperatives with a limited exemption from antitrust laws intended to empower farmers to market and price agricultural products collectively.⁵⁰ Recent years have seen Capper-Volstead squarely raised in a multitude of cases, and several of them now are poised to address a significant issue that has been percolating in the courts – whether Capper-Volstead immunises the conduct of cooperatives that enter agreements to restrict agricultural output.

During the past decade, US agricultural producers and cooperatives in a number of industries (dairy, potatoes, eggs, mushrooms) implemented 'supply management' practices that resulted in production restrictions. Some of these practices took the form of standard-setting to promote animal welfare⁵¹ while others were voluntary programmes that directly removed agricultural produce from sale.⁵² Several of these practices are being challenged in ongoing litigation. No court has yet directly ruled on the legality of these practices or whether they are within Capper-Volstead's immunity,⁵³ but the issue is the subject of much debate.

Proponents of supply management practices primarily argue that the range of immune conduct listed in the Capper-Volstead

Act – ‘processing, preparing for market, handling, and marketing’⁵⁴ – necessarily encompasses decisions on production amounts and whether to withhold production, especially when a decision to withhold produce from market is the equivalent of a decision to plant or grow less. Proponents also point out that prohibiting these producer choices will foster market inefficiency, as producers would be unable to best allocate their resources in advance.⁵⁵ Opponents primarily argue that supply management practices are not within Capper-Volstead’s protection because neither ‘supply’ nor ‘production’ are stated in the Act. Further, the legislative history shows Congress passed the Act with the expectation it would increase, rather than restrict, production. And, Capper-Volstead, like any antitrust exemption, is to be interpreted narrowly.⁵⁶

The opinion of the government may decide this debate. Several sources reflect US agency positions that supply management conduct should not be exempted by Capper-Volstead. In 2010, the then Assistant Attorney General Christine Varney, when addressing Capper-Volstead issues, stated that the DoJ ‘has taken the position that the Act does not exempt production limits from the antitrust laws.’⁵⁷ The US Department of Agriculture has staked out a similar position in multiple, albeit dated, publications.⁵⁸ Further, a similarly dated FTC opinion hints that supply management, if proven, would fall outside Capper-Volstead’s exemption.⁵⁹ A District Court handling a case alleging unlawful supply management practices by US potato producers recently relied on these government positions in rendering a tentative ‘advisory opinion’ concluding that such practices are not exempted by Capper-Volstead.⁶⁰

The DoJ rightly recognised that the outcome of this issue ‘has great practical consequences for farmers and the agricultural community as a whole.’⁶¹ Indeed, the amount of US commerce linked with agricultural cooperatives is enormous: agricultural associations estimate that the 3,000-plus farming cooperatives in the US include a majority of the country’s 2 million farmers and their total business volume approaches US\$200 billion annually.⁶² Considering the scope of US agribusiness – and the apparently widespread use of supply management practices⁶³ – resolution of this issue will likely have important implications for the design (or elimination) of supply management practices and related production, marketing and pricing strategies of agricultural producers as well as consumers across the US.

Conclusion

During the past year, antitrust immunities and exemptions found in US law continued to evolve. The Supreme Court’s ruling in *Phoebe Putney* – and anticipated ruling in *Dental Board* – further limits the state action immunity. Lower courts also contributed to developments in the law by rejecting challenges to the baseball exemptions and weighing in on whether Capper-Volstead immunises output restrictions by agricultural producers. These developments, as well as others, could affect local governments and businesses in the US and all who believe they operate with immunity should proceed with caution, in addition to assessing whether they even remain eligible for immunity.

Notes

- 1 See generally Richard A Posner, ‘The effects of deregulation on competition: the experience of the United States,’ 23 *Fordham Int’l L.J.* 7 (2000).
- 2 See Christine Varney, US DoJ, ‘Antitrust immunities’ at 1 (24 June 2010), available at www.justice.gov/atr/public/speeches/262745.htm.
- 3 See 15 USC section 37b.

- 4 See 15 USC sections 1291–95.
- 5 See generally Antitrust Modernisation Commission, at 348–49 (2 April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/letter_to_president.pdf.
- 6 See generally ABA Section of Antitrust Law, *Antitrust Law Devs* (7th) at 1271 (2012).
- 7 See generally *id.*
- 8 See *Cal Retail Liquor Dealers Ass’n v Midcal Alum, Inc*, 445 U.S. 97 (1980).
- 9 See *Gordon v New York Stock Exch, Inc*, 422 US 659 (1975).
- 10 See *Square D Co v Niagara Frontier Tariff Bureau*, 476 US 409 (1986).
- 11 See *E RR Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127 (1961); and *United Mine Workers v Pennington*, 381 US 657 (1965).
- 12 See *Goldfarb v Va State Bar*, 421 US 773 (1975).
- 13 *FTC v Phoebe Putney Health Sys, Inc*, 133 S. Ct. 1003, 1010 (2013).
- 14 See generally *South Carolina State Bd of Dentistry v FTC*, 455 F.3d 436, 442 (4th Cir. 2006).
- 15 *Hoover v Ronwin*, 466 US 558, 568 (1984).
- 16 *Phoebe Putney*, 33 S. Ct. at 1011 (internal quotation marks omitted).
- 17 445 US 97, 105 (1980).
- 18 *Phoebe Putney*, 33 S. Ct. at 1010.
- 19 *Id* at 1011–12.
- 20 *Id* at 1011.
- 21 *Id* at 1016.
- 22 *Id* at 1012.
- 23 Brief for Respondent at 11–12, *FTC v Phoebe Putney Health Sys, Inc*, No. 11–1160 (27 August 2012).
- 24 *Phoebe Putney*, 33 S. Ct. at 1012.
- 25 717 3d 359 (2013).
- 26 *North Carolina Bd of Dental Examiners v FTC*, 717 3d 359, 368 (2013).
- 27 *Id* at 368.
- 28 *Id* at 370.
- 29 *North Carolina Bd of Dental Examiners v FTC*, 2014 WL 801099 (US 3 March 2014).
- 30 The dental board, on appeal, primarily argues that the Fourth Circuit’s decision is wrong because no court previously held that *Midcal*’s active supervision requirement applies to sub-state entities, and the ruling creates a conflict with at least two courts that had not imposed that requirement. See Brief for Petitioner at 13–18, *North Carolina Bd of Dental Examiners v FTC*, No. 13–534 (25 October 2013) (citing *Earles v State Bd of Certified Pub Accountants of La*, 139 F.3d 1033 (5th Cir. 1998); *Hass v Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989)). The FTC, in response, argues that the Fourth Circuit’s decision is consistent with the state action doctrine’s rationale that active supervision by the state is necessary to ensure the dental board’s conduct is in the interest of the state rather than the self-interest of its private members. See Brief for Amici Curiae State of Illinois, et al at 10–18, *North Carolina Bd. of Dental Examiners v FTC*, No. 13–534 (4 January 2014).
- 31 For example, in *Comcast Corp v Behrend*, 133 S. Ct. 1426 (2013), despite serious questions about whether the appeal was procedurally proper, the Supreme Court opted to address the substantive issues and delivered an opinion viewed by many as significantly altering US antitrust class action litigation.
- 32 Brief for Petitioner, *North Carolina Bd of Dental Examiners v FTC*, No. 13–534 (25 October 2013).
- 33 See, for example, *Am. Needle, Inc v Nat’l Football League*, 560 U.S. 183, 191–92 (2010) (explaining antitrust ‘seek[s] the central substance of the situation’ and therefore... are moved by the identity of the persons who act, rather than the label of their hats’).
- 34 See Brief for Respondent, *North Carolina Bd of Dental Examiners v FTC*, No. 13–534 (25 October 2013).

- 35 See, for example, *S Motor Carriers Rate Conference v United States*, 471 US 48 (1985); see also Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 *Harvard Law Review* 667, 685-86 (1991).
- 36 See Brief for Amici Curiae State of West Virginia and 22 other States at 8-9, *North Carolina Bd of Dental Examiners v FTC*, No. 13-534 (30 May 2014).
- 37 See Brief for Amici Curiae California Optometric Association at 5, *North Carolina Bd of Dental Examiners v FTC*, No. 13-534 (30 May 2014).
- 38 See generally http://en.wikipedia.org/wiki/Major_league_baseball.
- 39 *Federal Base Ball Club of Baltimore, Inc v Nat'l League of Prof'l Base Ball Clubs*, 259 US 200 (1922).
- 40 *Radovich v Nat'l Football League*, 352 US 445, 452 (1957) (stating that exemption for baseball, and not other professional sports, may be 'unrealistic, inconsistent, or illogical').
- 41 See *Toolson v New York Yankees, Inc*, 346 US 356 (1953) (per curiam); *Flood v Kuhn*, 407 U.S. 258 (1972).
- 42 *Radovich*, 352 US at 452 (reasoning that 'Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation' and '[t]he resulting product is therefore more likely to protect the industry and the public alike').
- 43 2013 WL 5609346, at *5-6 (N.D. Cal. 11 October 2013).
- 44 *City of San José v Comm'r of Baseball*, 2013 WL 5609346, at *5 (N.D. Cal. 11 October 2013).
- 45 See id. at *10-11.
- 46 See, for example, *Prof'l Baseball Sch & Clubs, Inc v Kuhn*, 693 F.2d 1085 (11th Cir. 1982); *Charles O Finley & Co v Kuhn*, 569 F.2d 527 (7th Cir. 1978); *Portland Baseball Club, Inc v Kuhn*, 491 F.2d 1101 (9th Cir. 1974) (per curiam); *Portland Baseball Club, Inc v Baltimore Baseball Club, Inc*, 282 F.2d 680 (9th Cir. 1960).
- 47 Samuel Alito, *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc v National League of Professional Baseball Clubs*, 34 J. of S.Ct. History 183 (July 2009).
- 48 See 15 USC section 26b.
- 49 See 7 USC section 291. The Capper-Volstead Act clarified and expanded the antitrust exemption for cooperatives found in section 6 of the Clayton Act, 15 USC section 17, which had been enacted to counter the possibility that the Sherman Act's prohibition against combinations in restraint of trade would imperil the development of unions and other cooperative endeavors. See, for example, *Case-Swayne Co v Sunkist Growers, Inc*, 389 US 384, 390-91 (1967).
- 50 See, for example, Christine A Varney, 'The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity,' ABA Antitrust Section, *The Antitrust Source* at 1-3 (December 2010).
- 51 *In re Processed Egg Prods Antitrust Litig*, No. 08-md-2002 (E.D. Pa.) (alleging egg producers and trade associations conspired to limit egg production through, among other things, agreeing to lower cage space densities for hens and to dispose of hen flocks).
- 52 *Edwards v Nat'l Milk Prods Fed'n*, No. 3:11-cv-04766 (N.D. Cal.) (alleging dairy farmer organisations conspired to limit the production of raw milk by agreeing on programmes to prematurely slaughter their dairy herds).
- 53 A handful of courts have commented, without analysis and in what is best characterised as dicta, that supply management falls outside of Capper-Volstead's protection. See, for example, *Alexander v Nat'l Farmers Org*, 687 F.2d 1173, 1182 (8th Cir. 1982) ('Co-ops cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by co-ops alone.').
- 54 7 USC section 291.
- 55 See Varney, note 50, supra, at 5.
- 56 See id. at 5.
- 57 See id. at 6.
- 58 US Dep't of Agric., *Rural Bus-Coop Serv*, Report 1, at section 3, *Cooperative Benefits and Limitations, Farmer Cooperatives in the United States* at 17 (1980) ('[A]t the present time, it is not legal for cooperatives to control members' production. The basic role of cooperatives is to market the available supply in the most effective manner possible, not to limit production. '); US Dep't of Agric, *Agric Coop Serv Coop Info Report 38, Managing Cooperative Antitrust Risk* at 23-24 (1989) ('There is a limited body of case law indicating producers may use their cooperative as a vehicle to agree among themselves to limit the quantity of a commodity they will produce. The conventional belief among cooperative scholars is that this goes beyond the extent of the protection available under the Capper-Volstead Act.').
- 59 See *Central Cal Lettuce Prods Coop*, 90 FTC 18, 102 No. 20 (1977) (explaining that price fixing generally is exempted, but a 'different issue would be presented if it were alleged and proven that a cooperative had sought to limit production even among its own members... there are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production.').
- 60 See *In re Fresh and Process Potatoes Antitrust Litig*, 834 F. Supp. 2d 1141, 1154-57 (D. Idaho 2011).
- 61 See Varney, note 50, supra, at 8.
- 62 Nat'l Council of Farmer Coops, 'Comments Regarding Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy' (30 December 2009), available at www.justice.gov/atr/public/workshops/ag2010/comments/255175.htm; Nat'l Council of Farmer Coops, 'Cooperative Facts', available at www.ncfc.org/about-ncfc/about-ncfc.
- 63 See, for example, Yuliya Bolotova, Int'l Food and Agribusiness Mgmt Ass'n Sci Research Symposium, 'Agricultural Supply Management and Antitrust in the United States System of Agribusiness' at 2 (16 June 2014) ('During the last decade, the organisations of agricultural producers in a number of industries in the United States (dairy, potatoes, eggs, mushrooms) used a supply management practice, which included some form of production restrictions (limitations)').



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Bob Abrams leads BakerHostetler's antitrust and trade regulation practice team and guides a team of attorneys with great depth and strength in the litigation and trial of antitrust cases, including class actions. The antitrust group also has significant experience in mergers and acquisitions and its partners have been point persons in dealing with the Department of Justice and the Federal Trade Commission on the antitrust aspects of clearing transactions. Bob has more than 30 years of experience litigating and trying antitrust and complex commercial and government enforcement matters. He is a fellow of the American College of Trial Lawyers and is ranked in *Chambers USA: America's Leading Lawyers for Business* in the area of antitrust.

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