

The State of South Carolina



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February 9, 1995

Elizabeth O. Levy, Staff Counsel
S. C. Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

Dear Ms. Levy:

As you are aware, I was assigned the task of responding to your letter of January 17, 1995, concerning the issue of the State Health Plan's including the following policy statement:

"Any applicant that applies for a Certificate of Need for a service for which criteria and standards exist in the State Health Plan, the applicant must prove that current pricing policies are not discriminatory toward other facilities who contract for any services and the applicant must give assurances that a discriminatory pricing policy toward other facilities will not occur in the future."

You specifically asked whether such a policy and implementation of the policy creates problems with antitrust laws. I assume that the antitrust law about which you expressed concern is the Sherman Act (15 U.S.C. §§ 1 and 2).

Section 1 of the Sherman Act provides, in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, . . . , is declared to be illegal. 15 U.S.C. § 1.

Elizabeth O. Levy, Staff Counsel
Page Two
February 9, 1995

Section 2 provides, in pertinent part:

Every person who shall 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...shall be deemed guilty of a felony. 15 U.S.C. § 2.

In the landmark case of Parker v. Brown, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943), the United States Supreme Court held that the Sherman Act does not apply to anticompetitive restraints imposed by the states "as an act of government." 317 U.S. at 352. The Parker case is generally cited as the case which created the state action exemption to the Sherman Act.

The holding in Parker was reaffirmed by the Court in Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 113 L.Ed.2d 382, 111 S.Ct. 1344 (1991). In Omni, id., the Court held as follows:

...We reiterate that, with the possible market participant exception, any action that qualifies as state action is "ipso facto...exempt from the operation of the antitrust laws," 113 L.Ed.2d at 397.

Thus, so long as the action by the State Health Planning Committee or the Department of Health and Environmental Control constitutes state action, such action is clearly exempt from federal antitrust laws.

Of course, state law prohibits trusts, monopolies and restraints of trade which lessen competition. See § 39-3-10, § 39-3-110, § 39-3-130, S. C. Code Ann. 1976. Those statutes generally may be considered South Carolina's antitrust or anti-monopoly body of law.

Each of the statutes cited prohibits arrangements, contracts, agreements or combinations between two or more persons as individuals, firms, corporations, syndicates or associations which lessen full and free competition. § 39-3-10, Code, § 39-3-110, Code. Section 39-3-130 prohibits agreements in restraint of trade by any corporation, partnership, individual or association of persons acting with any other corporation, partnership, individual or association of persons to regulate or fix prices. Section 39-3-140, Code, prohibits two or more persons who are engaged in the buying or selling of any article of commerce from entering into any pool, trust, agreement, confederation or association to limit trade

Elizabeth O. Levy, Staff Counsel
Page Three
February 9, 1995

by refusing to buy or sell from any person not a member of the pool, trust, agreement, confederation or association.

There are no reported South Carolina cases which have addressed the issue of whether a state agency is included in the statutory scheme which prohibits monopolies and restraints of trade. The statutes clearly do not include the state within the statutory language. As a general rule, persons can be "natural" or "artificial." "Natural" persons are, of course, human beings. "Artificial" persons include corporations, partnerships, and associations created by operation of law. Black's Law Dictionary, 6th Ed., "person" at pp. 1142-1143. Since the statutes in question do not include a definition of "persons", we believe reference should be made to the general definition of "persons," contained in state law.

Under the South Carolina Business Corporation Act, § 33-1-20, et seq., Code, "person" means an individual, a corporation (domestic or foreign), a partnership, an association, a trust or a fiduciary. § 33-1-20(18), Code. Under the Uniform Limited Partnership Act, "person" means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association or corporation. § 33-42-20(11), Code. Under the Unfair Trade Practices Act, person includes natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity. § 39-5-10(a), Code.

While a state or local agency may be a "person" for certain purposes, courts have usually held that for purposes of a state's antitrust laws, state agencies are exempt.

It does not appear that the term "person" or "persons" as used in our state antitrust laws was intended to include agencies of state government. Therefore, we are of the opinion that State antitrust laws do not apply to actions by a State agency.

I have enclosed for your convenience a copy of the Supreme Court's decision in Columbia v. Omni Outdoor Advertising, supra., and a copy of an opinion of this Office in which we concluded that proposed legislation relating to regulation of motorcycle dealerships was exempt from antitrust laws under the state action exemption created by Parker v. Brown, supra.

Elizabeth O. Levy, Staff Counsel
Page Four
February 9, 1995

I trust this sufficiently answers your questions. Please contact me if you need additional assistance.

Very truly yours,



William K. Moore
Deputy Attorney General

WKM/fc
Enclosure