



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Office of the Attorney General

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State Action Immunity Doctrine: What Is It?

- ▶ State action immunity is a legal doctrine which, under certain circumstances, exempts decisions made by state or local government actors from antitrust review.
- ▶ State action immunity applies when a state agency, under a clear legislative directive, takes actions which may have anticompetitive effects.
- ▶ State action immunity also protects the actions of private actors from antitrust review when these actions are authorized by a state agency, if the agency's authorization is itself protected by the state agency immunity doctrine.

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).



State Action Immunity Doctrine: When Does it Apply?

- ▶ For the state action immunity doctrine to protect private actors from antitrust review, a two-part test must be met:
 1. The State must clearly articulate a policy to displace competition with regulation; **and**
 2. The State must actively supervise the private anticompetitive conduct.

Parker v. Brown, 317 U.S. 341 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).



State Action Immunity Doctrine: Legislative Finding Under SB 7

- ▶ SB 7 includes a specific legislative finding relating to state action immunity: “The legislature intends to exempt from antitrust laws and provide immunity from federal antitrust laws through the state action doctrine a health care collaborative (HCC) that holds a certificate of authority . . . and that collaborative’s negotiations of contracts with payors. The legislature does not intend or authorize any person or entity to engage in activities or to conspire to engage in activities that would constitute per se violations of federal antitrust laws.”
- ▶ SB7, Section 2.01(c).



State Action Immunity Doctrine: What Legislative Finding Means

- ▶ So long as the HCC is operating within the scope of its certificate of authority, its negotiations with payors are not subject to antitrust review, with one important exception.
- ▶ If the HCC's negotiations with payors involve per se violations of the antitrust laws, they are not protected by state action immunity. Examples of per se violations include agreements among competitors to fix prices or allocate markets.
- ▶ What the legislative finding does not mean: That all of the HCC's activities are protected from antitrust review.



SB 7 Sets A Two-Part Test For Antitrust Review Of Applications

For a certificate of authority to issue, the HCC applicant must demonstrate:

1. The Proposed HCC is not likely to reduce competition in any market for physician, hospital, or ancillary health care services due to:
 - The size of the HCC; or
 - The composition of the HCC, including the distribution of physicians by specialty within the HCC in relation to the number of competing health care providers in the HCC's geographic market; **and**
2. The procompetitive benefits of the proposed HCC are likely to substantially outweigh the anticompetitive effects of any increase in market power.

Texas Insurance Code, Sections 848.057(5), (6).

Whether this two-part test can be met will be fact specific.



SB 7 Requires TDI And OAG To Both Conduct An Antitrust Review

- ▶ As part of its review of the HCC application, Texas Department of Insurance (TDI) is required to determine whether the applicant meets SB 7's antitrust test.
- ▶ Office of the Attorney General (OAG) must then conduct an independent antitrust review of the HCC application to determine if it meets the SB 7 antitrust test.
- ▶ A certificate of authority cannot issue unless both TDI and OAG independently determine that the applicant satisfies the SB 7 antitrust test.
- ▶ Antitrust Review must be conducted of every initial or renewal application for an HCC certificate of authority.



SB 7: OAG's Current Implementation Activities

Over the past four months, OAG has been working with TDI on preparation of rules relating to antitrust review of HCC applications. As part of this process, OAG representatives have:

- Met with stakeholders to gather information about HCCs;
- Met with TDI staff to review antitrust standards;
- Reviewed and commented on numerous drafts of TDI's proposed antitrust rules; and
- Attended the January 30 and April 24 stakeholder meetings.



SB 7: OAG Future Implementation Activities

- ▶ OAG will continue to work closely with TDI staff as the HCC rules are revised, in light of comments received from stakeholders.
- ▶ OAG will be prepared to review HCC applications once the HCC rules are posted and applications are submitted.