



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 41

Leon C. Logan, Chairman
Kansas State Board of Accountancy
Landon State Office Building, Suite 556
900 S.W. Jackson Street
Topeka, Kansas 66612

Re: Accountants, Certified Public--State Board of
Accountancy--Organization; Officers; Meetings;
Quorum; Records; Rules and Regulations; Power and
Duties

Synopsis: K.A.R. 74-5-103 prohibits certified public
accountants (CPAs) from paying a commission to
obtain a client and from accepting a commission for
referring a client to products or services of
others. The regulation promulgated pursuant to
state authorization is immune from antitrust law
challenge under the state action doctrine.
Cited herein: K.S.A. 1990 Supp. 1-202.

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Dear Mr. Logan:

As chairman of the Kansas state board of accountancy (board) you inquire whether our office will defend the board in its position to uphold K.A.R. 74-5-103 which prohibits certified public accountants (CPAs) from paying a commission to obtain a client or accepting a commission for referring a client to products or services of others. You additionally inquire whether our office would defend the prohibition if it were a statutory requirement.

K.A.R. 74-5-103 states:

"A certified public accountant shall not pay a commission to obtain a client, nor accept a commission for a referral to a client of products or services of others. This rule does not prohibit payments for the purchase of all, or a material part, of an accounting practice, or retirement payments to persons formerly engaged in the practice of public accountancy, or payments to the heirs or estates of such persons."

You indicate that your inquiry is prompted by a recent charge by the federal trade commission (FTC) that a like prohibition on accepting or paying commissions violated federal antitrust laws. The FTC charge resulted in a consent agreement between the FTC and the American Institute of Certified Public Accountants (AICPA) a private professional organization that agreed to drop its prohibition.

The issue presented by your inquiries is whether the state action doctrine, which provides immunity from challenge under the federal antitrust laws, applies to the prohibition against CPAs paying or accepting commissions. The state action doctrine is an implied exemption from the federal antitrust laws for the acts of a state in its sovereign capacity, even if such acts would violate the antitrust laws if performed by private parties. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942); 54 Am.Jur.2d Monopolies, Etc. § 15 (1971). We note that this issue was not relevant to the FTC agreement with the AICPA because the AICPA, charged with the antitrust violation, is a private organization.

A state is deemed to be acting in its sovereign capacity when it acts through its legislature. Parker v. Brown, 317 U.S. at 350, 63 S.Ct. at 313-14, 87 L.Ed. at 326. Thus, addressing your second inquiry first, it is our opinion that if codified the prohibition in question is exempt from the operation of antitrust laws. As a statute, its terms would clearly establish a state policy to replace competition with regulation pursuant to the State's exercise of its police powers. See Parker v. Brown, (antitrust law is not intended to supersede the exercise of the police powers of the states).

Your first inquiry involves a regulation imposed by the board, the regulatory agency charged with administering the accountancy act, K.S.A. 1-201 et seq. As such, the prohibition is not an act of the state in its sovereign capacity because the prohibition is not codified in a state statute. See Hass v. Oregon State Bar, 883 F.2d 1453, 1456 (9th Cir., 1989) citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-92, 95 S.Ct. 2004, 2014-16, 44 L.Ed.2d 572 (1975). We must, therefore, determine whether the state action immunity is available to the board pursuant to state authorization.

The U.S. Supreme Court has formulated a two-part test to determine whether immunity applies to a state actor pursuant to state authorization. First, the challenged conduct must be undertaken pursuant to "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. Hoover v. Ronwin, 466 U.S. 558, 569, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 558, 569 (1984); accord Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), citing City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (plurality). Second, when the challenged conduct is that of a private party, the challenged activity must be "actively supervised" by the state. Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989) citing Midcal, 445 U.S. at 105, 100 S.Ct. at 943, 63 L.Ed.2d at 243. Whether, however, the conduct of a state agency must also be "actively supervised" by the state is an open question. Haas, 883 F.2d at 1457

In order to determine whether there is a clearly articulated and affirmatively expressed state policy to replace competition with regulation in the area of paying or accepting commissions we must examine the pertinent enabling legislation. The accountancy act authorizes the board to "adopt such rules and regulations as it may deem necessary for the proper administration of its duties and the carrying out of the purposes of this act." K.S.A. 1990 Supp. 1-202(a). Additionally the board is authorized to "[a]dopt, amend, and revoke rules of professional conduct." K.S.A. 1990 Supp. 1-202.

In order to satisfy the requirement of clear articulation, a statute need not expressly mention the challenged anticompetitive activity, Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42, 105 S.Ct. 1713, 1718, 85

L.Ed.2d 24, 31 (1985), nor must the authorizing statute direct or compel the state agency to engage in the challenged activity, Southern Motor Carriers Rate Conf., Inc. v. U.S., 471 U.S. 48, 61, 105 S.Ct. 1721, 1729, 85 L.Ed.2d 36, 47-8 (1985). But, while the authorizing legislation need not expressly mention nor specifically direct the challenged activity, the legislation cannot be neutral. Community Communications Co. v. City of Boulder, 455 U.S. 40, 55, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982).

Applying the first requirement of clear articulation to our facts we find that the state specifically authorized the board to adopt rules to carry out the purpose of the act, and more specifically the state has delegated to the board the express authority to adopt rules of professional conduct. In our opinion the legislature has delegated broad authority to regulate that foreseeably can result in anticompetitive effects. See Town of Hallie v. City of Eau Claire, 471 U.S. at 43, 105 S.Ct. at 1718, 85 L.Ed.2d at 31 (1985).

Once it is clear that state authorization exists, there is no need to require that the state actively supervise a state agency's execution of a properly delegated function. Town of Hallie v. Eau Claire 471 U.S. 47, 105 S.Ct. at 1720, 85 L.Ed.2d at 34; Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989).

In conclusion we opine that K.A.R. 74-5-103 which prohibits CPAs from paying a commission to obtain a client or accepting a commission for referring a client to products or services is exempt from the antitrust laws under the state action doctrine.

Very truly yours,



ROBERT T. STEPHAN
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