Public Roundtable Discussion Series on Regulation & Antitrust Law

Session One: Roundtable on Exemptions and Immunities from Antitrust Laws

Wednesday, March 14, 2018

TRANSCRIPT PART TWO

ROGER ALFORD: So welcome back. It's a thrill to be moderating this second discussion of the specific issue on implied immunities. I think this is the first day where I completely feel like I'm a fish in water in this job. Because this feels like a colloquium that you would have at a university, with a whole diverse range of viewpoints. So I'm especially comfortable today, doing this. And so I welcome all of you and the chance to be here.

So today, in this session, we're going to be talking about implied immunities. Thank you for your contributions thus far. Obviously, implied immunities are especially disfavored. So we went from a session discussing exemptions as disfavored to implied immunities as especially disfavored. So I guess the discussion today is, why are they especially disfavored, instead of just disfavored with a particular focus on the relationship between Congress and the courts and the relationship between them, in terms of how they articulate these immunities?

So with that, I will open it up. And if we want to start with a general question-- is it appropriate for courts to create exemptions that Congress has not expressly enacted? That would be the meta-question, I think, of the session. Anyone?

GEORGE SLOVER: Probably not. Maybe in an extreme case, if there is one that really satisfies all the tests that *Credit Suisse* put there: basically, that:

"It's impossible for a business to follow this comprehensive, detailed, regulatory regime, full of minutiae that get into pricing and all of the other terms of service, and then to *also* have to worry about the antitrust laws. And there are going to be two law enforcers bearing down on us and giving us contradictory directions, under penalty of prison or substantial fines, if we can't figure out a way to do both. And we're diverting all of these resources for that."

But I think, in most cases, you can figure out a way to make the antitrust laws compatible with the regulatory regime.

And so I think that should be what's tried first. And I don't know how to say it any more specifically, but there should be just a really high burden to say that Congress intended for the antitrust laws to be displaced in enacting this comprehensive regulatory regime. And as a practical matter, there are probably not going to be that many comprehensive regulatory regimes that get into pricing and other market decision minutiae.

ROGER ALFORD: OK.

JOHN BERGMAYER: I would say, in almost the way it's framed-- and obviously, it's the way that the courts frame it-- is, I think, a little bit misleading. Because if you have two different statutes, one might just be a statute granting the agency power. And then, this other statute, the antitrust laws-- and they're in conflict.

Well, laws come into conflict. And courts have to deal with that all the time. And it's not a matter of the courts-- or looking at this situation and using their common-law powers, inventing an immunity. They're just reconciling statutory language from statutes that are passed at different times.

So I think, just framing it as the court constructing a doctrine and then having tests-- obviously, that's the way it has worked-- is just not the right way to look at it. It's just the way of, how do courts deal with sets of statutes that are incompatible all the time? You either try to find a way to read them so that they both can be effective-- and if that doesn't work, you figure out which one wins.

CRAIG WOLF: So obviously, the alcohol beverage industry-- which I also represent, obviously, today-- does not have any immunities. But to John's point, when you deal with analysis of a state law that's challenged, you do have to then go over and see, well, what is the implication under the 21st Amendment? And there's a balancing test on it at that point to see whether the interests served are intertwined with the core powers of the 21st Amendment.

So I would agree with John to the extent that, in certain situations, the courts-- simply making decisions based on competing either statutory or constitutional, in this case, provisions. That's a necessary thing. But certainly, I think it would be disfavored to create, out of whole cloth, new types of immunities.

JOHN ROBERTI: So I think, if I have the question-- is, should courts develop a doctrine of implied immunity? Is that the question that's--

ROGER ALFORD: Sure, absolutely.

JOHN ROBERTI: And so, I think, what I heard John saying is-- I think I agree with it. I just want to, maybe, take it from the perspective of somebody who counsels clients. And there is a client that is trying to comply with two different statutory schemes. They have to know what they can and can't do.

I'll throw out an example. Imagine a scenario where you have a CFO who's on an analyst call and is asked the question, what are the company's plans for pricing in the next quarter? The SEC would tell you, disclose. The antitrust laws would imply that you shouldn't. That CFO needs some guidance. And I think that's why I get paid, is to try to help them.

But the courts need to step in and give guidance on that point. So I think the answer to the question is actually, yeah. I think the courts do need to do that.

ROGER ALFORD: Randy?

RANDY STUTZ: So I agree with John's point that, on a basic level, courts really do need to do that. And oftentimes, there are, at the root of these implied exemptions, higher constitutional values, like free speech and federalism. But usually, where the difficulty arises is instances where these values are just implicated, maybe, in a vague sense or a narrow sense, rather than

really deeply imperiled. And the room for judges to use these doctrines to get rid of cases to free up dockets, that causes a lot of mischief.

ROGER ALFORD: Yep, Daniel.

DANIEL HAAR: I'd just like to ask a follow-up question, which I'll throw out to anyone. It seems like there is general agreement that, when two statutes apply to a particular type of conduct, courts play some role in reconciling the two statutes or figuring out how to apply both. Some previous cases articulated that it was required for there to be clear repugnancy in order for a later-in-time statute to impliedly repeal the antitrust laws in regards to a particular conduct, which might imply that a particular party couldn't comply with the terms of both laws.

Credit Suisse does seem to broaden that, in terms of where two statutes might give conflicting guidance or differing standards of conduct but not requiring repugnancy in the sense that it was impossible to follow the dictates of both statutes at the same time for the parties whose conduct has been challenged. So what I'd like to open up to the panel is a more specific question about whether *Credit Suisse* got it right, in terms of that responsibility of courts to determine how to reconcile the statutes.

GEORGE SLOVER: Yeah, I have probably not read *Credit Suisse* as many times as some others in this room. I've read it a number of times though, for that point. And I read it differently. I read it as just re-affirming the standard that's been there, and applying it exactingly. Impossible might be a little bit further than you need to go, but practically impossible, or more than just, “Hey, we're a business. We'd like to comply with as few legal regimes as possible. These two sort of operate in the same space. We'd like to just pick one. And this is the one we prefer.”

I think it could degenerate that way, if you allow some of the rationales to be read more loosely and to be taken that way. I think the actual holding was one that said that it would create chaos or confusion to such an extent that it would divert undue resources to the lawyers trying to figure out, “how can you comply with both of these?”

ROGER ALFORD: Dan, do you want-- anyone?

DIANA MOSS: Can I ask just a follow-up question? It's a really good question you're asking. But might it also apply to merger review, where you've got a regulatory agency with a public interest standard looking at a merger? But you also have the antitrust agencies looking at a merger. We've seen lots of points of conflict there as well, with or without exemptions, where the agencies are applying different standards and, potentially, getting to different outcomes and using different remedies.

Doing a lot of work in mergers myself, that has always fascinated me as a potential point of tension or point of conflict. But I just don't know if you were thinking about it that broadly.

DANIEL HAAR: Do you have an answer to help courts reconcile?

DIANA MOSS: Well, it depends, obviously, on the disposition of the case. But AAI has a long history of giving a lot of deference to the antitrust agencies on evaluating the effects on competition whereas, the regulatory agencies provide really, really important institutional and technical expertise and insight into the industries that they regulate. But I think it's an on-going debate.

JOHN ROBERTI: I was just going to weigh in with the following thought. As people who live and breathe anti-trust, we always think anti-trust ought to win. And I think that's part of what bothers us about the implied immunities is it sort of suggests, wait. There's something that should push antitrust to the side, and the principles that we really believe in, in terms of free competition.

And I think, again, it touches on some of the principles we talked about in the earlier session, which is, "Wait. Are we in a place where Congress has directed us to put aside the values of competition, which we think are really, really important, in deference to a regulatory scheme?" So how should courts weigh it?

I think, just as a matter of policy, probably, the regulatory scheme comes first and the antitrust comes second. And just being practical, I think that's probably how courts will come out. It's just, how far does the regulatory scheme go in displacing that competition?

ROGER ALFORD: Alden?

ALDEN ABBOTT: Yeah, let me raise a slightly different issue. I certainly agree, courts-- they're in the job of having to construe and harmonize statutes to the extent possible. But what happens when a court fails to follow the dictates of the statute? What if there is subject matter jurisdiction, clearly you have personal jurisdiction, and there is clear antitrust harm to American consumers?

I'm thinking of a case being teed up before the Supreme Court, the *Animal Products* case, where you have, admittedly, say a foreign price-fixing cartel exporting directly into the United States. And without any finding of foreign sovereign compulsion-- that's a separate doctrine I don't want to get into-- nor active state-- also an established doctrine.

Although, when I studied public international law, it's not a doctrine of public international law. It's a doctrine created by the courts, although recognized in the restating of the Foreign Relations law. But what happens if a court, just on its own, says, we want to engage in comity balancing? Based on one letter or one submission, by some instrumentality of a foreign government, we are going to give that presumptive weight and say we're not going to apply the antitrust laws, despite the fact that you have clear harm?

To me, that's inconsistent with the separation of powers. Article I of the Constitution, we know from *Marbury v. Madison*, says quite clearly, that the courts are to apply the laws, say what laws mean. But it does not say that the courts can decide not to apply the laws, except in very narrow circumstances. Those sorts of circumstances should not be presented by a court on its own, engaging in foreign policy, by deciding whether or not to weight a foreign interest.

That is not an authority committed to Article III. Foreign policy is committed to the Article I and Article II branches. So without knowing what the court is going to decide, I'd find a whole Mannington-Mills-Timberlane doctrine of potential implied immunity, based on balancing, as being very problematic.

ROGER ALFORD: Hm, that's interesting-- the foreign sovereign compulsion as a variation on an implied immunity.

ALDEN ABBOTT: Right-- right. Although, I think-- Roger, correct me if I'm wrong-- but foreign sovereign compulsion-- you really have to meet some tight standards to show. Indeed, I think sometimes it's raised by parties who claim foreign sovereign compulsion, but it's not really applicable.

ROGER ALFORD: Right. Yep-- yep. Randy?

RANDY STUTZ: I was thinking of the same analogy between *Credit Suisse* and the Vitamin C case. And just, in further support of the point you're making, the Foreign Sovereign Compulsion doctrine has— it's well-developed— a common law, the requirement of the impossibility of complying with both the foreign law and domestic U.S. antitrust law.

And so there's also and administrability component to thinking about sound rules, as opposed to this, sort of, free-floating comity analysis that the Second Circuit undertook in that case. I think there's a more principled approach that relies on the common law.

ROGER ALFORD: Craig?

CRAIG WOLF: So the Chamber, obviously, was engaged in the Vitamin C cartel case. It involved an amicus brief. And they too have the same concerns. And that is that you don't want to have, essentially, a blanket immunity given, without a proper consideration for the factors involved, whether it be a direct control or some lesser degree of control. But you have to at least be able to evaluate that and not just say, comity's going to allow them to walk away without any type of scrutiny of that relationship.

ROGER ALFORD: A couple other questions I wanted to highlight. One is, does displacing that trust actually help consumers? And then a second question that I'd just like to throw out-- you mentioned the idea of stickiness as a problem with express immunities. Does the same stickiness problem exist with implied immunities?

JOHN BERGMAYER: It seems, when the stickiest problem is with a statutory exemption, you have a very difficult political problem to solve to get out of that. I think, in cases of, perhaps, reading *Credit Suisse* or similar doctrines too broadly, there can be just challenge through enforcement actions that then get upheld. If courts create a doctrine, courts can take it away, if the right cases are brought before them, where it becomes apparent that reading an implied immunity too broadly would not be the right outcome.

So that's where your opening statement-- to some extent, I get to say this, because I don't have to be a litigator. But it means, sometimes, bringing cases which can seem hard in light of the arguments that are going to be made as to why there's an immunity and just bringing them anyway and just hoping that the court will come to its senses and read the implied immunity narrowly.

DIANA MOSS: I think, generally, the answer is no. But it's definitely worth going through, just, a process of unpacking the different venues where consumers are close to an exemption or an immunity versus farther away. I would point out— and this is more likely to arise in the case of statutory exemptions— that consumers are, probably, more victimized by regulatory capture, in the event the antitrust laws are precluded from applying.

And we see it all the time. A lot of regulatory regimes are constructed and evolve, over time, in a way that really protects the industry and creates rent seeking and all sorts of other distortions. And that's very harmful to consumers. That harms them in terms of choice and quality and getting better products faster to market. So I think that's a really important issue.

Whereas, antitrust, by virtue of how it acts in terms of promoting consumer welfare, is going to address, much more directly and effectively, the effects of anti-competitive behavior on consumers.

DANIEL HAAR: One issue that commentators often bring up is that of the Supreme Court's decision in *Trinko*. In particular, they often lump it in with a discussion of Credit Suisse and other cases on implied immunities and implied repeal. So I just wanted to open up to discussion, is that case properly considered one about an exemption from the antitrust laws? Or is it simply about the proper reach of Section 2 of the Sherman Act?

GEORGE SLOVER: So I deal with that a little bit more in my written statement. I think, the latter. I think it really just said, in a nutshell, you can't get a shortcut to a Section 2 violation by proving noncompliance with the Telecom Act. And there was a lot of free-wheeling discussion in Justice Scalia's opinion about whether this might be an industry where the regulatory regime would displace antitrust, except for the savings clause. I'm glad we got the savings clause in there.

But I think, first and foremost, it's a case about keeping the antitrust laws separate from other laws, in terms of how you prove a violation.

ALDEN ABBOTT: I agree with George. I don't think it's really, what is the Section 2 standard to apply? It's not about immunity, in my view.

DIANA MOSS: I think we would tend to agree with George on that. I think *Trinko* is in sort of a gray area, given the existence of a savings clause, given no duty to deal, from an antitrust perspective. I actually think the major impact of *Trinko* was-- and I was at the FERC, as a federal regulator at the time *Trinko* came out. And I remember the day the decision was coming out, because we were all sitting at our desks, holding our breath, wondering if the court's reasoning in *Trinko* would pour over to other industries, for example, like electricity.

So we were all just sort of panicking in advance about whether there would be that portability. So I think that was really one of the major impacts. But I also think the decision came out at a time when there was that whole cluster of cases. There was *Credit Suisse*. There was *Link Line*, I think. And then there was the *Trinko* case. They were just in relatively close proximity to each other.

BOB POTTER: So one of the things we've been talking about is how Congress and the courts are used to reconcile these things. I assume, in the first instance, we'd agree that the problem here, arguably, starts in Congress, because they've written two statutes which appear to be incompatible. Is there anything we can do, when Congress is drafting statutes that might be incompatible with the antitrust laws, other than an antitrust savings clause, that would take some of these questions off the table?

GEORGE SLOVER: So I was going to reply to the last question with this. But I think it also applies here. Which is that, in a way, *Trinko* actually helps answer the question that we've been discussing with regard to *Credit Suisse* and implied immunity, which is that, if you have to, you can find a way to reconcile them. The antitrust savings clause said, no, the antitrust laws are not going to be displaced. You need to figure out a way to make them compatible.

And things have moved on. And the two laws are still on the books. And we're still using them. So I think, in a way, that shows the answer can beis an antitrust savings clause -- as long as it's not used too often, and it cheapens the coin of the realm.

We don't want courts, every time they hear the words uttered, "implied immunity," to say, “Oh, well, that's going to be answered by whether there's an antitrust exemption in this statute or not. Oh, there's not one. Well, there must be implied immunity.”

So one of the things that, when I was on the Judiciary Committee staff, when I would come and say, do we need to clarify this with an antitrust savings clause? The professional drafters up there would push back and say, no, you don't want too many of these. You want to first decide if there's really a confusion there.

And I think, to the extent that we have *Trinko* as an example, it gets us— one, it can be helpful to have an antitrust savings clause if you really think there's going to be doubt. And two, it shows that there may not really be as much of an implied immunity problem, as long as you keep the bar high.

BOB POTTER: Would you recommend that, in Senate or House reports, this specific language that says, we considered whether to include an antitrust savings clause, but decided not to, since it wasn't necessary? Since we didn't see a conflict.

GEORGE SLOVER: I would love to think that the courts are going to read legislative history carefully, particularly the Committee reports, which have a lot of deliberative input into them. I don't think we can rely on that always.

ROGER ALFORD: Others? Just a few more minutes on implied immunity. Yeah?

DANIEL HAAR: One more question— Roger kicked off the discussion with the proposition that express immunities are disfavored, implied immunities are especially disfavored. I just want to see, is there consensus around the table on that?

BOB POTTER: Anyone who disagrees, how about you speak up now.

GEORGE SLOVER: I would say totally agree, as to both.

ALDEN ABBOTT: They're both disfavored.

ROGER ALFORD: OK. Yeah— any question about implied immunities, as applied to the foreign context? So, is there an argument to be made that there have been immunities under the Foreign Sovereign Immunities Act, for example, that, obviously, absolute immunity has been modified to be, sort of, a limited immunity, with specific exceptions? And one of the exceptions is, of course, the exception of the Foreign Sovereign Immunities Act.

So it's essentially, there's an immunity. But then it's subject to an exception, under the Commercial Activity exception. Any thoughts on that, in the antitrust context? Because there's not a lot of litigation on that question.

ALDEN ABBOTT: Well, I think, as Roger noted, of course, we do have a, in effect, market operator exception. And my own view would be you'd want to read the Foreign Sovereign Immunity Act correctly but narrowly, and not read it broadly to create implied immunities.

But I think it's interesting. It does point to the way foreign market operators, which can be subject to U.S. antitrust law, if their jurisdiction harm is to U.S. commerce and effects on U.S. commerce are met, why not subject market operators to the antitrust laws, if they're subject to state ownership or control or— we know, municipalities, obviously, raise the difference to federalism issue. They're more clearly subject to antitrust laws. But why not state-owned or controlled, or departments, if they are acting in a purely commercial phase or manner?

RANDY STUTZ: So in addition to foreign sovereign immunity, the FTAIA and principles of international comity can also act much like exemptions, narrowing the reach of the antitrust laws. And you think about export cartels in particular—the United States has the Webb Pomerine Act. We exempt export cartels.

And now, if we're going to rely on principles of comity, to stay the U.S. courts' hand when foreign export cartels harm the United States, you're creating, among other things, deterrence gaps. You're creating a lack of redress for domestic consumers. But you're also failing to deter the most harmful international cartels. And the host country doesn't have an incentive to prosecute them.

ROGER ALFORD: What about— I'm sorry. Go ahead, John.

JOHN ROBERTI: Yeah, just to respond to that—I want to draw a distinction between an immunity and an interpretation of the antitrust laws. Because an immunity says, you do whatever

you want. And we don't care, because you can do whatever you want. An interpretation of the antitrust laws means that, as a matter of policy, we think that the antitrust laws are not going to reach this conduct or that conduct.

Taking the FTEAIA as an example, there are foreign businesses that conduct their operations with the expectations that they are not going to be drawn into U.S. courts. And they should be— that's not creating an immunity. That's just, how far do we want to expand the antitrust laws? I probably have a different view than most of the people on the Vitamin C case.

Because I think it is very difficult for a U.S. business, or any business operating abroad, being directed by a foreign sovereign, to do something, to say, "I'm sorry, I'm not going to do what you ask. Because some plaintiff may drag me into court in the United States." So I would draw a distinction between the two. We've been talking about implied immunities, which are super disfavored. I think you added— what was it? Very disfavored?

ROGER ALFORD: Especially.

JOHN ROBERTI: Especially—OK. But courts should, as just a matter of practice, decide the scope of the antitrust laws—and of course, if they get it wrong, Congress should fix it.

ROGER ALFORD: Anyone else? What's that? Yep. Last chance— great. OK, thanks. We'll stop there. And I invite Andrew Finch to do the next session. Thanks very much.

ANDREW FINCH: Thanks, Roger. That was very interesting. And I'll say, when I was sitting here, I was flipping through Justice Kennedy's decisions, since we're going to talk about the state action doctrine— *North Carolina State Board of Dental Examiners*, which I hadn't really spent a lot of time looking at all the way through since it came out. But one phrase-- parts of it are beautifully written.

It's particularly apt. He says, "There is a long tradition of citizens esteemed by their professional colleagues, devoting time, energy, and talent to enhancing the dignity of their calling." And I thought that was particularly nice, as I was sitting there watching all of you who have come to talk today about the topics that are covered by this roundtable. Because that really is true. And it really does reflect what's going on here today and the quality of the submissions and the thoughtfulness that you've all brought to that. And it's much appreciated.

So this particular part of the roundtable is about the state of the state action doctrine. And so we have a lot of questions that we'd like to throw out there for people to think about, in terms of the state action doctrine, how it's evolving. Is it now, in its current form, striking the proper balance between state sovereignty on the one hand and the federal commitment to competition in interstate commerce?

When should states be adopting regulations that limit competition? And I'm particularly interested in this issue, brought to the forefront by the *North Carolina Board* decision. When are regulated or state entities permitted to do that? And what sorts of active supervision should be

required? What form should that actually take, in order for them to come within the narrow confines of the state action doctrine?

We also have a question about, what can or should the dormant commerce clause do in the state action context? It provides some additional guidelines or rails for state conduct, with regard to infringing on competition in interstate commerce. So those are just some starting points, some ideas. But I'd like to open the floor and welcome comments from the panelists about where we think the state action doctrine is, where it's going, where it should be going.

Does anybody have anything else?

RANDY STUTZ: Well, just to reiterate some of what I said in my opening remarks, I think both *Phoebe Putney* and *Dental Examiners* have taken us to a point where the legal policy underlying the doctrine is now coherent and makes a lot of sense. Justice Kennedy, in the *Dental Examiners* opinion, cited law review articles by Einer Elgauge and Merrick Garland—Judge Garland—that really reflect, I think, the thinking in that opinion.

And the basic policy underlying the doctrine now seems to be that what federalism allows is for states to substitute regulation for competition, not to declare action lawful, not to declare the antitrust laws don't apply. So I think, there is now— there's a square recognition of the goal of the doctrine, which is to reconcile federalism policy and competition policy.

Whether in practice, whether it's going to create additional costs and difficulties, both for states and for plaintiffs, maybe still remains to be seen, given the nascency of those decisions.

ANDREW FINCH: OK.

LINA KAHN: I guess, generally, we think that *Dental Examiners* did strike the appropriate balance. And we think that the courts move away from considering the formal relationship between the entities towards looking through towards, what are the potential incentives to self-deal or serve private interests?

We think that kind of inquiry is very appropriate, given that it seems like an underlying concern about state action is not the authority of the state but more about issues of abuse that could stem from regulatory capture. And so we think the inquiry, as structured in that case, gets to those underlying concerns in a way that's appropriate.

ANDREW FINCH: OK.

GEORGE SLOVER: One potentially missing piece in the state action doctrine, as it's laid out now— and it's probably not something that the courts can or should deal with—is whether the regulatory purpose that the state has decided is more important than antitrust really is more important than antitrust, and whether the state should be enacting this policy that displaces antitrust.

And that's why-- and I think you touched on this, as you were laying out the question-- it's not just something for the courts. It's also something before the courts would ever get involved, which is engaging with the legislatures and saying, have you thought this through? Is this really something you want to do? Do you realize what the harms are? Is there a way that you can do this that doesn't require setting up a regime that's going to make it harder to enforce the antitrust laws?

And I know the Antitrust Division is very active in that area. And the FTC is, too. And that's maybe something that more of us can help with.

DIANA MOSS: Can I just bring up a broader policy point? And I speak as an economist, because I see the state action problem from the perspective of an economist. And I would just note that, particularly in the context of state licensing boards, a lot of these problems are occurring because the state licensing boards are populated with entrenched incumbents in the industry, whether it's dentists in North Carolina or doctors in Texas.

So if you think about the *Teledoc* case, the *North Carolina Dental* case, one policy approach to that is to work with the states more carefully to populate their boards with representatives that don't just reflect entrenched incumbent interests in the market. In other words, bring in, onto the boards, practicing professionals who represent the new market entrants that are actually being foreclosed by the decisions of the state licensing boards.

And that's a whole different policy prong kind of a way to deal with the state action problem, at least in that context. But it doesn't go to narrowing the state action interpretation of the doctrine or what we can do there. But it does go to a different policy approach to fixing this problem, so that state action isn't used as a way to harm competition.

ANDREW FINCH: And that's useful in an economic perspective. From the legal perspective, are there thoughts about how we might operationalize that? Because that's, I think, one of the challenges. And there's room for creativity, in terms of how you actually implement those sorts of requirements. Any thoughts on that?

JOHN ROBERTI: I'll share some private conversations that I've had with various members of the Antitrust Section who work in state attorney generals' offices, who believe in antitrust and, at the same time, have clients they're trying to counsel. It's putting the states in a very tough spot. What the states really need, I think, is clearer guidance from someone about what they should and should not do.

I think it's going to be hard to get that clear guidance through the courts. So maybe, getting that guidance through the enforcement agency would be helpful. But I think, some bright lines would be along the lines of what Diana talked about and others. I think some bright lines would be very, very helpful in trying to establish that.

ANDREW FINCH: There may be different types of mechanisms that would be useful. And they may need to be tested and evolve in different ways. But it's hard to know what would be the one right way to do it and to just sort of announce, this is the way to establish oversight for a board or

to populate the members of a board. So it may be the case that there needs to be some trial and error possibly.

JOHN ROBERTI: Agreed, but until there is, it's going to put a strain on the states.

ANDREW FINCH: Do you have a sense of how states are going about it? And variations and different ways that they're doing it and a view on what might be--

JOHN ROBERTI: Yeah, so--

ANDREW FINCH: --a good way versus a not-so-successful way?

JOHN ROBERTI: At a very high level, I think the antitrusters in the room are having more influence across the state AG's offices to try to help their colleagues counsel the base of the various licensing boards. Beyond that, I don't think I'd have any great insight into how the states are restructuring themselves.

ANDREW FINCH: Mm-hm, OK.

BOB POTTER: Alden, I think you said, in your opening statement, that you were tossing out the question. I just wanted to follow up on it. I have it written down. There should be a market participant exemption to the state action doctrine? Do you want to follow up on that and see if other panelists have any views?

ALDEN ABBOTT: Right-- well, I think the interesting thing about the market-- in some respects, I would argue that a market participant exemption may be an easier situation to deal with that the issue of state boards. The State Board raises a question about whom are we going to get to serve on the state boards? I've heard state officials say that.

Market participant exception really is aimed in a situation when you have something that looks like a duck, quacks like a duck—looks like a profit-making enterprise or private business, acts like a private business in all respects. And should a mere fact that the formalistic fact that is, say, part of a statutory department of a state, as opposed to just being regulated by the state, suddenly prevent it from being considered as a private actor?

And I think the argument there is really— and I think, implicitly— that I think you can tease out of some Supreme Court decisions that they're really looking at the function. Functionally, is this party really acting not in a sovereign capacity? Is it acting like a private party? A state governor's office, a state commerce department sitting making policy statements—even a state bar with making some ethics rulings may be acting in a sovereign capacity.

But if a company is engaging in pricing policies to drive out other utility companies, the mere fact it's part of a state department by statute— is it really acting in a sovereign capacity? So I think that should be the key question. If the answer is no, it's engaging in sales or commercial transactions or services that are quintessentially private sector.

They're engaged in by the private sector. It's really engaged in a private capacity. And therefore, it should not use a special statute as a shield to liability. And that's particularly— because that sort of special statute is precisely the sort of special statute that, likely, was engendered through rent seeking, so a special rent seeking.

I think there's procedural grounds that this Arizona utilities case coming before the Supreme Court— it's really on, as I say, a procedural posture, not a substantive posture. It's interlocutory appeals. But if it is the case that you have a company that lobbied to be made a state department as a matter of state statute but it still acts like a purely private party, should be waving the magic wand and say it's shielded by state action.

I think there's a strong argument the answer to that is no. And I think, in some respects, it's, as I said, a much easier question than this question of state boards.

CRAIG WOLF: So in the beverage alcohol industry, there are a number of states that are called Control States. And they are engaged in the business of distributing and sometimes retailing wine and spirits. So the question, I guess, Alden, are you suggesting they should be susceptible then to antitrust laws? Or you're saying there should be an exemption to that? Or it should be removed, because they're engaging in the commerce?

ALDEN ABBOTT: Well, Craig, I think you raise a good point. The 21st Amendment—it's part of our Constitution. So it raises some specific issues. Obviously, there was a discussion in the *Interstate Wines* case-- the interplay between the dormant commerce clause and the 21st Amendment— how you should read that. I have not given a lot of thought to that situation. Wouldn't want to comment on it.

I'm just saying, as a general matter, again, the 21st Amendment raises specific issues. But if you're not really given special federal constitutional status and you're clearly acting in a purely private capacity, by any sort of classic objective test, I would argue that you probably should be subject to federal antitrust laws.

RANDY STUTZ: So my understanding of the Market Participant exception is it's just the idea that a state entity that participates commercially in a market has to satisfy both of the mid-count prongs. It has to be actively supervised, in addition to acting pursuant to a clearly-articulated state interest. So it's just treated more like a private party than like a municipality, for example, which only has to satisfy the first prong.

So that's really the zone of disagreement, regarding governmental market participants. My own view is it seems like the logic and the rationale of the *North Carolina Dental* case seems to go a really long way towards suggesting we should have a market participant exception. If entities that are controlled by private market participants need to be actively supervised, entities that are themselves active market participants seem like they should be supervised as well.

Coupled with—Justice Kennedy made the point that it's not denigrating the motives of volunteer board members, who are experts in their own profession, who serve on boards, to require active supervision. It's a natural risk that people will confuse the best interests of the profession for the

public interest. And that same risk seems to be in play when you have a governmental market participant. So I think the market participant exception is a good idea.

BILL RINNER: OK, so I have a question I want to throw out there. So someone touched on the federalism justification for the state action doctrine. And of course, we know this comes from *Parker*, which said that—the state action doctrine— you need to understand it as deriving from the structure of federal power versus state power in 1890, when the Sherman Act was passed. Because of course, much of the economic regulation at the time was really happening at the state level. And so that's where it comes from.

But at the same time, we also understand the Sherman Act as a common law statute, in other words, a delegation from Congress to the courts, to give meaning to the text of Section 1 and Section 2 based on economic wisdom. I think the Supreme Court recognized this in the *Leegin* case, among others. So I guess, the question I have is whether there's an actual tension between the two.

In other words, we think about Congress's intent and the fixed meaning of the Sherman Act, in 1890, for purposes of the state action doctrine. But for all the purposes, we have a common law understanding of the Sherman Act, for purposes of justifying our treatment of restraints. Is there a tension there?

And if so, what does that mean? And how would we resolve that tension? Would it mean that we need to think through the theoretical underpinnings of the state action doctrine entirely? Or we can just pass.

GEORGE SLOVER: Well, I think it's a good question. And it sort of brings everything together that we've been talking about, with respect to state action. And just thinking it through myself, I think it's kind of answered in the two prongs that are there. Which is that the Sherman Act is able to adapt and fit itself into the legal framework that is everything else, and still be overarching in its basic requirements to have a free-market-based economy.

So I think, as long as you work through the analysis for the two prongs, you've satisfied the demands of giving due deference to federalism and making the antitrust laws apply where they can and will.

BOB POTTER: As, I think, the last question for the session, can I maybe throw a bombshell into it and see what people react to? I still find it a little hard to understand why California could have a policy that requires consumers in the 49 other states to, essentially, pay more for raisins. That seems to me to be a wrong-headed decision by the courts.

So I guess I'm asking, the fundamental premise of *Parker v. Brown*— did the court adequately take into account the costs on consumers in the rest of the United States in favoring California and raisin producers? Does anybody have a view on that?

ALDEN ABBOTT: I'd just point out-- and anyone correct me if I'm wrong. But as a historical matter, the dormant commerce clause jurisprudence had not been well-developed at the time

Parker v. Brown was handed down. I think it's arguable that, given some of the facts there, a couple decades later—20, 30 years later— the scheme might have been struck down under the dormant commerce clause. I'm not saying it would have. But I'm just saying that I think one needs to see that in its historical perspective.

DANIEL HAAR: I think a logical follow-on question to your comment, Alden, is, at the present moment, does the doctrine of the dormant commerce clause provide a separate limitation on states' ability to displace competition with regulation? We've been talking about the appropriate reach of the state action doctrine. And a number of the participants said, in its current form, it roughly has reached the right place, which gives states the ability to displace competition with regulation.

It does not necessarily mean, therefore, that displacing competition with regulation is a good idea, a wise idea, or is beneficial to consumers. So the question is, are there other legal limitations on states' ability to displace competition with regulation? Is the dormant commerce clause one of them? Is it an appropriate vehicle to reign in some anti-competitive actions of states?

GEORGE SLOVER: So catching the bomb that's been thrown— there was a House Committee Chairman, he was Chairman of the Commerce Committee, who said, "if it moves, it's commerce, and it's in my jurisdiction." And I think, the dormant commerce clause, as I've understood it, has been more about the moving kinds of commerce than the localized actions, which can still have implications for the world.

I mean, any product that is manufactured and sold in one area could be resold in another area and could, ultimately, have an effect anywhere in the world. But I'm not sure that the dormant commerce clause is the best way to get at anti-competitive pricing schemes.

JOHN BERGMAYER: Yeah, I would just say, I'm skeptical of reading the Dormant Commerce clause too broadly, because it can be sometimes applied in ways where it's just sort of saying, well, states can't regulate in a way that has an effect outside of their borders. Which is not really what it says. It's more about discrimination—a state discriminating in favor of itself or its own companies against out-of-state entities.

But to say, for instance, that a particular state can't enact a regulation if it raises prices around the country— well, what if it was a health and safety regulation? And if California passes some rule and manufacturers find it easier to just comply with California's rule nationwide and prices go up for everyone, that's just a consequence of the fact that we have a federal system. And California is a large and important state.

And there might be people who disagree substantively with what a state does. But I wouldn't look, necessarily, to the dormant commerce clause as a way of fighting a policy you disagree with, unless it was designed to be discriminatory against out-of-state commerce.

ALDEN ABBOTT: I think John raised a good point. I think the case of *Parker* is an awfully stark one. Because there, it looked like a private cartel that controlled 80% or 90% of sale of

raisins in the United States. Basically, in California, it was affecting— so that's sort of an unusual case. But I agree that a lot of regulation, really implicitly— and usually attests have been, as already mentioned some actual effect on discriminatory effect on movement.

So I'm not saying even the stark facts of *Parker* would have led to a dormant commerce clause violation. I'd say it's clearly something to think about. And of course, as we know, Justice Thomas doesn't believe in dormant commerce clause. I don't know if any other Justices have that opinion. But the majority does. But it clearly is a cabin doctrine.

And there are real risks of applying it too broadly. I certainly agree.

DOUGLAS RATHBUN: Any reactions to Congress considering getting into this? An example being the Restoring Board Immunity Acts, to clarify exactly how active supervision should operate. Or any other ideas—or how Congress should approach this?

RANDY STUTZ: So the Restoring Board Immunity Act is interesting, because it trades off a substantive legislative reform for antitrust immunity, which is pretty different than what the state action doctrine does. One of state action's defining features is that it's agnostic on the merits of state regulation. It can be entirely the product of capture, woefully inefficient. It's rooted in federalism. And it's the freedom of the states to do what they see fit, as long as they clearly articulate and actively supervise.

So in principle, the RBI Act seems like a pretty big departure. But at the same time, if states value the certainty of immunity that would come with that kind of trade-off more than their freedom to experiment, that seems like a perfectly legitimate trade-off. But I think, for it to be successful, it's going to need—and any legislation— is going to need buy-in from the states, in that respect.

ANDREW FINCH: And I guess, that's because, in some sense, we have a decision to make. A decision needs to be made. Should this be done by Congress? Would it be the states that need to fill the void? Or are federal courts, under the guise of antitrust law, going to become the regulators of how state boards are structured and their members are operated to create a whole other layer to state action defense litigation?

BOB POTTER: Any other thoughts about the state action doctrine that the panelists would like to share? Or the dormant commerce clause?

ANDREW FINCH: OK— well, with that, why don't we go around and ask all the panelists if they have any specific observations on any topic that was discussed today, in the nature of, sort of, a brief closing remark. If you have them, I welcome those.

JOHN ROBERTI: Yeah-- and I think we're over time. So I promise to be brief. I think this has been really very interesting. Thank you— honored to have been asked to participate. It's been a very interesting discussion. I guess, my takeaway on this is something I commented on earlier. It seems like we really agree on a lot of this.

None of us like exemptions. And I think the key question becomes, really, not so much, should we add new ones? Because I don't think we all want to do that. I think we all agree we don't do any more of that. But how do we deal with the ones that are here? And how do we make sure they're the right size and shape?

So I think that's going to be the challenge. And again, I would urge the agencies to share as much guidance as they possibly can. Because that really does help the private bar to counsel their clients. Thank you.

DIANA MOSS: Thanks. And thank you, again, for inviting us here today. I thought it was a very productive discussion. Certainly helps us in our thinking at the American Antitrust Institute. My final comment would really be about framing an approach moving forward, to harnessing all of this great conversation and knowledge here today— but developing some sort of tractable framework for going about unpacking the project of getting rid of immunities and exemptions.

And one idea might be to focus on areas of enforcement. So we've talked a little bit about cartel enforcement and how immunities and exemptions—and there are many, as we've heard, that really undermine cartel deterrence. And cartels are incredibly damaging, in terms of extracting harm from consumers. And then do the same for exclusionary conduct.

For example, in rolling back the net neutrality laws and the Ninth Circuit decision on the common carrier exemption from Section 5, that has created an enormous vacuum for different types of exclusionary conduct involving the Internet. So approaching it by attacking different areas of enforcement— and then, certainly, on the merger front, you have a whole other set of issues-- that might be one way to organize thinking moving forward. Thank you.

RANDY STUTZ: I think, I'll just let that be the last word on behalf of AAI, but just offer my thanks, again, for hosting a great program and for having us.

JOHN BERGMAYER: Yep, same. Thanks for the vision and the other participants, because I learned a lot today.

LINA KAHN: I echo others' thanks, specifically for me for inviting Open Markets. And I guess, just to go back to what I said earlier, I think the fact that, as a descriptive matter, energy for exemptions and immunities can come in response to a feeling that there are already existing market failures or distortions— I think, ensuring that that is a way to flag where there may be a reason to focus on certain areas could be a way to forestall exemptions going forward.

GEORGE SLOVER: I want to also thank you for inviting me and Consumers Union here today. I think this is a great demonstration of the Antitrust Division's commitment here. I hope that will continue. I think you all can provide great leadership. There needs to be an authoritative voice who can speak on the importance of the antitrust laws. Congress needs to hear that. And the rest of the country needs to hear that. And this is an important place for that message to come from.

GLYNIS LLOYD-BELL: Yes, I agree with everybody. Thank you very much for inviting the Association of Corporate Council to offer our opinion. It's a very valuable discussion. And we look forward to being a resource, as you continue to build this framework.

ANDREW FINCH: Thank you.

CRAIG WOLF: Same thing-- thanks you for inviting the Chamber to be here and allowing me to speak on their behalf today. Certainly, I think the concerns were all expressed today with opening further exemptions, further immunities. And certainly, from the Chamber's perspective, the concern about immunity when operating foreign markets or foreign companies coming here as well— and I think that needs to be stressed, from the Chamber's perspective.

From my perspective, from the Wine and Spirits Wholesalers of America perspective, just making sure that, as you move forward with your discussions in the next two rounds, that there's a balance between consumer protection and competition.

ALDEN ABBOTT: Thank you, again. Thank you very much for the invitation. Great job the Antitrust Division is doing, hosting these roundtables-- or square-tables. I disagree. I think it's clearly important to be concerned about antitrust immunities that foster anti-competitive behavior cartelization— very important. At the same time, as has been pointed out, there are other statutes out there— state statutes, consumer protection statutes, federal regulatory statutes.

And you're dealing with a complex world, where the goals of competition need to be advanced. But you have to read the antitrust laws consistent with other statutes and, obviously, be appropriately concerned about federalism while, at the same time, I think, not ever forgetting, once again, the point that the antitrust laws are the, sort of, Magna Carta of American free enterprise system. As a general matter, I think that was true and remains true.

ANDREW FINCH: Well, I just want to thank everybody. We've really accomplished what we intended to accomplish. Part of Makan's inspiration in the idea behind having these roundtables was the recognition that, as an antitrust enforcer, a lot of what you do is a function of the cases that come in the door, the mergers that you get, the opportunities that you see, in cases, to participate as an amicus. But this kind of forum gives us a way to broaden that perspective and help shape our enforcement priorities and goals in broader ways. And your input is all very helpful and appreciated.

And we thank you, again, for your written submissions. The written submissions will be available on the Department's website. And there will also be details about the upcoming roundtables. The next roundtable is on April 26th. And that will focus on antitrust consent decrees. So thanks for coming. Thanks for making this a success. We're very appreciative. Thank you.

[APPLAUSE]