



THE SUPREME COURT *of* OHIO

UNAUTHORIZED
PRACTICE OF LAW
Seminar



Oct. 28, 2016
Columbus

THE SUPREME COURT *of* OHIO

2016 UPL SEMINAR

Presented by
The Board on the Unauthorized Practice of Law



MAUREEN O'CONNOR

CHIEF JUSTICE

PAUL E. PFEIFER

TERRENCE O'DONNELL

JUDITH ANN LANZINGER

SHARON L. KENNEDY

JUDITH L. FRENCH

WILLIAM M. O'NEILL

JUSTICES

MICHAEL L. BUENGER

ADMINISTRATIVE DIRECTOR

OFFICE OF ATTORNEY SERVICES

SUSAN B. CHRISTOFF, ESQ.
DIRECTOR OF ATTORNEY SERVICES

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW

MINERVA ELIZAGA, ESQ.
SECRETARY

ROBERT V. MORRIS II, ESQ., CHAIR
COLUMBUS

RENISA A. DORNER, ESQ.
TOLEDO

SCOTT E. ELISAR, ESQ.
COLUMBUS

BEN ESPY, ESQ.
COLUMBUS

KENT C. KIFFNER, ESQ.
NEW ALBANY

PAUL T. KIRNER, ESQ.
NORTH ROYALTON

YALE R. LEVY, ESQ.
COLUMBUS

REGIS MCGANN, ESQ.
CLEVELAND

EDWARD T. MOHLER, ESQ.
MAUMEE

F. SCOTT O'DONNELL
CLEVELAND

DAVID TOM, PH.D.
COLUMBUS

RANDALL L. SOLOMON, ESQ.
CLEVELAND

LEO M. SPELLACY JR., ESQ., VICE CHAIR
CLEVELAND

UPL Rule & Regulations

RULE VII. UNAUTHORIZED PRACTICE OF LAW

Section 1. Board on the Unauthorized Practice of Law.

(A) There shall be a Board on the Unauthorized Practice of Law of the Supreme Court consisting of thirteen commissioners appointed by the Court. Eleven commissioners shall be attorneys admitted to the practice of law in Ohio and two commissioners shall be persons not admitted to the practice of law in any state. The term of office of each commissioner shall be three years, beginning on the first day of January next following the commissioner's appointment. Appointments to terms commencing on the first day of January of any year shall be made prior to the first day of December of the preceding year. A commissioner whose term has expired and who has an uncompleted assignment as a commissioner shall continue to serve for the purpose of that assignment until the assignment is concluded before the Board, and the successor commissioner shall take no part in the proceedings of the Board concerning the assignment. No commissioner shall be appointed for more than two consecutive three-year terms. Vacancies for any cause shall be filled for the unexpired term by the Justice who appointed the commissioner causing the vacancy or by the successor of that Justice. A commissioner appointed to a term of fewer than three years to fill a vacancy may be reappointed to not more than two consecutive three-year terms.

(B) The Board shall each year elect an attorney commissioner as chair and vice-chair. A commissioner may be reelected as chair, but shall not serve as chair for more than two consecutive one-year terms. A commissioner may be reelected as vice-chair, but shall not serve as vice-chair for more than two consecutive one-year terms. The Administrative Director or his or her designee shall serve as the Secretary of the Board. The chair, vice-chair, or the Secretary may execute administrative documents on behalf of the Board. The Secretary may execute any other documents at the direction of the chair or vice-chair.

(C) Commissioners shall be reimbursed for expenses incurred in the performance of their official duties. Reimbursement shall be paid from the Attorney Services Fund.

(D) Initial appointments for terms beginning January 1, 2005, shall be as follows:

(1) One attorney and one nonattorney shall be appointed for terms ending December 31, 2005. Commissioners appointed pursuant to this division shall be eligible for reappointment to two consecutive three-year terms.

(2) Two attorneys shall be appointed for terms ending December 31, 2006. Commissioners appointed pursuant to this division shall be eligible for reappointment to two consecutive three-year terms.

(3) One attorney shall be appointed for a term ending December 31, 2007. A commissioner appointed pursuant to this division shall be eligible for reappointment to one three-year term.

(4) Thereafter, appointments shall be made pursuant to division (A) of this section.

(E) For the initial appointment beginning January 1, 2011, one nonattorney shall be appointed for a term ending December 31, 2013. A commissioner appointed pursuant to this division shall be eligible for reappointment to one three-year term.

Section 2. Jurisdiction of Board.

(A) The unauthorized practice of law is:

(1) The rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar unless the person is:

(a) Certified as a legal intern under Gov. Bar R. II and rendering legal services in compliance with that rule;

(b) Granted corporate status under Gov. Bar R. VI and rendering legal services in compliance with that rule;

(c) Certified to temporarily practice law in legal services, public defender, and law school programs under Gov. Bar R. IX and rendering legal services in compliance with that rule;

(d) Registered as a foreign legal consultant under Gov. Bar R. XI and rendering legal services in compliance with that rule;

(e) Granted permission to appear pro hac vice by a tribunal in a proceeding in accordance with Gov. Bar R. XII and rendering legal services in that proceeding;

(f) Rendering legal services in accordance with Rule 5.5 of the Ohio Rules of Professional Conduct (titled "Unauthorized practice of law; multijurisdictional practice of law").

(2) The rendering of legal services for another by any person:

(a) Disbarred from the practice of law in Ohio under Gov. Bar R. V;

(b) Designated as resigned or resigned with disciplinary action pending under former Gov. Bar R. V (prior to September 1, 2007);

(c) Designated as retired or resigned with disciplinary action pending under Gov. Bar R. VI.

(3) The rendering of legal services for another by any person admitted to the practice of law in Ohio under Gov. Bar R. I while the person is:

- (a) Suspended from the practice of law under Gov. Bar R. V;
- (b) Registered as an inactive attorney under Gov. Bar R. VI;
- (c) Summarily suspended from the practice of law under Gov. Bar R. VI for failure to register;
- (d) Suspended from the practice of law under Gov. Bar R. X for failure to satisfy continuing legal education requirements;
- (e) Registered as retired under former Gov. Bar R. VI (prior to September 1, 2007).

(4) Holding out to the public or otherwise representing oneself as authorized to practice law in Ohio by a person not authorized to practice law by the Supreme Court Rules for the Government of the Bar or Prof. Cond. R. 5.5.

For purposes of this section, “holding out” includes conduct prohibited by divisions (A)(1) and (2) and (B)(1) of section 4705.07 of the Revised Code.

(B) The Board shall receive evidence, preserve the record, make findings, and submit recommendations concerning complaints of unauthorized practice of law except for complaints against persons listed in division (A)(3) of this section, which shall be filed in accordance with the disciplinary procedure set forth in Gov. Bar R. V.

(C) The Board may issue informal, nonbinding advisory opinions to any regularly organized bar association in this state, Disciplinary Counsel, or the Attorney General in response to prospective or hypothetical questions of public or great general interest regarding the application of this rule and the unauthorized practice of law. The Board shall not issue advisory opinions in response to requests concerning a question that is pending before a court or a question of interest only to the person initiating the request. All requests for advisory opinions shall be submitted, in writing, to the Secretary with information and details sufficient to enable adequate consideration and determination of eligibility under this rule.

The Secretary shall acknowledge the receipt of each request for an advisory opinion and forward copies of each request to the Board. The Board shall select those requests that shall receive an advisory opinion. The Board may decline to issue an advisory opinion and the Secretary promptly shall notify the requesting party. An advisory opinion approved by the Board shall be issued to the requesting party over the signature of the Secretary.

Advisory opinions shall be public and distributed by the Board.

(D) *Referral of Procedural Questions to Board.* In the course of an investigation, the chair of the unauthorized practice of law committee of a bar association, Disciplinary Counsel, or the Attorney General may direct a written inquiry regarding a procedural question to the Board chair or vice-chair. The inquiry shall be sent to the Secretary. The chair or vice-chair and the Secretary shall consult and direct a response.

Section 3. Referral for Investigation.

The Board may refer to the unauthorized practice of law committee of the appropriate bar association, Disciplinary Counsel, or the Attorney General any matters coming to its attention for investigation as provided in this rule.

Section 4. Application of Rule.

(A) All proceedings arising out of complaints of the unauthorized practice of law shall be brought, conducted, and disposed of in accordance with the provisions of this rule except for complaints against persons listed in Section 2(A)(3) of this rule, which shall be filed in accordance with the disciplinary procedure set forth in Gov. Bar R. V. A bar association that permits the membership of any attorney practicing within the geographic area served by that association without reference to the attorney's area of practice, special interest, or other criteria and that satisfies other criteria that may be established by Board regulations may establish an unauthorized practice of law committee. Members of bar association unauthorized practice of law committees shall be attorneys admitted to the practice of law in Ohio. Unauthorized practice of law committees, Disciplinary Counsel, and the Attorney General may share information with each other regarding investigations and prosecutions. This information shall be confidential and not subject to discovery or subpoena. Unauthorized practice of law committees may conduct joint investigations and prosecutions of unauthorized practice of law matters with each other, Disciplinary Counsel, and the Attorney General.

(B) The unauthorized practice of law committee of a bar association or Disciplinary Counsel shall investigate any matter referred to it or that comes to its attention and may file a complaint pursuant to this rule. The Attorney General may also file a complaint pursuant to this rule. The Board, Disciplinary Counsel, the president, secretary, or chair of the unauthorized practice of law committee of a bar association, and the Attorney General may call upon an attorney or judge in Ohio to assist in any investigation or to testify in any hearing before the Board as to any matter as to which he or she would not be bound to claim privilege as an attorney. No attorney or judge shall neglect or refuse to assist in any investigation or to testify.

(C) By the thirty-first day of January of each year, each bar association, Disciplinary Counsel, and the Attorney General shall file with the Board, on a form provided by the Board, a report of its activity on unauthorized practice of law complaints, investigations, and other matters requested by the Board. The report shall include all activity for the preceding calendar year.

(D) For complaints filed more than sixty days prior to the close of the report period on which a disposition has not been made, the report shall include an expected date of disposition and a statement of the reasons why the investigation has not been concluded.

Section 5. The Complaint; Where Filed; By Whom Signed.

(A) A complaint shall be a formal written complaint alleging the unauthorized practice of law by one who shall be designated as the respondent. The original complaint shall be filed in the office of the Secretary and shall be accompanied by thirteen copies plus two copies for each respondent named in the complaint. A complaint shall not be accepted for filing unless it is signed by one or more attorneys admitted to the practice of law in Ohio who shall be counsel for the relator. The complaint shall be accompanied by a certificate in writing signed by the president, secretary or chair of the unauthorized practice of law committee of any regularly organized bar association, Disciplinary Counsel, or the Attorney General, who shall be the relator, certifying that counsel are authorized to represent relator and have accepted the responsibility of prosecuting the complaint to conclusion. The certification shall constitute a representation that, after investigation, relator believes probable cause exists to warrant a hearing on the complaint and shall constitute the authorization of counsel to represent relator in the action as fully and completely as if designated by order of the Supreme Court with all the privileges and immunities of an officer of the Court. The Attorney General may serve as co-relator with any regularly organized bar association or Disciplinary Counsel.

(B) Upon the filing of a complaint with the Secretary, the relator shall forward a copy of the complaint to Disciplinary Counsel, the unauthorized practice of law committee of the Ohio State Bar Association, and any local bar association serving the county or counties from which the complaint emanated, except that the relator need not forward a copy of the complaint to itself.

Section 5a. Interim Cease and Desist Order

(A)(1) Upon receipt of substantial, credible evidence demonstrating that an individual or entity has engaged in the unauthorized practice of law and poses a substantial threat of serious harm to the public, Disciplinary Counsel, the unauthorized practice of law committee of any regularly organized bar association, or the Attorney General, which shall be referred to as the relator, shall do both of the following:

(a) Prior to filing a motion for an interim cease and desist order, make a reasonable attempt to provide the individual or entity, who shall be referred to as respondent, with notice, which may include notice by telephone, that a motion requesting an interim order that the respondent cease and desist engaging in the unauthorized practice of law will be filed with the Supreme Court and the Board.

(b) Simultaneously file a motion with the Supreme Court and the Board requesting that the Court order respondent to immediately cease and desist engaging in the unauthorized practice of law. The relator shall include, in its motion, proposed findings of fact, proposed conclusions of law, and other information in support of the requested order.

Evidence relevant to the requested order shall be attached to or filed with the motion. The motion shall include a certificate detailing the attempts made by relator to provide advance notice to the respondent of relator's intent to file the motion. The motion also shall include a certificate of service on the respondent at the most recent address of the respondent known to the relator. Upon the filing of a motion with the Court and the Board, proceedings before the Court shall be automatically stayed and the matter shall be deemed to have been referred by the Court to the Board for application of this rule.

(2) After the filing of a motion for an interim cease and desist order the respondent may file a memorandum opposing the motion in accordance with Rule XIV of the Rules of Practice of the Supreme Court of Ohio. The respondent shall attach or file with the memorandum any rebuttal evidence and simultaneously file a copy with the Board. If a memorandum in opposition to the motion is not filed, the stay of proceedings before the Supreme Court shall be automatically lifted and the Court shall rule on the motion pursuant to division (C) of this section.

(B) Upon the filing of a memorandum opposing the motion for an interim cease and desist order, the Board chair or the chair's designee ("commissioner") shall set the matter for hearing within seven days. A designee shall be an attorney member of the Board. Upon review of the filings of the parties, the commissioner will determine whether an oral argument or an evidentiary hearing shall be held based upon the existence of any genuine issue of material fact. Within seven days after the close of hearing, the commissioner shall file a report, including the transcript of hearing and the record, with the Supreme Court recommending whether or not an interim cease and desist order should be issued. Upon the filing of the commissioner's report, the stay of Supreme Court proceedings shall be automatically lifted.

(C) Upon consideration of the commissioner's report required by division (B) of this section, or if no memorandum in opposition is filed, the Supreme Court may enter an order that the respondent cease and desist engaging in the unauthorized practice of law, pending final disposition of proceedings before the Board, predicated on the conduct posing a substantial threat of serious harm to the public, or may order other action as the Court considers appropriate.

(D)(1) The respondent may request dissolution or modification of the cease and desist order by filing a motion with the Supreme Court. The motion shall be filed within thirty days of entry of the cease and desist order, unless the respondent first obtains leave of the Supreme Court to file a motion beyond that time. The motion shall include a statement and all available evidence as to why the respondent no longer poses a substantial threat of serious harm to the public. A copy of the motion shall be served by the respondent on the relator. The relator shall have ten days from the date the motion is filed to file a response to the motion. The Supreme Court promptly shall review the motion after a response has been filed or after the time for filing a response has passed.

(2) In addition to the motion allowed by division (D)(1) of this section, the respondent may file a motion requesting dissolution of the interim cease and desist order, alleging that one hundred eighty days have elapsed since the entry of the order and the relator has failed to file

with the Board a formal complaint predicated on the conduct that was the basis of the order. A copy of the motion shall be served by the respondent on the relator. The relator shall have ten days from the date the motion is filed to file a response to the motion. The Supreme Court promptly shall review the motion after a response has been filed or after the time for filing a response has passed.

(E) The Rules of Practice of the Supreme Court of Ohio shall apply to interim cease and desist proceedings filed pursuant to this section.

(F) Upon the entry of an interim cease and desist order or an entry of dissolution or modification of such order, the Clerk of the Supreme Court shall mail certified copies of the order as provided in Section 19(E) of this rule.

Section 5b. Settlement of Complaints; Consent Decrees

(A) As used in this section:

(1) A “settlement agreement” is a voluntary written agreement entered into between the parties without the continuing jurisdiction of the Board or the Supreme Court.

(2) A “consent decree” is a voluntary written agreement entered into between the parties, approved by the Board, and approved and ordered by the Supreme Court. The consent decree is the final judgment of the Supreme Court and is enforceable through contempt proceedings before the Court.

(3) A “proposed resolution” is a proposed settlement agreement or a proposed consent decree.

(B) The proposed resolution of a complaint filed pursuant to Section 5 of this rule, prior to adjudication by the Board, shall not be permitted without the prior review of the Board, the Supreme Court, or both. Parties contemplating the proposed resolution of a complaint shall file a motion to approve settlement agreement or motion to approve consent decree, whichever is applicable, with the Secretary. The motion shall be accompanied by:

(1) A proposed settlement agreement or a proposed consent decree that is signed by the respondent, respondent’s counsel, if the respondent is represented by counsel, and the relator and contains a stipulation of facts and waiver of notice and hearing as stated in Section 7(H) of this rule;

(2) A memorandum in support of the proposed resolution that demonstrates the resolution complies with the factors set forth in division (C) of this section and makes a recommendation concerning civil penalties based upon the factors set forth in Section 8(B) of this rule and Regulation 400(F) of the Regulations Governing Procedure on Complaints and Hearings Before the Board on the Unauthorized Practice of Law;

- (3) An itemized statement of the relator's costs or a statement that no costs have been incurred.

The voluntary dismissal of a complaint filed pursuant to Civ. R. 41(A) in conjunction with a proposed resolution is subject to the requirements of this section.

(C) The Board shall determine whether a proposed resolution shall be considered and approved by either the Board or the Supreme Court based on the following factors:

- (1) The extent the proposed resolution:
 - (a) Protects the public from future harm and remedies any substantial injury;
 - (b) Resolves material allegations of the unauthorized practice of law;
 - (c) Contains an admission by the respondent to material allegations of the unauthorized practice of law as stated in the complaint and a statement that the admitted conduct constitutes the unauthorized practice of law;
 - (d) Involves public policy issues or encroaches upon the jurisdiction of the Supreme Court to regulate the practice of law;
 - (e) Contains an agreement by the respondent to cease and desist the alleged activities;
 - (f) Furthers the stated purposes of this rule;
 - (g) Designates whether civil penalties are to be imposed in accordance with Section 8 of this rule;
 - (h) Assigns the party responsible for costs, if any.
- (2) The extent the motion to approve settlement agreement or consent decree and any accompanying documents comply with the requirements of division (B) of this section;
- (3) Any other relevant factors.

(D) Review by the Board

(1) Upon receipt of a proposed resolution, the Board chair shall direct the assigned hearing panel to prepare a written report setting forth its recommendation for the acceptance or rejection of the proposed resolution. The Board shall vote to accept or reject the proposed resolution. Upon a majority vote to accept a settlement agreement, an order shall be issued by

the Board chair or vice-chair dismissing the complaint. Upon a majority vote to accept a consent decree, the Board shall prepare and file a final report with the Supreme Court in accordance with division (E)(1) of this section.

(2) The refiling of a complaint previously resolved as a settlement agreement pursuant to this section shall reference the prior settlement agreement, and proceed only on the issue of the unauthorized practice of law. The case shall be presented on the merits and any previous admissions made by the respondent to allegations of conduct may be offered into evidence.

(E) Review by the Court

(1) After approving a proposed consent decree, the Board shall file an original and twelve copies of a final report and the proposed consent decree with the Clerk of the Supreme Court. A copy of the report shall be served upon all parties and counsel of record. Neither party shall be permitted to file an objection to the final report.

(2) A consent decree may be approved or rejected by the Supreme Court. If a consent decree is approved, the Court shall issue the appropriate order.

(3) A motion to show cause alleging a violation of a consent decree and any memorandum in opposition shall be filed with both the Supreme Court and the Board. The Board, upon receipt of the motion and memorandum in opposition, by panel assignment shall conduct either an evidentiary hearing or oral argument hearing on the motion, and by a majority vote of the Board submit a final report to the Court with findings of fact, conclusions of law, and recommendations on the issue of whether the consent decree was violated. Neither party shall be permitted to file objections to the Board's report without leave of Court.

(F) Rejection of a Proposed Resolution

(1) A complaint will proceed on the merits pursuant to this rule if a proposed resolution is rejected by either the Board or the Supreme Court. Upon rejection by the Board, an order shall be issued rejecting the proposed resolution and remanding the matter to the hearing panel for further proceedings. Upon rejection by the Court, an order shall be issued remanding the matter to the Board with or without instructions.

(2) A rejected proposed resolution shall not be admissible or otherwise used in a subsequent proceeding before the Board.

(3) No objections or other appeal may be filed with the Supreme Court upon a rejection by the Board of a proposed resolution.

(4) Any panel member initially considering a proposed resolution and voting with the Board on the rejection of the proposed resolution may proceed to hear the original complaint.

(G) The parties may consult with the Board through the Secretary concerning the terms of a proposed resolution.

(H) All settlement agreements approved by the Board and all consent decrees approved by the Supreme Court shall be recorded for reference by the Board, bar association unauthorized practice of law committees, and Disciplinary Counsel.

(I) This section shall not apply to the resolution of matters considered by an unauthorized practice of law committee, Disciplinary Counsel, or the Attorney General before a complaint is filed pursuant to Section 5 of this rule.

Section 6. Duty of the Board Upon Filing of the Complaint; Notice to Respondent.

The Secretary shall send a copy of the complaint by certified mail to respondent at the address indicated on the complaint with a notice of the right to file, within twenty days after the mailing of the notice, an original and thirteen copies of an answer and to serve copies of the answer upon counsel of record named in the complaint. Extensions of time may be granted, for good cause shown, by the Secretary.

Section 7. Proceedings of the Board after Filing of the Complaint.

(A) *Hearing Panel.*

(1) After respondent's answer has been filed, or the time for filing an answer has elapsed, the Secretary shall appoint a hearing panel consisting of three commissioners chosen by lot. At least two members of the hearing panel shall be attorney commissioners. The Secretary shall designate one of the commissioners chair of the panel, except that a nonattorney commissioner shall not be chair of the panel. The Secretary shall serve a copy of the entry appointing the panel on the respondent, relator, and all counsel of record.

(2) A majority of the panel shall constitute a quorum. The panel chair shall rule on all motions and interlocutory matters. The panel chair shall have a transcript of the testimony taken at the hearing, and the cost of the transcript shall be paid from the Attorney Services Fund and taxed as costs.

(3) Upon reasonable notice and at a time and location set by the panel chair, the panel shall hold a formal hearing. Requests for continuances may be granted by the panel chair for good cause. The panel may take and hear testimony in person or by deposition, administer oaths, and compel by subpoena the attendance of witnesses and the production of books, papers, documents, records, and materials.

(B) *Motion for Default.* If no answer has been filed within twenty days of the answer date set forth in the notice to respondent of the filing of the complaint, or any extension of the answer date, relator shall file a motion for default. Prior to filing, relator shall make reasonable efforts to contact respondent.

A motion for default shall contain at least all of the following:

- (1) A statement of the effort made to contact respondent and the result;
- (2) Sworn or certified documentary *prima facie* evidence in support of the allegations of the complaint;
- (3) Citations of any authorities relied upon by relator;
- (4) A statement of any mitigating factors or exculpatory evidence of which relator is aware;
- (5) A statement of the relief sought by relator;
- (6) A certificate of service of the motion on respondent at the address stated on the complaint and at the last known address, if different.

The hearing panel appointed pursuant to division (A) of this section shall rule on the motion for default. If the motion for default is granted by the panel, the panel shall prepare a report for review by the Board pursuant to division (E) of this section. If the motion is denied, the hearing panel shall proceed with a formal hearing pursuant to division (A) of this section.

The Board chair or vice-chair may set aside a default entry, for good cause shown, and order a hearing before the hearing panel at any time before the Board renders its decision pursuant to division (F) of this section.

(C) *Authority of Hearing Panel; Dismissal.* If at the end of evidence presented by relator or of all evidence, the hearing panel unanimously finds that the evidence is insufficient to support a charge or count of unauthorized practice of law, or the parties agree that the charge or count should be dismissed, the panel may order that the complaint or count be dismissed. The panel chair shall give written notice of the action taken to the Board, the respondent, the relator, all counsel of record, Disciplinary Counsel, the unauthorized practice of law committee of the Ohio State Bar Association, and the bar association serving the county or counties from which the complaint emanated.

(D) *Referral by the Panel.* If the hearing panel is not unanimous in its finding that the evidence is insufficient to support a charge or count of unauthorized practice of law, the panel may refer its findings of fact and recommendations for dismissal to the Board for review and action by the full Board. The panel shall submit to the Board its findings of fact and recommendation of dismissal in the same manner as provided in this rule with respect to a finding of unauthorized practice of law pursuant to division (E) of this section.

(E) *Finding of Unauthorized Practice of Law; Duty of Hearing Panel.* If the hearing panel determines, by a preponderance of the evidence, that respondent has engaged in the unauthorized

practice of law, the hearing panel shall file its report of the proceedings, findings of facts and recommendations with the Secretary for review by the Board. The report shall include the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with the proceedings.

(F) *Review by Entire Board.* After review, the Board may refer the matter to the hearing panel for further hearing or proceed on the report of the prior proceedings before the hearing panel. After the final review, the Board may dismiss the complaint or find that the respondent has engaged in the unauthorized practice of law. If the complaint is dismissed, the dismissal shall be reported to the Secretary, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the hearing panel.

(G) *Finding of Unauthorized Practice of Law; Duty of Board.* If the Board determines, by a preponderance of the evidence, that the respondent has engaged in the unauthorized practice of law, the Board shall file the original and twelve copies of its final report with the Clerk of the Supreme Court, and serve a copy of the final report upon all parties and counsel of record, Disciplinary Counsel, the unauthorized practice of law committee of the Ohio State Bar Association, and the bar association of the county or counties from which the complaint emanated. The final report shall include the Board's findings, recommendations, a transcript of testimony, if any, an itemized statement of costs, recommendation for civil penalties, if any, and a certificate of service listing the names and addresses of all parties and counsel of record.

(H) *Hearing on Stipulated Facts.* A stipulation of facts and waiver of notice and hearing, mutually agreed and executed by relator and respondent, or counsel, may be filed with the Board prior to the date set for formal hearing. If a stipulation and waiver are filed, the parties are not required to appear before the hearing panel for a formal hearing, and the hearing panel shall render its decision based upon the pleadings, stipulation, and other evidence admitted.

The stipulation of facts must contain sufficient information to demonstrate the specific activities in which the respondent is alleged to have engaged and to enable the Board to determine whether respondent has engaged in the unauthorized practice of law.

The waiver of notice and hearing shall specifically state that the parties waive the right to notice of and appearance at the formal hearing before the hearing panel.

Section 8. Costs; Civil Penalties.

(A) *Costs.* As used in Section 7(G) of this rule, "costs" includes both of the following:

(1) The expenses of relator, as described in Section 9 of this rule, that have been reimbursed by the Board;

(2) The direct expenses incurred by the hearing panel and the Board, including, but not limited to, the expense of a court reporter and transcript of any hearing before the hearing panel.

“Costs” shall not include attorney’s fees incurred by the relator.

(B) *Civil Penalties.* The Board may recommend and the Supreme Court may impose civil penalties in an amount up to ten thousand dollars per offense. Any penalty shall be based on the following factors:

- (1) The degree of cooperation provided by the respondent in the investigation;
- (2) The number of occasions that unauthorized practice of law was committed;
- (3) The flagrancy of the violation;
- (4) Harm to third parties arising from the offense;
- (5) Any other relevant factors.

Section 9. Expenses.

(A) *Reimbursement of Direct Expenses.* A bar association and the Attorney General may be reimbursed for direct expenses incurred in performing the obligations imposed by this rule. Reimbursement shall be limited to costs for depositions, transcripts, copies of documents, necessary travel expenses for witnesses and volunteer attorneys, witness fees, subpoenas, the service of subpoenas, postal and delivery charges, long distance telephone charges, and compensation of investigators and expert witnesses authorized in advance by the Board. There shall be no reimbursement for the costs of the time of other bar association or Attorney General personnel or attorneys in discharging these obligations.

An application for reimbursement of expenses, together with proof of the expenditures, shall be filed with the Secretary. Upon approval by the Board, reimbursement shall be made from the Attorney Services Fund.

(B) *Annual Reimbursement of Indirect Expenses.* A bar association may apply to the Board prior to the first day of February each year for partial reimbursement of other expenses necessarily and reasonably incurred during the preceding calendar year in performing their obligations under this rule. The Board, by regulation, shall establish criteria for determining whether expenses under this section are necessary and reasonable. The Board shall deny reimbursement for any expense for which a bar association seeks reimbursement on or after the first day of May of the year immediately following the calendar year in which the expense was incurred. Expenses eligible for reimbursement are those specifically related to unauthorized practice of law matters and include the following:

- (1) The personnel costs for the portion of an employee’s work that is dedicated to this area;

(2) The costs of bar counsel retained pursuant to a written agreement with the unauthorized practice of law committee;

(3) Postal and delivery charges;

(4) Long distance telephone charges;

(5) Local telephone charges and other appropriate line charges included, but not limited to, per call charges;

(6) The costs of dedicated telephone lines;

(7) Subscription to professional journals, law books, and other legal research services and materials related to unauthorized practice of law;

(8) Organizational dues and educational expenses related to unauthorized practice of law;

(9) All costs of defending a lawsuit relating to unauthorized practice of law and that portion of professional liability insurance premiums directly attributable to the operation of the committees in performing their obligations under this rule;

(10) The percentage of rent, insurance premiums not reimbursed pursuant to division (B)(9) of this section, supplies and equipment, accounting costs, occupancy, utilities, office expenses, repair and maintenance, and other overhead expenses directly attributable to the operation of the committees in performing their obligations under this rule, as determined by the Board and provided that no bar association shall be reimbursed in excess of three thousand five hundred dollars per calendar year for such expenses. Reimbursement shall not be made for the costs of the time of other bar association personnel, volunteer attorneys, depreciation, or amortization. No bar association shall apply for reimbursement or be entitled to reimbursement for expenses that are reimbursed pursuant to Gov. Bar R. V(3)(D).

(C) *Quarterly Reimbursement of Certain Indirect Expenses.* In addition to applying annually for reimbursement pursuant to division (B) of this section, a bar association may apply quarterly to the Board for reimbursement of the expenses set forth in divisions (B)(1) and (2) of this section that were necessarily and reasonably incurred during the preceding calendar quarter. Quarterly reimbursement shall be submitted in accordance with the following schedule:

| Reimbursement for the months of: | Due by: |
|---|--|
| January, February, and March | May 1 |
| April, May, and June | August 1 |
| July, August, and September | November 1 |
| October, November, and December | February 1 (with annual reimbursement request) |

Any expense that is eligible for quarterly reimbursement, but that is not submitted on a quarterly reimbursement application, shall be submitted no later than the appropriate annual reimbursement application pursuant to division (B) of this section and shall be denied by the Board if not timely submitted. The application for quarterly reimbursement shall include an affidavit with documentation demonstrating that the unauthorized practice of law committee incurred the expenses set forth in divisions (B)(1) and (2) of this section.

(D) *Audit.* Expenses incurred by bar associations and reimbursed under divisions (A), (B), and (C) of this section may be audited at the discretion of the Board or the Supreme Court and paid out of the Attorney Services Fund.

(E) *Availability of Funds.* Reimbursement under divisions (A), (B), and (C) of this section is subject to the availability of moneys in the Attorney Services Fund.

Section 10. Manner of Service.

Whenever provision is made for the service of any complaint, notice, order, or other document upon a respondent or relator in connection with any proceeding under this rule, service may be made upon counsel of record for the party personally or by certified mail.

If service of any document by certified mail is refused or unclaimed, the Secretary may make service by ordinary mail evidenced by a certificate of mailing. Service shall be considered complete when the fact of mailing is entered in the record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery.

Section 11. Quorum of Board.

A majority of the commissioners shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board.

Section 12. Power to Issue Subpoenas.

In order to facilitate any investigation and proceeding under this rule, upon application by Disciplinary Counsel, the unauthorized practice of law committee of any regularly organized bar association, respondent, relator, or the Attorney General, the Secretary, the Board chair or vice-chair, and the hearing panel chair may issue subpoenas and cause testimony to be taken under oath before Disciplinary Counsel, the unauthorized practice of law committee of any regularly organized bar association, the Attorney General, a Board hearing panel, or the Board. All subpoenas shall be issued in the name and under the seal of the Supreme Court and shall be signed by the Secretary, the Board chair or vice-chair, or the hearing panel chair and served as provided by the Rules of Civil Procedure. Fees and costs of all subpoenas shall be provided from the Attorney Services Fund and taxed as costs.

The refusal or neglect of a person subpoenaed or called as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of the Supreme Court and may be punished accordingly.

Section 13. Depositions.

The Secretary, the Board chair or vice-chair, and the hearing panel chair may order testimony of any person to be taken by deposition within or without this state in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

Section 14. Conduct of Hearing.

The hearing panel shall follow the Rules of Civil Procedure and Rules of Evidence wherever practicable, unless a provision of this rule or Board hearing procedures and guidelines provide otherwise. The panel chair shall rule on evidentiary matters. All evidence shall be taken in the presence of the hearing panel and the parties except where a party is absent, is in default, or has waived the right to be present. The hearing panel shall receive evidence by sworn testimony and may receive additional evidence as it determines proper. Any documentary evidence to be offered shall be served upon the adverse parties or their counsel and the hearing panel at least thirty days before the hearing, unless the parties or their counsel otherwise agree or the hearing panel otherwise orders. All evidence received shall be given the weight the hearing panel determines it is entitled after consideration of objections.

Section 15. Records.

The Secretary shall maintain permanent public records of all matters processed by the Board and the disposition of those matters.

Section 16. Board May Prescribe Regulations.

Subject to the prior approval of the Supreme Court, the Board may adopt regulations not inconsistent with this rule.

Section 17. Rules to Be Liberally Construed.

Amendments to any complaint, notice, answer, objections, or report may be made at any time prior to final order of the Board. The party affected by the amendment shall be given reasonable opportunity to meet any new matter presented by the amendment. This rule and regulations relating to investigations and proceedings involving complaints of unauthorized practice of law shall be liberally construed for the protection of the public, the courts, and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations and complaints whether the conduct involved occurred prior or subsequent to the enactment or amendment of this rule.

Section 18. Records and Proceedings Public.

All records, documents, proceedings, and hearings of the Board relating to investigations and complaints pursuant to this rule shall be public, except that deliberations by a hearing panel and the Board shall not be public.

Section 19. Review by Supreme Court of Ohio; Orders; Costs.

(A) *Show Cause Order.* After the filing of a final report of the Board, the Supreme Court shall issue to respondent an order to show cause why the report of the Board shall not be confirmed and an appropriate order granted. Notice of the order to show cause shall be served by the Clerk of the Supreme Court on all parties and counsel of record by certified mail at the address provided in the Board's report.

(B) *Response to Show Cause Order.* Within twenty days after the issuance of an order to show cause, the respondent or relator may file objections to the findings or recommendations of the Board and to the entry of an order or to the confirmation of the report on which the order to show cause was issued. The objections shall be accompanied by a brief in support of the objections and proof of service of copies of the objections and the brief on the Secretary and all counsel of record. Objections and briefs shall be filed in the number and form required for original actions by the Rules of Practice of the Supreme Court of Ohio, to the extent such rules are applicable.

(C) *Answer Briefs.* Answer briefs and proof of service shall be filed within fifteen days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required for original actions by the Rules of Practice of the Supreme Court of Ohio, to the extent such rules are applicable.

(D) *Supreme Court Proceedings.*

(1) After a hearing on objections, or if objections are not filed within the prescribed time, the Supreme Court shall enter an order as it finds proper. If the Supreme Court finds that respondent's conduct constituted the unauthorized practice of law, the Court shall issue an order that does one or more of the following:

(a) Prohibits the respondent from engaging in any such conduct in the future;

(b) Requires the respondent to reimburse the costs and expenses incurred by the Board and the relator pursuant to this rule;

(c) Imposes a civil penalty on the respondent. The civil penalty may be imposed regardless of whether the Board recommended imposition of the penalty pursuant to Section 8(B) of this rule and may be imposed for an amount greater or less than the amount recommended by the Board, but not to exceed ten thousand dollars per offense.

(2) Payment for costs, expenses, sanctions, and penalties imposed under this rule shall be deposited in the Attorney Services Fund established under Gov. Bar R. VI, Section 8.

(E) *Notice.* Upon the entry of any order pursuant to this rule, the Clerk of the Supreme Court shall mail certified copies of the entry to all parties and counsel of record, the Board, Disciplinary Counsel, and the Ohio State Bar Association.

(F) *Publication.* The Supreme Court reporter shall publish any order entered by the Supreme Court under this rule in the *Ohio Official Reports*, the *Ohio State Bar Association Report*, and in a publication, if any, of the local bar association in the county in which the complaint arose. The publication shall include the citation of the case in which the order was issued. Publication also shall be made in a local newspaper having the largest general circulation in the county in which the complaint arose. The publication shall be in the form of a paid legal advertisement, in a style and size commensurate with legal advertisements, and shall be published three times within the thirty days following the order of the Supreme Court. Publication fees shall be assessed against the respondent as part of the costs.

[Not analogous to former Rule VII, effective October 20, 1975; amended effective April 13, 1977; November 6, 1978; April 25, 1983; July 1, 1983; November 30, 1983; June 6, 1988; January 1, 1989; January 1, 1990; January 1, 1992; January 1, 1993; January 1, 1995; June 16, 2003; January 1, 2005; November 1, 2007; January 1, 2008; September 1, 2008; September 1, 2010; January 1, 2011; January 1, 2013.]

**REGULATIONS GOVERNING PROCEDURE ON COMPLAINTS AND
HEARINGS BEFORE THE BOARD ON THE UNAUTHORIZED PRACTICE
OF LAW**

UPL Reg. 100 Title, Authority and Application

(A) These regulations shall be known as the Regulations Governing Procedure on Complaints and Hearings Before the Board on the Unauthorized Practice of Law and shall be cited as “UPL Reg. ____.”

(B) The following regulations are adopted by the Board on the Unauthorized Practice of Law pursuant to Gov.Bar R. VII(16) of the Rules for the Government of the Bar of Ohio, with the prior approval of the Supreme Court of Ohio.

(C) Pursuant to Gov.Bar R. VII(14), the Board applies the Ohio Rules of Civil Procedure and Rules of Evidence whenever practicable, unless a provision of Gov.Bar R. VII, these regulations, or Board procedure provide otherwise. Local rules of court are not applicable to matters before the Board.

UPL Reg. 200 Case Management; Practice and Procedure

201 Case Schedule

(A) After assignment of the Hearing Panel, the Secretary of the Board in consultation with the Panel Chair shall issue a case scheduling order to all parties or their counsel as set forth in this regulation. The case schedule shall be served upon the parties no more than seven days after the time to plead or otherwise defend the complaint has elapsed. The case schedule shall at a minimum establish deadlines for certain case events and may be adjusted by the Panel Chair or for good cause shown:

| | |
|-------------------------------------|--|
| Assignment of Hearing Panel | 0 |
| Hearing Date | 266 days after assignment |
| Initial Telephone Status Conference | 30 days after assignment |
| Initial Disclosure of Witnesses | 80 days after assignment, or upon request of either party |
| Discovery Cut-off | 60 days before hearing |
| Pre-Hearing Statement/Briefs | 40 days before hearing |

(B) At the discretion of the Panel Chair, the following events may also be established:

- Dispositive Motion Deadline
- Motions on Preliminary or Procedural Issues Deadline
- Decisions on Motions
- Stipulations of Facts and/or Law
- Supplemental Disclosure of Witnesses
- Final Pre-Hearing Conference

(C) Any complaint filed by an Unauthorized Practice of Law Committee or the Disciplinary Counsel shall state whether the relator is aware that an underlying complainant or individual is seeking a private remedy pursuant to R.C. 4705.07. Upon receipt of the complaint, the Secretary shall designate the case accordingly and inform the Panel Chair, who will have the discretion to accelerate the case management schedule and hearing date.

202 Motions; Dispositive Motions

(A) Upon the filing of a motion and unless ordered otherwise by the Panel Chair, any memorandum in opposition shall be filed within twenty-one days after the filing of the motion. The response shall be served upon the Secretary and all adverse parties or their counsel. Unless directed otherwise by the Panel Chair, any reply to the memorandum in opposition shall be filed within ten days of the filing of the memorandum in opposition. Three days shall be added to the prescribed time periods when the motion or responsive memoranda are served by mail.

(B) Any motion, including but not limited to a motion for summary judgment, a motion for judgment on the pleadings, and a motion to dismiss, that seeks to determine the merits of any claim or defense as to any or all parties shall be considered a dispositive motion. A voluntary dismissal under Civ.R. 41 is not a dispositive motion for purposes of this regulation. All dispositive motions shall be filed no later than the date specified in the case schedule. Pursuant to Civ.R. 56(A), leave is granted in all cases to file summary judgment motions between the time of service of the complaint and the dispositive motion date, unless the Panel Chair dictates otherwise by setting a different date. If a dispositive motion date was not established in the initial case schedule, leave of the Panel must be obtained pursuant to Civ.R. 56(A). Parties shall file their summary judgment motion at the earliest practical date during the pendency of the case.

(C) The Panel Chair may order the simultaneous filing of motions and memoranda in opposition without provision for reply.

203 Pre-hearing Procedure

203.1 Pre-hearing Statements, Motions, and Briefs

(A) In all cases pending hearing, all parties shall prepare and serve upon the Secretary, with a copy to all opposing counsel, a final pre-hearing statement forty days prior to the assigned hearing date. The final pre-hearing statement shall at a minimum contain:

- (1) A brief statement of the facts and identification of claims and defenses;
- (2) The factual and legal issues which the cause presents;
- (3) For relator, its position on whether the facts and circumstances of the case warrant imposition of a civil penalty and if the relator seeks the imposition of a civil penalty, the relator shall specify the amount of the civil penalty it is requesting and identify the unique facts and circumstances that it believes warrant imposition of the civil penalty requested; and,
- (4) For respondent, an indication of whether there is opposition to any request for imposition of a civil penalty and the existence of evidence in mitigation;
- (5) The estimated days required for hearing.

(B) Parties shall separately prepare and serve upon the Secretary, with a copy to all opposing counsel, forty days prior to the assigned hearing date:

- (1) Stipulations of fact or law, if any;
- (2) A listing of all witnesses with a brief summary of expected testimony; a copy of all available opinions of all persons who may be called as expert witnesses;
- (3) A listing of all exhibits expected to be offered into evidence, except exhibits to be used only for impeachment, illustration, or rebuttal.

(C) Forty days prior to the hearing date, all other motions (other than dispositive motions), pleadings, filings or hearing briefs intended to be offered at the hearing shall be served upon the Secretary and opposing parties. A response to any motion, brief or other filing shall be served according to UPL Reg. 202(A). The required pre-hearing statement may be included as part of any hearing brief.

(D) All documentary evidence to be offered at hearing shall be served upon the Secretary, adverse parties or their counsel at least thirty days before hearing pursuant to Gov.Bar R. VII(14).

(E) There is reserved to each party, upon application to the Panel and for good cause shown, the right at the hearing to:

- (1) offer additional exhibits, file additional pleadings;
- (2) supplement the list of witnesses to be called; and,
- (3) call such rebuttal witnesses as may be necessary, without prior notice to opposing parties.

204 Certificate of Registration

After filing a complaint alleging the unauthorized practice of law, relator shall produce a Certificate from the Supreme Court of Ohio, Office of Attorney Registration, indicating whether any responsive party to the complaint is not admitted to practice law in the State of Ohio, and serve a copy upon all respondents, counsel of record, and the Secretary of the Board, and the original shall be offered as an exhibit at hearing and filed with the Board by the relator at the conclusion of hearing.

205 Final Pre-hearing Conferences

(A) No later than sixty days before hearing, a party may file a request for a pre-hearing conference with the Panel. The request may be granted by the Panel Chair. The Panel Chair may also establish a pre-hearing conference date consistent with the initial case scheduling order. A pre-hearing conference with the parties shall at a minimum attempt to accomplish the following objectives:

- (1) Simplification of the issues;
- (2) Necessity of amendment to the pleadings;
- (3) Resolution of outstanding discovery issues;
- (4) Identification of anticipated witnesses;
- (5) The possibility of obtaining:
 - (i) stipulations of fact or law;
 - (ii) stipulations of the admissibility of exhibits;
- (6) Such other matters as may expedite the hearing;
- (7) Confirmation of the final hearing date and venue.

(B) At the discretion of the Panel Chair, a pre-hearing conference may be held by telephone, and may be continued from day to day. Counsel and parties should be prepared to discuss the matters contained in this regulation. At the conclusion of the pre-hearing conference, the Panel Chair may enter an order setting forth the action taken and the agreements reached, which order shall govern the subsequent course of proceedings.

206 Electronic Filing (Reserved)

207 Continuances

(A) The continuance of a hearing date is a matter within the discretion of the Panel for good cause shown. No party shall be granted a continuance of a hearing date without a written motion from the party or counsel stating the reason for the continuance. The motion shall be filed with the Secretary no later than ten days before the date set for hearing. If the motion is not granted by the Panel Chair, the cause shall proceed as originally scheduled.

(B) When a continuance is requested due to the unavailability of a witness at the time scheduled for hearing, the Panel may consider the feasibility of permitting testimony pursuant to Civ.R. 32.

208 Subpoenas and Orders for Testimony

(A) To compel the testimony of a witness at the hearing, requests for the issuance of subpoenas pursuant to Gov.Bar R. VII(12) shall be made in writing and filed with the Secretary no later than ten days before the date on which a complaint has been set for hearing.

(B) To compel the testimony of a witness whose testimony will be offered at the hearing via deposition pursuant to Civ.R. 32, requests for orders for testimony pursuant to Gov.Bar R.VII(13) or the issuance of subpoenas pursuant to Gov.Bar R. VII(12) shall be made in writing and filed with the Secretary no later than thirty days before the date on which a complaint has been set for hearing.

209 Post-hearing Procedure of the Panel and Board

(A) A Panel Report shall be submitted to the Secretary within sixty days of the filing of the transcript for consideration at the next regularly scheduled meeting of the Board. The Secretary, at the request of the Panel Chair, may extend the date for the filing of the Panel Report with the Board.

(B) The Final Report of the Board shall be filed with the Court by the Secretary no later than thirty days after the conclusion of the Board's review, approval and adoption of whole or part of the Panel's report. After consideration by the Board, the Chair may be granted the authority by the Board to prepare and file the Final Report.

(C) Failure by the Board to meet the time guidelines set forth in these regulations shall not be grounds for dismissal of the complaint.

UPL Reg. 300 Regulation for the Issuance of Advisory Opinions

300.1 Procedure for Issuance

(A) Pursuant to Gov.Bar R. VII(2)(C) of the Supreme Court Rules for the Government of the Bar of Ohio, the Board on the Unauthorized Practice of Law may issue informal, non-binding Advisory Opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio regarding the unauthorized practice of law and issues implicated by R.C. 4705.01, 4705.07 and 4705.99. Requests for an Advisory Opinion may be submitted to the Board by Disciplinary Counsel or an Unauthorized Practice of Law Committee of a Local or State Bar Association.

(B) The Chair of the Board shall appoint three or more members of the Board to serve on an Advisory Opinion Subcommittee. The Advisory Opinion Subcommittee is a regular standing subcommittee of the Board. The subcommittee shall meet prior to each regularly scheduled Board meeting. The Chair will appoint one subcommittee member to serve as Chair of the Advisory Opinion Subcommittee. Each subcommittee member shall serve for a period of one year from the date of appointment and shall be eligible for re-appointment by the Chair.

(C) Requests for an Advisory Opinion shall be submitted in writing to the Secretary of the Board on the Unauthorized Practice of Law. The request for Advisory Opinion shall be in writing and state in detail to the extent practicable the operative facts upon which the request for Opinion is based, with information and detail sufficient to enable adequate consideration and determination of eligibility under these regulations. The request shall contain the name and address of the requester. A summary of the rules, opinions, statutes, case law and any other authority which the inquirer has already consulted concerning the questions raised should also be included in the request. A letter acknowledging the receipt of the request will be sent to the requester.

(D) The procedure for review of a request for Advisory Opinion shall be as follows:

(1) The Advisory Opinion Subcommittee shall review all requests for Advisory Opinion submitted by Disciplinary Counsel or an Unauthorized Practice of Law Committee of a Local or State Bar Association.

(2) The Advisory Opinion Subcommittee shall, within its discretion, accept or decline a request for an Advisory Opinion.

(3) In making such determination, the subcommittee shall be governed by Gov.Bar R. VII(2)(C) and respond only to prospective or hypothetical questions of public or great general interest regarding the application of Gov.Bar R. VII and the unauthorized practice of law. The subcommittee shall decline requests that concern a question that is pending before the Court, decided by the Court, or a question of interest only to the person initiating the request. If the subcommittee determines that adequate authority already exists to answer the inquiry posed, the requester will be advised of the applicable authority and no Opinion will be issued.

(4) If any member of the subcommittee requests the declination of the Advisory Opinion be considered by the full Board, such request will be presented to the full Board for consideration at the next business meeting. If the subcommittee unanimously declines a request for Advisory Opinion, such determination shall be final.

(E) The requester of an Advisory Opinion will be notified of the Board's determination to accept or decline a request.

(F) If a request for Advisory Opinion is accepted for consideration, the subcommittee will complete the process of researching, drafting and review as expeditiously as possible, preferably within two to six months after selection of the request. The subcommittee shall be empowered to request and accept the voluntary services of a person licensed to practice law in this state when the subcommittee deems it advisable to receive written or oral advice or assistance in research and analysis regarding the question presented by the requester.

(G) Conflict of Interest. Subcommittee members shall not participate in any matter in which they have either a material pecuniary interest that would be affected by a proposed Advisory Opinion or subcommittee recommendation or any other conflict of interest or an appearance of a conflict of interest that should prevent them from participating. However, no action of the subcommittee will be invalid where full disclosure has been made to the Chair of the Board and the Chair has not decided that the member's participation was improper.

(H) Each draft Opinion approved by majority vote of the subcommittee will be sent to the full Board on the Unauthorized Practice of Law for review approximately two weeks prior to the next Board meeting. Upon review, Board members may direct comments, suggestions, or objections to the Chair of the subcommittee.

(I) If objections are received, the draft Opinion will be placed on the agenda for discussion at the Board meeting. If no objections are received, the draft

Opinion will be adopted by a majority vote of the Board at the Board meeting. Minor or non-substantive changes are not considered as objections to a draft Opinion.

(J) A copy of the Adopted Advisory Opinion will be issued to the requester. Copies of the issued Opinions will be submitted for publication in the *ABA/BNA Lawyers Manual on Professional Conduct*, the *Ohio State Bar Association Report*, and other publications or electronic communications as the Board deems appropriate. Copies of issued Opinions will be forwarded to the Law Library of the Supreme Court of Ohio, County Law Libraries, Office of Disciplinary Counsel, Local and State Bar Associations with Unauthorized Practice of Law Committees.

(K) Issued Opinions shall not bear the name of the requester and shall not include the request letter. However, the requester's name and the request letter are not confidential and will be made available to the Bar, Judiciary, or the public upon request.

300.2 Procedure for Maintenance

(A) A copy of each Advisory Opinion will be kept in the Board's offices.

(B) An Advisory Opinion that becomes withdrawn, modified, or not current will be marked with an appropriate designation to indicate the status of the opinion.

(C) The designation "Withdrawn" will be used when an Opinion has been withdrawn by the majority vote the Board. The designation indicates that an Opinion no longer represents the advice of the Board.

(D) The designation "Modified" will be used when an Opinion has been modified by a majority vote of the Board. The designation indicates that an Opinion has been modified by a subsequent Opinion.

(E) The designation "Not Current" will be used at the discretion of the Board to indicate that an Opinion is not current in its entirety. The designation that an Opinion is no longer current in its entirety may be used to indicate a variety of reasons such as subsequent amendments to rules or statutes, or developments in case law.

(F) Other designations, as needed, may be used by majority vote of the Board.

(G) The Advisory Opinion index will include a list identifying the Opinions as "Withdrawn," "Modified," or "Not Current," and other designations as decided by the Board.

UPL Reg. 400

Guidelines for the Imposition of Civil Penalties

(A) Each case of unauthorized practice of law involves unique facts and circumstances.

(B) At the hearing and at the end of its case-in-chief, relator shall set forth its position on the imposition of a civil penalty. Relator shall specify the amount of the civil penalty it is requesting and identify the factors, circumstances, and aggravating factors, if any, that warrant imposition of the requested civil penalty.

(C) At the hearing respondent shall contest any request for imposition of a civil penalty. Evidence that is offered by respondent in mitigation shall be introduced as part of the respondent's case-in-chief .

(D) In determining whether to recommend the imposition of a civil penalty, the Board shall consider all relevant facts and circumstances, as well as precedent established by the Supreme Court of Ohio and the Board.

(E) In each case where the Board finds by a preponderance of the evidence that respondent has engaged in the unauthorized practice of law, the Board shall discuss in its final report to the Supreme Court any of the factors set forth in Gov.Bar R. VII(8)(B):

"(B) Civil Penalties. The Board may recommend and the Court may impose civil penalties in an amount up to ten thousand dollars per offense. Any penalty shall be based on the following factors:

(1) The degree of cooperation provided by the respondent in the investigation;

(2) The number of occasions that unauthorized practice of law was committed;

(3) The flagrancy of the violation;

(4) Harm to third parties arising from the offense;

(5) Any other relevant factors."

(F) As part of its analysis of "other relevant factors" pursuant to Gov.Bar R.VII(8)(B)(5), the Board may consider:

- (1) Whether relator has sought imposition of a civil penalty and, if so, the amount sought.
- (2) Whether the imposition of civil penalties would further the purposes of Gov.Bar R. VII.
- (3) Aggravation. The following factors may be considered in favor of recommending a more severe penalty:
 - (a) Whether respondent has previously engaged in the unauthorized practice of law;
 - (b) Whether respondent has previously been ordered to cease engaging in the unauthorized practice of law;
 - (c) Whether the respondent had been informed prior to engaging in the unauthorized practice of law that the conduct at issue may constitute an act of the unauthorized practice of law;
 - (d) Whether respondent has benefited from the unauthorized practice of law and, if so, the extent of any such benefit;
 - (e) Whether respondent's unauthorized practice of law included an appearance before a court or other tribunal;
 - (f) Whether respondent's unauthorized practice of law included the preparation of a legal instrument for filing with a court or other governmental entity; and
 - (g) Whether the respondent has held himself or herself out as being admitted to practice law in the State of Ohio, or whether respondent has allowed others to mistakenly believe that he or she was admitted to practice law in the State of Ohio.
- (4) Mitigation. The following factors may be considered in favor of recommending no penalty or a less severe penalty:
 - (a) Whether respondent has ceased engaging in the conduct under review;
 - (b) Whether respondent has admitted or stipulated to the conduct under review;
 - (c) Whether respondent has admitted or stipulated that the conduct under review constitutes the unauthorized practice of law;
 - (d) Whether respondent has agreed or stipulated to the imposition of an injunction against future unauthorized practice of law;
 - (e) Whether respondent's conduct resulted from a motive other than dishonesty or personal benefit;
 - (f) Whether respondent has engaged in a timely good faith effort to make restitution or to rectify the consequences of the unauthorized practice of law; and

(g) Whether respondent has had other penalties imposed for the conduct at issue.

UPL Reg. 500-900 (Reserved)

UPL Reg. 1000 Effective Date

(A) These regulations shall be effective June 1, 2006.



UPL Case Update

| BOARD REPORTS FILED WITH THE SUPREME COURT OF OHIO | | | | |
|---|---|------------|------------------------------------|---|
| Case No. | Case Names | Date Filed | Supreme Court Decision | Type |
| 1 | 2015-0540 In re application of Swendiman* | 4/3/2015 | 5/5/2016 | Bar Admissions/Character and Fitness Case. Applicant engaged in UPL in Ohio. Application for admission disapproved. |
| <i>*filed by the Board of Commissioners on Character and Fitness</i> | | | | |
| 2 | 2014-0517 Disciplinary Counsel v. Mary E. Hernandez | 4/4/2014 | 12/23/2014 | Relator's Motion for Default granted. 2 counts of UPL Civil penalty of \$15K |
| 3 | 2014-0518 Cleveland Metropolitan Bar Association v. William Hill, Individually, and The Advocacy Group, Inc. | 4/4/2014 | 12/3/2014 | Relator's Motion for Default granted. 22 counts of UPL Civil penalty of \$20K |
| 4 | 2014-1494 Disciplinary Counsel v. Ms. Betty J. Brown | 8/27/2014 | 5/9/2015 | Relator's Motion for Default granted. 3 counts of UPL Civil penalty of \$7K |
| 5 | 2014-1497 Toledo Bar Association v. Rick B. Vanlandingham III | 8/27/2014 | 4/3/2015 | Relator's Motion for Summary Judgment granted. UPL but no civil penalty. |
| 6 | 2014-1498 Ohio State Bar Association v. Robert M. Baratta and Artemio R. Baratta a.k.a. Tim Baratta | 8/27/2014 | 1/26/2015 | Matter dismissed by Supreme Court (no opinion). |
| 7 | 2015-0921 Ohio State Bar Association v. Wishgard, LLC and Edward Tygard | 6/3/2015 | 10/21/2016 | Consent Decree approved by Supreme Court |
| 8 | 2015-1955 Toledo Bar Association v. Raye-Lynn Abreu | 12/8/2015 | 5/17/2016 | Consent Decree approved by Supreme Court |
| 9 | 2015-2078 Disciplinary Counsel v. Kelly Catalfina | 12/23/2015 | 7/28/2016 | Relator's Motion for Default granted. One count dismissed by Board/Court. 2 counts of UPL. Civil penalty of \$6K |
| 10 | 2016-0595 Cleveland Metropolitan Bar Association v. Robert K. Wallace, et al. | 4/19/2016 | 9/1/2016 | Consent Decree approved by Supreme Court |
| SETTLEMENT AGREEMENT | | | | |
| 11 | UPL 15-01 Cleveland Metropolitan Bar Association v. Express Lien, Inc., dba <i>zlien</i> , et al. | 5/11/2015 | Accepted by UPL Board on 7/20/2016 | Unauthorized Practice of Law Case/On Settlement Agreement |
| MOTION FOR INTERIM CEASE AND DESIST FILED BY CMBA (GOV. BAR R. VII, SEC. 5A) | | | | |
| 12 | 2016-1426 Lorain County Bar Association v. Dariush Saghafi | 9/27/2016 | Pending | UPL case /On Motion for Interim Cease and Desist Order |



IN RE APPLICATION OF SWENDIMAN.

**[Cite as *In re Application of Swendiman*, 146 Ohio St.3d 444,
2016-Ohio-2813.]**

*Application for admission without examination—Applicant engaged in
unauthorized practice of law in Ohio—Application
disapproved—Applicant may reapply.*

(No. 2015-0540—Submitted June 10, 2015—Decided May 5, 2016.)

ON REPORT by the Board of Commissioners on Character and
Fitness of the Supreme Court, No. 592.

Per Curiam.

{¶ 1} Matthew Ashley Swendiman of Cincinnati, Ohio, has applied for admission to the Ohio bar without examination. The admissions committee of the Cincinnati Bar Association certified that Swendiman possessed the requisite character and fitness and recommended that his application be approved. The Board of Commissioners on Character and Fitness, however, invoked its sua sponte investigatory authority, conferred by Gov.Bar R. I(10)(B)(2)(e), apparently due to concerns arising from investigations initiated by the Occupational Safety and Health Administration (“OSHA”) and the CFA Institute, an association of investment professionals, as well as concerns that Swendiman had engaged in the unauthorized practice of law in Ohio.

{¶ 2} After conducting a hearing, a panel of the board issued a report finding that Swendiman engaged in the unauthorized practice of law in Ohio before and after he applied for admission to the Ohio bar and that he has therefore failed to prove that he currently possesses the requisite character and fitness to practice law in this state. Therefore, the panel recommended that his application for

admission without examination be denied. The board adopted the panel's report in its entirety and recommends that we disapprove Swendiman's application. Swendiman has not objected to the board's report and recommendation.

{¶ 3} We adopt the board's findings, disapprove Swendiman's pending application for admission without examination, and order him to immediately cease and desist activities constituting the practice of law in Ohio unless and until he is duly licensed to practice in this state.

Swendiman's Practice of Law in Ohio

{¶ 4} Swendiman has been admitted to practice law in three jurisdictions, including Indiana in 2001, Connecticut in 2003 (although this license is no longer active), and the District of Columbia in 2005. Since his first admission, he has primarily engaged in the financial-investment business as a lawyer and as a financial advisor. In 2006, he took a position as in-house counsel for Fifth Third Bank and its asset-management subsidiary in Ohio and eventually became the chief administrative officer of that subsidiary. During his time with Fifth Third, Swendiman registered for corporate status pursuant to Gov.Bar R. VI(6).

{¶ 5} Following Swendiman's tenure at Fifth Third, two employees filed a complaint with OSHA alleging that their employment was terminated after they voiced concerns about alleged exaggerations and misrepresentations in the prospectuses for products offered by Fifth Third's asset-management subsidiary during Swendiman's tenure. Although the complaint apparently alleged that Swendiman had failed to correct misinformation regarding the identity of some of the subsidiary's fund managers, he told the panel that OSHA never contacted him about the allegations. He also reported that the CFA Institute terminated its related investigation into the allegations after an internal Fifth Third investigation and a third-party investigation conducted at Fifth Third's request found no evidence of wrongdoing.

{¶ 6} Swendiman left Fifth Third in April 2011 to take a position as chief operating officer with another corporation, but he left that job after just seven months to start his own investment company, Swendiman Wealth Strategies, Inc. He became of counsel to the Cincinnati law firm Graydon, Head & Ritchey, L.L.P., in September 2012 and worked part-time for the firm while continuing to operate his investment company. Approximately six months after joining the firm, Swendiman applied for admission to the Ohio bar without examination. And by late 2014, he had closed his business and began working full-time for the firm, though his application for admission to the bar remained pending.

{¶ 7} In a June 2013 amended affidavit of past practice, Swendiman avers that he has been and is practicing law at the Graydon firm. At the panel hearing, he testified that he took the position because his clients and other professional contacts were asking him not only to provide financial investment advice, but also to perform legal services for them. The panel found that because of Swendiman's extensive experience in investment advising and contacts with institutional clients around the country, he was responsible for establishing client relationships and serving as a resource to the Graydon firm's securities group.

{¶ 8} Gov.Bar R. VII(2)(A)(1) defines the unauthorized practice of law in Ohio as the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar. A person not so admitted may practice law if he or she is rendering legal services in compliance with the requirements of Prof.Cond.R. 5.5 regarding the multijurisdictional practice of law. Swendiman argued that his practice with the Graydon firm is authorized by Prof.Cond.R. 5.5(d)(2).

{¶ 9} Prof.Cond.R. 5.5(b)(1) prohibits a lawyer who is not admitted to practice in this jurisdiction from establishing an office or other systematic and continuous presence in this jurisdiction for the practice of law except as otherwise authorized by the professional rules or other law. Swendiman admitted that he has

established an office and a continuous presence in Ohio and that he had practiced law in this state, but he contended that his practice was authorized pursuant to Prof.Cond.R. 5.5(d)(2), which provides that a lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction if “the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law.” During the proceedings below, Swendiman appeared to argue that because he was advising clients regarding federal law only and because he was licensed to practice law in the District of Columbia, where filings before the Securities and Exchange Commission and other federal agencies are made, he was authorized to render those services in Ohio. The panel noted that Swendiman did not cite any legal authority to support his “seemingly novel” argument that his practice of law in Ohio was authorized, and it found no cases directly on point. Moreover, the panel found that cases in which a lawyer’s practice of law has been deemed to be authorized by federal law occurred when the lawyer’s practice had been specifically authorized by a separate federal admissions authority.

{¶ 10} For example, in *Disciplinary Counsel v. Harris*, 137 Ohio St.3d 1, 2013-Ohio-4026, 996 N.E.2d 921, ¶ 14-15, this court found that Harris did not engage in the unauthorized practice of law when he represented a client before the United States Bankruptcy Court for the Northern District of Ohio, because he had been admitted to practice in that court, even though he had not been admitted to the Ohio bar. In doing so, we acknowledged that “ ‘[a] bankruptcy court has the power to regulate the practice of law in the cases before it.’ ” *Id.* at ¶ 15, quoting *In re Ferguson*, 326 B.R. 419, 422 (Bankr.N.D. Ohio 2005). *See also In re Desilets*, 291 F.3d 925 (6th Cir.2002) (holding that an attorney licensed in Texas and admitted to practice before a federal bankruptcy court in Michigan was authorized to practice federal bankruptcy law in Michigan, even though he was not licensed in Michigan, because the bankruptcy court’s rules permitted the attorney not only to appear before the bankruptcy court, but also to counsel clients in bankruptcy actions or

proceedings). Distinguishing Swendiman's case from *Harris* and *Desilets*, however, on the ground that admission to the District of Columbia bar is not tantamount to admission by a separate federal authority, the panel found that Swendiman's reliance on Prof.Cond.R. 5.5(d)(2) was misplaced.

{¶ 11} Although the panel did not believe that Swendiman's conduct was intentional, it found that he was not particularly attentive to Prof.Cond.R. 5.5 or thoughtful or diligent about how he should proceed once he decided to resume the practice of law, as he waited almost six months after he commenced his legal employment with the Graydon firm to apply for admission to the Ohio bar. Finding that Swendiman engaged in the unauthorized practice of law in Ohio and that he continued to do so at the time of his admissions hearing, however, the panel found that he did not possess the requisite character and fitness to practice law in this state.

{¶ 12} The board adopted the panel's findings of fact and recommendation that Swendiman's pending application for admission without examination be disapproved. The board recommended that he be permitted to reapply for admission to the practice of law in Ohio by filing a new application and undergoing a complete character and fitness investigation, including a new character and fitness interview and report by the National Conference of Bar Examiners. And as noted above, Swendiman failed to object to the board's findings or recommendation.

Disposition

{¶ 13} An applicant to the Ohio bar must prove by clear and convincing evidence that he or she "possesses the requisite character, fitness, and moral qualifications for admission to the practice of law." Gov.Bar R. I(11)(D)(1). The applicant's record must justify "the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." Gov.Bar R. I(11)(D)(3). "A record manifesting a significant deficiency in the honesty, trustworthiness,

diligence, or reliability of an applicant may constitute a basis for disapproval of the applicant.” *Id.*

{¶ 14} Commission of an act constituting the unauthorized practice of law is one factor to be considered in determining whether an applicant possesses the requisite character, fitness, and moral qualifications to practice law in Ohio. Gov.Bar R. I(11)(D)(3)(c). In assigning weight and significance to the applicant’s prior conduct, we consider the age of the applicant at the time of the conduct, the recency of the conduct, and the reliability of the information concerning the conduct, among other factors. Gov.Bar R. I(11)(D)(4).

{¶ 15} The panel found that Swendiman has engaged in the unauthorized practice of law in Ohio before and after he submitted his application for admission to the Ohio bar without examination. We find, at a minimum, that he has failed to present sufficient evidence to establish that he was authorized by Ohio or federal law to provide the legal services that he has rendered to clients in Ohio through his employment with Graydon, Head & Ritchey. Therefore, we agree that he has failed to carry his burden of proving by clear and convincing evidence that he currently possesses the requisite character, fitness, and moral qualifications for admission to the practice of law in Ohio.

{¶ 16} Accordingly, we adopt the board’s recommendation to disapprove Swendiman’s pending application for admission without examination. Swendiman may reapply for admission without examination, and if he does, he will be subject to a full character and fitness examination. Furthermore, we order Swendiman to immediately cease and desist all activities described herein and any other activities constituting the practice of law in Ohio unless and until he is duly licensed to practice in this state.

Judgment accordingly.

PFEIFER, O’DONNELL, KENNEDY, and FRENCH, JJ., concur.

O’CONNOR, C.J., dissents and would permanently deny admission.

LANZINGER and O'NEILL, JJ., dissent and would permanently deny admission without prior examination.

Graydon, Head & Ritchey, L.L.P., and Steven P. Goodin, for applicant.

Maria C. Palermo; and Santen & Hughes and Stephanie M. Day, for Cincinnati Bar Association.



DISCIPLINARY COUNSEL v. HERNANDEZ.

[Cite as *Disciplinary Counsel v. Hernandez*, 142 Ohio St.3d 251,
2014-Ohio-5486.]

Unauthorized practice of law—Advertising oneself as a lawyer and giving legal advice for a fee—injunction and civil penalty.

(No. 2014-0517—Submitted May 28, 2014—Decided December 23, 2014.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law of the
Supreme Court, No. UPL 13-02.

Per Curiam.

{¶ 1} Relator, disciplinary counsel, charged Mary E. Hernandez of Cincinnati, Ohio, with the unauthorized practice of law for distributing business cards representing herself as an attorney practicing in the areas of criminal, family, juvenile, and immigration law, and for preparing documents and correspondence on behalf of Miguel Galan-Rubio regarding immigration matters before the Department of Homeland Security, United States Citizenship and Immigration Services (“USCIS”), and the Executive Office for Immigration Review Cleveland Immigration Court (“Immigration Court”). Hernandez is not admitted to the practice of law in Ohio or any other state.

{¶ 2} Hernandez received relator’s initial letter of inquiry and left a voicemail message for relator the following day, stating that she was experiencing several health problems and that her daughter would call at a later time to discuss the letter of inquiry in more detail. And after receiving a hand-delivered copy of relator’s draft complaint, she called relator’s office to deny most of the allegations in the complaint and attempt to explain her conduct. Relator advised her to respond to the allegations through proper channels—by providing a response to the draft complaint and filing an answer to the formal complaint. Although

Hernandez was served with the formal complaint by certified mail, she never filed an answer. Consequently, relator moved for an entry of default.

{¶ 3} Based on the affidavits and sworn or certified documents submitted with relator's motion, a three-member panel of the Board on the Unauthorized Practice of Law issued findings of fact and conclusions of law and determined that Hernandez had engaged in the unauthorized practice of law. The panel recommended that we enjoin Hernandez from engaging in further acts of the unauthorized practice of law and assess a \$15,000 civil penalty.

{¶ 4} The board adopted the panel's findings of fact with some minor modifications and, in addition to the sanctions recommended by the panel, recommended that we require Hernandez to make restitution to Galan-Rubio and to the Department of Homeland Security, Office of Inspector General.

{¶ 5} We agree that Hernandez engaged in the unauthorized practice of law and adopt the board's recommendation that she be enjoined from engaging in further acts of the unauthorized practice of law and that a civil penalty of \$15,000 be assessed against her.

Hernandez's Unauthorized Practice of Law

{¶ 6} The sworn affidavits submitted with relator's motion for default demonstrate that in late January or early February 2011, Miguel Galan-Rubio picked up Hernandez's business card at a local Hispanic grocery store. Bearing her name and "Hernandez Law," the card indicated that she practiced criminal, family, juvenile, and immigration law and that she spoke Spanish. Hernandez, however, is not licensed to practice law in Ohio or any other state.

{¶ 7} Galan-Rubio has a family and three young children who are United States citizens, but he faces possible deportation because he illegally entered the United States from Mexico in or about 1999. He met with Hernandez in late January or early February 2011 to discuss his pending immigration matters, including a March 16, 2011 hearing before the United States Immigration Court

in Cleveland. She told Galan-Rubio that she had a personal relationship with a high-level employee with United States Citizenship and Immigration Service who would assist her with his case for a fee and that her personal and direct contacts with the immigration judge presiding over his case, the Ohio governor, and an Ohio senator would also help.

{¶ 8} Over the course of several weeks, Galan-Rubio spoke regularly with Hernandez by phone. She advised him that she had spoken to the judge and her contact at USCIS and everything was “fine” and told him that he did not need to appear for his March 16, 2011 hearing. She asked him to pay certain fees, a portion of which she claimed would be forwarded to the judge and her USCIS contact for their services.

{¶ 9} Hernandez also met with Galan-Rubio in person on several occasions and presented him with several documents pertaining to his case including (1) an I-485 Application to Register Permanent Residence or Adjust Status that she had prepared on his behalf, (2) several letters that she had prepared and claimed to have sent to the judge and her USCIS contact, (3) a forged letter purporting to be from the judge acknowledging receipt of Galan-Rubio’s paperwork, and (4) a letter detailing the breakdown of her fees. Some of these documents identify Hernandez as Galan-Rubio’s lawyer.

{¶ 10} By the end of February 2011, Galan-Rubio had become suspicious of Hernandez, in part because she could not provide him with proof that he was not required to attend his March 16, 2011 immigration hearing or that she was, in fact, an attorney. After he called the immigration court directly and learned that, contrary to Hernandez’s representations, his hearing had not been canceled, he retained attorney Marilyn Zayas-Davis to represent him in his immigration matters.

{¶ 11} Not only did attorney Zayas-Davis handle Galan-Rubio’s immigration matter, but she also notified numerous agencies, including the

Department of Homeland Security, Office of Inspector General (“OIG”) of Hernandez’s actions. The OIG initiated an investigation, focusing on whether the immigration judge and Hernandez’s purported contact at the USCIS had accepted bribes from Hernandez in exchange for taking favorable actions in Galan-Rubio’s case. As part of that investigation, and with Galan-Rubio’s consent, the OIG monitored his communication with Hernandez.

{¶ 12} During a monitored March 24, 2011 telephone call, Hernandez told Galan-Rubio that she had completed all of the necessary paperwork in his case and that she had spoken with the judge about the proceedings on several occasions. She asked Galan-Rubio for an additional \$600, which she stated was for the judge to “finish up the case.”

{¶ 13} At a March 30, 2011 meeting, monitored by the OIG, Galan-Rubio gave Hernandez \$600 provided to him by the OIG. Hernandez stated that the money was for the judge assigned to his case and gave Galan-Rubio a letter, purporting to be from the judge, which stated that the judge had received \$1,550 from Hernandez. And in an April 6, 2011 monitored telephone call, Hernandez once again claimed to have spoken with the judge, advised Galan-Rubio that he did not have to attend any court proceedings and instructed him not to call the court directly, because the judge had already taken care of everything. She also requested more money from Galan-Rubio for the services she had performed on his behalf. Galan-Rubio did not speak to Hernandez after that telephone conversation, but she wrote to him on at least two occasions demanding payment of \$2,500 for her services. She threatened to contact immigration officials or “file papers at the courthouse against [him] for nonpayment,” which she asserted would lead to his deportation—and which she claimed she could not stop a second time.

{¶ 14} After interviewing the immigration judge and the USCIS employee implicated by Hernandez, the OIG determined that they had not engaged in any

misconduct. And although the OIG reported Hernandez's conduct to federal and local prosecutors, it appears that both entities declined to prosecute her.

{¶ 15} Because Hernandez held herself out as an attorney on the business cards she used to advertise her legal services, in her conversations with Galan-Rubio, and in the documents and correspondence that she had prepared for the Immigration Court on Galan-Rubio's behalf, the board determined that Hernandez had engaged in the unauthorized practice of law.

{¶ 16} The unauthorized practice of law is defined as "[t]he rendering of legal services for another by any person not admitted to practice in Ohio." Gov.Bar R. VII(2)(A)(1); *Cleveland Bar Assn. v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193, ¶ 7. The unauthorized practice of law includes, but is not limited to, the drafting and preparation of pleadings filed in the courts of Ohio and includes the preparation of legal documents and instruments upon which legal rights are secured and advanced. *Akron Bar Assn. v. Greene*, 77 Ohio St.3d 279, 280, 673 N.E.2d 1307 (1997); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934), syllabus. We have also held that nonlawyers engage in the unauthorized practice of law when they accept legal fees for providing legal representation and advice. *Disciplinary Counsel v. Brown*, 121 Ohio St.3d 423, 2009-Ohio-1152, 905 N.E.2d 163, ¶ 28.

{¶ 17} A person who is not licensed to practice law in this state is prohibited from holding himself or herself out as an attorney at law, by using the words "lawyer," "attorney at law," "counselor at law," "law," "law office," or equivalent words along with the person's own name, or any sign, card, letterhead, or other document when the evident purpose is to induce others to believe that the person is an attorney. Gov.Bar R. VII(2)(A)(4); R.C. 4705.07(A)(1) and (B)(1). Moreover, a nonlawyer is also prohibited from representing orally or in writing, directly or indirectly, that he or she is authorized to practice law. R.C. 4705.07(A)(2).

{¶ 18} Hernandez did not possess the requisite qualifications to practice law in this state, but a preponderance of the evidence shows that she advertised legal services by distributing business cards for “Hernandez Law,” bearing her name and the words “Criminal, Family, Juvenile, and Immigration,” suggesting that she had skills or knowledge regarding those areas of the law. She met with Galan-Rubio, told him—both orally and in writing—that she was a lawyer, and advised him regarding his pending immigration matters. Although we recognize that the Code of Federal Regulations permits nonlawyers to represent parties to immigration proceedings in certain, limited circumstances, *see* 8 C.F.R. 1292.1, those circumstances are not relevant here, because Hernandez falsely held herself out as a lawyer throughout her representation of Galan-Rubio.

{¶ 19} Accordingly, we accept the board’s findings that Hernandez has engaged in the unauthorized practice of law.

Sanction

{¶ 20} Because we find that Hernandez engaged in the unauthorized practice of law, we adopt the board’s recommendation that we enjoin her from engaging in further acts of the unauthorized practice of law. Pursuant to Gov.Bar R. VII(19)(D)(1)(c), we may also impose civil penalties in an amount greater or less than the amount recommended by the board, but not to exceed \$10,000 per offense. In determining whether to impose a civil penalty, Gov.Bar R. VII(8)(B) directs us to consider

- (1) The degree of cooperation provided by the respondent in the investigation;
- (2) The number of occasions that unauthorized practice of law was committed;
- (3) The flagrancy of the violation;
- (4) Harm to third parties arising from the offense; and

(5) Any other relevant factors.

{¶ 21} Hernandez did not cooperate during relator’s investigation and did not answer the formal complaint filed against her. The board found that she had engaged in two instances of the unauthorized practice of law—first by using business cards to advertise her legal services and then by advising Galan-Rubio on his immigration matters and preparing documents and correspondence on his behalf.

{¶ 22} With regard to the flagrancy of the violations, the board found that despite the fact that she is not licensed to practice law in any state, Hernandez engaged in a pattern of deceit. She falsely claimed to have personal relationships with real federal employees, forged letters that purported to be from the immigration judge presiding over Galan-Rubio’s case, and alleged that they were her coconspirators, willing to engage in ex parte communications and accept bribes in exchange for a favorable outcome in a pending case. As a result of her actions, the federal employees she identified suffered damage to their professional reputations and became the subjects of an investigation conducted by the OIG.

{¶ 23} The board found that Hernandez’s fraud was particularly heinous because, in addition to affecting official government proceedings, it also preyed on vulnerable, unwitting victims who are unfamiliar with the immigration process and who may be accustomed to the practice of bribing government officials to obtain favorable results in their countries of origin. The consequences of such schemes are enormous. Here, not only did Hernandez take \$2,650 from Galan-Rubio (\$2,050 of his own money plus \$600 provided by the OIG as part of its investigation), but Galan-Rubio’s attorney averred that if her client had heeded Hernandez’s advice and failed to appear at his March 16, 2011 immigration hearing, the immigration court would have issued an order for him to be “removed in absentia.” And if deported pursuant to that order, Galan-Rubio

SUPREME COURT OF OHIO

would have had to wait ten years before he could return to the United States. Because Hernandez failed to cooperate in the proceedings, there is no way to know how many others may have fallen victim to her scheme.

{¶ 24} Therefore, we agree with the board’s recommendation that we enjoin Hernandez from engaging in further acts of the unauthorized practice of law, impose the maximum \$10,000 civil penalty for Hernandez’s acts against Galan-Rubio and an additional \$5,000 civil penalty for her distribution of business cards to advertise her legal services. *See Cleveland Metro. Bar Assn. v. McGinnis*, 137 Ohio St.3d 166, 2013-Ohio-4581, 998 N.E.2d 474 (imposing a \$6,000 civil penalty against a respondent who posted and circulated fliers advertising her legal services and prepared two legal documents on behalf of the defendant in an eviction action). Although we do not order restitution at this time, we note that a victim of the unauthorized practice of law can seek redress by suing an unlicensed practitioner directly to recover fees and other damages pursuant to R.C. 4705.07(C)(2).

{¶ 25} Accordingly, we enjoin Hernandez from engaging in any further acts that constitute the unauthorized practice of law. We also impose a civil penalty of \$10,000 against Hernandez for her representation of Galan-Rubio and \$5,000 for her advertisement of legal services, for a total of \$15,000. Costs and expenses are taxed to Hernandez.

Judgment accordingly.

O’CONNOR, C.J., and PFEIFER, O’DONNELL, LANZINGER, KENNEDY, FRENCH, and O’NEILL, JJ., concur.

Scott J. Drexel, Disciplinary Counsel, and Karen H. Osmond, Assistant Disciplinary Counsel, for relator.

CLEVELAND METROPOLITAN BAR ASSOCIATION v. HILL ET AL.

[Cite as *Cleveland Metro. Bar Assn. v. Hill*,
141 Ohio St.3d 166, 2014-Ohio-5239.]

*Unauthorized practice of law—Entering into agreements to represent others as
“attorney/advocate” and holding self out as advocate for others—
Injunction issued and civil penalty imposed.*

(No. 2014-0518—Submitted May 14, 2014—Decided December 3, 2014.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law of the
Supreme Court, No. UPL 10-09.

Per Curiam.

{¶ 1} On December 29, 2010, relator, Cleveland Metropolitan Bar Association, filed a complaint with the Board on the Unauthorized Practice of Law alleging that respondents, William Hill and his company, the Advocacy Group, Inc., had engaged in the unauthorized practice of law in Ohio by entering into contracts to represent 20 students, giving them legal advice, and attempting to settle their claims of, among other things, “institutional racism” and “discriminatory business practices” against Bryant & Stratton College.

{¶ 2} Respondents were served with the complaint but failed to file an answer. Relator moved for default pursuant to Gov.Bar R. VII(7)(B). A panel of the board granted the motion after reviewing relator’s evidence, which included a transcript of Hill’s June 18, 2010 deposition testimony, in which he admitted having committed much of the charged misconduct. The panel issued findings of fact and determined that respondents had engaged in 22 counts of the unauthorized practice of law—one count for each of the 20 students they contracted to represent, one count for drafting the letter to and meeting with college representatives, and one count for conduct that had not been alleged in the

complaint but that was discovered during Hill's deposition. The panel recommended that we enjoin respondents from further engaging in the unauthorized practice of law and impose a civil penalty of \$7,500 for each of the 22 counts, for a total penalty of \$165,000.

{¶ 3} For the most part, the board adopted the panel's findings of fact and conclusions of law. It did not adopt the panel's finding of unauthorized practice of law regarding the conduct that had not been alleged in the complaint. It adopted the panel's recommendation that respondents be enjoined from engaging in the unauthorized practice of law, but recommends that we impose a civil penalty of \$20,000—\$10,000 for executing agreements to serve as "Attorney/Advocate" for the students in their complaint against the school, and \$10,000 for holding themselves out as the advocate of the students in a letter to and in a meeting with the school's legal counsel.

{¶ 4} We agree that respondents engaged in the unauthorized practice of law and impose a \$20,000 civil penalty against them.

Respondents Engaged in the Unauthorized Practice of Law

{¶ 5} Hill is a retired police officer with 25 years of law-enforcement experience. The Advocacy Group is a for-profit corporation registered with the Ohio Secretary of State. The corporation's initial articles of incorporation identify Hill as the sole director and authorized representative of the corporation. Hill has not attended law school, and neither he nor the Advocacy Group has been admitted to the practice of law in Ohio or any other jurisdiction or is certified for the limited practice of law pursuant to Gov.Bar R. II.

{¶ 6} At one time, the Advocacy Group ran a website, www.bryantstrattonscrewedme.com,¹ and circulated fliers offering to assist individuals who had been wronged by businesses, government agencies, or employers in obtaining justice "By Any Legal Means Necessary."

¹ An August 21, 2014 search revealed that the website is no longer in operation.

{¶ 7} In 2008, respondents were retained by 20 students of Bryant & Stratton College’s Cleveland, Ohio campus. Each of the students signed a form appointing the Advocacy Group and its representatives as his or her “attorney/advocate(s)-in-fact” with respect to “[a]ll information pertaining to [his or her] enrollment and experiences at Bryant & Stratton College while attending school for their Nursing Program.” Hill signed each of those forms with the designations “Attorney/Advocate” and “President, The Advocacy Group, LLC,” following his name. Some of those students paid the Advocacy Group a fee of \$25, and those funds were deposited into the company’s bank account.

{¶ 8} Respondents drafted and sent a letter to Ted Hansen, director of Bryant & Stratton’s Eastlake campus, on December 15, 2008. The letter stated that the Advocacy Group was “the official advocate for a growing number of [the college’s] students, past and present,” alleged that the college had engaged in “institutional racism, racial profiling, financial profiling, [and] discriminatory business practices,” and demanded an opportunity to meet in order to discuss the allegations and a possible resolution of the matters. A meeting was eventually scheduled for May 29, 2009. Shortly before that meeting, respondents delivered another letter to counsel for Bryant & Stratton College demanding, among other things, that the college (1) permit students represented by the Advocacy Group to retake classes and tests at no cost, (2) forgive the outstanding account balances of all students represented by the Advocacy Group, and (3) pay the students \$5 million.

{¶ 9} On May 29, 2009, respondents, four former Bryant & Stratton students, attorney W. Scott Ramsey, and Dr. David Whitaker, who is also an attorney, met with counsel for Bryant & Stratton College, including attorney Steven E. Seasley, of Hahn Loeser & Parks, L.L.P. At the meeting, the students stated that they were represented by Hill. At his deposition, Hill testified that the meeting was brief—lasting at most 15 to 20 minutes—because he and his

contingent “were there to try to resolve the situation and if there was no intent to resolve the situation, there was nothing really to talk about.” Because Seasily “wanted to discuss the issues” and Hill wanted only to negotiate the terms and conditions of a settlement, he and his contingent left the meeting.

{¶ 10} “The Ohio Constitution, Article IV, Section 2(B)(1)(g) gives this court original jurisdiction over all matters relating to the practice of law, including the unauthorized practice of law.” *Cleveland Metro. Bar Assn. v. Davie*, 133 Ohio St.3d 202, 2012-Ohio-4328, 977 N.E.2d 606, ¶ 18. The unauthorized practice of law is “[t]he rendering of legal services for another by any person not admitted to practice in Ohio * * *.” Gov.Bar R. VII(2)(A)(1); *Cleveland Bar Assn. v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193, ¶ 7. We restrict the practice of law to licensed attorneys to “protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40.

{¶ 11} “We have consistently held that the practice of law encompasses the drafting and preparation of pleadings filed in the courts of Ohio and includes the preparation of legal documents and instruments upon which legal rights are secured or advanced.” *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, ¶ 17, citing *Akron Bar Assn. v. Greene*, 77 Ohio St.3d 279, 280, 673 N.E.2d 1307 (1997); and *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650, syllabus (1934). We have also held that “one who purports to negotiate legal claims on behalf of another and advises persons of their legal rights and the terms and conditions of settlement engages in the practice of law.” *Cleveland Bar Assn. v. Henley*, 95 Ohio St.3d 91, 92, 766 N.E.2d 130 (2002), citing *Cleveland Bar Assn. v. Moore*, 87 Ohio St.3d 583, 722 N.E.2d 514 (2000); and *Cincinnati Bar Assn. v. Cromwell*, 82 Ohio St.3d 255, 695 N.E.2d 243 (1998).

{¶ 12} Although Hill did not possess the qualifications necessary to practice law in this state, a preponderance of the evidence shows that he and the Advocacy Group entered into agreements to serve as “Attorney/Advocates” for 20 current or former Bryant & Stratton College students and purported to negotiate legal claims on their behalf in written correspondence to and in a meeting with college representatives. Accordingly, we adopt the board’s findings that Hill and the Advocacy Group engaged in the unauthorized practice of law.

Sanction

{¶ 13} Because we find that Hill and the Advocacy Group engaged in the unauthorized practice of law, we adopt the board’s recommendation that we enjoin them from further engaging in the unauthorized practice of law. Pursuant to Gov.Bar R. VII(19)(D)(1)(c), we may also impose civil penalties in an amount greater or lesser than the amount recommended by the board, but not in excess of \$10,000 per offense. In determining whether to impose a civil penalty, Gov.Bar R. VII(8)(B) directs us to consider (1) the degree of cooperation provided by the respondent in the investigation, (2) the number of occasions that the unauthorized practice of law was committed, (3) the flagrancy of the violation, (4) the harm to third parties arising from the offense, and (5) any other relevant factors.

{¶ 14} Here, Hill appeared for his June 18, 2010 deposition, answered the majority of the questions posed by relator, and appears to have produced the documents requested in relator’s subpoena duces tecum. He described, in detail, the legal services he performed on behalf of the 20 students he purported to represent, but he refused to acknowledge that his conduct was inappropriate.

{¶ 15} The panel found that Hill and the Advocacy Group committed 22 acts of the unauthorized practice of law—20 acts of entering into a contract to represent a student, one act of holding Hill and the Advocacy Group out as the students’ advocates by drafting a letter to and attending a follow-up meeting with college representatives, and one act relating to conduct that had not been alleged

in the complaint—and recommended that we impose a \$7,500 civil penalty for each of those 22 offenses, for a total civil penalty of \$165,000. But the board found that respondents had engaged in just two acts of the unauthorized practice of law—the first being entering into agreements to represent the current and former students as “Attorney/Advocates” and the second being Hill’s holding himself and the Advocacy Group out as the students’ advocates in correspondence to and in a meeting with counsel for the school. And the board recommends that we impose the maximum penalty of \$10,000 for each of the two offenses, for a total civil penalty of \$20,000. The board rejected the panel’s finding of the unauthorized practice of law with regard to the conduct that had not been alleged in the complaint.

{¶ 16} With regard to the flagrancy of the violations, the board noted that Hill is a former police officer with 25 years of law-enforcement experience but is not qualified to give legal advice, because he has not attended law school or been admitted to the practice of law in Ohio or any other jurisdiction. Despite these facts, he openly referred to himself as an “Attorney/Advocate,” agreed to represent clients for a fee, and attempted to negotiate settlements of their legal claims. By acting as attorney/advocates for the students who retained them, Hill and the Advocacy Group prevented the college’s legal counsel from communicating directly with the students to learn more about their concerns and to come to an amicable resolution. The board noted that as of the date of its report, respondents’ website appeared to be operational, although the address had been changed to <http://bryantstrattonscruedme.com/wordpress/>.² The board also expressed concern that the conduct of attorneys W. Scott Ramsey and Dr. David Whitaker, who attended the May 29, 2009 meeting with Hill, may have given Hill the impression that his conduct was permissible.

² An August 21, 2014 search revealed that the website is no longer in operation.

{¶ 17} Having considered these factors, we conclude that a civil penalty is warranted in this case. We agree with the board that respondents engaged in two distinct instances of the unauthorized practice of law. Based on the flagrancy of the violations and the number of students whose legal claims were affected, we agree that the maximum civil penalty is warranted for each of those offenses. Therefore we impose against respondents, jointly and severally, a civil penalty in the amount of \$10,000 for each of the two instances of the unauthorized practice of law, for a total civil penalty of \$20,000.

{¶ 18} William Hill and the Advocacy Group, Inc., are enjoined from further acts constituting the unauthorized practice of law, including but not limited to agreeing to represent clients in matters involving legal claims and attempting to negotiate the settlement of legal claims on behalf of others. We also impose against respondents, jointly and severally, a civil penalty in the amount of \$10,000 for each of their two offenses, for a total of \$20,000.

{¶ 19} Costs are taxed to respondents.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Michael P. Harvey Co., L.P.A., and Michael P. Harvey; and Ott & Associates Co., L.P.A., and Latha Malini Srinivasan, for relator.

William Hill, pro se.



DISCIPLINARY COUNSEL v. BROWN.

[Cite as *Disciplinary Counsel v. Brown*, 142 Ohio St.3d 459, 2015-Ohio-1819.]

Unauthorized practice of law—Preparing documents and filing them on behalf of others—Injunction issued and civil penalty imposed.

(No. 2014-1494—Submitted January 14, 2015—Decided May 19, 2015.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law of the Supreme Court, No. UPL 13-03.

Per Curiam.

{¶ 1} On June 25, 2013, relator, disciplinary counsel, filed a complaint alleging that respondent, Betty J. Brown of Eastlake, Ohio, had engaged in three counts of the unauthorized practice of law by preparing documents and filing them on behalf of others in the Cuyahoga County Court of Common Pleas. Brown did not respond to the complaint or to relator’s motion for default, which was supported with sworn or certified evidence in accordance with Gov.Bar R. VII(7)(B). The Board on the Unauthorized Practice of Law granted the default motion, found that Brown had engaged in the unauthorized practice of law, and recommends that we enjoin her from performing further legal services as well as impose a \$7,000 civil penalty.

{¶ 2} We agree that Brown engaged in the unauthorized practice of law and that an injunction and civil penalties are warranted.

Brown’s Conduct

{¶ 3} Brown has never been admitted to the practice of law in Ohio and is not otherwise authorized to practice law in this state.

{¶ 4} Relator’s evidence demonstrates that Brown filed multiple documents in three separate cases in the Cuyahoga County Court of Common

SUPREME COURT OF OHIO

Pleas and that in some of those documents, she identified herself as attorney-in-fact for the plaintiff. The case underlying the allegations in Count 1, *Schwartz v. Lord*, case No. CV-09-706768, began with a complaint seeking damages from and injunctive relief against six employees of the Mayfield Heights police and fire departments based on their alleged removal of Evelyn Schwartz from her home against her will. Brown signed the complaint as a notary, attesting to Schwartz's signature. Brown later filed a document titled "Writ of Error Quae Coram Nobis Residant," which states, "This court vacates all rulings and decisions entered in this case by the Honorable LANCE T MASON * * *, including but not limited to; the docketed journal entry in this case denying plaintiffs [sic] motion to strike defendants [sic] answers." The document further cautions the judge against entering further rulings "without leave of this court," and it bears the alleged signature of Evelyn R. Schwartz as "private attorney" and is signed by "Betty-Janet: Brown" as attorney-in-fact for Schwartz.

{¶ 5} In a November 25, 2009 entry, the court acknowledged receipt of correspondence filed by Brown on Schwartz's behalf that the court interpreted as a request that the court vacate a prior order in the case. The court denied the request and advised, "Ms. Brown is engaging in the unauthorized practice of law. The unauthorized practice of law occurs when a person not licensed or otherwise permitted to practice law in Ohio renders legal services on another's behalf." The court similarly admonished Brown's conduct in a February 2, 2010 entry, in which it dismissed the underlying action and ordered that costs be taxed to Brown.

{¶ 6} The case underlying the allegations in Count 2, *Schwartz v. Cuyahoga Cty. Adult Protective Servs.*, case No. CV-09-705794, alleged that Cuyahoga County Adult Protective Services ("APS") and ten other individually named defendants trespassed on Schwartz's property and sequestered her in an adult-care facility over her express objections. Brown signed the complaint as a

notary, but a later filing, titled “Replication to Defendant Nelli Johnson” bore both the alleged signature of Schwartz and Brown’s signature as Schwartz’s attorney-in-fact.

{¶ 7} In support of their motion to strike all documents that Brown had filed in the case, the defendants attached a certified copy of an ex parte order issued by the Cuyahoga County Court of Common Pleas, Probate Division, that declared Schwartz incapacitated, authorized APS to provide protective services for her, and restrained Brown from having any contact with Schwartz or interfering with the services being provided to her. The common pleas court dismissed the complaint, granted the defendants’ motion to strike all documents filed by Brown, and determined that she had engaged in the unauthorized practice of law.

{¶ 8} In the case underlying the allegations in Count 3, *Betty-Janet: Brown as POA for Dean M. Marinpietri v. Baron*, case No. CV-10-722577, Brown alleged that Schwartz’s court-appointed guardian had taken unlawful possession of Schwartz’s house and property from Dean Marinpietri, who she claimed had a right to possess them. Brown identified herself as Marinpietri’s “durable POA” in the complaint and signed that document, as well as a later petition for emergency injunction, as “POA, attorney in fact for Dean Marinpietri.”

{¶ 9} Schwartz’s court-appointed guardian answered the complaint, stating that Schwartz had been diagnosed with dementia and that he was required to sell her home. He further explained that he had given Marinpietri, who was incarcerated, and Brown ample notice to remove Marinpietri’s property from Schwartz’s residence.

{¶ 10} Relator submitted the affidavit of J. Michael Goldberg, staff attorney for Judge Joan Synenberg, who conducted a pretrial conference in the matter. Goldberg averred that Brown had not only appeared before him but had

also confirmed that she had prepared the complaint in the case. He further reported that when he advised Brown that she needed to be a licensed attorney to represent another person in a legal proceeding, she replied that she was a sovereign citizen and had the right to file the lawsuit. Judge Synenberg ultimately found that the complaint stated claims on behalf of Marinpietri but failed to state any claim on Brown's own behalf. Therefore, the judge struck the complaint and other documents Brown had filed, on the ground that she had engaged in the unauthorized practice of law.

Brown Engaged in the Unauthorized Practice of Law

{¶ 11} The Supreme Court of Ohio has original jurisdiction regarding admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law in Ohio. Article IV, Section 2(B)(1)(g), Ohio Constitution; *Royal Indemn. Co. v. J.C. Penney Co., Inc.*, 27 Ohio St.3d 31, 34, 501 N.E.2d 617 (1986). Accordingly, the court has exclusive jurisdiction to regulate the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, ¶ 16; *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, ¶ 16. The purpose of that regulation is to “protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40.

{¶ 12} The unauthorized practice of law is the rendering of legal services for another by any person not admitted or otherwise certified to practice law in Ohio. Gov.Bar R. VII(2)(A). This includes the “ ‘preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and the courts.’ ” *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 28, 193 N.E. 650 (1934), quoting *People v. Alfani*, 227 N.Y. 334, 337-338, 125 N.E. 671 (1919).

The unauthorized practice of law also encompasses the representation of another during discovery, settlement negotiations, and pretrial conferences. *See, e.g., Ohio State Bar Assn. v. Kolodner*, 103 Ohio St.3d 504, 2004-Ohio-5581, 817 N.E.2d 25 (negotiating collection claims on behalf of debtors is the practice of law); and *Disciplinary Counsel v. Brown*, 99 Ohio St.3d 114, 2003-Ohio-2568, 789 N.E.2d 210 (participating in pretrial conferences and depositions on another's behalf is the practice of law).

{¶ 13} The board found that relator proved by a preponderance of the evidence that Brown had engaged in the unauthorized practice of law. Relator has proved that Brown prepared for others legal documents that were then filed in the Cuyahoga County Court of Common Pleas and also appeared at a pretrial conference on behalf of another. Therefore, we agree that she engaged in the unauthorized practice of law.

An Injunction and Civil Penalties Are Warranted

{¶ 14} Having found that Brown engaged in the unauthorized practice of law, we accept the board's recommendation that we issue an injunction prohibiting Brown from performing legal services in the state of Ohio unless and until she secures a license to practice law and registers in accordance with the Rules for the Government of the Bar of Ohio.

{¶ 15} Relator has requested that we impose a civil penalty of \$10,000 for each count, for a total of \$30,000. After weighing the aggravating and mitigating factors set forth in Gov.Bar R. VII(8)(B) and UPL Reg. 400(F), however, the board recommends that we assess a \$7,000 civil penalty against Brown—\$1,000 each for Counts 1 and 2, and \$5,000 for Count 3.

{¶ 16} In support of that recommendation, the board found that although Brown timely responded to relator's initial letter of inquiry, she refused to submit to a deposition, challenged the board's jurisdiction over her, and declared that the allegations against her were frivolous and meant to harass her. Despite being

served with a copy of the complaint, she failed to file an answer. She also failed to participate in the initial status conference and failed to respond to relator’s motion for default—even after the panel offered her additional time to do so. Indeed, her only submission to the board was a letter, in which she stated, “You all/both have ignored my answer and therefore denied me due process of law. As such you have lost your assumed subject matter jurisdiction and have no lawful means to default me. Please leave me alone.” *See* Gov.Bar R. VII(8)(B)(1).

{¶ 17} The board found that Brown had not only engaged in the unauthorized practice of law by filing documents in three separate cases and attending a pretrial conference in one, but also had “demonstrate[d] her intent to manipulate and circumvent the rules regulating the practice of law,” despite having been admonished by two judges for her conduct. *See* Gov.Bar R. VII(8)(B)(2) and (3); UPL Reg. 400(F)(3)(c), (e), and (f). Brown’s conduct also caused harm to numerous defendants named in her complaints and wasted judicial resources to address her frivolous litigation. *See* Gov.Bar R. VII(8)(B)(4).

{¶ 18} The only mitigating factor that the board noted was that there was no evidence that Brown had engaged in the unauthorized practice of law after June 2010. *See* UPL Reg. 400(F)(4)(a).

{¶ 19} The board’s recommendation that we impose a civil penalty of \$1,000 for Brown’s unauthorized practice of law in Counts 1 and 2 for a total of \$2,000 is consistent with *Cleveland Metro. Bar Assn. v. McGinnis*, 137 Ohio St.3d 166, 2013-Ohio-4581, 998 N.E.2d 474. In that case, we imposed a \$1,000 civil penalty for each of two instances in which the respondent drafted a pleading for another.

{¶ 20} But noting that Brown filed a complaint and petition for emergency injunction in the Marinpietri matter after she had been clearly admonished by two Cuyahoga Court of Common Pleas Court judges for her unauthorized practice of law, and that she claimed she had the right to file the lawsuit as a “sovereign

citizen,” the board recommends that we impose a \$5,000 civil penalty with respect to Count 3. That recommendation is consistent with *Disciplinary Counsel v. Bukstein*, 139 Ohio St.3d 230, 2014-Ohio-1884, 11 N.E.3d 237, in which we imposed a \$5,000 civil penalty for each of two counts of the unauthorized practice of law against a respondent who made legal arguments on behalf of parties in two domestic-relations cases. Bukstein held herself out as a “civil rights advocate,” drafted a motion for a party to sign pro se, and sent communications demanding discovery.

{¶ 21} We accept the recommendation of the board. Therefore, Betty J. Brown is enjoined from performing legal services in the state of Ohio unless and until she secures a license to practice law and registers in accordance with the Rules for the Government of the Bar in Ohio. We also order Brown to pay civil penalties of \$7,000. Costs are taxed to Brown.

Judgment accordingly.

O’CONNOR, C.J., and PFEIFER, O’DONNELL, LANZINGER, KENNEDY, FRENCH, and O’NEILL, JJ., concur.

Scott J. Drexel, Disciplinary Counsel, and Donald M. Scheetz, Assistant Disciplinary Counsel, for relator.



TOLEDO BAR ASSOCIATION v. VANLANDINGHAM.

[Cite as *Toledo Bar Assn. v. VanLandingham*, 143 Ohio St.3d 328,
2015-Ohio-1622.]

*Unauthorized practice of law—Filing a motion on behalf of a codefendant—
Injunction imposed.*

(No. 2014-1497—Submitted January 14, 2015—Decided April 30, 2015.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law of the
Supreme Court, No. UPL 13-06.

Per Curiam.

{¶ 1} On July 29, 2013, relator, Toledo Bar Association, filed a complaint with the Board on the Unauthorized Practice of Law against Rick B. VanLandingham III, of Toledo, Ohio. The complaint alleged that VanLandingham engaged in a single act of the unauthorized practice of law by filing a motion on behalf of his girlfriend in a case pending before the Toledo Municipal Court. Although VanLandingham answered the complaint, he did not respond to relator’s motion for summary judgment, which included a certificate of service stating that he had been served with the motion by regular mail.

{¶ 2} The board found that VanLandingham is not licensed to practice law in Ohio and that he engaged in the unauthorized practice of law as charged. Therefore, the board granted relator’s motion for summary judgment and recommends that we issue an injunction prohibiting him from engaging in the unauthorized practice of law. Neither party has filed objections to the board’s report.

{¶ 3} Upon review, we agree that VanLandingham engaged in the unauthorized practice of law, and we enjoin him from committing further illegal acts and assess costs.

VanLandingham’s Conduct

{¶ 4} VanLandingham has never been admitted to the practice of law in Ohio and is not otherwise authorized to practice law in this state. In his answer to relator’s complaint, VanLandingham admitted that he prepared a motion to set aside a plea agreement and to vacate the guilty plea of his codefendant, Meghan E. Link, but he claimed that he filed it on his own behalf and that because he had forgotten to sign it, he merely attempted to file it. The certified journal report of the case, submitted with relator’s motion for summary judgment, states that the motion was not signed and should not have been docketed.

VanLandingham Engaged in the Unauthorized Practice of Law

{¶ 5} The Supreme Court of Ohio has original jurisdiction regarding the admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Article IV, Section 2(B)(1)(g), Ohio Constitution; *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 501 N.E.2d 617 (1986). Accordingly, the court has exclusive jurisdiction to regulate the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, ¶ 16; *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, ¶ 16. The purpose of that regulation is to “protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40.

{¶ 6} The unauthorized practice of law is the rendering of legal services for another by any person not admitted or otherwise certified to practice law in Ohio. Gov.Bar R. VII(2)(A). This includes the “preparation of pleadings and

other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and the courts.” *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934), paragraph one of the syllabus.

{¶ 7} The board found that by drafting and filing, or attempting to file, a motion to set aside a plea agreement and to vacate a guilty plea on behalf of Meghan Link in Toledo Municipal Court case No. CRB-12-04420, VanLandingham engaged in the unauthorized practice of law. We agree.

Sanctions

{¶ 8} Relator did not seek the imposition of a civil penalty. After reviewing the aggravating and mitigating factors enumerated by UPL Reg. 400(F)(3) and (4), the board concluded that a civil penalty was not warranted, given that VanLandingham engaged in a single instance of the unauthorized practice of law, did not benefit from his actions, and does not appear to have caused any harm to a third party.

{¶ 9} Because we find that VanLandingham engaged in the unauthorized practice of law with respect to the motion that he prepared on behalf of another, we accept the board’s findings and adopt its recommendation to enjoin VanLandingham from engaging in the unauthorized practice of law in the future.

{¶ 10} Rick B. VanLandingham is enjoined from engaging in the unauthorized practice of law, including all attempts to prepare legal papers on behalf of any person or entity other than himself. Costs are taxed to VanLandingham.

Judgment accordingly.

O’CONNOR, C.J., and PFEIFER, O’DONNELL, LANZINGER, KENNEDY, FRENCH, and O’NEILL, JJ., concur.

Michael A. Bonfiglio, Bar Counsel, and Gregory B. Denny, for relator.

SUPREME COURT OF OHIO

Rick B. VanLandingham III, pro se.

The Supreme Court of Ohio FILED

JAN 26 2015

Ohio State Bar Association,
Relator,

v.

Robert M. Baratta and
Ertemio R. Baratta a.k.a. Tim Baratta,
Respondents.

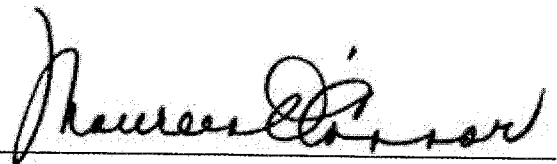
Case No. 2014-1498

CLERK OF COURT
SUPREME COURT OF OHIO

ORDER

The Board on the Unauthorized Practice of Law filed its final report on August 27, 2014, recommending that, pursuant to Gov.Bar R. VII(7)G), the court issue an order finding that respondents, Robert M. Baratta and Ertemio R. Baratta a.k.a. Tim Baratta, engaged in the unauthorized practice of law and requiring respondents to pay the costs and expenses incurred by the board and relator in this matter. Respondents filed no objections to the final report, and this cause was considered by the court.

On consideration thereof, it is ordered by the court that this cause is dismissed.



Maureen O'Connor
Chief Justice



OHIO STATE BAR ASSOCIATION v. WISHGARD, L.L.C., ET AL.

[Cite as *Ohio State Bar Assn. v. Wishgard, L.L.C.*, 144 Ohio St.3d 408,
2015-Ohio-4309.]

*Unauthorized practice of law—Negotiating oil and gas leases on behalf of
landowners and providing legal advice—Consent decree approved—
Injunction issued.*

(No. 2015-0921—Submitted June 24, 2015—Decided October 21, 2015.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law
of the Supreme Court, No. UPL 14-04.

Per Curiam.

{¶ 1} Pursuant to Gov.Bar R. VII(5b), the Board on the Unauthorized Practice of Law has recommended that we approve a consent decree proposed by relator, Ohio State Bar Association (“OSBA”), and respondents, Wishgard, L.L.C., and Edward Tygard. We accept the board’s recommendation and approve the proposed consent decree as submitted by the parties as follows:

1. OSBA is a Bar Association whose members include attorneys-at-law admitted to the practice of law in Ohio and who practice throughout the State of Ohio. OSBA, through its Unauthorized Practice of Law Committee, is authorized by Gov.Bar R. VII to file a Complaint with the Board regarding the unauthorized practice of law.

2. Respondent Wishgard, LLC (“Wishgard”) is a foreign limited liability company incorporated in Pennsylvania with its headquarters at 145 Vanceville Road, Eighty Four, PA 15330 and

SUPREME COURT OF OHIO

with a place of business at 104 West Main Street, Baltic, OH 43804. Wishgard transacts business in Ohio.

3. At all relevant times, Respondent Edward Tygard was an employee, agent, and managing member of Wishgard, LLC.

4. Respondents are not attorneys-at-law in the State of Ohio admitted pursuant to Gov.Bar R. I, registered pursuant to Gov.Bar R. VI, or certified pursuant to Gov.Bar R. II, IX, or XI.

5. Wishgard began operations in 2010 and, at that time, its business was aimed at assisting landowners to organize into groups and negotiate terms of oil and gas leases with third-party lessees. During this process, Wishgard and landowners would enter into Agreements to Market Oil and Gas Rights. The Agreement to Market Oil and Gas Rights attached to OSBA's Complaint as Exhibit A is a true and accurate copy of a blank/sample Agreement. Pursuant to those Agreements, Wishgard negotiated oil and gas leases with third-parties on behalf of its landowner-clients. Wishgard received compensation for their services under the terms of those Agreements.

6. During 2010, Wishgard also held group meetings with landowners to educate them about the oil and gas leasing process and to offer their services. At certain times during those meetings, Edward Tygard, as a representative of Wishgard, held in-person meetings with landowners about potential oil and gas leases and answered specific questions about the terms of potential leases and the landowners' potential legal rights and duties under the terms of the proposed leases.

7. On or around January 25, 2011, Respondents received a letter from OSBA advising them that it received a complaint and

information indicating that they had engaged in the unauthorized practice of law.

8. Respondents promptly responded to that letter.

9. Upon receipt of the letter from OSBA, Respondents also ceased negotiating oil and gas leases on behalf of landowners and, instead, began executing leases with landowners directly, with Wishgard as the named lessee therein.

10. Respondents also immediately stopped providing legal advice to landowners.

11. Therefore, since early 2011, Respondents have not engaged in the unauthorized practice of law.

* * *

12. R.C. 4705.01 provides: “No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct or defend any action or proceeding in which the person is not a party concerned * * * unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.”

13. The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice law in Ohio. Gov.Bar R. VII(2)(A).

14. The practice of law is not limited to the conduct of cases in court, but embraces advice to clients regarding their legal rights and responsibilities. *Ohio State Bar Assn. v. Leingard [Lienguard], Inc.*, 126 Ohio St.3d 400, 934 N.E.2d 337 (2010); *Cincinnati Bar Assn. v. Foreclosure Solutions, LLC*, 123 Ohio St.3d 107, 914 N.E.2d 386 (2009); *Disciplinary Counsel v. Brown*, 121 Ohio St.3d 423, 905 N.E.2d 163 (2009).

SUPREME COURT OF OHIO

15. The unauthorized practice of law also occurs when a nonattorney acts as an intermediary to advise, counsel, or negotiate on behalf of an individual to resolve legal claims and interests with third parties. See, *Ohio State Bar Assn. v. Kolodner*, 103 Ohio St.3d 504, 817 N.E.2d 25 (2004).

* * *

16. OSBA and Respondents have agreed that the conduct described in paragraphs five and six herein, namely, providing legal advice to others and negotiating with oil and gas lessees on behalf of landowners constitute the unauthorized practice of law.

17. Respondents Wishgard, LLC and Edward Tygard, as well as their successors, affiliates, assigns, officers, members, agents, [and] representatives have ceased engaging in the conduct described above, they shall not engage in such conduct in the future, and they are hereby permanently enjoined from engaging in such conduct in the future and from otherwise engaging in the unauthorized practice of law in the State of Ohio.

18. The parties jointly recommend that no civil penalty be imposed against Respondents. The factors of Gov.Bar R. VII(8)(B) apply as follows:

(1) *The degree of cooperation provided by the respondent in the investigation:* Respondents have cooperated fully in both the pre-filing and post-filing investigation of this matter. They promptly ceased all conduct that allegedly constituted the unauthorized practice of law upon receiving notice from OSBA in early 2011.

(2) *The number of occasions that unauthorized practice of law was committed:* the unauthorized practice of law occurred

over a matter of a few months and in a limited geographical area. OSBA received one complaint and the number of victims identified at this time is fewer than five.

(3) *The flagrancy of the violation:* the violation was unknowing or unwitting, it did not include actual in-court representation or filings, and is far from the most severe, deliberate, ill-willed, or damaging conduct OSBA and the Board have seen.

(4) *Harm to third parties arising from the offense:* the victims and complainants have not presented information to show that they were damaged by Respondent's legal advice or negotiations.

(5) *Any other relevant factors:* after the occurrence of the conduct described above and after ceasing to engage in the conduct following receipt of the notice from the OSBA, Wishgard was the subject of bankruptcy proceedings in the United States Bankruptcy Court for the Western District of Pennsylvania, Case No. 13-20613-CMB. Wishgard emerged from bankruptcy as a reorganized company by a plan of reorganization confirmed January 30, 2014, effective April 7, 2014.

19. Respondent cooperated throughout the investigation, admitted to the unauthorized practice of law, and agreed to cease the activity. Therefore, the Panel agrees with Relator that civil penalties are not warranted.

* * *

Relator states that no costs have been incurred.

So ordered.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, and O'NEILL, JJ., concur.

SUPREME COURT OF OHIO

FRENCH, J., dissents.

Patrick W. Skilliter, Eugene P. Whetzel, and Jean Desiree Blankenship, for
relator.

Vorys, Sater, Seymour & Pease, L.L.P., Timothy B. McGranor, and
Timothy J. Cole, for respondents.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Toledo Bar Assn. v. Abreu*, Slip Opinion No. 2016-Ohio-2972.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2016-OHIO-2972

TOLEDO BAR ASSOCIATION v. ABREU.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Toledo Bar Assn. v. Abreu*, Slip Opinion No. 2016-Ohio-2972.]

Unauthorized practice of law—Offering to provide advice on meeting Medicaid eligibility requirements—Consent decree approved—Injunction issued.

(No. 2015-1955—Submitted January 6, 2016—Decided May 17, 2016.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law
of the Supreme Court, No. UPL 14-01.

Per Curiam.

{¶ 1} Pursuant to Gov.Bar R. VII(5b), the Board on the Unauthorized Practice of Law has recommended that we approve a consent decree proposed by relator, Toledo Bar Association, and respondent, Raye-Lynn Abreu. We accept the board's recommendation and approve the proposed consent decree as submitted by the parties as follows:

SUPREME COURT OF OHIO

1. Toledo Bar Association (“TBA”), the Relator, is authorized to bring this action by Supreme Court Rules, Gov. Bar Rule VII.

2. The Supreme Court of Ohio, Board on the Unauthorized Practice of Law, has the jurisdiction to hear and decide this matter.

3. Relator and Respondent waive the right to notice and appearance before the hearing panel of the Board, pursuant to Gov. Bar Rule VII(7)(H).

4. Respondent, Raye-Lynn Abreu, is a natural person who is not licensed or authorized to practice law in the state of Ohio.

5. At all times relevant hereto Respondent is or was doing business under the trade name of * * * “A.I.M.S.”, an acronym for “All Inclusive Medicaid Specialists”, or “Personalized Long Term Consulting & Medicaid Applications” or “Medicaid Solutions”.

6. On or about February 28, 2012, Susan Heasley executed a Contract of Services with Respondent and paid Respondent an application fee in the amount of \$7,975.00.

7. On or about September 8, 2012, Howard Williamson, Jr., as [power of attorney] for his sister, executed a Contract of Services with Respondent and mailed to Respondent an application fee in the amount of \$8,975.00. (When Mr. Williamson elected to terminate the relationship, Respondent returned his check.)

8. In exchange for the fees referenced in paragraphs 6 and 7 above, Respondent represented that she would provide “Personalized Medicaid Strategies and Asset Protection” [and] “create a strategy specific to your family’s needs”, and that “the strategy will define the exact amount of resources you will be able to retain and the date Medicaid eligibility will exist”. Respondent

further represented that Ms. Heasley and Mr. Williamson, Jr., would “be informed not only of the amount of assets you will be keeping, but the appropriate way to reduce your resources.”

9. Respondent admits that she engaged in the unauthorized practice of law when she marketed and represented to Susan Heasley and Howard Williamson, Jr., that she was a Medicaid specialist who could create a strategy for the appropriate way to reduce resources in order to become Medicaid eligible.

10. Respondent further admits that she engaged in the unauthorized practice of law when she either provided or offered to provide Susan Heasley and Howard Williamson, Jr., with Medicaid planning which involved creating a strategy for the appropriate way to reduce resources in order to achieve Medicaid.

11. Respondent shall cease all activities that constitute the unauthorized practice of law, and shall take the following specific steps within the time specified:

- (i) Respondent shall immediately cease to conduct and market herself as a Medicaid specialist who can provide a strategy for the appropriate way to reduce resources in order to achieve Medicaid, and shall cease to conduct and market herself as a Medicaid specialist who can provide a strategy for spending down and arranging assets and income to meet Medicaid eligibility requirements.
- (ii) All websites, advertisements, brochures, contracts, business cards, and any other marketing material that reflects Respondent is a Medicaid specialist who can provide a strategy for the appropriate way to reduce

resources in order to achieve Medicaid, or that reflect that Respondent is a Medicaid specialist who can provide a strategy for spending down and arranging assets and income to meet Medicaid eligibility requirements, shall be immediately revised with said representations being deleted.

- (iii) Respondent, individually or as a business, shall not, in the future, represent that she is a Medicaid specialist who can provide a strategy for the appropriate way to reduce resources in order to achieve Medicaid, or that she is a Medicaid specialist who can provide a strategy for spending down and arranging assets and income to meet Medicaid eligibility requirements.

12. Relator does not recommend imposition of civil penalties pursuant to Gov. Bar Rule VII(8)(B).

IT IS HEREBY ORDERED:

A. Respondent is enjoined from all activities that constitute the unauthorized practice of law, including:

- (i) Rendering advice or providing a strategy for the appropriate way to reduce resources in order to achieve Medicaid, including rendering advice or providing strategy for spending down and arranging assets and income to meet Medicaid eligibility requirements;
- (ii) Marketing or advertising in any fashion that Respondent will provide advice or strategy for the appropriate way to reduce resources in order to

achieve Medicaid, including marketing or advertising in any fashion the Respondent will provide advice or strategy for spending down and arranging assets and income to meet Medicaid eligibility requirements.

B. Respondent shall make restitution to Susan Heasley in the amount of \$7,275.00 by December 15, 2014.

C. Respondent shall be assessed all costs of this matter pursuant to Gov. Bar Rule VII(8)(A).

(Boldface sic.)

So ordered.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Michael A. Bonfiglio and Gregory B. Denny, for relator.

Laura J. Avery, for respondent.



[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Disciplinary Counsel v. Catalfina*, Slip Opinion No. 2016-Ohio-5126.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2016-OHIO-5126

DISCIPLINARY COUNSEL v. CATALFINA.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Disciplinary Counsel v. Catalfina*, Slip Opinion No. 2016-Ohio-5126.]

Unauthorized practice of law—Purporting to negotiate Social Security disability claims—Agreeing to represent client in divorce case—Collecting payments for purported legal representation and filing fees—Injunction issued and civil penalty imposed.

(No. 2015-2078—Submitted February 10, 2016—Decided July 28, 2016.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law of the Supreme Court, No. UPL 13-05.

Per Curiam.

{¶ 1} On July 18, 2013, relator, disciplinary counsel, filed with the Board on the Unauthorized Practice of Law a complaint against respondent, Kelly

Catalfina (“Catalfina”) of Largo, Florida.¹ The three-count complaint alleged that Catalfina, who is not licensed to practice law in Ohio, engaged in the unauthorized practice of law by holding herself out to three individuals as an Ohio attorney. Catalfina initially sought and was granted leave to retain counsel and file an answer. However, to date she has not filed an answer or retained counsel. Following numerous attempts to engage Catalfina, relator filed a motion for default judgment on July 1, 2014, but Catalfina again failed to respond. The panel of the board that was assigned to hear this matter granted the motion for default judgment as to the first two counts but dismissed the third count for insufficient evidence. No objections were filed.

{¶ 2} The board found that Catalfina engaged in the unauthorized practice of law and recommends that we issue an order prohibiting her from engaging in the unauthorized practice of law in the future and imposing a civil penalty of \$6,000 pursuant to Gov.Bar R. VII(8)(B). We agree with the board’s finding that Catalfina engaged in the unauthorized practice of law and that a civil penalty is appropriate under these circumstances.

Catalfina’s Conduct

The Kellett Matter

{¶ 3} Lisa Kellett retired early from the United States Postal Service (“USPS”) due to a chronic illness. She applied for early USPS retirement benefits and for Social Security disability benefits, but the Social Security Administration denied her application. Her husband and Catalfina’s husband, Christian Catalfina, worked together, and Christian had previously told Kellett’s husband that his wife was an attorney and could assist the Kelletts with any legal problems they might have.

¹ Catalfina has also used the names Kelly Fligor, Kelly Foxall, and Kelly Williamson.

{¶ 4} On September 8, 2011, the Kelleths met with Catalfina at her home. At Catalfina's request, the Kelleths paid her \$1,000 so that she could represent Lisa Kellett. Catalfina also told the Kelleths that if they referred five individuals to her, she would refund their money.

{¶ 5} Kellett regularly communicated with Catalfina regarding her case, mostly through text messages. Over the next several months, Catalfina told Kellett that her case was progressing as expected and that everything was fine. However, although Kellett asked several times, Catalfina never produced documentation of the progress of the Social Security matter. And during this time, Catalfina led Kellett to believe that she was an attorney by referring to her work on other cases, including once having had "a 'long and grueling' day in court." Also during this period, Catalfina gave Kellett a business card suggesting that Catalfina had expertise in "Senior Care Consulting," "Estate Planning," "Medicare/Medicaid," and "Wills & asset Protection."

{¶ 6} In December 2011, Catalfina informed Kellett that she "had been approved for Social Security benefits" after a hearing, but Catalfina continued to ignore Kellett's concerns about the lack of documentation concerning her case. On January 5, 2012, Kellett informed Catalfina via text message that she was going to stop pursuing her Social Security claim, and she asked for all her personal files, including correspondence held by Catalfina. Shortly thereafter, Kellett requested the same documents in a letter via regular mail and e-mail. Upon calling the Social Security Administration herself, Kellett discovered that Catalfina had never been listed with it as her attorney or representative and that no appeal had been filed in her case. Kellett also called a bar association, which informed her that Catalfina was not an attorney. Kellett's husband acknowledged in a letter to relator that toward the end of their relationship, Catalfina offered to refund the \$1,000 that Kellett had paid her; however, though Kellett ultimately requested it, Catalfina never refunded the money.

The Gall Matter

{¶ 7} Jason Gall also worked with Christian Catalfina, and Christian had similarly told Gall that his wife was an attorney and that she could assist him with any legal problems. Around November 2011, Gall informed Christian that he was having problems with his uncontested divorce after his wife moved to Florida and failed to return documents that he had downloaded from the Internet and sent for her to sign. Gall gave Christian the papers to give to Catalfina and \$150 for a court filing fee.

{¶ 8} Shortly before Thanksgiving 2011, Catalfina called Gall and told him that she had filed his divorce paperwork and that a hearing had been scheduled for December. She also said that she had sent his wife a form that she needed to sign. Gall's wife, however, never received the form, although Catalfina claimed that she had sent it multiple times. Gall ultimately took care of getting his wife's signature on the form himself.

{¶ 9} Gall called the court about the December hearing and learned that it was never scheduled and, moreover, that no filing had been made in the case. Soon thereafter, Catalfina stopped responding to Gall's e-mails, but eventually she responded that she was waiting for the court to schedule a new hearing date. By February 2012, neither Gall nor his wife had heard anything about their divorce. While researching Catalfina, they learned that she was not an attorney and that she still had not made any filing in their case. Gall's wife sent an e-mail to Catalfina, and shortly thereafter, Catalfina sent Gall an e-mail stating that she no longer could represent him.

Respondent Engaged in the Unauthorized Practice of Law

{¶ 10} This court has original jurisdiction to define and regulate the practice of law in Ohio, including the unauthorized practice of law. *Cleveland Metro. Bar Assn. v. Davie*, 133 Ohio St.3d 202, 2012-Ohio-4328, 977 N.E.2d 606, ¶ 18, citing Ohio Constitution, Article IV, Section 2(B)(1)(g). "The unauthorized practice of

law includes the provision of legal services for another by a person who is neither admitted to the practice of law pursuant to Gov.Bar R. I nor certified for the limited practice of law pursuant to Gov.Bar R. II.” *Disciplinary Counsel v. Casey*, 138 Ohio St.3d 38, 2013-Ohio-5284, 3 N.E.3d 168, ¶ 9, citing *Geauga Cty. Bar Assn. v. Haig*, 129 Ohio St.3d 601, 2011-Ohio-4271, 955 N.E.2d 352, ¶ 2, and Gov.Bar R. VII(2)(A)(1).

{¶ 11} Catalfina has never been licensed to practice law in Ohio. We have previously held that “one who purports to negotiate legal claims on behalf of another and advises persons of their legal rights * * * engages in the practice of law.” *Cleveland Bar Assn. v. Henley*, 95 Ohio St.3d 91, 92, 766 N.E.2d 130 (2002). Also, representing that one is authorized to practice law in Ohio without such authorization, by directly or indirectly creating the misimpression of that authority through manipulation of credentials and strategic silence, constitutes the unauthorized practice of law. *Casey* at ¶ 11, citing *Cleveland Bar Assn. v. Misch*, 82 Ohio St.3d 256, 261, 695 N.E.2d 244 (1998). Thus, by purporting to negotiate Social Security disability claims on behalf of Lisa Kellett, accepting money to do so, and holding herself out as an attorney to Kellett, Catalfina engaged in the unauthorized practice of law. And by holding herself out as an attorney to Jason Gall, indicating that she would represent him in his divorce and collecting \$150 from him purportedly for filing fees, Catalfina engaged in the unauthorized practice of law.

Sanction

{¶ 12} Because we find that Catalfina engaged in the unauthorized practice of law, we accept the board’s findings and adopt its recommendation to enjoin Catalfina from engaging in the unauthorized practice of law in the future.

{¶ 13} The board considered the factors set forth in Gov.Bar R. VII(8)(B) and UPL Reg. 400(F) in determining whether to recommend a penalty. It found that Catalfina had not fully cooperated with the investigation and resolution of this

SUPREME COURT OF OHIO

matter and that the two violations were flagrant, in that she took money from her clients for services she never provided and was never authorized to provide. The board found no mitigating factors and recommended that we impose a \$6,000 civil penalty upon Catalfina, \$3,000 for each of the Kellett and Gall matters. Although Catalfina's acts of misconduct were relatively few, they were flagrant and caused harm to her clients. Therefore, we find this penalty appropriate and accept the board's recommendation.

{¶ 14} Kelly Catalfina is enjoined from engaging in the unauthorized practice of law, including performing legal services or directly or indirectly holding herself out to be authorized to perform legal services in the state of Ohio. We also impose a civil penalty against Catalfina in the amount of \$6,000—\$3,000 for each of the Kellett and Gall matters. Costs are taxed to Catalfina.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Scott J. Drexel, Disciplinary Counsel, and Karen H. Osmond, Assistant Disciplinary Counsel, for relator.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Cleveland Metro. Bar Assn. v. Wallace*, Slip Opinion No. 2016-Ohio-5603.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2016-OHIO-5603

CLEVELAND METROPOLITAN BAR ASSOCIATION v. WALLACE ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Cleveland Metro. Bar Assn. v. Wallace*, Slip Opinion No. 2016-Ohio-5603.]

Unauthorized practice of law—Preparing and filing complaints challenging real-property assessments and notices of appeal to Board of Tax Appeals—Consent decree approved—Injunction issued.

(No. 2016-0595—Submitted May 4, 2016—Decided September 1, 2016.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law
of the Supreme Court, No. UPL 14-06.

Per Curiam.

{¶ 1} Pursuant to Gov.Bar R. VII(5b), the Board on the Unauthorized Practice of Law has recommended that we approve a consent decree proposed by relator, Cleveland Metropolitan Bar Association, and respondents, Robert K. Wallace, Amy M. Wallace, and Tax Compliance Service, L.L.C., a.k.a. Tax

SUPREME COURT OF OHIO

Compliance Services. We accept the board's recommendation and approve the proposed consent decree as submitted by the parties as follows:

1. On November 21, 2014 the Cleveland Metropolitan Bar Association, pursuant to Gov. Bar R. VII(5), filed a complaint, as Relator, against Respondents Robert K. Wallace, Amy M. Wallace aka Mimi Wallace, and Tax Compliance Service, LLC aka Tax Compliance Services alleging that they engaged in the unauthorized practice of law in Ohio by preparing complaints against the valuation of real property for filing with county boards of revision throughout Ohio, by filing notices of appeal from decisions of county boards of revision to the Ohio Board of Tax Appeals, proposing settlements of such cases, and proposing and preparing hearing waivers.

2. Respondents Robert K. Wallace and Amy M. Wallace ("Wallaces") are individuals who live in Strongsville, Ohio, and both are not, and never have been, attorneys admitted to practice, granted active status, or certified to practice law in the State of Ohio pursuant to Gov. Bar R. I, II or III, nor were either of them ever admitted to the practice of law in another state. Respondent Tax Compliance Service, LLC, which is also known as Tax Compliance Services ("TCS") is not, and never has been, a corporate entity, but it is registered with the Ohio Secretary of State as a limited liability partnership. The Wallaces on their tax returns have treated TCS as a partnership owned fifty percent by each of them.

3. Wallaces, individually and doing business as TCS, have rendered legal services in the State of Ohio and Respondent Robert K. Wallace admitted on deposition to rendering such services.

Additionally, Respondents solicited for their business residents throughout the state of Ohio. Examples of Respondents' solicitation and engagement forms and examples of board of revision complaints and notices of appeal to the Ohio Board of Tax Appeals were attached as exhibits to Relator's complaint.

4. Numerous, but not all, tax assessment complaints and notices of appeal and other documents prepared by Wallaces showed then Ohio-admitted attorney Rami M. Awadallah ("Awadallah") as attorney for the property owner. At all times relevant, Awadallah maintained an office in Akron, Ohio, but many of the documents prepared by Wallaces showed his address as a Cleveland, Ohio post office box rented and controlled by Wallaces. All customer or client matters for real estate tax assessment complaint proceedings and appeals originated with Wallaces not Awadallah, who was paid directly by respondents.

5. Wallaces' and TCS's solicitation and retention agreements provided for the property owner to elect to have an attorney involved for an extra fee paid to TCS, which, in turn, would pay Awadallah for his services. The form attorney retention agreement, which was prepared by Awadallah, gave control of each case to TCS.

6. In many instances, complaints on tax assessments to boards of revision were dismissed when neither Awadallah, a representative of TCS or a property owner appeared at scheduled hearings. Dismissals occurred, under similar circumstances at hearings before the Ohio Board of Tax Appeals.

7. Although there is clear Ohio Supreme Court authority to the effect that the preparation of complaints as to tax valuation

SUPREME COURT OF OHIO

assessments for filing with Ohio boards of revision for others is the unauthorized practice of law (*Sharon Village Ltd. v. Licking Cty. Bd. of Revision*, 78 Ohio St.3d 479, 678 N.E.2d 932 (1997)), and that the preparation and filing of notices of appeal to the Ohio Board of Tax Appeals for others is the unauthorized practice of law (*Ohio State Bar Assn. v. Ryan, L.L.C.*, 138 Ohio St.3d 62, 2013 Ohio-5500, 3 N.E.3d 194), Wallaces maintain that they were unaware of this and that Awadallah never informed them that their operation involved the unauthorized practice of law.

8. Upon the filing of Relator's complaint alleging unauthorized practice of law, Wallaces ceased advertising for customers/clients, and ceased operating Tax Compliance Services, and they have cooperated with Relator's investigation of this matter.

9. Wallaces admit that they engaged in the unauthorized practice of law in the numerous matters where they prepared and filed complaints to the assessment of real property and/or notices of appeal to the Ohio Board of Tax Appeals, and that there were more than 100 of such matters.

10. Respondents agree to desist from engaging in the unauthorized practice of law in Ohio directly or indirectly, personally or through any corporation, organization, partnership, or other business entity, and agree to be permanently enjoined from doing so by Court Order[.]

11. Respondents, jointly and severally, agree to pay a civil penalty in the total amount of \$15,000, and Relator agrees that such amount is consistent with the factors set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Regulations of the Board.

12. Respondents, jointly and severally also agree to pay all sums taxed as costs in these proceedings.

13. The parties stipulate to the foregoing, waive notice and hearing, and consent to a decree consistent with this settlement.

So ordered.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Buckley King, L.P.A., and John A. Hallbauer; James E. Young; and Heather M. Zirke, Bar Counsel, for relator.

Koblentz & Penvose, L.L.C., Richard S. Koblentz, and Nicholas E. Froning, for respondent.



**BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF
THE SUPREME COURT OF OHIO**



**CLEVELAND METROPOLITAN
BAR ASSOCIATION,** :
Relator, :
v. :
EXPRESS LIEN, INC., dba ZLIEN, et al. :
Respondents. :

Case No. **UPL 15-01**

**ORDER DISMISSING
COMPLAINT (Gov. Bar
R. VII, SEC. 5b(D)(1) –
SETTLEMENT AGREEMENT
ACCEPTED**

I. SUMMARY

This matter was presented to the Board on the Unauthorized Practice of Law (“Board) at a regular meeting on July 8, 2016, on a complaint filed on May 11, 2015, by the Cleveland Metropolitan Bar Association alleging that Respondent Express Lien, Inc., dba *zlien*, and several individual respondents, engaged in the unauthorized practice of law by preparing and attempting to file a mechanic’s lien on behalf of another in Ohio.

The parties submitted a Settlement Agreement (Exhibit A) on May 13, 2016. Upon review and consideration of the panel’s report and recommendation to approve the settlement agreement, the Board approved the settlement agreement. By this order, the Board hereby adopts the panel’s report and recommendation and for the following reasons, dismisses the complaint styled *Cleveland Metropolitan Bar Association v. Express Lien, et al.*, Case No. UPL 15-01.

II. INTRODUCTION AND PROCEDURAL BACKGROUND

Relator, Cleveland Metropolitan Bar Association, filed a Complaint on May 11, 2015, alleging the unauthorized practice of law against Respondents Express Lien, Inc.,

dba Zlien (*zlien*); Nate Budde; Gretchen Lynn; Jennifer Smiley; Seth J. Smiley; and Scott G. Wolfe, Jr.. The Complaint states that Respondents performed legal services in Ohio through the attempted filing of mechanic's liens on behalf of others and interpreting and advising clients on Ohio-specific law.

In accordance with Gov. Bar R. VII, Sec. 6, a copy of the complaint by certified mail was sent to each respondent with a notice of right to file an answer within twenty days of the mailing of the notice. On June 22, 2015, Respondent Nate Budde submitted an email requesting until July 10, 2015, to file an answer, which request was granted by the Secretary. Gov. Bar R. VII, Sec. 6. The Respondents filed an Answer on July 10, 2015. The Board notes that the answer did not include any signatures but rather listed each respondent. It is therefore unclear who drafted the answer.

On July 16, 2015, a three-member panel was appointed to hear this cause: attorney Leo M. Spellacy, Chair, attorney Regis E. McGann, and Dr. David Tom. Commissioner McGann recused himself from the proceeding and by entry dated September 22, 2015, attorney Robert V. Morris II was appointed as a panel member.

A Case Scheduling Order was issued in this matter, and an Initial Status Conference was held by telephone on August 18, 2015. Daniel Myers and Nicole Wilson, counsel for Relator, participated in the conference, and respondents Nate Budde and Seth Smiley participated *pro se*. By entry dated September 8, 2015, the panel ordered that Respondent Express Lien, Inc. retain Ohio counsel within fourteen (14) days and file a Notice of Appearance, as corporate entities may not appear *pro se*. See, *Union Sav. Ass'n v. Home Owners Aid*, 23 Ohio St. 2d 60, 63 (Ohio 1970). On September 22, 2015, a Notice of Appearance of Counsel for Respondents was filed by Christopher Weber of Kegler, Brown,

Hill, & Ritter. Respondents filed a Motion to Dismiss and/or for Summary Judgment on December 23, 2015, and on January 11, 2016, Relator filed a Motion for Extension of Time to Respond to Respondents' Motion to Dismiss and/or for Summary Judgment. On January 12, 2016, a Notice of Substitution of Counsel on behalf of Respondents was filed by Charles J. Kettlewell. Respondents filed a Memorandum in Opposition to Relator's motion, and on January 15, 2016, Relator filed a Reply in Support of its Motion for Extension of Time.

The panel scheduled a status conference on January 28, 2016, and by entry, the panel granted Relator's motion for extension of time and ordered that the parties submit a joint motion and proposed discovery schedule. On February 1, 2016, Texas attorney Peter D. Kennedy filed a Notice of Appearance as counsel of record for Respondents pursuant to Rule 5.5(c)(1) of the Ohio Rules of Professional Conduct.¹

The parties filed a joint status update on February 11, 2016, indicating that they were negotiating the terms of a protective order and the deadlines for outstanding discovery had not been established. A second joint status update was filed on February 25, 2016, indicating that the parties were engaging in settlement discussions. On March 8, 2016, Relator requested via email a telephone conference with the panel what Relator described as a "Threatening Letter from Zlien to Witness". Relator provided a copy of a letter addressed to Bobby Grambo of Midwest Interiors, a witness for Relator. The letter dated February 12, indicated in part,

¹ Prof. Cond. R. 5.5(c)(1) states: A lawyer who is admitted in another United States jurisdiction, is in good standing in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if ... the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter...."

...*zlien* is hereby tendering it's [sic] defense to you pursuant to the Terms of Use, and informing you of your obligation to indemnify the company for any loss or damage suffered. *Zlien* is currently represented in the underlying suit, and your obligations require you to assume payment of *zlien*'s attorneys' fees and costs.

The letter concludes with the following:

Thank you for your prompt attention to this matter, and your acceptance of the tender of *zlien*'s defense in the suit raised by your lien. If you do not wish to incur continuing expenses related to *zlien*'s defense, feel free to contact the CMBA and request the dismissal of the complaint.

The panel held a telephone conference on March 11, 2016. Thereafter, counsel for Relator provided the Board with a copy of a letter dated March 8, 2016, from *zlien* to Mr. Grambo stating that "*zlien* will not take further action in pursuit of arbitration with Midwest Interiors LLC, while settlement discussion are [sic] ongoing."

On May 13, 2016, the parties filed a Settlement Agreement. The parties also filed a Motion to Approve Settlement Agreement and a Memorandum in Support of Motion to Approve Settlement Agreement. The panel presented its report to the Board at a regular meeting on July 8, 2016, and the settlement agreement was approved.

III. FINDINGS OF FACT

1. Relator, the Cleveland Metropolitan Bar Association, is authorized to investigate and prosecute unauthorized practice of law matters pursuant to Gov. Bar R. VII(4).
2. Respondents Express Lien, Inc., dba Zlien ("*zlien*"); Nate Budde ("Budde"); Gretchen Lynn ("Lynn"); Jennifer Smiley ("Jennifer Smiley"); Seth J. Smiley ("Seth Smiley"); and Scott G. Wolfe, Jr. ("Wolfe") are not admitted to the practice of law in Ohio pursuant to Gov. Bar R. I ("Admission to the practice of law") (Answer p. 2.) or otherwise authorized to practice law in Ohio pursuant to Gov. Bar R. II ("Limited practice of law by

a legal intern”) or Gov. Bar R. III (“Legal professional associations authorized to practice law”). Complaint ¶ 3.

3. Respondent Budde, the Chief Legal Officer of *zlien*, is admitted to the practice of law in Louisiana. Answer p. 2, ¶ 4. Respondent Seth Smiley was the Chief Operating Officer of *zlien* and is admitted to the practice of law in Louisiana; however, Mr. Smiley is no longer employed with *zlien*. Compl. ¶ 7; Answer p. 2, ¶ 7. Mr. Wolfe, founder and CEO of *zlien*, is admitted to the practice of law in California, Louisiana, Oregon, and Washington. Compl. ¶8. Respondents Lynn and Ms. Smiley do not appear to be admitted to the practice of law in any jurisdiction. Lynn is the Director of Client Experience at *zlien*, and Ms. Smiley’s title for the company is unknown. Ms. Smiley is no longer employed at *zlien*. Compl. ¶5 and ¶6.

4. Respondent *zlien* is not registered with the Ohio Secretary of State. Compl. ¶ 9 ; Answer ¶9. Respondents describe *zlien* as a “technology company dedicated to innovating beautifully to put companies in complete control of their security and lien rights.” Answer ¶ 9.

5. Relator states that Respondent Lynn prepared, signed, and attempted to file a lien on behalf of Midwest Interiors LLC, an Ohio company. Compl. ¶ 12. A redacted Affidavit of Mechanics Lien indicated that Respondent Gretchen Lynn is the “authorized and disclosed agent for” the Lien Claimant. Compl. Ex. C. The affidavit was signed by Respondent Lynn and notarized by Respondent Seth Smiley. Compl. ¶ 12.; Compl. Ex. C.

6. Respondents maintain that Ms. Lynn did not file a mechanic’s lien on behalf of Midwest Interiors. Answer ¶ 12. Rather, Respondent “*zlien*’s software took information provided by Midwest Interiors LLC and transferred it verbatim to a form”, which was

merely signed by Respondent Lynn as the authorized and disclosed agent for Midwest Interiors LLC. *Id.* Respondent Lynn signed the Express Lien check made payable to “Fiscal Officer” and dated 2/17/12. Compl. ¶ 14, Ex. D. A letter from the Cuyahoga County Fiscal Office dated 2/21/12 included a handwritten note stating, “Last day of work over the 75 days for commercial property[.] Not recordable.” *Id.*

7. Relator provided an email that appears to be from Respondent Jennifer Smiley that states:

Please see the attached mechanics lien and rejection letter from Cuyahoga county. Usually once the county receives the liens, they are recorded shortly thereafter. However, the county decided to reject the lien for reason(s) such as : Date of last work on the job has surpassed the 75 day window to file a mechanic lien.

Zlien software does calculate deadline(s) such as these for clients so that they do not file an expired lien or miss any deadlines. Your deadline calculate show that you are 33 days past the date for filing.

While zlien does not always agree with the county rejections or decision, sometimes they are right and other times they are wrong; we can only attest [sic] these decisions at our clients [sic] discretion. Compl. Ex. E.

8. Relator indicates that Respondent *zlien* “researches the legal property description and property owner, prepares the mechanics lien, signs the mechanics lien using a power of attorney, delivers and files the lien with the County Recorder, serves the filed lien on the property owner and required parties, and monitors lien deadlines and expirations.” Compl. ¶ 10. Relator provided Respondent *zlien*’s website which features a video entitled “How does *zlien* File your Mechanics Lien?” <http://www.zlien.com/mechanics-lien/how-does-zlien-work/> *Id.* Respondents, however, maintain that the statement *zlien* “will have your mechanics lien document generated and prepared,” is different than *zlien* preparing the document. Answer ¶ 10. Respondents maintain that “*zlien* acts as a technology powered scrivener, and merely copies verbatim the user provided information.” *Id.*

IV. CONCLUSIONS OF LAW

1. The Supreme Court of Ohio has original jurisdiction regarding admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Ohio Constitution, Article IV, Section 2(B)(1)(g); *Royal Indemnity Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 501 N.E.2d 617 (1986); *Judd v. City Trust & Sav. Bank*, 133 Ohio St. 81, 12 N.E.2d 288 (1937). Accordingly, the Court has exclusive jurisdiction over the regulation of the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St. 3d 455, 2009 Ohio 3508, 912 N.E.2d 567, 2009 Ohio LEXIS 1938 (Ohio 2009); *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, at ¶ 16.

2. The unauthorized practice of law is the rendering of legal services for another by any person not admitted or otherwise registered or certified to practice law in Ohio. Gov.Bar R. VII(2)(A). The use of a power of attorney does not give one the right to practice law on behalf of another. See, *Disciplinary Counsel v. Coleman*, 88 Ohio St.3d 155, 2000-Ohio-288, “a non-lawyer with a power of attorney may not appear in court on behalf of another, or otherwise practice law.”

3. The Court has consistently held that “[t]he practice of law is not limited to appearances in court, but also includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved.” *Miami Cty. Bar Assn. v. Wyandt & Silvers, Inc.*, 107 Ohio St.3d 259, 2005-Ohio-6430, 838 N.E.2d 655, at ¶ 11 (emphasis added), quoting *Cleveland Bar Assn. v. Misch*, 82 Ohio St.3d 256, 259, 695 N.E.2d 244 (1998); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 28, 193 N.E. 650 (1934).

4. R.C. 4705.07(A) provides that “[n]o person who is not licensed to practice law in this state shall do any of the following: (1) Hold that person out in any manner as an attorney at law; (2) Represent that person orally or in writing, directly or indirectly, as being authorized to practice law; (3) Commit any act that is prohibited by the [S]upreme [C]ourt as being the unauthorized practice of law.”

5. In *Ohio State Bar Assn. v. Lienguard, Inc.*, the Supreme Court approved the proposed consent decree of the parties which states that the preparation of an affidavit for mechanic’s lien or in satisfaction of mechanic’s lien is the unauthorized practice of law. 126 Ohio St.3d 400, 2010-Ohio-3827 (2010).

V. PRINCIPAL TERMS OF SETTLEMENT AGREEMENT

1. The parties stipulate that *zlien’s* current policy and practice is not to select or recommend which property description(s) to use in mechanic’s lien affidavits. Settlement Agreement, ¶ 1.

2. Respondents agree that they will not sign any mechanic’s lien affidavits for properties located in Ohio, pursuant to a power of attorney or otherwise, unless they themselves are the lien claimant for the particular lien or licensed to practice law in Ohio. Settlement Agreement, ¶ 3. However, the parties stipulate that if a court of competent jurisdiction determines that signing a mechanic’s lien affidavit is not the practice of law in Ohio, Respondents shall no longer be required to comply with that restriction. Settlement Agreement ¶ 3.

3. The parties agree that *zlien* is not prohibited from providing software that allows customers to complete forms creating mechanic’s lien affidavits to file in Ohio, so long as the forms conform to ORC 1311.06 and *zlien* does not select the property

descriptions to be inserted into the affidavits or advise customers which property descriptions to use. Settlement Agreement ¶ 2.

4. There are no civil penalties to be imposed on any Respondent. Settlement Agreement ¶ 10.

5. Each parties shall bear its own costs in this proceeding. Settlement Agreement ¶ 11.

VI. BOARD ANALYSIS

A. Review of Settlement Agreement Using Factors in Gov.Bar R. VII (5b)(C)

When evaluating a settlement agreement, the Board is required to consider the factors set forth in Gov.Bar R. VII(5b)(C). The Board reviewed the parties' Settlement Agreement using the factors stated in Section 5b(C) and finds the following:

1. The resolution is submitted in the proper form, and includes the required waiver of notice and hearing under Gov.Bar R. VII(7)(H);

2. Respondents continue to deny the material allegations of the unauthorized practice of law as stated in the Complaint;

3. The public is sufficiently protected from future harm, as Respondents have ceased the practice of signing mechanic's lien affidavits for properties in Ohio and further stipulate not to select or recommend to customers which property description to use in mechanic's lien affidavits;

5. The Settlement Agreement resolves all material allegations of the unauthorized practice of law;

6. The Settlement Agreement furthers public policy by both ensuring a cessation of the herein described business practices, because the Settlement

Agreement will be posted for reference by the Board in accordance with Gov.Bar R. VII(5b)(H), placing the public on notice that Respondents have ceased the conduct alleged by Relator to constitute the unauthorized practice of law; and

7. The parties' collaborative efforts to resolve this matter by entering into the Settlement Agreement further the purposes of Gov.Bar. R. VII to prevent protracted litigation.

B. Applicability of Civil Penalties Based on Factors in Gov.Bar R. VII(8)(B) and UPL Reg. 400

When determining whether civil penalties should be imposed in an unauthorized practice of law case, the Board is required to base its recommendation on the factors set forth in Gov.Bar R. VII(8)(B) and UPL Reg. 400(F). Additionally, UPL Reg. 400(F) specifies aggravating and mitigating factors that the Board may use to justify an enhanced or a reduced penalty. The Board considered the general, aggravating, and mitigating factors as described below.

1. General Civil Penalty Factors

With regard to the general civil penalty factors listed in Gov.Bar R. VII(8)(B)(1)-(5) and UPL Reg. 400(F)(1) and (2), the Board finds:

- a. Respondents cooperated with Relator's investigation and participated in the proceeding; and
- b. Relator has not sought the imposition of a civil penalty;

2. Aggravating Civil Penalty Factors

Reviewing the aggravating factors of UPL Reg. 400(F)(3)(a)-(g), which are the basis for a recommendation of a more severe penalty, the Board finds that

the record does not contain evidence or statements establishing any of these factors.

3. Mitigating Civil Penalty Factors

Applying the mitigating factors of UPL Reg. 400(F)(4)(a)-(g), which are the basis for a recommendation of no civil penalty or a less severe penalty, the Board finds:

- a. Respondents have ceased the conduct of filing mechanic's liens in Ohio as alleged in the Complaint; and
- b. Respondents have agreed to cease and desist from similar conduct in the future, unless the conduct is found not be the practice of law in Ohio.

4. Conclusion Regarding Civil Penalties

The Board defers to the Relator's recommendation that civil penalties are not warranted in this case, as Relator conducted the investigation and negotiated the terms of the Settlement Agreement with Respondents.

VII. CONCLUSION

Based upon these findings, the Board hereby approves the Settlement Agreement. It is hereby ordered that pursuant to Gov. Bar R. VII(5b)(H), the Settlement Agreement shall be recorded for reference by the Board, bar association unauthorized practice of law committees, and Disciplinary Counsel. It is further ordered that pursuant to Gov. Bar R. VII(5b)(D)(1), the Complaint in this matter is hereby **DISMISSED**.

**FOR THE BOARD ON THE
UNAUTHORIZED PRACTICE OF
LAW**

s/Robert V. Morris II, Chair

Its: CEO

Date: 4/20/16



Nate Budde

Gretchen Lynn

Jennifer Smiley

Seth Smiley

Scott G. Wolfe, Jr.

Its: Bar Counsel

Date 5-3-16

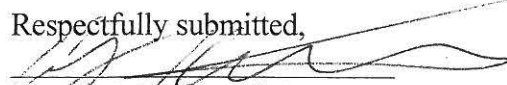
Date 4/20/2016

Date 4/20/2016

Date 4/24/2016

Date 4/25/2016

Date

Respectfully submitted,


Charles J. Kettlewell (0072448)
Charles J. Kettlewell LLC
445 Hutchinson Avenue, Suite 100
Columbus, Ohio 43235
Office (614) 436-2750
Fax (614) 436-2865
Charles@legalethics.pro



Peter D. Kennedy
Texas Bar No. 11296650
GRAVES, DOUGHERTY, HEARON
& MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
pkennedy@gdhn.com
(512) 480-5764 Phone
(512) 536-9908 Fax



Daniel J. Myers, Esq. (0087909)
Myers Law LLC
610 Skylight Office Tower
1660 West 2nd Street
Cleveland, Ohio 44113
Phone (216)236-8202
Fax (216) 674-1696
DMyers@MyersLawLLC.com
Counsel for Relator


Counsel for the Respondents
EXPRESS LIEN, INC dba *zlien*,
NATE BUDDE
GRETCHEN LYNN
JENNIFER SMILEY
SETH J. SMILEY,
SCOTT G. WOLFE, JR.

Anti-trust Law & UPL


III.

Anti-Trust Law
& UPL


UPL Enforcement in Ohio
The Impact of *North Carolina State Board of Dental Examiners v. FTC*



February 25, 2015



U.S. Supreme Court ruling in *North Carolina State Board of Dental Examiners v. FTC*






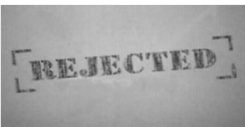
Antitrust



Focus of *NC Dental*:
When are state boards/agencies that are controlled by members of the industry being regulated immune from antitrust liability?



Another byproduct of *NC Dental*:
New hope for those wishing to challenge negative decisions of state regulatory boards.



Impact in Ohio thus far includes...



Federal antitrust lawsuit filed against a local bar association and the Ohio Supreme Court's UPL Board in 2015



This presentation will cover:

- Basics of Antitrust Law;
- State Action Immunity Analysis;
- State Action Immunity in UPL Cases Before *NC Dental*;
- The *NC Dental* decision; and
- Educated Guesses About Future Application of *NC Dental* to UPL.



The Basics of Antitrust Law



Goal is to promote competition...



...Not individual competitors.





Federal Sherman Act prohibits:

- “Every contract, combination...or conspiracy, in restraint of trade” and
- “Monopoliz[ation], attempt[ed] monopoliz[ation], or conspir[acy]...to monopolize.”



**Only
unreasonable
restraints of trade
are prohibited.**



Examples of antitrust violations:

- Competitors agreeing on price;
- Competitors agreeing on allocation of territories/customers;
- Agreements to boycott or exclude others from the market.



PENALTY Stakes are high

Damages
Damages
Damages

LAW SUIT




MIKE DeWINE

Defending an antitrust case
can take a heavy toll – even
if you win!



MIKE DeWINE

Can the
State
violate the
antitrust
laws?



MIKE DeWINE

**Sherman Act:
Every agreement in
restraint of trade is
illegal.**



**One of the most significant
sources of restraints on
trade...**



Example:





Restraint on trade?





Parker v. Brown
(U.S. Supreme Court 1943)

Holding:
Federal antitrust laws were never intended to apply to the sovereign acts of the states.



The state can pass anticompetitive legislation and take anticompetitive actions if it chooses.

So, a vital question is...



Who is the state?



The State is:

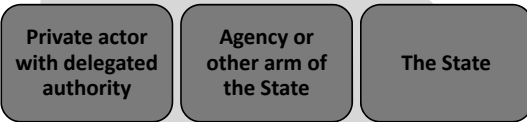


MIKE DeWINE

What about state agencies?

MIKE DeWINE

State Action Immunity Continuum



MIKE DeWINE

State action immunity for state agencies:

There must be a clearly-articulated policy to displace competition.



Can private actors obtain state action immunity?

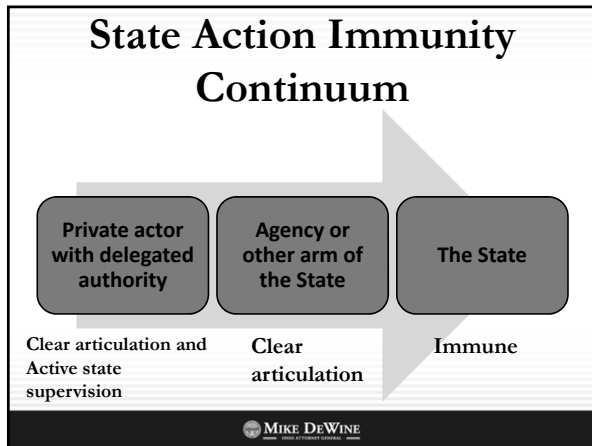


California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. (U.S. Supreme Court 1980)

Holding – Private actors get immunity if:

- “Clearly articulated” and “affirmatively expressed” policy; and
- “Actively supervised” by the state.







State Action Immunity and UPL Enforcement Before *NC Dental*

MIKE DeWINE

Surprising number of state action decisions dealt with UPL and attorney licensure/discipline



MIKE DeWINE

Goldfarb v. Virginia State Bar
(U.S. Supreme Court 1975)

- County bar association adopted minimum fee schedule for title exams
- State bar association issued reports and ethics opinions in support



MIKE DeWINE

Bar associations argued:

State bar association was deemed a state agency for some purposes;
 Local bar association's acts were "prompted" by the state bar's ethics opinions on fee schedules.

MIKE DeWINE

***Goldfarb* holding:**



- No immunity
- Action must be "compelled by direction of the State acting as sovereign" – not merely "prompted"



MIKE DeWINE

Bates v. State Bar of Arizona
 (U.S. Supreme Court 1977)

- Attorneys advertised low-cost legal services in newspaper
- State bar initiated complaint and recommended license suspensions
- Attorneys challenged the state supreme court's rule against lawyer advertising

Bates holding:



- State bar immune
- Bar's role "completely defined" by the court
- Rules are clear articulation
- Subject to "pointed re-examination" by the court
- Four years before *Midcal* – supervision a key factor




Hoover v. Ronwin
 (U.S. Supreme Court 1984)



- Applicant to Arizona bar failed bar exam
- Sued Supreme Court's bar exam committee members for conspiring to reduce the number of attorneys in the market

Pass
 Fail


***Hoover* holding:**

- Only issue – WHO denied bar admission?
- In Arizona, only the Supreme Court can admit or refuse admission
- Thus, the decision could not have been that of the Committee alone
- Committee was immune



In other words...

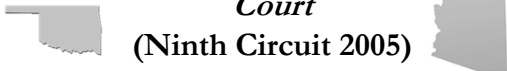
**No exercise of
discretion = no
liability**



**More from our
friends in Arizona...**



Mothershed v. Justices of Supreme Court



(Ninth Circuit 2005)

- Attorney licensed in OK but practiced in AZ
- Both state bars initiated disciplinary proceedings
- Censured in AZ; disbarred in OK
- Filed suit against both bars, both supreme courts



Mothershed holding:

- All defendants exempt
- Real party in interest is the Court, not the bar associations or justices
- The lawsuit challenges the rules themselves
- Rules were acts of the sovereign that “compelled” the bars to act



Moving on to Ohio...



Lender's Service, Inc. v. Dayton Bar Ass'n
(S.D. Ohio 1991)

- Dayton Bar Ass'n sued company that sold title reports it compiled from public property records alleging UPL
- Company sued Bar Ass'n and members of its UPL committee for antitrust violation



MIKE DeWINE

Lender's Service holding:

- All defendants immune
- Both prongs of *Midcal* satisfied
- Clear articulation – Bar's acts contemplated by Court rules
- Active supervision – Rule VII has annual reporting requirements; UPL Board must approve filing of lawsuit



MIKE DeWINE

Defendants in *Lender's Service* also succeeded on claims of *Noerr-Pennington* immunity.

MIKE DeWINE

Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc. (U.S. Supreme Court 1961)

Genuine efforts to influence government are immune from antitrust liability, even if they have anticompetitive motives.

(Exception – efforts that are strictly a sham.)



Defendants in *Lender's Service* were *Noerr* protected

Bar association was petitioning government when it filed its complaint with the UPL Board, and later when it filed in common pleas court.



North Carolina State Board of Dental Examiners v. FTC



Early 2000s – teeth whitening kiosks spring up in shopping malls across the country, manned by non-dentists.



MIKE DeWINE
GOVERNOR OF NORTH CAROLINA

NC dentists complain to state dental board...



- Board issues cease and desist letters
- Board sends letters to mall owners

MIKE DeWINE
GOVERNOR OF NORTH CAROLINA



FTC investigates and files antitrust enforcement action against Board

MIKE DeWINE
GOVERNOR OF NORTH CAROLINA

FTC prevails before the ALJ, the Fourth Circuit and the Supreme Court (6-3 ruling).



Question in *NC Dental*:

Do acts of a state regulatory board controlled by active market participants constitute acts of the state (immune under *Parker*), or acts of private parties (immune only if both prongs of *Midcal* are satisfied)?



***NC Dental* holding:**

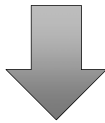
- “Controlling number” of Board’s decision makers were active market participants
- Thus, Board must satisfy both *Midcal* prongs – clear articulation and active state supervision – to qualify for immunity.



Great emphasis on motivation for private parties to “confus[e] their own interests with the State’s policy goals.”



Conflicting interests



Akin to private entities



Who are active market participants?



Limited guidance in *NC Dental* opinion.



MIKE DeWINE

October 2015:

FTC issued *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

MIKE DeWINE

FTC Staff Guidance:


Person is an “active market participant” if:

- **Licensed by the board; or**
- **Provides any service subject to the regulatory authority of the board**

MIKE DeWINE


What if the board member is not personally interested in the specific activity in question?

No defense.




What if the board member has temporarily suspended his or her practice while serving?

No defense.



What if the board members are selected/appointed by the Governor?

No defense.



What is a “controlling number” of active market participants?

- Need not be numerical majority
- Fact-sensitive inquiry
- Factors: Rules governing board operation, deference of lay members, actual percentage.

30%

50%

MIKE DeWINE

What constitutes active state supervision?

MIKE DeWINE

Guidance from *NC Dental* opinion:

- Supervisor must review the substance of the decision, not just the procedures used to get there.
- Supervisor must have the power to veto the decision if not in accord with state policy (mere potential for supervision is not sufficient).
- Supervisor itself may not be an active market participant.

MIKE DeWINE

Additional Guidance from the FTC:

- Supervision must precede implementation of the restraint at issue.
- Existence of a written decision by the supervisor is an extremely important factor.



**Educated Guesses
About the Future
Application of *NC
Dental* to UPL
Enforcement**



Cases against regulatory boards are springing up across the country.



Ohio's UPL Board and the UPL Committee of the Cleveland Metropolitan Bar Association, the CMBA itself and the individual members of the CMBA's UPL Committee have already been the focus of an antitrust suit

September 2015 – Louisiana federal court



Express Lien, Inc. v. Cleveland Metropolitan Bar Ass'n (E.D. La 2015)

- Plaintiff – company providing online mechanic's lien services
- Accused defendants of "suppressing the commercial activity" of Express Lien
- Sought treble damages
- Resolved by settlement



Too soon to tell conclusively how *NC Dental* will impact UPL enforcement in the long run.



Here's how *NC Dental* appears to have changed the landscape...





The Supreme Court...

No change. The Court remains equivalent to the State itself.



Bar associations...

Very little change. Bar associations have been required to satisfy supervision requirements since before *Midcal* was decided.



- Where rules require a bar association or committee to take action, immunity seems easy to obtain (*e.g., Hoover – bar exams*)
- Where bar associations or committees have discretion, *NC Dental* may have some impact (*e.g., Lender’s Service – UPL*).



Would the annual reporting requirements in *Lender’s Service* pass muster today as supervision?



- Must review substance, not process
- Mere “potential” for supervision is not enough
- Supervision must precede action




But, don’t forget *Noerr-Pennington!*

May be effective in securing antitrust immunity for bar associations and their UPL committees in making recommendations to the Board or filing a complaint.




The Court's UPL Board...

- Probably the most change
- Previously, UPL Boards often treated like the court itself
- Today, UPL Board likely viewed as an entity that has to satisfy *Midcal* because of *NC Dental (11 of 13 commissioners must be attorneys)*





Passing the *Midcal* test

- Clear articulation prong – relatively easy. Rule VII spells out Board's duties in great detail.
- Active state supervision prong – Board can generally only recommend. The Court issues the order.



CAVEATS:

Plaintiff could inquire into the Court's process for reviewing the recommendations. Cannot just be "rubber stamp."



If the Board takes action that does not require confirmation by the Court (*see, e.g.*, issuance of advisory opinions – Gov. Bar R. VII, Section 2(C)), is there active supervision?



MIKE DeWINE

Final caveats:

An antitrust case will not necessarily succeed on the merits simply because state action immunity is not granted.

AND...

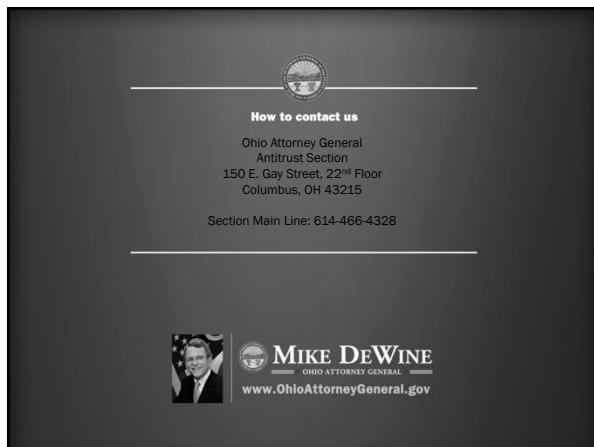
MIKE DeWINE

A case that lacks substantive merit might be filed anyway.

Look carefully at your processes where attorneys not employed by the State are licensing, disciplining or otherwise restricting attorneys or others who wish to perform legal services.

MIKE DeWINE







Outline

UPL Enforcement in Ohio – The Impact of *North Carolina State Board of Dental Examiners v. FTC*

*Jennifer L. Pratt, Chief, Antitrust Section
Office of Ohio Attorney General Mike DeWine*

Introduction

- February 25, 2015 U.S. Supreme Court ruling in *North Carolina State Board of Dental Examiners v. FTC* has focused attention of the states' regulatory boards and commissions on antitrust.
- *NC Dental* addresses how and when regulatory bodies controlled by members of the industry being regulated can claim immunity from federal antitrust liability.
- Those aggrieved by decisions of these state regulatory bodies are also paying heightened attention to antitrust issues; Decisions are being challenged through the filing of lawsuits alleging illegal restraint of trade by the boards.
- One such lawsuit filed here in Ohio against a local bar association and the Supreme Court of Ohio's Board on the Unauthorized Practice of Law points out the importance to those involved with UPL enforcement of understanding state action immunity and how the *NC Dental* decision did – and did not – change the landscape.

Basics of Antitrust Law

- Designed to protect and promote competition (not individual competitors)
- Federal Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," and any "monopoliz[ation], or attempt to monopolize, or combine or conspire ... to monopolize."
- SCOTUS has made clear that it is only *unreasonable* restraints of trade that are illegal. But that analysis is easier said than done!
- Clearly prohibited – anticompetitive agreements between competitors such as: agreements on price, territorial/customer allocation agreements, agreements to boycott or otherwise exclude others from the market.
- The stakes are extremely high – criminal penalties – up to \$10 million for corporate violators and \$1 million for individuals, along with up to 10 years in prison. For civil proceedings, those found liable of antitrust violations can have treble damages imposed, civil penalties, attorneys fees, etc
- Anticompetitive activities can subject the perpetrator to lawsuits by state and/or federal antitrust enforcers (DOJ, FTC, state AGs) and by private plaintiffs.
- Antitrust cases are also notoriously long, expensive and document-intensive. Defending against an antitrust claim – even if ultimately successful – can take a heavy toll.

The State as an Antitrust Law Violator?

- Sherman Act didn't say that only restraints put in place by competitors themselves are illegal. It said "every" agreement "in restraint of trade". One of the greatest sources of restraints on trade comes from the states themselves – their laws and regulation of business and the professions.
- *Parker v. Brown*, 317 U.S. 431 (1943) – Federal antitrust laws were never intended to apply to the sovereign acts of the states. States are entitled to displace the competitive process with regulation if they choose.
- Who is the state? Complex question, but it is well-settled that a state's legislature and its supreme court are synonymous with the state itself for state action purposes.
- State agencies fall further down the state versus private actor continuum – there must be a clearly-articulated policy to displace competition in order for a state agency to be immune.
- What about the state delegating its authority to private actors to carry out its (otherwise anticompetitive) policies? Does state action immunity apply?
- 1980 – The U.S. Supreme Court decided *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Holding: Private actors may receive the protection of state action immunity when engaging in anticompetitive activity under a delegation of authority by a state so long as two requirements are satisfied: (1) the state must have "clearly articulated" and "affirmatively expressed" the displacement of competition as its policy; and (2) the anticompetitive policy must be "actively supervised" by the state itself.

Application of State Action Immunity Concepts to UPL Enforcement Before *NC Dental*

- Surprising number of pre-*NC Dental* state action immunity decisions concerning UPL and attorney licensure/discipline
- *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). County bar association adopted minimum fee schedules for title examinations. State bar association issued reports and ethics opinions asserting that failure to adhere to the price schedules would be misconduct on the part of the lawyer. Both claimed state action immunity in price-fixing case against them. State bar argued that it was a state agency by law for some purposes; County bar argued that the state bar's ethics codes and other actions "prompted" it to set the price schedule.
- Court in *Goldfarb* held: It is not enough that the conduct is "prompted" by the state; it must be "compelled by direction of the State acting as sovereign" in order to qualify for state action immunity. 421 U.S. at 791. In other words, both bar associations failed the clear articulation test.
- *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Two Arizona attorneys opened low-cost legal clinic and placed ads in local newspapers advertising their services, in direct violation of an Arizona Supreme Court rule prohibiting advertising by lawyers. State bar initiated a complaint and recommended a suspension of their licenses. The lawyers sought review in

the Arizona Supreme Court, arguing that the rule violated the Sherman Act (along with 1st Amendment arguments). The Court rejected their appeal.

- Holding in *Bates*: State bar's role in enforcing these particular rules is "completely defined by the court." 433 U.S. at 361. Even though this was three years before *Midcal*, nevertheless the Court went on to point out that "the appellee acts as the agent of the court under its continuous supervision." *Id.* More specifically, the rules "reflect a clear articulation of the State's policy with regard to professional behavior" and are "subject to pointed re-examination by the policymaker the Arizona Supreme Court in enforcement proceedings." *Id.* at 362. Court was already focused on the importance of active supervision when moving down the continuum away from the state itself.
- *Hoover v. Ronwin*, 466 U.S. 558 (1984). Four years after *Midcal*. Unsuccessful applicant for the Arizona Bar petitioned the Arizona Supreme Court to review the Supreme Court's Committee on Examinations and Admissions' testing and grading procedures when he failed the bar exam. The Court denied his petition, and Supreme Court denied cert. Four years later, he filed an antitrust action in federal court alleging that the Committee members had conspired to "artificially reduc[e] the numbers of competing attorneys in the State of Arizona."
- Holding in *Hoover*: Case turns on the narrow issue of "*who* denied Ronwin admission to the Arizona Bar?" *Id.* at 581 (emphasis added). While the dissent argued that because there was no court order, this must have been the action of the Committee, the majority held: "This argument ignores the incontrovertible fact that under the law of Arizona only the State Supreme Court had authority to admit or deny admission to practice law." *Id.* Court went on to say: "We are unwilling to assume that the Arizona Supreme Court failed to comply with state law, and allowed the Committee alone to make the decision with respect to the February 1974 examination." It further pointed out that his petition to the Court to review the testing procedures did yield a court order rejecting his contentions. Again, the implication is that if the law had not placed bar admission solely in the hands of the Supreme Court, the state action immunity would not have been automatic for the Committee members.
- *Mothershed v. Justices of Supreme Court*, 410 F.3d 602 (9th Cir. 2005). Attorney licensed only in Oklahoma lived and practiced in Arizona. Arizona and Oklahoma State Bars initiated disciplinary proceedings. Arizona Supreme Court censured him. Oklahoma Supreme Court disbarred him. The attorney filed suit against both state bars, both supreme courts, the disciplinary commission and others alleging state and federal antitrust violations.
- Ninth Circuit held in *Mothershed*: The real party in interest here is not the bar associations and/or the individual justices, but rather the Supreme Court itself, because it was solely the rules requiring practicing attorneys to be licensed that are being challenged. The Rules were acts of the sovereign that "compelled" the bar associations to act as they did. Thus, all defendants were exempt from antitrust liability. *Id.* at 609.
- *Lender's Service, Inc. v. Dayton Bar Ass'n*, 758 F.Supp. 429 (S.D. Ohio 1991). A company that compiled reports on title matters from public property records was sued by the Dayton Bar

Ass'n for the unauthorized practice of law. The company brought an antitrust case against the Bar Ass'n and members of its UPL Committee.

- Southern District of Ohio held in *Lender's Service*: Defendants were immune. Both prongs of the *Midcal* test were required to be satisfied – because Ohio Supreme Court rules allow local bar associations the discretion of whether to file a UPL action with the board or in court, “[i]t is within this apparent realm of discretion that bar associations may function more as private actors than state agencies.” *Id.* at 437. (1) Clear articulation – Bar associations acts were clearly contemplated by the Supreme Court’s rules. (2) Active supervision – Rule VII has annual reporting requirements for local bar associations’ investigative activities; Civil action for judicial determination may not be filed unless the Board authorizes it.
- Important note – Defendants in *Lender's Service* also succeeded in claiming *Noerr-Pennington* immunity.
- *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) held that genuine efforts to influence government are immune from antitrust liability, even if they have anticompetitive motives. Only exception is if those efforts are a “mere sham.”
- In *Lender's Service*, the Court found that the bar association and its UPL Committee were essentially petitioning the government when they filed their complaint with the board, and when they filed their subsequent complaint in common pleas court. The activities were *Noerr* protected.

North Carolina State Board of Dental Examiners v. FTC

- In 2015, the U.S. Supreme Court heard an appeal arising out of an FTC enforcement action against a state regulatory board in North Carolina.
- Background: Early 2000s, dentists in NC began to complain to the state Dental Board that non-dentists were offering teeth-whitening services in such places as mall kiosks.
- Board issued cease and desist letters; sent mall owners letters suggesting they were in violation by allowing the activity to take place.
- FTC sued, alleging the Board’s action was concerted action by competitors in restraint of trade in the market for teeth-whitening services. The Board moved to dismiss, claiming state action immunity.
- FTC prevailed before the ALJ, the Fourth Circuit and the Supreme Court (6-3 ruling).
- Question in *North Carolina Dental*: Do the actions of a state regulatory board controlled by active participants in the market being regulated constitute acts of the state (thus immune under *Parker*), or do they constitute acts of private actors (thus immune only if both prongs of the *Midcal* test are satisfied)?
- Holding: Because a “controlling number” of the Board’s decision makers are “active market participants in the occupation the board regulates,” the Board must satisfy *Midcal*’s active state supervision requirement in order to qualify for state action immunity. *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1114 (2015).

- The decision places great emphasis on the fact that active market participants have “strong private interests”, leading to a significant danger that they will “confus[e] their own interests with the State’s policy goals.” *Id.* Those private interests make them more like private entities than arms of the state.
- Questions raised by *North Carolina Dental*:
- Who are active market participants?
- The Supreme Court’s opinion did not provide detailed guidance on this question. However, the FTC issued *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* in October 2015. It provides that a person is an “active market participant” if the person “(i) is licensed by the board” OR (ii) “provides any service that is subject to the regulatory authority of the board.”
- No defense that Board members are not personally interested in the particular activity under examination.
- No defense that a Board member’s practice is temporarily suspended while serving on the Board.
- Does not matter how selected – whether elected by those being regulated, or nominated by the Governor.
- What is a “controlling number” of active market participants?
- Need not be a numerical majority. It is a fact-sensitive inquiry – percentage, rules governing the operation of the board, typical level of engagement by the non-active-market-participant members (*i.e.*, do they typically defer to the market participants?)
- What constitutes active state supervision?
- *NC Dental* opinion gave some guidance on this point: (1) Supervisor must review the substance of the decision, not just the procedures used to get there. (2) Supervisor must have the power to veto the decision if not in accord with state policy (mere potential for supervision is not sufficient). (3) Supervisor itself may not be an active market participant. *NC Dental*, 135 S.Ct. at 1116-17.
- FTC Guidance adds: (1) Supervision must precede implementation of the restraint at issue. (2) Existence of a written decision by the supervisor is an extremely important factor in deciding whether supervision is adequate.

Educated Guesses About the Future Application of *NC Dental* to UPL Enforcement

- Cases against regulatory boards started springing up all across the country after *NC Dental* was decided.
- UPL cases have historically been a lightning rod for antitrust challenges, and *NC Dental* is only likely to exacerbate that problem.
- Ohio’s UPL Board and the UPL Committee of the Cleveland Metropolitan Bar Association, the CMBA itself and the individual members of the CMBA’s UPL Committee have already been the subjects of an antitrust suit filed in September 2015 in federal court in Louisiana by

a company providing online services to businesses and individuals wishing to file mechanics' liens in Ohio. (*Express Lien, Inc. v. Cleveland Metropolitan Bar Ass'n* (E.D. La 2015)). Plaintiff sought treble damages, attorneys fees and an injunction preventing defendants from "suppressing the commercial activity" of Express Lien. Case resolved by settlement during the MTD phase on jurisdictional issues.

- So how will *NC Dental* likely impact UPL enforcement in Ohio going forward?
- Too soon to tell conclusively – will take years before a clear picture begins to take shape. Moreover, state action immunity cases have been fraught with inconsistencies, so even the most educated guesses have a high probability of being wrong in any given situation.
- At this point, the following appears to be the lay of the land.
- The Supreme Court itself – No change at all. The Court is equivalent to the state, and *NC Dental* did nothing to alter that.
- Bar associations – Very little change. Courts have been requiring local bar associations to satisfy both prongs of the *Midcal* test since before *Midcal* was even decided. (See *Bates* in 1977 – “pointed reexamination”).
- In those actions where the court’s rules require a local bar to do something, immunity seems easy to come by (e.g., *Hoover* – bar exam case). Where local bar associations have discretion to take an act or not, (e.g., *Lender’s Service* – UPL case) *NC Dental* may have some impact. The court in *Lender’s* pointed out that the discretion made the bar association more like a private entity than the state, and thus required active supervision. It pointed to the annual reporting requirements imposed by the Supreme Court. Would this pass muster in the post-*NC Dental* era? Remember – the supervisor must review the substance of each decision, not just the process; the mere “potential” for supervision is not enough; supervision must precede action. However, *Noerr-Pennington* immunity may be available if state action immunity fails.
- The Court’s UPL Board – Here’s where the analysis (although probably not the result) has changed the most. Before *NC Dental*, it is likely that the Board would have been treated as a part of the state itself. Today, it would likely be viewed as an entity that has to satisfy *Midcal* in order to gain the protection of state action immunity. (11 of 13 commissioners must be “attorneys admitted to the practice of law in Ohio”. Gov. Bar R. VII, Section 1(A).)
- Satisfying clear articulation will likely be rather easy, as Rule VII spells out the Board’s duties in great detail.
- Satisfying active state supervision is probably going to be relatively easy in most cases, as the Board can only recommend most actions – it is the Court that issues the order. See, e.g., Gov. Bar R. VII, Section 19 (A).
- Caveats – (a) A plaintiff could inquire into the Court’s process for reviewing the recommendations that come before it. A finding that the Court merely “rubber stamped” a decision could cast doubt on whether the supervision was adequate to ensure that the Board’s action was really the policy of the State and not the whims of private actors. (b) If

the Board takes action that does not require confirmation by the Court (*see, e.g.*, issuance of advisory opinions – Gov. Bar R. VII, Section 2(C)), is there active supervision?





KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado, D.Puerto Rico, December 29, 2015

135 S.Ct. 1101

Supreme Court of the United States

NORTH CAROLINA STATE BOARD

OF DENTAL EXAMINERS, Petitioner

v.

FEDERAL TRADE COMMISSION.

No. 13–534.

|

Argued Oct. 14, 2014.

|

Decided Feb. 25, 2015.

Synopsis

Background: North Carolina State Board of Dental Examiners petitioned for review of an order of the Federal Trade Commission (FTC), 2011 WL 11798463, which prohibited board from directing non-dentists to stop providing teeth whitening services or products, discouraging or barring the provision of those goods and services, or communicating to certain third parties that non-dentist teeth whitening goods or services violated state's Dental Practice Act. The United States Court of Appeals for the Fourth Circuit, Shedd, Circuit Judge, 717 F.3d 359, denied petition. Board's petition for writ of certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, held that board was nonsovereign entity controlled by active market participants that did not receive active supervision by state, and thus board's anticompetitive actions were not entitled to Parker state-action immunity from federal antitrust law.

Affirmed.

Justice Alito, filed dissenting opinion in which Justices Scalia and Thomas joined.

West Headnotes (16)

[1] Antitrust and Trade Regulation

➔ State Action

Nonsovereign actor controlled by active market participants enjoys *Parker* state-action immunity from federal antitrust liability for anticompetitive conduct only if: (1) challenged restraint imposed by nonsovereign actor is one clearly articulated and affirmatively expressed as state policy; and (2) that policy is actively supervised by the state. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

[2] Antitrust and Trade Regulation

➔ State Action

Statutes

➔ Implied Repeal

Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, *Parker* state-action immunity from federal antitrust liability is disfavored, much as are repeals by implication. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[3] Antitrust and Trade Regulation

➔ State Action

Entity may not invoke *Parker* state-action immunity from federal antitrust liability unless the entity's actions in question are an exercise of the state's sovereign power. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[4] Antitrust and Trade Regulation

➔ State Action

State legislation and decisions of a state supreme court, acting legislatively rather than

judicially, are ipso facto exempt from the operation of federal antitrust laws under the *Parker* state-action immunity doctrine because such actions by a state legislature or supreme court are an undoubted exercise of state sovereign authority. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[5] Antitrust and Trade Regulation

🔑 State Action

“Nonsovereign actor” that is not always entitled to *Parker* state-action immunity from federal antitrust liability is an actor whose conduct does not automatically qualify as that of the sovereign state itself. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[6] Antitrust and Trade Regulation

🔑 State Action

State agencies are not simply by their governmental character sovereign actors entitled to *Parker* state-action immunity from federal antitrust liability, rather, *Parker* immunity for state agencies requires more than a mere facade of state involvement to ensure the states accept political accountability for anticompetitive conduct they permit and control. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[7] Antitrust and Trade Regulation

🔑 State Action

Under *Parker* state-action immunity doctrine and the Supremacy Clause, the states' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations of regulatory power over a market to active market participants. U.S.C.A. Const. Art. 6, cl. 2; Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[8] Antitrust and Trade Regulation

🔑 State Action

Parker state-action immunity from federal antitrust liability for nonsovereign actors requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the state to regulate their own profession, result from procedures that suffice to make the conduct the state's own. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[9] Antitrust and Trade Regulation

🔑 State Action

Whether *Parker* state-action immunity from federal antitrust liability extends to anticompetitive conduct of nonsovereign actors requires a determination not as to whether the challenged conduct is efficient, well-functioning, or wise, but rather whether the anticompetitive conduct engaged in by the nonsovereign actors should be deemed state action and thus shielded from the antitrust laws. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[10] Antitrust and Trade Regulation

🔑 State Action

To meet “clear articulation” requirement for extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of nonsovereign actor, displacement of competition must be the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature to the nonsovereign actor. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[11] Antitrust and Trade Regulation

🔑 State Action

To meet “active supervision” requirement for extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of a nonsovereign actor, state officials must have and exercise power to review particular anticompetitive acts of the nonsovereign actor and disapprove those acts that fail to accord with state policy. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[12] Antitrust and Trade Regulation

🔑 State Action

Antitrust and Trade Regulation

🔑 Political subdivisions;municipalities

Antitrust and Trade Regulation

🔑 Private parties

Active supervision by the state is an essential prerequisite of extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of any nonsovereign entity, public or private, controlled by active market participants in the market affected by the challenged conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[13] Antitrust and Trade Regulation

🔑 Private parties

North Carolina State Board of **Dental Examiners** was nonsovereign entity controlled by active market participants that did not receive active supervision by state when interpreting state **Dental Practice Act** (Act) as covering teeth whitening and issuing cease-and-desist letters to nondentist teeth whiteners, and thus **board's** anticompetitive actions were not entitled to *Parker* state-action immunity from federal antitrust law; state delegated **board** to regulate dentistry but majority of **board** members were dentists who may have been pursuing private interests when they engaged in challenged conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; West's N.C.G.S.A. § 90–22(a, b).

2 Cases that cite this headnote

[14] Antitrust and Trade Regulation

🔑 Private parties

State **board** on which a controlling number of decisionmakers are active market participants in the occupation the **board** regulates must be subject to active supervision by the state in order for the **board** to invoke *Parker* state-action antitrust immunity from federal antitrust liability for the **board's** anticompetitive conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

4 Cases that cite this headnote

[15] Antitrust and Trade Regulation

🔑 State Action

In determining whether *Parker* state-action immunity from federal antitrust liability extends to anticompetitive conduct of nonsovereign entity, requisite active supervision of entity by state need not entail day-to-day involvement in entity's operations or micromanagement of its every decision, rather, the question is whether state's review mechanisms provide realistic assurance that nonsovereign entity's anticompetitive conduct promotes state policy, rather than merely the entity's individual interests. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[16] Antitrust and Trade Regulation

🔑 State Action

To meet active supervision requirement for extending *Parker* state-action immunity from federal antitrust liability to anticompetitive conduct of any nonsovereign entity, state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, state supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, and state supervisor may not itself be an active market participant

in the market affected by the anticompetitive conduct. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5 Cases that cite this headnote

***1104** *Syllabus* *

North Carolina's Dental Practice Act (Act) provides that the **North Carolina State Board of Dental Examiners (Board)** is “the agency of the State for the regulation of the practice of dentistry.” The **Board's** principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the **Board** that nondentists were charging lower prices for such services than dentists did, the **Board** issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related **Board** actions led nondentists to cease offering teeth whitening services in **North Carolina**.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the **Board's** concerted action to exclude nondentists from the market for teeth whitening services in **North Carolina** constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the **Board's** motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the **Board** had acted pursuant to a clearly articulated state policy to displace competition, the **Board** must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the **Board** had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in all respects.

Held: Because a controlling number of the **Board's** decisionmakers are active market participants in the

occupation the **Board** regulates, the **Board** can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 1109 – 1117.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 1109 – 1110.

(b) The **Board's** actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the **Board**—enjoys *Parker* immunity only if “ ‘the challenged restraint ... [is] clearly articulated and *1105 affirmatively expressed as state policy,’ and ... ‘the policy ... [is] actively supervised by the State.’ ” *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. —, —, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233). Here, the **Board** did not receive active supervision of its anticompetitive conduct. Pp. 1110 – 1116.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the

ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 1110 – 1112.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie v. Eau Claire*, 471 U.S. 34, 35, 105 S.Ct. 1713, 85 L.Ed.2d 24. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U.S., at 374, 111 S.Ct. 1344, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633, 112 S.Ct. 2169, 119 L.Ed.2d 410, and *Phoebe Putney, supra*, at —, 133 S.Ct. 1003. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 1112 – 1114.

(3) The **Board's** argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision *1106 requirement was created to address. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests

with the State's policy goals. While *Hallie* stated “it is likely that active state supervision would also not be required” for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there was more like prototypical state agencies, not specialized **boards** dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U.S., at 105–106, 100 S.Ct. 937. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra*, at 39, 105 S.Ct. 1713. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus, the Court holds today that a state **board** on which a controlling number of decisionmakers are active market participants in the occupation the **board** regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 1113 – 1115.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including **board** members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget*, 486 U.S. 94, 105–106, 108 S.Ct. 1658, 100 L.Ed.2d 83, particularly in light of the risks licensing **boards** dominated by market participants may pose to the free market. Pp. 1114 – 1116.

(5) The **Board** does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that

basis. The Act delegates control over the practice of dentistry to the **Board**, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the **Board** relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the **Board** exceeded its powers under **North Carolina** law, there is no evidence of any decision by the State to initiate or concur with the **Board's** actions against the nondentists. P. 1116.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's *1107 anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U.S., at 100–101, 108 S.Ct. 1658. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra*, at 638, 112 S.Ct. 2169. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 1116 – 1117.

717 F.3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Attorneys and Law Firms

Hashim M. Mooppan, Washington, DC, for Petitioner.

Malcolm L. Stewart, for Respondent.

Glen D. Nager, Counsel of Record, Hashim M. Mooppan, Amanda R. Parker, Jones Day, Washington, DC, for Petitioner.

Jonathan E. Nuechterlein, General Counsel, David C. Shonka, Principal Deputy General Counsel, Imad D. Abyad, Mark S. Hegedus, Attorneys, Federal Trade Commission, Washington, DC, Donald B. Verrilli, Jr., Solicitor General, Counsel of Record, William J. Baer, Assistant Attorney General, Malcolm L. Stewart, Deputy Solicitor General, Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, DC, for Respondent.

Opinion

Justice KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory **board**. A majority of the **board's** members are engaged in the active practice of the profession it regulates. The question is whether the **board's** actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

I

A

In its **Dental** Practice Act (Act), **North Carolina** has declared the practice of dentistry to be a matter of public concern requiring regulation. N.C. Gen.Stat. Ann. § 90–22(a) (2013). Under the Act, the **North Carolina State Board** of **Dental** Examiners (**Board**) is "the agency of the State for the regulation of the practice of dentistry." § 90–22(b).

The **Board's** principal duty is to create, administer, and enforce a licensing system for dentists. See §§ 90–29 to 90–41. To perform that function it has broad authority over licensees. See § 90–41. The **Board's** authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the **Board** may file suit to "perpetually enjoin any person from ... unlawfully practicing dentistry." § 90–40.1.

*1108 The Act provides that six of the **Board's** eight members must be licensed dentists engaged in the active practice of dentistry. § 90–22. They are elected by other licensed dentists in **North Carolina**, who cast their ballots in elections conducted by the **Board**. *Ibid*. The seventh member must be a licensed and practicing **dental** hygienist, and he or she is elected by other licensed hygienists. *Ibid*. The final member is referred to by the Act as a “consumer” and is appointed by the Governor. *Ibid*. All members serve 3–year terms, and no person may serve more than two consecutive terms. *Ibid*. The Act does not create any mechanism for the removal of an elected member of the **Board** by a public official. See *ibid*.

Board members swear an oath of office, § 138A–22(a), and the **Board** must comply with the State's Administrative Procedure Act, § 150B–1 *et seq.*, Public Records Act, § 132–1 *et seq.*, and open-meetings law, § 143–318.9 *et seq.* The **Board** may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the **North Carolina** Rules Review Commission, whose members are appointed by the state legislature. See §§ 90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in **North Carolina** started whitening teeth. Many of those who did so, including 8 of the **Board's** 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the **Board** about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the **Board** opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the **Board's** hygienist member nor its consumer member participated in this undertaking. The **Board's** chief operations officer remarked that the **Board** was “going forth to do battle” with nondentists. App. to Pet. for Cert. 103a. The **Board's** concern did not result in a formal rule or regulation reviewable by the independent Rules Review

Commission, even though the Act does not, by its terms, specify that teeth whitening is “the practice of dentistry.”

Starting in 2006, the **Board** issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease “all activity constituting the practice of dentistry”; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes “the practice of dentistry.” App. 13, 15. In early 2007, the **Board** persuaded the **North Carolina Board** of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the **Board** sent letters to mall operators, stating that kiosk teeth whiteners were violating the **Dental** Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in **North Carolina**.

C

In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the **Board** with violating § 5 of *1109 the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45. The FTC alleged that the **Board's** concerted action to exclude nondentists from the market for teeth whitening services in **North Carolina** constituted an anticompetitive and unfair method of competition. The **Board** moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the **Board** had acted pursuant to a clearly articulated state policy to displace competition, the **Board** is a “public/private hybrid” that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the **Board** could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the **Board** had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the **Board's** public safety justification, noting, *inter alia*, “a wealth of evidence ...

suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure.” *Id.*, at 123a.

The FTC ordered the **Board** to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the **Board** to issue notices to all earlier recipients of the **Board's** cease-and-desist orders advising them of the **Board's** proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F.3d 359, 370 (2013). This Court granted certiorari. 571 U.S. —, 134 S.Ct. 1491, 188 L.Ed.2d 375 (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While “the States regulate their economies in many ways not inconsistent with the antitrust laws,” *id.*, at 635–636, 112 S.Ct. 2169, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on

the States' power to regulate. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); see also Easterbrook, *1110 Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U.S., at 350–351, 63 S.Ct. 307. That ruling recognized Congress' purpose to respect the federal balance and to “embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.” *Community Communications Co. v. Boulder*, 455 U.S. 40, 53, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, e.g., *Ticor*, *supra*, at 632–637, 112 S.Ct. 2169; *Hoover v. Ronwin*, 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394–400, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

III

[1] In this case the **Board** argues its members were invested by **North Carolina** with the power of the State and that, as a result, the **Board's** actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the **Board**—enjoys *Parker* immunity only if it satisfies two requirements: “first that ‘the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy,’ and second that ‘the policy ... be actively supervised by the State.’” *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. —, —, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While **North Carolina** prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the **Board** did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

[2] Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’ ” *Phoebe Putney, supra*, at —, 133 S.Ct., at 1010 (quoting *Ticor, supra*, at 636, 112 S.Ct. 2169).

[3] [4] An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). State legislation and “decision[s] of a state supreme court, acting legislatively rather than judicially,” will satisfy this standard, and “*ipso facto* are exempt from the operation of the antitrust laws” because they are an undoubted exercise of state sovereign authority. *Hoover, supra*, at 567–568, 104 S.Ct. 1989.

[5] [6] But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. See *Parker, supra*, at 351, 63 S.Ct. 307 *1111 (“[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”). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover, supra*, at 567–568, 104 S.Ct. 1989. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U.S., at 636, 112 S.Ct. 2169.

[7] Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra*, at 106, 100 S.Ct. 937 (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988); *Hoover, supra*, at 584, 104 S.Ct. 1989 (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of ... our antitrust jurisprudence”); see also Elhauge, *The Scope of Antitrust Process*, 104 Harv. L.Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 500 (1986).

[8] [9] *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. See *Goldfarb, supra*, at 790, 95 S.Ct. 2004; see also 1A P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, supra*, at 634–635, 112 S.Ct. 2169. Rather, it is “whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws.” *Patrick v. Burget*, 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233, a case arising from California's delegation of price-fixing authority *1112 to wine merchants. Under *Midcal*, “[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.” *Ticor, supra*, at 631, 112 S.Ct. 2169 (citing *Midcal, supra*, at 105, 100 S.Ct. 937).

[10] [11] *Midcal*'s clear articulation requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” *Phoebe Putney*, 568 U.S., at —, 133 S.Ct., at 1013. The active supervision requirement demands, *inter alia*, “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick, supra*, 486 U.S., at 101, 108 S.Ct. 1658.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor, supra*, at 636–637, 112 S.Ct. 2169. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal's supervision rule “stems from the recognition that ‘[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’” *Patrick, supra*, at 100, 108 S.Ct. 1658. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands

“realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.” *Patrick, supra*, at 101, 108 S.Ct. 1658.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie v. Eau Claire*, 471 U.S. 34, 45, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), the Court held municipalities are subject exclusively to *Midcal*'s “‘clear articulation’” requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.” 471 U.S., at 47, 105 S.Ct. 1713. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9, 105 S.Ct. 1713. Critically, the municipality in *Hallie* exercised a wide range of governmental *1113 powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U.S., at 45, 105 S.Ct. 1713.

Following *Goldfarb, Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing

an ordinance restricting new billboard construction. 499 U.S., at 367–368, 111 S.Ct. 1344. The Court disagreed, holding there is no “conspiracy exception” to *Parker. Omni, supra*, at 374, 111 S.Ct. 1344.

Omni, like the cases before it, recognized the importance of drawing a line “relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest.” 499 U.S., at 378, 111 S.Ct. 1344. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for “corruption” as vague and unworkable, since “virtually all regulation benefits some segments of the society and harms others” and may in that sense be seen as “ ‘corrupt.’ ” 499 U.S., at 377, 111 S.Ct. 1344. *Omni* also rejected subjective tests for corruption that would force a “deconstruction of the governmental process and probing of the official ‘intent’ that we have consistently sought to avoid.” *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

[12] *Omni* 's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal* 's limits on delegation must ensure that “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” 504 U.S., at 633, 112 S.Ct. 2169. And in *Phoebe Putney* the Court observed that *Midcal* 's active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has “an incentive to pursue [its] own self-interest under the guise of implementing state policies.” 568 U.S., at —, 133 S.Ct., at 1011 (quoting *Hallie, supra*, at 46–47, 105 S.Ct. 1713). The lesson is clear: *Midcal* 's active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

[13] The **Board** argues entities designated by the States as agencies are exempt from *Midcal* 's second requirement.

*1114 That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal* 's supervision requirement was created to address. See *Areeda & Hovencamp* ¶ 227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U.S., at 100–101, 108 S.Ct. 1658.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” 421 U.S., at 791, 792, 95 S.Ct. 2004. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S., at 791, 95 S.Ct. 2004; see also *Hoover*, 466 U.S., at 569, 104 S.Ct. 1989 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361–362, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker”).

While *Hallie* stated “it is likely that active state supervision would also not be required” for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized **boards** dominated by active market participants. In important regards, agencies controlled

by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, “[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” *Allied Tube*, 486 U.S., at 500, 108 S.Ct. 1931. For that reason, those associations must satisfy *Midcal*'s active supervision standard. See *Midcal*, 445 U.S., at 105–106, 100 S.Ct. 937.

[14] The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39, 105 S.Ct. 1713 (rejecting “purely formalistic” analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See *Areeda & Hovencamp* ¶ 227, at 226. The Court holds today that a state **board** on which a controlling number of decisionmakers are active market participants in the occupation the **board** regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.

*1115 D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, *The Hippocratic Oath and the Ethics of Medicine* (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (2014); R. Baker, *Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution* (2013). Dentists are no exception. The American **Dental** Association, for example, in an exercise of “the privilege and obligation of self-government,” has “call[ed] upon dentists to follow high ethical standards,” including “honesty, compassion, kindness, integrity, fairness and charity.” American **Dental** Association, *Principles of Ethics and Code of Professional Conduct* 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The **Board** argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia*, 566 U.S. —, —, 132 S.Ct. 1657, 1666, 182 L.Ed.2d 662 (2012) (warning in the context of civil rights suits that the “the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts”). But this case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including **board** members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U.S., at 792, n. 22, 95 S.Ct. 2004; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional

regulation absent compliance with the prerequisites for invoking *Parker* immunity:

“[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and *1116 actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own.” *Patrick*, 486 U.S. at 105–106, 108 S.Ct. 1658 (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing **boards** dominated by market participants may pose to the free market. See generally Edlin & Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. Pa. L.Rev. 1093 (2014).

E

The **Board** does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, **North Carolina** delegates control over the practice of dentistry to the **Board**. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the **Board's** dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the **Board** relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the **State, North Carolina** officials may well have been unaware that the **Board** had decided teeth whitening constitutes “the practice of dentistry” and sought to prohibit those who competed against dentists from participating in the teeth

whitening market. Whether or not the **Board** exceeded its powers under **North Carolina** law, cf. *Omni*, 499 U.S., at 371–372, 111 S.Ct. 1344, there is no evidence here of any decision by the State to initiate or concur with the **Board's** actions against the nondentists.

IV

[15] The **Board** does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide “realistic assurance” that a nonsovereign actor's anticompetitive conduct “promotes state policy, rather than merely the party's individual interests.” *Patrick*, *supra*, at 100–101, 108 S.Ct. 1658; see also *Ticor*, 504 U.S., at 639–640, 112 S.Ct. 2169.

[16] The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U.S., at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor*, *supra*, at 638, 112 S.Ct. 2169. Further, *1117 the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352, 63 S.Ct. 307. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way.¹ Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.² But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the *1118 Federal Trade Commission Act, see *FTC v.*

Ticor Title Ins. Co., 504 U.S. 621, 635, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate “their purely internal affairs.” *Leisy v. Hardin*, 135 U.S. 100, 122, 10 S.Ct. 681, 34 L.Ed. 128 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.³

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power “to the utmost extent.” *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 17–18, 9 S.Ct. 6, 32 L.Ed. 346 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it “exerts a substantial economic effect on interstate commerce.” *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital Building Co. v. Trustees of Rex*

Hospital, 425 U.S. 738, 743, n. 2, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (“[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power”). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U.S., at 346–347, 63 S.Ct. 307. Raisins were among the regulated commodities, and so the Commission *1119 established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348, 63 S.Ct. 307. The *Parker* Court assumed that this program would have violated “the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons,” and the Court also assumed that Congress could have prohibited a State from creating a program like California’s if it had chosen to do so. *Id.*, at 350, 63 S.Ct. 307. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351, 63 S.Ct. 307.

The Court’s holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” 317 U.S., at 351, 63 S.Ct. 307. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court

refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court’s error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States’ sovereign police power. By that time, many States had established medical and **dental boards**, often staffed by doctors or dentists,⁴ and had given those **boards** the authority to confer and revoke licenses.⁵ This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia*, 129 U.S. 114, 128, 9 S.Ct. 231, 32 L.Ed. 623 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state **board** of health attesting to their qualifications. And in *Hawker v. New York*, 170 U.S. 189, 192, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court reiterated that a law specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the **North Carolina** statutes establishing and specifying the powers of the State **Board** of **Dental** Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the **North Carolina Board** *1120 of **Dental** Examiners is really a state agency, and the answer to that question is clearly yes.

- The **North Carolina** Legislature determined that the practice of dentistry “affect[s] the public health, safety and welfare” of **North Carolina’s** citizens and that therefore the profession should be “subject to regulation and control in the public interest” in order to ensure “that only qualified persons be permitted to practice dentistry in the State.” N.C. Gen.Stat. Ann. § 90–22(a) (2013).
- To further that end, the legislature created the **North Carolina State Board** of **Dental** Examiners “as the

agency of the State for the regulation of the practice of dentistry in th[e] State.” § 90–22(b).

- The legislature specified the membership of the **Board**. § 90–22(c). It defined the “practice of dentistry,” § 90–29(b), and it set out standards for licensing practitioners, § 90–30. The legislature also set out standards under which the **Board** can initiate disciplinary proceedings against licensees who engage in certain improper acts. § 90–41(a).
- The legislature empowered the **Board** to “maintain an action in the name of the **State** of **North Carolina** to perpetually enjoin any person from ... unlawfully practicing dentistry.” § 90–40.1(a). It authorized the **Board** to conduct investigations and to hire legal counsel, and the legislature made any “notice or statement of charges against any licensee” a public record under state law. §§ 90–41(d)–(g).
- The legislature empowered the **Board** “to enact rules and regulations governing the practice of dentistry within the State,” consistent with relevant statutes. § 90–48. It has required that any such rules be included in the **Board's** annual report, which the **Board** must file with the **North Carolina** secretary of **state**, the state attorney general, and the legislature's Joint Regulatory Reform Committee. § 93B–2. And if the **Board** fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, **North Carolina's Board of Dental Examiners** is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The **Board** is not a private or “nonsovereign” entity that the **State** of **North Carolina** has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not “‘give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.’” *Ante*, at 1111 (quoting *Parker*, 317 U.S., at 351, 63 S.Ct. 307). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's

monopolizing activities from federal antitrust law. *Id.*, at 344–345, 63 S.Ct. 307. Nothing similar is involved here. **North Carolina** did not authorize a private entity to enter into an anticompetitive arrangement; rather, **North Carolina** created a **state** agency and gave that agency the power to regulate a particular subject affecting public health and safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are “controlled by active *1121 market participants,” *ante*, at 1114, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorated marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U.S., at 346, 63 S.Ct. 307. If the Commission then agreed that a marketing plan was warranted, the Commission would “select a program committee *from among nominees chosen by the qualified producers.*” *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347, 63 S.Ct. 307. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a “sovereign” when it “adopt[ed] and enforc[ed] the prorated program.” *Id.*, at 352, 63 S.Ct. 307. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the *Parker* doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to

private entities. The Court requires the **North Carolina Board** to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both “ ‘clearly articulated’ ” and “ ‘actively supervised by the State itself.’ ” 445 U.S., at 105, 100 S.Ct. 937. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The **North Carolina Board** is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign **State** of **North Carolina**.

Our decision in *Hallie v. Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie*, the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities “are not themselves sovereign.” 471 U.S., at 38, 105 S.Ct. 1713. But recognizing that a municipality is “an arm of the State,” *id.*, at 45, 105 S.Ct. 1713, the Court held that a municipality *1122 should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U.S., at 46, 105 S.Ct. 1713. That municipalities are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the **North Carolina Board's** status as a full-fledged state agency; it treats the **Board** less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006), and California's sovereignty

provided the foundation for the decision in *Parker, supra*, at 352, 63 S.Ct. 307. Municipalities are not sovereign. *Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under [42 U.S.C.] § 1983”), with *Monell v. City Dept. of Social Servs., New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipalities liable under § 1983 where “execution of a government's policy or custom ... inflicts the injury”).

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the **North Carolina Board** of **Dental** Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the **North Carolina Board** are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374, 111 S.Ct. 1344. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U.S., at 398, 111 S.Ct. 1344. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U.S., at 374–379, 111 S.Ct. 1344. But that is essentially what the Court has done here.

IV

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and **dental boards** have been staffed by practitioners since they were first created, and there are

obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State **Board of Dental** Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition *1123 of medical, **dental**, and other **boards**, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the **North Carolina Board** because “active market participants” constitute “a controlling number of [the] decisionmakers,” *ante*, at 1114, but this test raises many questions.

What is a “controlling number”? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an “active market participant”? If **Board** members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the **board**? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the **Board** members, though practicing dentists, did not provide teeth whitening services? What if

they were orthodontists, periodontists, and the like? And how much participation makes a person “active” in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing **board**. When the Court asks whether market participants control the **North Carolina Board**, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.⁶ So why ask only whether the members of a **board** are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

V

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

All Citations

135 S.Ct. 1101, 191 L.Ed.2d 35, 83 USLW 4110, 2015-1 Trade Cases P 79,072, 15 Cal. Daily Op. Serv. 1880, 2015 Daily Journal D.A.R. 2171, 25 Fla. L. Weekly Fed. S 85

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 S. White, *History of Oral and Dental Science in America 197–214* (1876) (detailing earliest American regulations of the practice of dentistry).

- 2 See, e.g., R. Shrylock, *Medical Licensing in America* 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid–19th century, in part out of concerns about restraints on trade); Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L.Rev. 6 (1976); Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J. Law & Econ. 187 (1978).
- 3 See Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 Colum. L.Rev. 1, 4–6 (1976) (collecting cases).
- 4 Shrylock 54–55; D. Johnson and H. Chaudry, *Medical Licensing and Discipline in America* 23–24 (2012).
- 5 In *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1, 18 S.Ct. 573. See also *Douglas v. Noble*, 261 U.S. 165, 166, 43 S.Ct. 303, 67 L.Ed. 590 (1923) (“In 1893 the legislature of Washington provided that only licensed persons should practice dentistry” and “vested the authority to license in a board of examiners, consisting of five practicing dentists”).
- 6 See, e.g., R. Noll, *Reforming Regulation* 40–43, 46 (1971); J. Wilson, *The Politics of Regulation* 357–394 (1980). Indeed, it has even been charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, “The Nader Report” on the Federal Trade Commission vii–xiv (1969); Posner, *Federal Trade Commission*, Chi. L.Rev. 47, 82–84 (1969).





KeyCite Yellow Flag - Negative Treatment

Abrogation Recognized by L.J. Zucca, Inc. v. Allen Bros. Wholesale Distributors, Inc., D.Del., July 29, 2008

100 S.Ct. 937

Supreme Court of the United States

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, Petitioner,

v.

MIDCAL ALUMINUM, INC., et al.

No. 79-97.

|

Argued Jan. 16, 1980.

|

Decided March 3, 1980.

Wholesale distributor of wine filed writ of mandate asking for injunction against **California's** wine pricing system. The **California** Court of Appeal, 90 Cal.App.3d 979, 153 Cal.Rptr. 757, ruled that wine pricing scheme restrained trade in violation of Sherman Act and ordered **California** Department of Alcoholic Control not to enforce resale price maintenance and price posting statutes for the wine trade, and intervenor, association of **liquor retailers**, appealed. The **California** Supreme Court declined to hear the case, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that: (1) **California's** system for wine pricing constituted resale price maintenance in violation of Sherman Act; (2) state's involvement in price-setting program was insufficient to establish antitrust immunity under *Parker v. Brown*; and (3) Twenty-first Amendment did not bar application of Sherman Act.

Affirmed.

West Headnotes (13)

[1] Antitrust and Trade Regulation

🔑 Resale Price Maintenance

Sherman Act's ban on resale price maintenance applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

8 Cases that cite this headnote

[2] Antitrust and Trade Regulation

🔑 Food and beverages;restaurants

Where, under **California** statutes governing wine pricing, no state-licensed wine merchant could sell wine to **retailer** other than for price set either in an effective price schedule or in an effective fair trade contract, where licensee selling below established prices faced fines, license suspension, or outright license revocation, and where wine producers held power to prevent price competition by dictating prices charged by wholesalers, **California's** system for wine pricing constituted resale price maintenance in violation of Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; West's Ann.Cal.Bus. & Prof.Code, §§ 24752, 24862, 24864-24866, 24880.

59 Cases that cite this headnote

[3] Antitrust and Trade Regulation

🔑 State Action

The two standards for antitrust immunity under *Parker v. Brown* are: first, challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and second, policy must be actively supervised by the state itself. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

407 Cases that cite this headnote

[4] Antitrust and Trade Regulation

🔑 Private parties

Where, under **California** statutes governing wine pricing, state simply authorized price setting and enforced prices established by private parties, state neither established prices nor reviewed reasonableness of price schedules nor did it regulate terms of fair trade contract, and state did not monitor market conditions or engage in any pointed reexamination of program, state's involvement in price-setting program was

insufficient to establish antitrust immunity under *Parker v. Brown*, even though legislative policy was forthrightly stated and clear in its purpose to permit resale price maintenance. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; West's Ann.Cal.Bus. & Prof.Code, §§ 24752, 24862, 24864–24866, 24880.

302 Cases that cite this headnote

[5] Antitrust and Trade Regulation

➔ Private parties

Comprehensive regulation of distribution of **liquor** in states that completely control such distribution within their boundaries would be immune from Sherman Act under *Parker v. Brown* since state would displace unfettered business freedom with its own power. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

80 Cases that cite this headnote

[6] Intoxicating Liquors

➔ Legislative regulation

In determining state powers under Twenty-first Amendment, primary focus is on language of the provision rather than history behind it. U.S.C.A.Const. Amend. 21.

10 Cases that cite this headnote

[7] Intoxicating Liquors

➔ Legislative regulation

Under Twenty-first Amendment, state's control over transportation or importation of **liquor** into its territory logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. U.S.C.A.Const. Amend. 21.

39 Cases that cite this headnote

[8] Commerce

➔ Imports

Intoxicating Liquors

➔ Taxation

Notwithstanding Twenty-first Amendment, states cannot tax imported **liquor** in violation of export-import clause. U.S.C.A.Const. Amend. 21.

6 Cases that cite this headnote

[9] Constitutional Law

➔ Intoxicating **liquors**

Constitutional Law

➔ Intoxicating **liquors**

Intoxicating Liquors

➔ States

States cannot insulate **liquor** industry from Fourteenth Amendment's requirements of equal protection and due process. U.S.C.A.Const. Amends. 14, 21.

Cases that cite this headnote

[10] Commerce

➔ Powers reserved to states

Intoxicating Liquors

➔ Legislative regulation

Twenty-first Amendment grants states virtually complete control over whether to permit importation or sale of **liquor** and how to structure **liquor** distribution system, but, although states retain substantial discretion to establish other **liquor** regulations, those controls may be subject to the federal commerce power in appropriate situations; the competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case. U.S.C.A.Const. Amend. 21.

70 Cases that cite this headnote

[11] Antitrust and Trade Regulation

➔ Constitutional and Statutory Provisions

Congress exercised all the power it possessed under the commerce clause when it approved the Sherman Act. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5 Cases that cite this headnote

[12] **Federal Courts**

🔑 Highest court

Federal Courts

🔑 Questions of fact, verdicts, and findings

Supreme Court accords respectful consideration and great weight to views of a state's highest court on matters of state law and customarily accepts factual findings of state courts in the absence of exceptional circumstances.

11 Cases that cite this headnote

[13] **Intoxicating Liquors**

🔑 United States

Twenty-first Amendment did not bar application of Sherman Act to **California's** wine pricing system, where nothing in the record suggested that resale price maintenance mandated by the system helped sustain small **retail** establishments, where record did not demonstrate that the program inhibited the consumption of alcohol by Californians, and where asserted state interests were therefore less substantial than national policy in favor of competition. West's Ann.Cal.Bus. & Prof.Code, §§ 24866, 24866(b); Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U.S.C.A.Const. Amend. 21, § 2.

171 Cases that cite this headnote

****939 *97 Syllabus***

A **California** statute requires all wine producers and wholesalers to file fair trade contracts or price schedules with the State. If a producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule and are prohibited from selling wine to a **retailer** at other than the price set in a price schedule or fair trade contract. A wholesaler selling below the established prices faces fines or license suspension or revocation. After being charged with selling wine for less than the

prices set by price schedules and also for selling wines for which no fair trade contract or schedule had been filed, respondent wholesaler filed suit in the **California** Court of Appeal asking for an injunction against the State's wine-pricing scheme. The Court of Appeal ruled that the scheme restrains trade in violation of the Sherman Act, and granted injunctive relief, rejecting claims that the scheme was immune from liability under that Act under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and was also protected by § 2 of the Twenty-first Amendment, which prohibits the transportation or importation of intoxicating **liquors** into any State for delivery or use therein in violation of the State's laws.

Held:

1. **California's** wine-pricing system constitutes resale price maintenance in violation of the Sherman Act, since the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. And the State's involvement in the system is insufficient to establish antitrust immunity under *Parker v. Brown, supra*. While the system satisfies the first requirement for such immunity that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy," it does not meet the other requirement that the policy be "actively supervised" by the State itself. Under the system the State simply authorizes price setting and enforces the prices established by private parties, and it does not establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, or engage in any "pointed reexamination" ***98** of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. Pp. 941–944.

2. The Twenty-first Amendment does not bar application of the Sherman Act to **California's** wine-pricing system. Pp. 944–948.

(a) Although under that Amendment States retain substantial discretion to establish **liquor** regulations over and above those governing the importation or sale of **liquor** and the structure of the **liquor** distribution system, those controls may be subject to the federal commerce power in appropriate situations. Pp. 944–946.

(b) There is no basis for disagreeing with the view of the **California** courts that the asserted state interests behind the resale price maintenance system of promoting temperance and protecting small **retailers** are less substantial than the national policy in favor of competition. Such view is reasonable and is supported by the evidence, there being nothing to indicate that the wine-pricing system helps sustain small **retailers** or inhibits the consumption of alcohol by Californians. Pp. 946–948.

90 Cal.App.3d 979, 153 Cal.Rptr. 757, affirmed.

Attorneys and Law Firms

****940** William T. Chidlaw, Sacramento, **Cal.**, for petitioner.

Jack B. Owens, San Francisco, **Cal.**, for respondents.

George J. Roth, Sacramento, **Cal.**, for the State of **California**, as amicus curiae, by special leave of Court.

Opinion

***99** Mr. Justice POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to **California's** resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the “state action” doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866(b) of the **California** Business and Professions Code, all wine producers, wholesalers, and rectifiers must file fair trade contracts or price schedules with the State.¹ If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. § 24866(a). No state-licensed wine merchant may sell wine to a **retailer** at other than the price set “either in an effective price schedule or in an effective fair trade contract” § 24862 (West Supp.1980).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. §§ 24862, 24864, 24865 (West Supp.1980). Similarly, state ***100** regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, 983–984, 153 Cal.Rptr. 757, 760 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal.Bus. & Prof.Code Ann. § 24880 (West Supp.1980).² The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine **dealers**.

Midcal Aluminum, Inc., is a wholesale distributor of wine in southern **California**. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E. & J. Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the **California** Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U.S.C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 **Cal.**3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), where the **California** Supreme Court struck down parallel restrictions on the sale of distilled **liquors**. In that ****941** case, the court held that because the State played only a passive part in **liquor** pricing, there was no *Parker v. Brown* immunity for the program.

“In the price maintenance program before us, the state plays no role whatever in setting the **retail** prices. The ***101** prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control or ‘pointed re-

examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal.3d, at 445, 146 Cal.Rptr., at 595, 579 P.2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices.³ Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See *infra*, at 947.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal.App.3d, at 984, 153 Cal.Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from *102 this Court, did not appeal the ruling in this case.⁴ An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.⁵ The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, 444 U.S. 824, 100 S.Ct. 45, 62 L.Ed.2d 31 (1979), and now affirm the decision of the state court.

II

[1] The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407, 31 S.Ct. 376, 384, 55 L.Ed. 502 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing

goods]." See *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail establishments that Congress **942 thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.⁶ Consequently, the Sherman Act's ban on resale price *103 maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

[2] California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); see *Albrecht v. Herald Co.*, *supra*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra*. The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U.S., at 408, 31 S.Ct., at 384.⁷ Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros. v. Calvert Corp.*, *supra*; *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967) (*per curiam*).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, *104 an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351, 63 S.Ct., at

313. In *Parker v. Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against “individual and not state action,” the Court concluded that state regulatory programs could not violate it. *Id.*, at 352, 63 S.Ct., at 314.

Under the program challenged in *Parker*, the State Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: “It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it” *Ibid.* In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted that “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” *Id.*, at 351, 63 S.Ct., at 314.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. “It is not enough that . . . anticompetitive conduct is ‘prompted’ by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.” *Id.*, at 791, 95 S.Ct., at 2015. Similarly, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because *105 they “reflect[ed] a clear articulation of the State's policy with regard to professional behavior” and were “subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings.” *Bates v. State Bar of Arizona*, 433 U.S. 350, 362, 97 S.Ct. 2691, 2698, 53 L.Ed.2d 810 (1977).

Only last Term, this Court found antitrust immunity for a **California** program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103, 99 S.Ct., at 408. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The “clearly articulated and affirmatively expressed” goal of the state policy was to “displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships.” *Id.*, at 109, 99 S.Ct., at 412.

[3] [4] [5] These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be “one clearly articulated and affirmatively expressed as state policy”; second, the policy must be “actively supervised” by the State itself. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.).⁸ The **California** system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate *106 the terms of fair trade contracts. The State does not monitor market conditions or engage in any “pointed reexamination” of the program.⁹ The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, “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” 317 U.S., at 351, 63 S.Ct., at 314.

**944 III

Petitioner contends that even if **California's** system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture,

sale, or transportation of **liquor**. The second section reserved to the States certain power to regulate traffic in **liquor**: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating **liquors**, in violation of the laws thereof, is hereby prohibited.” The remaining question before us is whether § 2 permits **California** to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

[6] [7] In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the *107 provision rather than the history behind it. *State Board v. Young's Market Co.*, 299 U.S. 59, 63–64, 57 S.Ct. 77, 78–79, 81 L.Ed. 38 (1936).¹⁰ In terms, the Amendment gives the States control over the “transportation or importation” of **liquor** into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 166, 84 L.Ed. 128 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of **liquor** from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of **liquor** that could be imported from other States, *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938); two others *108 involved “retaliation” statutes barring imports from States that proscribed shipments of **liquor** from other States, *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the “importation and transportation” of intoxicating **liquors**. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 “freed the States from all restrictions upon the police power to be found in other provisions of the

Constitution.” *Young's Market, supra*, 229 U.S., at 64, 57 S.Ct., at 79.

[8] [9] Subsequent decisions have given “wide latitude” to state **liquor** regulation, *Joseph E. Seagram & Sons, Inc. v. Hostetter* **945, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966), but they also have stressed that important federal interests in **liquor** matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported **liquor** in violation of the Export-Import Clause. *Department of Revenue v. James Beam Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nor can they insulate the **liquor** industry from the Fourteenth Amendment's requirements of equal protection, *Craig v. Boren*, 429 U.S. 190, 204–209, 97 S.Ct. 451, 460–463, 50 L.Ed.2d 397 (1976), and due process, *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 27 L.Ed.2d 515 (1971).

More difficult to define, however, is the extent to which Congress can regulate **liquor** under its interstate commerce power. Although that power is directly qualified by § 2, the Court has held that the Federal Government retains some Commerce Clause authority over **liquor**. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey-labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977. And in *Ziffrin, Inc. v. Reeves, supra*, the Court did not uphold Kentucky's system of licensing **liquor** haulers until it was satisfied that the state program was reasonable. 308 U.S., at 139, 60 S.Ct., at 167.

*109 The contours of Congress' commerce power over **liquor** were sharpened in *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331–332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

“To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating **liquors** is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* ‘repealed,’ then Congress would be left with no regulatory power over interstate or foreign

commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.”

The Court added a significant, if elementary, observation: “Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.” *Id.*, at 332, 84 S.Ct., at 1298. See *Craig v. Boren*, 429 U.S., at 206, 97 S.Ct., at 461.¹¹

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945). In *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a *110 program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were “no higher than the lowest price” charged anywhere in the United States. *Seagram & Sons v. Hostetter, supra*. The Court concluded that the statute exerted “no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply,” but it **946 also cautioned that “[n]othing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act” against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46, 86 S.Ct., at 1261. See *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967) (*per curiam*).

[10] These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to

establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a “concrete case.” *Hostetter v. Idlewild Liquor Corp., supra*, at 332, 84 S.Ct., at 1298.

B

[11] The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” *111 *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

See *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress “exercis[ed] all the power it possessed” under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932); see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S., at 398, 98 S.Ct., at 1129. We must acknowledge the importance of the Act's procompetition policy.

[12] The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 760, and in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d, at 451, 146 Cal.Rptr., at 598, 579 P.2d, at 490.¹² Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment. See *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659, 65 S.Ct. 870, 874, 89 L.Ed. 1252 (1945); *Creswill v. Knights of Pythias*, 225 U.S. 246, 261, 32 S.Ct. 822, 827, 56 L.Ed. 1074 (1912). Nevertheless, this Court accords “respectful consideration and great weight to the views of the state's highest court” on matters of state law, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S.Ct. 443,

446, 82 L.Ed. 685 (1938), and we customarily accept the factual findings of state courts in the *112 absence of “exceptional circumstances.” *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 206, 97 L.Ed. 168 (1952).

[13] The **California** Court of Appeal stated that its review of the State's system of wine pricing was “controlled by the reasoning of the [**California**] Supreme Court in *Rice* [*supra*].” 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 760. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled **liquors**.

947 In *Rice*, the State Supreme Court found two purposes behind **liquor resale price maintenance: “to promote temperance and orderly market conditions.” 21 **Cal.**3d, at 451, 146 Cal.Rptr., at 599, 579 P.2d, at 490.¹³ The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita **liquor** consumption in **California** from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 146 Cal.Rptr., at 602–603, 579 P.2d, at 494, citing **California** Dept. of Finance, *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies*, xi, 15 (1974). Such studies, the court wrote, “at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance.” 21 **Cal.**3d, at 457–458, 146 Cal.Rptr., at 603, 579 P.2d, at 494.¹⁴

The *Rice* opinion identified the primary state interest in orderly market conditions as “protect[ing] small licensees from predatory pricing policies of large **retailers**.” *Id.*, at 456, 146 Cal.Rptr., at 602, 579 P.2d, at 493.¹⁵ In gauging this interest, the court *113 adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency “rejected the argument that fair trade laws were necessary to the economic survival of small **retailers**” *Ibid.* The agency relied on a congressional study of the impact on small **retailers** of fair trade laws enacted under the Miller-Tydings Act. The study revealed that “states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small **retail** stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with

fair trade laws.” *Ibid.*, citing S.Rep. No. 94-466, p. 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see *supra*, at 942, the State Supreme Court found no persuasive justification to continue “fair trade laws which eliminate price competition among **retailers**.” 21 **Cal.**3d, at 457, 146 Cal.Rptr., at 603, 579 P.2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 760.

We have no basis for disagreeing with the view of the **California** courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small **retail** establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small **retailers** *114 ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the **California** Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by **948 the State's wine pricing program.¹⁶ The judgment of the **California** Court of Appeal, Third Appellate District, is

Affirmed.

Mr. Justice BRENNAN did not take part in the consideration or decision of this case.

All Citations

445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 The statute provides:
“Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:
“(a) Post a schedule of selling prices of wine to **retailers** or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.
“(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to **retailers** or consumers.” Cal.Bus. & Prof.Code Ann. § 24866 (West 1964).
- 2 Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damages suits for unfair competition. § 24752 (West 1964).
- 3 The court cited record evidence that in July 1976 five leading brands of gin each sold in **California** for \$4.89 for a fifth of a gallon, and that five leading brands of Scotch whiskey sold for either \$8.39 or \$8.40 a fifth. *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 **Cal.**3d, at 454, and nn. 14, 16, 146 Cal.Rptr. 585, 600, and nn. 14, 16, 579 P.2d, at 491–492, and nn. 14, 16.
- 4 The State also did not appeal the decision in *Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd.*, 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979), which used the analysis in *Rice* to invalidate **California's** resale price maintenance scheme for **retail** wine sales to consumers.
- 5 The **California Retail Liquor Dealers** Association, a trade association of independent **retail liquor dealers** in **California**, claims over 3,000 members.
- 6 The congressional Reports accompanying the Consumer Goods Pricing Act of 1975, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control **liquor** prices. S.Rep. No. 94–466, p. 2 (1975); H.R.Rep. No. 94–341, p. 3, n. 2 (1975), U.S.Code Cong. & Admin.News, p. 1569. We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.
- 7 In *Rice*, the **California** Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See *supra*, at 941, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system “cannot be upheld for the same reasons the **retail** price maintenance provisions were declared invalid in *Rice*.” *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, 983, 153 Cal.Rptr. 757, 760 (1979).
- 8 See *Norman's On the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd. v. FTC*, 263 F.2d 502, 509–510 (CA4 1959); Note, *Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor*, and *Bates*, 77 Colum.L.Rev. 898, 916 (1977).
- 9 The **California** program contrasts with the approach of those States that completely control the distribution of **liquor** within their boundaries. *E. g.*, Va.Code §§ 4–15, 4–28 (1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker v. Brown*, since the State would “displace unfettered business freedom” with its own power. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978); see *State Board v. Young's Market Co.*, 299 U.S. 59, 63, 57 S.Ct. 77, 78, 81 L.Ed. 38 (1936).
- 10 The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions. The Senate sponsor of the Amendment resolution said the purpose of § 2 was “to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating **liquors**. . . .” 76 Cong.Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that “dry” States could not be forced by the Federal Government to permit the sale of **liquor**. See 76 Cong.Rec., at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of **liquor** traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action “to regulate the **liquor** traffic”). See generally Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating **Liquors**, 75 Colum.L.Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv.L.Rev. 1145, 1147 (1959).
- 11 In *Nippert v. Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946), the Court commented in a footnote:
“[E]ven the commerce in intoxicating **liquors**, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress” *Id.*, at 425, n. 15, 66 S.Ct., at 591, n. 15.

- 12 As the unusual posture of this case reflects, the State of **California** has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the **California** Court of Appeal. See *supra*, at 941; Tr. of Oral Arg. 20. Instead, this action has been maintained by the **California Retail Liquor Dealers** Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state-court opinions cited in text.
- 13 The **California** Court of Appeal found no additional state interests in the instant case. 90 Cal.App.3d, at 984, 153 Cal.Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes “do not distinguish between **California** wines and imported wines.” *Ibid*.
- 14 See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39, 86 S.Ct. 1254, 1258, 16 L.Ed.2d 336 (1966) (citing study concluding that resale price maintenance in New York State had “no significant effect upon the consumption of alcoholic beverages”).
- 15 The **California** Supreme Court also stated that orderly market conditions might “reduce excessive consumption, thereby encouraging temperance.” 21 **Cal.**3d, at 456, 146 Cal.Rptr., at 602, 579 P.2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for **liquor**.
- 16 Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U.S.C. § 15.





KeyCite Yellow Flag - Negative Treatment

Not Followed on State Law Grounds Classic Communications, Inc. v. Rural Telephone Service Co., Inc., D.Kan., December 4, 1996

63 S.Ct. 307

Supreme Court of the United States.

PARKER, Director of Agriculture, et al.

v.

BROWN.

No. 46.

Reargued Oct. 12, 13, 1942.

Decided Jan. 4, 1943.

Appeal from the District Court of the United States for the Southern District of California.

Action by Porter L. **Brown** against W. B. **Parker**, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, and others, to restrain enforcement as to plaintiff of a prorate program for raisins prescribed under authority of the California Agricultural Prorate Act, wherein defendant Proration Zone No. 1 filed a cross-complaint. From a judgment of a statutory three-judge District Court, 39 F.Supp. 895, defendants appeal.

Reversed.

See, also, 62 S.Ct. 946; 62 S.Ct. 1266, 86 L.Ed. 1778.

West Headnotes (28)

[1] **Federal Courts**

🔑 Antitrust

A suit to restrain enforcement as to plaintiff of raisin marketing program adopted under California Agricultural Prorate Act, wherein complaint assailed validity of the program under anti-trust laws, was within jurisdiction of three-judge federal court as a suit “arising under a law regulating commerce”, and allegation and proof of jurisdictional amount were not required. Anti-Trust Acts,

15 U.S.C.A. §§ 1–33; St.1933, p. 1969, as amended (see Gen.Laws, Act 143a Agric.Code § 2000 et seq.); 28 U.S.C.A. §§ 1253, 2101, 2281, 2284.

76 Cases that cite this headnote

[2] **Federal Courts**

🔑 Particular Laws or Action, and Particular Challenges Thereto

Courts

🔑 Restraining Particular Proceedings

A suit brought before statutory three-judge court to restrain enforcement as to plaintiff of raisin marketing program adopted under California Agricultural Prorate Act was within the equity jurisdiction of the court, where complaint alleged and evidence showed threatened irreparable injury to plaintiff’s business and threatened prosecutions. St.1933, p. 1969, as amended. (See Gen.Laws, Act 143a Agric.Code § 2000 et seq.); 28 U.S.C.A. §§ 1252, 1253, 2101, 2281, 2284, 18 U.S.C.A. § 3731.

15 Cases that cite this headnote

[3] **States**

🔑 Federal Supremacy;Preemption

Congress has constitutional power to suspend state laws by occupying a legislative field in the exercise of a granted power.

17 Cases that cite this headnote

[4] **Antitrust and Trade Regulation**

🔑 State Action

The Sherman Anti-Trust Act was not intended to restrain a state or its officers or agents from activities directed by the state legislature. Sherman Anti-Trust Act §§ 1–8, 15 U.S.C.A. §§ 1–7, 15 note.

424 Cases that cite this headnote

[5] **States**

🔑 Powers of United States and Infringement on State Powers

An unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

24 Cases that cite this headnote

[6] Antitrust and Trade Regulation

🔑 Right of Action;Persons Entitled to Sue; Standing;Parties

A state may maintain a suit for damages under the Sherman Anti-Trust Act, but the United States may not. Sherman Anti-Trust Act §§ 1–8, 15 U.S.C.A. §§ 1–7, 15 note.

93 Cases that cite this headnote

[7] Antitrust and Trade Regulation

🔑 Purpose of Antitrust Regulation

The purpose of the Sherman Anti-Trust Act was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations. Sherman Anti-Trust Act §§ 1–8, 15 U.S.C.A. §§ 1–7, 15 note.

22 Cases that cite this headnote

[8] Antitrust and Trade Regulation

🔑 Private parties

A state does not give immunity to those who violate the Sherman Anti-Trust Act by authorizing them to violate it, or by declaring that their action is lawful. Sherman Anti-Trust Act §§ 1–8, 15 U.S.C.A. §§ 1–7, 15 note.

733 Cases that cite this headnote

[9] Antitrust and Trade Regulation

🔑 Agricultural enterprises

The raisin marketing program adopted under California Agricultural Prorate Act, after approval of producers on referendum as prescribed by the act, is not illegal as constituting a “contract” or “conspiracy in restraint of trade” within the Sherman Anti-Trust Act, since the restraint was imposed by

the state as an act of government, which was not prohibited by the Sherman Act. Sherman Anti-Trust Act §§ 1–8, 15 U.S.C.A. §§ 1–7, 15 note; St.Cal.1933, p. 1969, as amended.

204 Cases that cite this headnote

[10] Commerce

🔑 Agriculture

The Agricultural Marketing Agreement Act contemplates that its policies may be effectuated by a state program either with or without promulgation of a federal program by order of the Secretary of Agriculture, and the adoption of an adequate state program may be deemed by the secretary a sufficient ground for believing that the policies of the act will be effectuated without promulgation of an order. Agricultural Marketing Agreement Act of 1937, as amended, § 1 et seq., 7 U.S.C.A. § 601 et seq.

5 Cases that cite this headnote

[11] Commerce

🔑 Agriculture

The Agricultural Marketing Agreement Act contemplates existence of state programs at least until such time as Secretary of Agriculture shall establish a federal marketing program unless the state program in some way conflicts with the policy of the act, and contemplates that each sovereign shall operate in its own sphere, but can exert its authority in conformity rather than in conflict with that of the other. Agricultural Marketing Agreement Act of 1937, as amended, § 1 et seq., 7 U.S.C.A. § 601 et seq.

20 Cases that cite this headnote

[12] Agriculture

🔑 Constitutional and statutory provisions

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 are co-ordinate parts of a single plan for raising farm prices to parity levels, and a “parity price” is computed

by multiplying an index of prices paid by farmers for goods used in farm production and for family living expenses, together with real estate taxes and interest on farm indebtedness, by the average price during the base period of the commodity in question. Agricultural Marketing Agreement Act of 1937, as amended, § 1 et seq., and § 2(1), 7 U.S.C.A. § 601 et seq., and § 602(1); Agricultural Adjustment Act of 1938, § 301 et seq., 7 U.S.C.A. § 1301 et seq.

8 Cases that cite this headnote

[13] Commerce

🔑 Agriculture

The Federal Agricultural Marketing Agreement Act is not in conflict with the California Agricultural Prorate Act and the raisin marketing program adopted thereunder, with collaboration of officials of Department of Agriculture and aided by loans from Commodity Credit Corporation, and the mere adoption of federal act without issuance of order by secretary putting it into effect does not preclude effective operation of the raisin marketing program. St.Cal.1933, p. 1969, as amended; Agricultural Marketing Agreement Act of 1937 as amended, § 1 et seq., 7 U.S.C.A. § 601 et seq., Executive Order Oct. 16, 1933, No. 6340, and Aug. 7, 1939, No. 8219; Reorganization Plan No. 1, 5 U.S.C.A. following section 133t.

15 Cases that cite this headnote

[14] Agriculture

🔑 Particular Crops, Control

The raisin marketing program, adopted pursuant to California Agricultural Prorate Act by state officials, has the force of law. St.Cal.1933, p. 1969, as amended.

26 Cases that cite this headnote

[15] States

🔑 Status under Constitution of United States, and relations to United States in general

The state governments are sovereign within their territory except only as they are subject to prohibitions of the constitution or as their action in some measure conflicts with powers delegated to the federal government or with congressional legislation enacted in the exercise of those powers.

11 Cases that cite this headnote

[16] Commerce

🔑 Local matters affecting commerce

The grant of power to Congress by the commerce clause of Constitution did not wholly withdraw from the states authority to regulate the commerce with respect to matters of local concern on which Congress has not spoken. U.S.C.A.Const. art. 1, § 8, cl. 3.

4 Cases that cite this headnote

[17] Commerce

🔑 Local matters affecting commerce

Many subjects and transactions of local concern not themselves interstate commerce or a part of its operation are within the regulatory powers of the state so long as the state action serves local ends and does not discriminate against interstate commerce, even though exercise of such powers may materially affect it. U.S.C.A.Const. art. 1, § 8, cl. 3.

10 Cases that cite this headnote

[18] Commerce

🔑 Subjects of Commerce in General

In applying mechanical test to determine when interstate commerce begins and ends for purposes of local regulation, “manufacture” is not “interstate commerce” even though the manufacturing process is of slight extent. U.S.C.A.Const. art. 1, § 8, cl. 3.

1 Cases that cite this headnote

[19] Commerce

🔑 Mercantile business in general

A state is free to license intrastate buying where purchaser expects in the usual course of business to resell in interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

Cases that cite this headnote

[20] Commerce

🔑 Local matters affecting commerce

State regulation imposed before any operation of interstate commerce occurs is not prohibited by commerce clause of Constitution, however drastically it may affect interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

1 Cases that cite this headnote

[21] Commerce

🔑 Food products

The raisin marketing program adopted under the California Agricultural Prorate Act, which imposed duty on program committee to control marketing of crop so as to enhance or at least maintain prices by restraints upon competition of producers in sale of their crops to buyers who eventually would sell and ship 95 per cent. of the crop in interstate commerce, was not void as interfering with “interstate commerce”, since the regulation was applied to transactions wholly intrastate before the raisins were ready for shipment in interstate commerce. St.Cal.1933, p. 1969, as amended; U.S.C.A.Const. art. 1, § 8, cl. 3.

17 Cases that cite this headnote

[22] Commerce

🔑 Local matters affecting commerce

Where Congress has not exerted its power under the commerce clause of the Constitution and state regulation of matters of local concern is so related to interstate

commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and federal interests involved. U.S.C.A.Const. art. 1, § 8, cl. 3.

12 Cases that cite this headnote

[23] Commerce

🔑 Local matters affecting commerce

State regulation of matter of local concern which is so related to interstate commerce that it also operates as a regulation of that commerce may be upheld on ground that on consideration of all relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interests of safety, health, and well-being of local communities and which because of its local character and practical difficulties involved may never be adequately dealt with by Congress. U.S.C.A.Const. art. 1, § 8, cl. 3.

18 Cases that cite this headnote

[24] Commerce

🔑 Commerce among the states

The principal objects sought to be secured by the commerce clause of the Constitution are regulation of interstate commerce by a single authority and maintaining free flow of commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

Cases that cite this headnote

[25] Evidence

🔑 Management and Conduct of Occupations

The Supreme Court may take judicial notice of available data of raisin industry in California.

3 Cases that cite this headnote

[26] Commerce

🔑 Agriculture

The adoption by the state of California of legislative measures to prevent demoralization of raisin industry by stabilizing marketing of raisin crop was a matter of state as well as federal concern, and, in absence of inconsistent congressional action, was a problem whose solution was peculiarly within the province of the state. St.Cal.1933, p. 1969, as amended.

9 Cases that cite this headnote

[27] Commerce

🔑 Food products

The raisin marketing program adopted under California Agricultural Prorate Act, which imposed duty on program committee to control marketing of raisin crop so as to enhance price or at least maintain prices by restraints on competition of producers in sale of their crops to buyers who would ultimately ship 95 per cent. of the crops in interstate commerce, could be upheld notwithstanding its effect on interstate commerce on theory that it constituted a regulation of state industry of “local concern” which under the circumstances did not impair federal control over “interstate commerce” in manner or to degree forbidden by constitution. St.Cal.1933, p. 1969, as amended; U.S.C.A.Const. art. 1, § 8, cl. 3.

121 Cases that cite this headnote

[28] Commerce

🔑 Nonexercise of power by Congress

The commerce clause in conferring on Congress power to regulate commerce did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

3 Cases that cite this headnote

Attorneys and Law Firms

*343 **310 Messrs. Walter L. Bowers, of Los Angeles, Cal., and Strother P. Walton, of Fresno, Cal., for appellants.

Mr. G. Levin Aynesworth, of Fresno, Cal., for appellees.

Mr. Robert L. Stern, of Washington, D.C., for the United States as amicus curiae by special leave of Court.

Opinion

*344 Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act¹ is rendered invalid (1) by the Sherman Act, 15 U.S.C.A. s 1—7, 15 note, or (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. s 601 et seq., 7 U.S.C.A. s 601 et seq., or (3) by the Commerce Clause of the Constitution, art. 1, s 8, cl. 3.

Appellee, a producer and packer of raisins in California, brought this suit in the district court to enjoin appellants—the State Director of Agriculture, Raisin Proration Zone No. 1, the members of the State Agricultural Prorate Advisory Commission and of the Program Committee for Zone No. 1, and others charged by the statute with the administration of the Prorate Act—from enforcing, as to appellee, a program for marketing the 1940 crop of raisins produced in ‘Raisin Proration Zone No. 1’. After a trial upon oral testimony, a stipulation of facts and certain exhibits, the district court held that the 1940 raisin marketing program was an illegal interference with and undue burden upon interstate commerce and gave judgment for appellee granting the injunction prayed for. D.C., 39 F.Supp. 895. The case was tried by a district court of three judges *345 and comes here on appeal under ss 266 and 238 of the Judicial Code as amended, 28 U.S.C. ss 380, 345, 28 U.S.C.A. ss 380, 345.

As appears from the evidence and from the findings of the district court, almost all the raisins consumed in the United States, and nearly one-half of the world crop, are produced in Raisin Proration Zone No. 1. Between 90 and 95 per cent of the raisins grown in California are ultimately shipped in interstate or foreign commerce.

The harvesting and marketing of the crop in California follows a uniform procedure. ****311** The grower of raisins picks the bunches of grapes and places them for drying on trays laid between the rows of vines. When the grapes have been sufficiently dried he places them in 'sweat boxes' where their moisture content is equalized. At this point the curing process is complete. The growers sell the raisins and deliver them in the 'sweat boxes' to handlers or packers whose plants are all located within the Zone. The packers process them at their plants and then ship them in interstate commerce. Those raisins which are to be marketed in clusters are sometimes merely packed, unstemmed, in suitable containers, but are more often cleaned, fumigated, and, when necessary, steamed to make the stems pliable. Most of the raisins are not sold in clusters; such raisins are stemmed before packing, and most packers also clean, grade and sort them. One variety is also seeded before packing.

The packers sell their raisins through agents, brokers, jobbers and other middlemen, principally located in other states or foreign countries. Until he is ready to ship the raisins the packer stores them in the form in which they have been received from producers. The length of time that the raisins remain at the packing plants before processing and shipping varies from a few days up to two years, depending upon the packer's current supply of raisins and the market demand. The packers frequently place orders with producers for fall delivery, before the ***346** crop is harvested, and at the same time enter into contracts for the sale of raisins to their customers. In recent years most packers have had a substantial 'carry over' of stored raisins at the end of each crop season, which are usually marketed before the raisins of the next year's crop are marketed.

The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural crops' of the state. It authorizes, s 3, the creation of an Agricultural Prorate Advisory Commission of nine members, of which a state official, the Director of Agriculture, is ex-officio a member. The other eight members are appointed for terms of four years by the

Governor and confirmed by the Senate, and are required to take an oath of office. s 4.

Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone, s 8, and after a public hearing, s 9, and after making prescribed economic findings, s 10, showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. The Director, with the approval of the commission, is then required to select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers who receive the regulated commodity from producers for marketing. ss 11, 14, 15.

***347** The program committee is required, s 15, to formulate a proration marketing program for the commodity produced in the zone, which the Commission is authorized to approve after a public hearing and a finding that 'the program is reasonably calculated to carry out the objectives of this act.' The Commission may, if so advised, modify the program and approve it as modified. If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted. s 16.

Authority to administer the program, subject to the approval of the Director of Agriculture, is conferred on the program committee. ss 6, 18, 22. Section 22.5 declares that it shall be a misdemeanor, which is punishable by fine and imprisonment (Penal Code s 19), for any producer to sell or any handler to receive or possess without proper authority any commodity for ****312** which a proration program has been instituted. Like penalty is imposed upon any person who aids or abets in the commission of any of the acts specified in the section, and it is declared that each 'infraction shall constitute a separate and distinct offense'. Section 25 imposes a civil liability of \$500 'for each and every violation' of any provision of a proration program.

The seasonal proration marketing program for raisins, with which we are now concerned, became effective on September 7, 1940. This provided that the program committee should classify raisins as 'standard',

'substandard', and 'inferior'; 'inferior' raisins are those which are unfit for human consumption, as defined in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. s 301 et seq., 21 U.S.C.A. s 301 et seq. The committee is required to establish receiving stations within the zone to which every producer must deliver all raisins which he desires to market. The raisins are graded at these stations. All inferior raisins are to be placed in the *348 'inferior raisin pool', to be disposed of by the committee 'only for assured by-product and other diversion purposes'. All substandard raisins, and at least 20 per cent of the total standard and substandard raisins produced, must be placed in a 'surplus pool'. Raisins in this pool may also be disposed of only for 'assured by-product and other diversion purposes', except that under certain circumstances the program committee may transfer standard raisins from the surplus pool to the stabilization pool. Fifty per cent of the crop must be placed in a 'stabilization pool'.

Under the program the producer is permitted to sell the remaining 30 per cent of his standard raisins, denominated 'free tonnage', through ordinary commercial channels, subject to the requirement that he obtain a 'secondary certificate' authorizing such marketing and pay a certificate fee of \$2.50 for each ton covered by the certificate. Certification is stated to be a device for controlling 'the time and volume of movement' of free tonnage into such ordinary commercial channels. Raisins in the stabilization pool are to be disposed of by the committee 'in such manner as to obtain stability in the market and to dispose of such raisins', but no raisins, (other than those subject to special lending or pooling arrangements of the Federal Government) can be sold by the committee at less than the prevailing market price for raisins of the same variety and grade on the date of sale. Under the program the committee is to make advances to producers of from \$25 to \$27.50 a ton, depending upon the variety of raisins, for deliveries into the surplus pool, and from \$50 to \$55 a ton for deliveries into the stabilization pool. The committee is authorized to pledge the raisins held in those pools in order to secure funds to finance pool operations and make advances to growers.

Appellee's bill of complaint challenges the validity of the proration program as in violation of the Commerce *349 Clause and the Sherman Act; in support of the decree of the district court he also urges that it conflicts with and is superseded by the Federal Agricultural Marketing Agreement Act of 1937. The complaint alleges that he is

engaged within the marketing zone both in producing and in purchasing and packing raisins for sale and shipment interstate; that before the adoption of the program he had entered into contracts for the sale of 1940 crop raisins; that unless enjoined appellants will enforce the program against respondent by criminal prosecutions and will prevent him from marketing his 1940 crop, from fulfilling his sales contracts, and from purchasing for sale and selling in interstate commerce raisins of that crop.

[1] [2] Appellee's allegations of irreparable injury are in general terms, but it appears from the evidence that he had produced 200 tons of 1940 crop raisins; that he had contracted to sell 762 1/2 tons of the 1940 crop; that he had dealt in 2,000 tons of raisins of the 1939 crop, and expected to sell, if the challenged program were not in force, 3,000 tons of the 1940 crop at \$60 a ton; that the pre-season price to growers of raisins of the 1940 crop, before the program became effective, was \$45 per ton, and that immediately afterward it rose to \$55 per ton or higher. It also appears that the district court having awarded the final injunction prayed, appellee has proceeded with the marketing of his 1940 crop and has disposed of all except twelve tons, which remain on hand. Although the district court found that the amount in controversy exceeds \$3,000, we are of opinion that as **313 the complaint assails the validity of the program under the anti-trust laws, 15 U.S.C. ss 1—33, 15 U.S.C.A. ss 1—33, the suit is one 'arising under' a 'law regulating commerce' and allegation and proof of the jurisdictional amount are not required. 28 U.S.C. s 41(1), (8), 28 U.S.C.A. s 41(1), (8); *Peyton v. Railway Express Agency*, 316 U.S. 350, 62 S.Ct. 1171, 56 L.Ed. 1525. The majority of the Court is also of opinion that the suit is within the equity jurisdiction of the court since the complaint *350 alleges and the evidence shows threatened irreparable injury to respondent's business and threatened prosecutions by reason of his having marketed his crop under the protection of the district court's decree.

Validity of the Prorate Program under the Sherman Act

[3] Section 1 of the Sherman Act, 15 U.S.C. s 1, 15 U.S.C.A. s 1, makes unlawful 'every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States'. And s 2, 15 U.S.C. s 2, 15 U.S.C.A. s 2, makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States'. We

may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. See *Adams Express Co. v. Croninger*, 226 U.S. 491, 505, 33 S.Ct. 148, 151, 57 L.Ed. 314, 44 L.R.A.,N.S., 257; *Napier v. Atlantic Coast Line*, 272 U.S. 605, 607, 47 S.Ct. 207, 71 L.Ed. 432; *Missouri Pacific R. Co. v. Porter*, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 510, 62 S.Ct. 384, 389, 86 L.Ed. 371.

[4] [5] But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its *351 legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

[6] The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations, s 7, 15 U.S.C.A., and it authorizes suits under it by persons and corporations. s 15. A state may maintain a suit for damages under it, *State of Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346, but the United States may not, *United States v. Cooper Corp.*, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

[7] There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations'. 21 Cong.Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311, 128 A.L.R. 1044, and note 15; *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, 46 L.R.A. 122, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; **314 *Standard Oil Co. v. United States*, 221 U.S. 1, 54-58, 31 S.Ct. 502, 513, 515, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734.

[8] True, 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, *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344—347, 24 S.Ct. 436, 454, 459—461, 48 L.Ed. 679; and we have no question of the state or its municipality becoming a participant in a private agreement or combination *352 by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L.Ed. 441; *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407, 48 S.Ct. 348, 351, 72 L.Ed. 624;

Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122.

[9] The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen v. Smith*, 195 U.S. 332, 344, 345, 25 S.Ct. 52, 54, 55, 49 L.Ed. 224; cf. *Lowenstein v. Evans*, C.C., 69

F. 908, 910. Validity of the Program Under the Agricultural Marketing Agreement Act

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. s 601 et seq., 7 U.S.C.A. s 601 et seq., authorizes the Secretary *353 of Agriculture to issue orders limiting the quantity of specified agricultural products, including fruits, which may be marketed 'in the current of * * * or so as directly to burden, obstruct, or affect interstate or foreign commerce'. Such orders may allot the amounts which handlers may purchase from any producer by means which equalize the amount marketed among producers; may provide for the control and elimination of surpluses and for the establishment of reserve pools of the regulated produce. s 8c(6), 7 U.S.C.A. s 608c(6). The federal statute differs from the California Prorate Act in that its sanction falls upon handlers alone while the state act, s 22.5(3), applies to growers and extends also to handlers so far as they may unlawfully receive or have in their possession within the state any commodity subject to a prorate program.

We may assume that the powers conferred upon the Secretary would extend to the control of surpluses in the raisin industry through a pooling arrangement such as was promulgated under the California Prorate Act in the present case. See *United States v. Rock Royal Co-op.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; *Currin v. Wallace*, supra. We may assume also that a stabilization program adopted under the Agricultural Marketing Agreement Act would supersede the state act. But the federal act becomes effective only if a program is ordered by the Secretary. Section 8c(3) provides that whenever the Secretary of Agriculture 'has reason to believe' that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity he shall give due notice

of an opportunity for a hearing upon a proposed order, and s 8c(4) provides that after the hearing he shall issue an order if he finds and sets forth in the order that its issuance will tend to effectuate the declared policy of the Act with respect to the commodity **315 in question. Since the Secretary has not given notice of hearing and has not proposed or promulgated any order regulating raisins it must be *354 taken that he has no reason to believe that issuance of an order will tend to effectuate the policy of the Act.

[10] The Secretary, by s 10[i], 7 U.S.C.A. s 610(i), is authorized 'in order to effectuate the declared policy' of the Act, and 'in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities,' to confer and cooperate with duly constituted authorities of any state. From this and the whole structure of the Act, it would seem that it contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program by order of the Secretary. Cf. *United States v. Rock Royal Co-op., Inc.*, supra. It follows that the adoption of an adequate program by the state may be deemed by the Secretary a sufficient ground for believing that the policies of the federal act will be effectuated without the promulgation of an order.

[11] It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act. The Act contemplates that each sovereign shall operate 'in its own sphere but can exert its authority in conformity rather than in conflict with that of the other'. H.Rep.No.1241, 74th Cong., 1st Sess. pp. 22—23; S.Rep. 1011, 74th Cong., 1st Sess. p. 15.² The only suggested possibility of conflict is between the declared purposes of the two acts. The object of the federal statutes is stated to be the establishment, by exercise *355 of the power conferred on the Secretary, of 'orderly marketing conditions for agricultural commodities in interstate commerce' such as will tend to establish 'parity prices' for farm products,³ but with the further purpose that, in the interest of consumers, current consumptive demand is to be considered and that no action shall be taken for the purpose of maintaining prices above the parity level. s 2, 7 U.S.C.A. s 602.

The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve the agricultural wealth of the State' by raising and maintaining prices, but 'without permitting unreasonable profits to the producers' **316 . s 10. The only possibility of conflict would seem to be if a State program were to raise prices beyond the parity price prescribed by the Federal Act, a condition which has not occurred.⁴

*356 That the Secretary has reason to believe that the state act will tend to effectuate the policies of the federal act so as not to require the issuance of an order under the latter is evidenced by the approval given by the Department of Agriculture to the state program by the loan agreement between the state and the Commodity Credit Corporation.⁵ By s 302(a) of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U.S.C. s 1302(a), 7 U.S.C.A. s 1302(a) the Commodity Credit Corporation is authorized 'upon recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities * * *'. The 'amount, terms, and conditions' of such loans are to be 'fixed by the Secretary, subject to the approval of the Corporation and the President'. Under this authority the Commodity Credit Corporation made loans of \$5,146,000 to Zone No. 1, secured by a *357 pledge of 109,000 tons of 1940 crop raisins in the surplus and stabilization pools. These loans were ultimately liquidated by sales of 76,000 tons to packers and 33,000 tons to the Federal Surplus Marketing Administration, an agency of the Department of Agriculture,⁶ for relief distribution and for export under the Lend-Lease program.⁷ The loans **317 were conditional upon the adoption by the state of the present seasonal marketing program. We are informed by the Government, which at our request filed a brief amicus curiae, that under the loan agreement prices and sales policies as to the pledged raisins were to be controlled by a committee appointed by the Secretary, and that officials of the Department of Agriculture collaborated in drafting the 1940 state raisin program.

*358 [12] [13] Section 302 of the Agricultural Adjustment Act of 1938 requires the Commodity Credit Corporation to make non-recourse loans to producers of

certain agricultural products at specified percentages of the parity price, and authorizes loans on any agricultural commodity. The Government informs us that in making loans under the latter authority, s 302 has been construed by the Department of Agriculture as requiring the loans to be made only in order to effectuate the policy of federal agricultural legislation.⁸ Section 2 of the Agricultural Adjustment Act of 1938, 7 U.S.C.A. s 1282, declares it to be the policy of Congress to achieve the statutory objective through loans. The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 were both derived from the Agricultural Adjustment Act of 1933, 48 Stat. 31, 7 U.S.C.A. s 601 et seq., and are coordinate parts of a single plan for raising farm prices to parity levels. The conditions imposed by the Secretary of Agriculture in the loan agreement with the State of California, and the collaboration of federal officials in the drafting of the program, must be taken as an expression of opinion by the Department of Agriculture that the state program thus aided by the loan is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts. We find no conflict between the two acts and no such occupation of the legislative field by the mere adoption of the Agricultural Marketing Agreement Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act.

We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity *359 Credit Corporation recommended by the Secretary of Agriculture.

Validity of the Program under the Commerce Clause

[14] The court below found that approximately 95 per cent of the California raisin crop finds its way into interstate or foreign commerce. It is not denied that the proration program is so devised as to compel the delivery by each producer, including appellee, of over two-thirds of his 1940 raisin crop to the program committee, and to subject it to the marketing control of the committee. The program, adopted through the exercise of the legislative power delegated to state officials, has the force of law. It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance

the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of the crop, including price. And since 95 per cent of the crop is marketed in interstate commerce the program may be taken to have a substantial effect on the commerce, in placing restrictions on the sale and marketing of a product to buyers who eventually sell and ship it in interstate commerce.

The question is thus presented whether in the absence of congressional legislation prohibiting or regulating the transactions affected by the state program, the restrictions which it imposes upon the sale within the state of a commodity by its producer to a processor who contemplates doing, and in fact does work upon the commodity before packing and shipping it in interstate commerce, violate the Commerce Clause.

[15] **[16]** **[17]** The governments of the states are sovereign within their territory save ****318** only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, ***360** or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U.S. 352, 399, 400, 33 S.Ct. 729, 739, 740, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 187 et seq., 625, 58 S.Ct. 510, 514 et seq., 82 L.Ed. 734; *People of State of California v. Thompson*, 313 U.S. 109, 113, 114, 61 S.Ct. 930, 932, 933, 85 L.Ed. 1219, and cases cited; *Duckworth v. Arkansas*, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, 138 A.L.R. 1144. A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it—or whether we consider only the power of the state in the absence of Congressional

action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power.

[18] **[19]** In applying the mechanical test to determine when interstate commerce begins and ends (see *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 21, 54 S.Ct. 267, 268, 269, 78 L.Ed. 622, and cases cited; *State of Minnesota v. Blasius*, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131, and cases cited) this Court has frequently held that for purposes of local taxation or regulation ‘manufacture’ is not interstate commerce even though the manufacturing process is of slight extent. *Crescent Cotton Oil Co. v. Mississippi*, 257 U.S. 129, 42 S.Ct. 42, 66 L.Ed. 166; *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929; *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049; *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237; ***361** *Champlin Refining Co. v. Corporation Commission* 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403; *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. *Kidd v. Pearson*, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346; *Champlin Refining Co. v. Corporation Commission*, supra; *Sligh v. Kirkwood*, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835; see *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 245, 22 S.Ct. 120, 123, 46 L.Ed. 171; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 77, 57 S.Ct. 364, 374, 375, 81 L.Ed. 510; cf. *Bayside Fish Flour Co. v. Gentry*, supra. A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. *Chassaniol v. Greenwood*, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

[20] **[21]** All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce

occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.

****319** It is for this reason that the present case is to be distinguished from *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458, and *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909, on which appellee relies. There the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a ***362** part of the interstate commerce. Compare *Chassaniol v. Greenwood*, supra.

[22] This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See *Di Santo v. Pennsylvania*, 273 U.S. 34, 44, 47 S.Ct. 267, 271, 71 L.Ed. 524 (with which compare *People of State of California v. Thompson*, supra); *South Carolina State Highway Dept. v. Barnwell Bros.*, supra; *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; *Illinois Natural Gas Co. v. Central Illinois Public Service Comm.*, 314 U.S. 498, 504, 505, 62 S.Ct. 384, 386, 387, 86 L.Ed. 371.

[23] **[24]** Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', see *Di Santo v. Pennsylvania*, supra; cf. *Wickard v. Filburn*, supra, not because they control interstate

activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with ***363** by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate Cases (Simpson v. Shepard)*, supra, 230 U.S. 398-412, 33 S.Ct. 739, 745, 57 L.Ed. 1511, 48 L.R.A., N.S., 1151, Ann.Cas.1916A, 18; *People of State of California v. Thompson*, supra, 313 U.S. 113, 61 S.Ct. 932, 85 L.Ed. 1219. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.

[25] Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries.⁹ Between 1914 and 1920 ****320** there was a spectacular rise in price of all types of California grapes, including raisin grapes. The price of raisins reached its peak, \$235 per ton, in 1921, and was followed by large increase in acreage with accompanying reduction in price. The price of raisins in most ***364** years since 1922 has ranged from \$40 to \$60 per ton but acreage continued to increase until 1926 and production reached its peak, 1,433,000 tons of raisin grapes and 290,000 tons of raisins, in 1938. Since 1920 there has been a substantial carry over of 30 to 50% of each year's crop. The result has been that at least since 1934 the industry, with a large increase in acreage and the attendant fall in price, has been unable to market its product and has been compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production.¹⁰

The history of the industry at least since 1929 is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers.¹¹ It is significant of the relation of the local interest in maintaining this program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for *365 the 1940 raisin crop, the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state. Local cooperative market stabilization programs for raisins in 1929 and 1930 were approved by the Federal Farm Board which supported them with large loans.¹² In 1934 a marketing agreement for California raisins was put into effect under s 8(2) of the Agricultural Adjustment Act of 1933, as amended, 48 Stat. 528, which authorized the Secretary of Agriculture, in order to effectuate the Act's declared policy of achieving parity **321 prices, to enter into marketing agreements with processors, producers and others engaged in handling agricultural commodities 'in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce'.¹³

*366 Raisin Proration Zone No. 1 was organized in the latter part of 1937. No proration program was adopted for the 1937 crop but loans of \$1,244,000 were made on raisins of that crop by the Commodity Credit Corporation.¹⁴ In aid of a proration program adopted under the California Act for the 1938 crop, a substantial part of that crop was pledged to the Commodity Credit Corporation as security for a loan of \$2,688,000, and was ultimately sold to the Federal Surplus Commodities Corporation for relief distribution.¹⁵ Substantial purchases of raisins of the 1939 crop were also made by Federal Surplus Commodities Corporation, although no proration program was adopted for that year.¹⁶ In aid of the 1940 program, as we have already noted, the Commodity Credit Corporation made loans in excess of \$5,000,000, and 33,000 tons of the raisins pledged to it were sold to the Federal Surplus Marketing Administration.¹⁷

*367 [26] This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the

marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. Cf. *Kidd v. Pearson*, supra; *Sligh v. Kirkwood*, supra; *Champlain Refining Co. v. Corporation Commission*, supra; **322 *South Carolina State Highway Department v. Barnwell Bros.*, supra, and cases cited at page 189, of 303 U.S., at page 516 of 58 S.Ct. 82 L.Ed. 734, and notes 4 and 5; *People of State of California v. Thompson*, supra, 313 U.S. 113, 115, 61 S.Ct. 932, 933, 85 L.Ed. 1219, and cases cited.

In comparing the relative weights of the conflicting local and national interests involved it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California prorate program, for stabilizing the marketing of agricultural products. Acting under this legislation the Secretary of Agriculture has established a large number of market stabilization programs for agricultural commodities moving in interstate commerce in various parts of the country, including seven affecting California crops.¹⁸ All involved attempts *368 in one way or another to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective. Most if not all had a like effect in restricting shipments and raising or maintaining prices of agricultural commodities moving in interstate commerce.

It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies in conformity to the Agricultural Marketing Agreement Act, and s 302 of the Agricultural Adjustment Act. Nor is the effect on the commerce greater than or substantially different

in kind from that contemplated by the stabilization programs authorized by federal statutes. As we have seen, the Agricultural Marketing Agreement Act is applicable to raisins only on the direction of the Secretary of Agriculture who, instead of establishing a federal program has, as the statute authorizes, cooperated in promoting the state program and aided it by substantial federal loans. Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production.

[27] We conclude that the California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which, in all the circumstances of this case which we have detailed, does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution.

Reversed.

All Citations

317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315

Footnotes

- 1 Act of June 5, 1933, ch. 754, p. 1969, Statutes of California of 1933, as amended by chs. 471 and 743, pp. 1526, 2087, Statutes of 1935; ch. 6, p. 39, Extra Session, 1938; chs. 363, 548 and 894, pp. 1702, 1947, 2485, Statutes of 1939; and chs. 603, 1150 and 1186, pp. 2050, 2858, 2943, Statutes of 1941. Its constitutionality under both Federal and State Constitutions was sustained by the California Supreme Court in *Agricultural Prorate Commission v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495.
- 2 See also 79 Cong.Rec. 9470, 11149-50, 11153; Hearings Before the Senate Committee on Agriculture and Forestry on S. 1807, (March, 1935) 29, 73; Hearings Before the House Committee on Agriculture (Feb.—March, 1935) 53, 178-9. The Agricultural Marketing Agreement Act of 1937 was for the most part a reenactment of certain provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended in 1935, 49 Stat. 753. s 10(i) was first introduced in 1935, and reenacted without change in 1937.
- 3 A 'parity' price is one which will 'give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period'. 7 U.S.C. s 602(1), 7 U.S.C.A. s 602(1). The parity price is computed by multiplying an index of prices paid by farmers for goods used in farm production, and for family living expenses, together with real estate taxes and interest on farm indebtedness, by the average price during the base period of the commodity in question. See Dept. of Agriculture, *Parity Prices, What They Are and How They Are Calculated* (1942). The base period for commodities other than tobacco and potatoes is August 1909—July 1914. However, by 7 U.S.C. s 608e, 7 U.S.C.A. s 608e, the period of August 1919—July 1929 or a part thereof may be used for any commodity as to which the Secretary finds and proclaims that adequate statistics for the 1909-14 period are not available. By proclamation dated June 26, 1942, the Secretary designated the period 1919—1929 as the base period for raisins. 7 Red.Reg. 4867.
- 4 The parity price for raisins on June 15, 1942, as published by the Department of Agriculture was \$100.51 per ton. Preliminary figures show the average price for the 1941-42 crop to be \$80.60. *Parity Prices, What They Are and How They are Computed*, supra, vii. Parity prices for raisins for previous years are not published. However they may be computed from the base period price of \$105.80 and the indices of prices paid by farmers published by the Department of Agriculture in the statistical publications cited infra, note 9. Such computations for 1933 and subsequent years, supplied by the Department of Agriculture, indicate that while the price received by the farmer for the 1940 crop was \$57.60 the parity price for 1940 was \$80.41 and for 1941 was \$86.76. They further indicate that raisin prices have not since 1933 equalled parity and that the field prices for all crops prior to that of 1941 have been from \$15 to \$40 per ton below parity.
- 5 The Commodity Credit Corporation was created by Executive Order No. 6340, October 16, 1933. It has been continued in existence by Acts of Congress, 49 Stat. 4; 50 Stat. 5; 53 Stat. 510. By Reorganization Plan No. I, 53 Stat. 1429, approved by Act of Congress, 53 Stat. 813, and effective July 1, 1939, 5 U.S.C.A. following section 133t, the Corporation was transferred to the Department of Agriculture, to be 'administered in such department under the general direction and supervision of the Secretary of Agriculture.' By Executive Order No. 8219, Aug. 7, 1939, 4 Fed.Reg. 3565, exclusive voting rights in its capital stock were vested in the Secretary.
- 6 The Surplus Marketing Administration was created by Reorganization Plan No. III, 45 Stat. 1232, approved 54 Stat. 231, effective June 30, 1940, 5 U.S.C.A. following section 133t, as a consolidation of the Division of Marketing and

Marketing Agreements of the Agricultural Adjustment Administration, and the Federal Surplus Commodities Corporation. The Surplus Commodities Corporation was incorporated on October 4, 1933, under the name of the Federal Surplus Relief Corporation. Its existence as 'an agency of the United States under the direction of the Secretary of Agriculture' was continued by Acts of Congress, 50 Stat. 323; 52 Stat. 38. The members of the Corporation are the Secretary of Agriculture, the Administrator of the Agricultural Adjustment Administration, and the Governor of the Farm Credit Administration.

As successor to the Corporation the Surplus Marketing Administration exercises the authority given by s 32 of the Agricultural Adjustment Act of 1935, 7 U.S.C. s 612c, 7 U.S.C.A. s 612c, to use 30% of annual gross customs receipts to encourage the exportation, and the domestic consumption by persons in low income groups, of agricultural commodities, and to reestablish farmers' purchasing power. As successor to the Division of Markets and Marketing Agreements, the Administration is charged with the enforcement of the Agricultural Marketing Agreement Act of 1937.

7 Report of the President of the Commodity Credit Corporation (1941) 14, 21; Wm. J. Cecil (Zone Agent, Raisin Proration Zone No. 1), The 1940 Raisin Program, 30 Calif. Dept. of Agriculture Bulletin 46.

8 See also Report of the President of the Commodity Credit Corporation (1940) 4, 6.

9 The principal statistical sources are U.S. Tariff Commission, Grapes, Raisins and Wines, Report No. 134, Second Series, issued pursuant to 19 U.S.C. s 1332, 19 U.S.C.A. s 1332 and the following publications of the U.S. Department of Agriculture: Yearbook of Agriculture (published annually until 1936); Agricultural Statistics (published annually since 1936); Crops and Markets (published quarterly); Season Average Prices and Value of Production, Principal Crops, 1940 and 1941 (Dec. 18, 1941). For general discussions of the economic status of the raisin industry see Grapes, Raisins and Wines, *supra*; Shear and Gould, Economic Status of the Grape Industry, University of California, Agricultural Experiment Station Bulletin No. 429 (1927); Shear and Howe, Factors Affecting California Raisin Sales and Prices, 1922-29, Giannini Foundation of Agricultural Economics, Paper No. 20 (1931).

10 Studies made under the auspices of the University of California indicate that the cost of production of Thompson Seedless raisins, including the growers' labor, a management charge, depreciation, and interest on investment, is \$49.58 per ton on a farm yielding two tons per acre, and \$72.07 per ton on a farm yielding 1 ton per acre. A two-ton yield is described as 'good'; a one-ton yield as 'usual'. Adams, Farm Management Crop Manual, University of California Syllabus Series No. 278 (1941) 142-5. Another student has computed the cost of production at \$53.96 for a two-ton per acre yield, about \$65 for a 1.5 ton yield, and \$90 for a one-ton yield. Shultis, Standards of Production, Labor, Material and other Costs for Selected Crops and Livestock Enterprises, University of California Extension Service (1938) 13. Field prices for Thompson Seedless raisins were below \$49.50 in 1923, 1928, 1932, and 1938; since 1922 they have been at \$65.00 or higher in only 5 years, and have only once been as high as \$72.00. Grapes, Raisins and Wines, *supra*, 149. For parity prices for raisins, see *supra*, note 4.

11 For discussion of private efforts within the industry prior to 1929 to regulate the marketing of raisins, see Grapes, Raisins and Wines, *supra*, 153—5.

12 See Annual Report of the Federal Farm Board (1930) 18, 73; *id.* (1931) 59-61, 91; Grapes, Raisins and Wines, *supra*, 62-64; S. W. Shear, The California Grape Control Plan, Giannini Foundation of Agricultural Economics, Paper No. 22 (1931); Stokdyk and West, The Farm Board (1930) 135-9. Loans of \$4,500,000 in 1929 and \$6,755,000 in 1930 were made by the Federal Farm Board. Shear, *supra*, states that the 1930 program, which provided for the formation of a single marketing agency, and the destruction or diversion to by-product use of surplus raisins, 'was designed by the Federal Farm Board'.

The Federal Farm Board was created by s 2 of the Agricultural Marketing Act of 1929, 46 Stat. 11, 12 U.S.C.A. s 1141a, which authorized the Board to make loans to cooperative associations to aid in 'the effective merchandising of agricultural commodities * * *' s 7, 12 U.S.C.A. s 1141e, so as to achieve the statutory objective of placing agriculture on a 'basis of economic equality with other industries' s 1, 12 U.S.C.A. s 1141.

13 See U.S. Dept. of Agriculture, Agricultural Adjustment in 1934, 202. The marketing program adopted is published by the Agricultural Adjustment Administration, Department of Agriculture, as Marketing Agreement Series—Agreement No. 44, License Series—License No. 55. It was in effect from May 29, 1934 to Sept. 14, 1935. The agreement provided for the creation of a control board on which representatives of packers and growers should have an equal voice. Subject to the approval of the Secretary of Agriculture the control board could fix minimum prices to be paid growers and require a percentage of the crop to be delivered to the control board. 15% of the 1934 crop was required to be delivered to the board, and prices for that crop were fixed at \$60, \$65 and \$70 per ton for Muscat, Sultana, and Thompson Seedless raisins respectively.

- 14 Report of the President of the Commodity Credit Corporation (1940) 16. These raisins were ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. *Ibid.*; Report of the Federal Surplus Commodities Corporation (1938) 16.
- 15 Report of the President of the Commodity Credit Corporation (1940) 16; Report of the Associate Administrator of the Agricultural Adjustment Administration in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1939) 52. The federal loan was conditioned upon the adoption of a state proration program by which 20% of the crop was delivered into a stabilization pool.
- 16 Cecil, the 1940 Raisin Proration Program, *supra*, 48; Report of the Federal Surplus Commodities Corporation (1940) 6.
- 17 The Commodity Credit Corporation similarly made loans on the 1937, 1938, and 1940 crops of dried prunes, the loans on the 1938 and 1940 crops being in aid of proration programs which were very similar to those adopted for raisins. Report of the President of the Commodity Credit Corporation (1940) 15, 21, *id.* (1941) 13-14, 21; Report of the Surplus Marketing Administration (1941) 33-4.
- 18 Twenty-eight such programs affect-milk, and nineteen affecting other agricultural commodities, were in effect during the fiscal year ending June 30, 1941. Report of the Surplus Marketing Administration (1941) pp. 7, 12. For discussions of the nature and purpose of these programs see the annual reports of the Agricultural Adjustment Administration; Nourse, Marketing Agreements under the A.A.A. (1935).



THE SUPREME COURT *of* OHIO

65 SOUTH FRONT STREET COLUMBUS, OHIO 43215-3431
614.387.9318 | sc.ohio.gov/boards/upl