COMMISSION AUTHORIZED

V890017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-3256
84-3603

RICHARD A. BOLT, et al.
Plaintiffs-Appellants

v.

HALIFAX HOSPITAL MEDICAL CENTER, et al.
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

IN BANC BRIEF OF THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE

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STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the "active supervision" component of the state action doctrine is satisfied by the availability of common law judicial review that does not include review of the merits of the allegedly anticompetitive private conduct to determine whether the conduct accords with state policy.

INTEREST OF THE FEDERAL TRADE COMMISSION

The "state action" doctrine, first enunciated by the Supreme Court in Parker v. Brown, 317 U.S. 341 (1943), exempts from Sherman Act liability decisions of a state, acting as sovereign, to restrict competition. The Federal Trade Commission applies the principles of the state action doctrine in carrying out its congressional mandate to prevent "unfair methods of competition." See 15 U.S.C. §§ 45 et seq. (1982 & Supp. IV 1986). Accordingly, the Commission has a strong interest in assuring that the state action doctrine is properly interpreted and applied, so that only conduct that may fairly be attributed to the state is shielded from the federal antitrust laws. Because the panel's analysis of the "active supervision" prong of the state action doctrine has broad implications for antitrust enforcement against private parties, the Commission submits this amicus curiae brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure.[1]

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[1] For private parties, the lack of active state supervision defeats a claimed state action defense, and thus, insofar as the private defendants are concerned, this court need not consider the panel's conclusion regarding the "clear articulation" part of the test for state action. It has not been determined whether defendant Halifax Hospital Medical Center (HHMC) is to be treated as a municipality, and therefore subject

STATEMENT OF THE CASE

Plaintiff in this case is a vascular and general surgeon whose medical staff privileges were revoked at three hospitals in the Daytona Beach, Florida, area. He brought suit against the three hospitals, members of their medical staffs, and the local medical society, charging that the revocations were based not on his professional abilities and performance, but rather were the product of a conspiracy in restraint of trade among the three hospitals and various physicians in the community. He alleged violations of antitrust laws and a variety of other federal and state laws. 851 F.2d at 1275-77.

Because of a pre-trial ruling by the district judge, the plaintiff was required to present his evidence on the conspiracy element of the alleged antitrust violation first, before addressing the reasonableness or the effects on competition of the defendants' actions. At the close of the conspiracy evidence, the district court granted directed verdicts for the defendants. Plaintiff appealed, challenging the district court's ruling that the evidence of concerted action was

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only to the clear articulation requirement. See 851 F.2d at 1284 n.19. In addition, analysis of the clear articulation requirement as it applies to HHMC would necessarily include consideration of HHMC's enabling legislation, a subject beyond the scope of the panel opinion. For these reasons, and because the panel's conclusion regarding the clear articulation requirement does not have the same broad implications as its holding on active supervision, the Commission does not address the panel's "clear articulation" analysis in this amicus brief.

insufficient, and attacking the exclusion of certain proffered testimony. Id. at 1278-79.

Following briefing and argument addressing the evidentiary issues raised on appeal, a panel of this court requested briefs from the parties on whether the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943), exempted the defendants from federal antitrust liability. The panel (Judge Tjoflat joined by Judges Kravitch and Tuttle) subsequently issued an opinion holding that participants in any conspiracies alleged to have occurred in connection with the privilege revocation proceedings at individual hospitals were protected from antitrust liability by the state action doctrine. The panel ruled that the alleged "community-wide conspiracy," in contrast, did not constitute state action, and that, while there was insufficient evidence from which to infer a community-wide conspiracy, the trial judge had erred in excluding certain testimony proffered by the plaintiff.

In holding that the privilege revocation proceedings at individual hospitals were exempt from federal antitrust liability, the panel began with an acknowledgment that the state action doctrine is intended to shield only those activities that are "truly the product of state regulation." 851 F.2d at 1281. To that end, the panel noted, private parties must satisfy the "rigorous two-prong test" articulated by the Supreme Court in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). That test requires that defendants show

that their conduct was (1) undertaken pursuant to a clearly articulated state policy to displace competition, and (2) actively supervised by the state. Id.

The panel believed that there was "little difficulty" finding that Florida had clearly articulated a policy favoring hospital medical staff peer review. 851 F.2d at 1281. The panel quoted statutory provisions authorizing hospital medical staffs to revoke or limit staff privileges for "good cause" and requiring hospitals to establish standards to be used by the hospital and its medical staff when considering privilege applications. It did not discuss how this statutory scheme articulated an intent to displace competition.

The active supervision portion of the test, the panel stated, presented a "somewhat more difficult" issue. Id. The panel had no trouble concluding that the state board of medical examiners did not provide the requisite supervision, because the Supreme Court's recent decision in Patrick v. Burget, 108 S. Ct. 1658 (1988), made it clear that a state does not actively supervise private decisions to terminate hospital privileges unless a state official has the power to review those decisions and to overturn those that fail to accord with state policy. The Florida Board, the panel observed, had no such power. 851 F.2d at 1281. The panel then considered whether the Florida courts provided active supervision.

Noting that the Supreme Court in Patrick had left open the broad question whether judicial review can ever constitute active supervision, the panel found no reason to distinguish "traditional judicial review" from the supervision by an administrative agency recognized in Supreme Court cases. Express statutory creation of a scheme of supervision is unnecessary, the panel ruled. Rather, "[i]t is sufficient if the legislature clearly articulates a policy and then acquiesces in the courts' implementation of that policy." Id. at 1282. The panel also deemed inconsequential the fact that state supervision through judicial review would not occur unless an aggrieved party undertakes to file a lawsuit. The panel reasoned that this apparent constraint on the scope of state supervision might simply reflect a legislature's view of the "most efficient" way to regulate. Id.

After concluding that the differences between administrative review and "traditional judicial review" did not seem to make judicial review inherently insufficient for purposes of the active supervision requirement, the panel went on to devise a standard for evaluating whether the judicial review actually available in a particular context would be sufficient to establish active supervision. The panel adopted a standard requiring that the review be "available on an established basis," and that it entail consideration of the fairness of the procedures used, the validity under state law of the criteria employed by the private actors, and the existence of an adequate

factual basis for their decision. Id. In setting forth this standard, the panel did not refer to Patrick or explain how this standard differed from the kind of judicial review that the Supreme Court found inadequate in Patrick. Finally, citing Florida case law, the panel asserted that its announced standard had been met for the intra-hospital conspiracies.[2]

Following the panel decision, the defendants (except for the local medical society) filed a petition for rehearing. On December 1, 1988, this court ordered rehearing in banc.

SUMMARY OF ARGUMENT

Last year in Patrick v. Burget, 108 S. Ct. 1658 (1988), the Supreme Court addressed the meaning of the state action doctrine's requirement that private restraints on competition be actively supervised by the state. Patrick, like this case, involved application of the state action doctrine in the context of hospital medical staff peer review and the termination of a physician's hospital privileges.

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[2] In their post-argument briefs on the state action question, which were filed prior to the Supreme Court's decision in Patrick, the parties provided almost no discussion of Florida court cases. One of the private hospitals asserted, without citation, that Florida courts review medical staff decisions to determine if they were made in good faith. Brief for Daytona Community Hospital at 8 (Apr. 7, 1988). The other private hospital defendant stated that (1) Florida statutes implicitly recognize a cause of action for damages where action is taken in bad faith and with malice; (2) injunctive relief is available if peer review action is arbitrary and capricious; and (3) physicians may bring an action under the state antitrust law, citing Hackett v. Metropolitan Gen. Hosp., 465 So.2d 1246 (Fla. Dist. Ct. App. 1985). Brief for Ormond Beach Memorial Hospital at 4 (Apr. 6, 1988).

In a unanimous opinion, the Supreme Court ruled that in order for state supervision to be adequate for state action purposes, state officials must "exercise ultimate control over the challenged anticompetitive conduct," id. at 1663, and that such control does not exist unless the state reviews the merits of hospital privilege termination decisions made by private parties to determine whether those terminations further state policy, id. at 1665. The Court concluded that Oregon did not provide for active supervision of hospital privileges terminations, holding that the kind of review that might be available in Oregon courts was too limited and deferential to satisfy the state action doctrine's active supervision requirement. Id. Because Oregon's judicial review of privilege terminations was insufficient, the Court found it unnecessary to consider whether judicial review could ever constitute active supervision.

The panel's decision in this case that Florida courts provide active supervision conflicts with this recent Supreme Court ruling. The panel, even given its generous reading of the Florida case law, accepted as active supervision a level of review that does not satisfy the standard set forth in Patrick, i.e., that the state undertake a thorough, on-the-merits review of individual privilege decisions. Indeed, the panel's standard for review that is sufficiently probing to qualify as active supervision seems much like the Patrick Court's description of the kind of review that Oregon courts might undertake, and which

the Supreme Court held fell "far short" of satisfying the active supervision requirement. Id.

ARGUMENT

THE PANEL DECISION THAT FLORIDA COURTS EXERCISE ACTIVE SUPERVISION OVER HOSPITAL PRIVILEGE TERMINATIONS IS INCONSISTENT WITH THE SUPREME COURT'S RECENT DECISION IN PATRICK V. BURGET.

I. Review That Fails To Consider The Merits Of A Private Decision Alleged To Restrain Competition Is Not Active State Supervision.

The state action doctrine allows states to override the national policy favoring competition and to provide that aspects of their economies will be governed by state regulation rather than market forces. States, however, may not simply authorize private parties to violate the antitrust laws. Parker v. Brown, 317 U.S. 341, 351 (1943). Rather, a state must substitute its own control for that of the market.

Accordingly, the Supreme Court has developed a two-part test for determining when the acts of private parties will be shielded from federal antitrust liability as "state action." First, the private conduct must be undertaken pursuant to a clearly articulated policy to displace competition. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). The state need not compel anticompetitive conduct to satisfy this first prong; a statute leaving parties with discretion may be sufficient, as long as it demonstrates the requisite intent to displace competition. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 59-62 (1985). Second, private parties claiming state action

protection must demonstrate that the state "actively supervises" the challenged conduct. Midcal, 445 U.S. at 105. This second prong, by requiring that the state examine anticompetitive private conduct to assure that it comports with state policy, prevents private conduct from escaping antitrust liability where there is merely "'a gauzy cloak of state involvement.'" Southern Motor Carriers, 471 U.S. at 62 n.23 (quoting Midcal, 445 U.S. at 106).

Last term in Patrick v. Burget, 108 S. Ct. 1658 (1988), the Supreme Court provided the fullest explanation to date of the meaning of the active supervision requirement. To satisfy the requirement, state officials must "have and exercise power to review particular anticompetitive acts and disapprove those that fail to accord with state policy." Id. at 1663. This standard, the Court held, is not met where the reviewing state official does not evaluate the substantive merits of the private action to determine whether it furthers state policy. Id. at 1665. Accordingly, the Court found that since courts in Oregon would not "'decide the merits of [a] plaintiff's dismissal,'" but merely review the reasonableness of the procedures used and the sufficiency of the evidence, such review would fail to satisfy the active supervision requirement. Id. (quoting Straube v. Emanuel Lutheran Charity Board, 287 Or. 375, 384, 600 P.2d 381, 386 (1976)).

The basis for this standard lies in the principles of federalism that underlie the state action doctrine. The two-

pronged Midcal test applicable to private parties is designed to ensure that an anticompetitive act of a private party is shielded from antitrust liability only if it is "truly the product of state regulation." Patrick, 108 S. Ct. at 1662. In particular, the Court explained, the active state supervision requirement "stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" Id. at 1663 (quoting Hallie v. Eau Claire, 471 U.S. 34, 47 (1985)). Accordingly, state supervision is meant to ensure that immunity is afforded only for "the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." Id. In this way, state interests, rather than selfish private interests, are protected.

Lower court opinions after the Patrick decision have followed the standard set forth therein, and have denied state action immunity claims based on some limited judicial review of hospital privilege determinations. See Jiricko v. Coffeyville Memorial Hosp. Medical Center, No. 84-1775-K (D. Kan. Nov. 4, 1988)(LEXIS, Genfed library, Dist file)(no statute or court decision demonstrated that the merits of a peer review decision are subject to judicial review); Shah v. The Memorial Hospital, 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. July 27, 1988) (defendants failed to show active supervision where cited

statute did not require that some state official have and exercise review of the merits of the peer review determination).

II. The Kind Of Judicial Review That The Panel Held To Constitute Active Supervision Does Not Involve Review Of The Merits Of The Private Decision.

The panel held that judicial review by Florida courts of hospital privilege terminations is "sufficiently probing" to constitute active state supervision. 851 F.2d at 1284. Sufficiently probing, according to the panel, means review of the fairness of the procedures, the validity of the private decision-makers' criteria under state law, and the sufficiency of the evidence. Id. at 1282. Even if Florida courts do in fact provide such review, however, their involvement would not satisfy the active supervision requirement because it does not entail the kind of scrutiny of the merits required by Patrick.

It should be noted at the outset that, while state courts might exercise active supervision under some circumstances, it is unlikely that typical common law judicial review could be adequate as a mechanism for active state supervision. As noted above, the Supreme Court stated in Patrick that the active supervision requirement is intended to ensure that the state action doctrine shields only those particular anticompetitive acts of private parties that actually further state policy. 108 S. Ct. at 1663. This purpose, the Court found, requires that the state retain the power to disapprove individual instances of anticompetitive private conduct. Id. The nature of traditional judicial review, however, is such that under certain

circumstances the state would lack the power to assess and correct private conduct that is not consistent with the state's policy.

This is not, as the panel suggested, merely because judicial review is not "automatic." More fundamentally, courts lack the ability to initiate review, and therefore have no power to review and correct abuse if the physician who has lost his or her privileges chooses not to file a lawsuit. Where the burdens involved in bringing a lawsuit deter a physician from bringing suit, traditional judicial rules of standing would likely prevent other affected parties, such as patients, from seeking review of anticompetitive private conduct. While an administrative agency might be able on its own initiative to respond in such a situation, courts do not usually have authority to initiate an investigation to determine whether private action furthers state policy or merely promotes anticompetitive private interests. Thus, the kind of supervision mandated by the Supreme Court simply would not occur.[3]

In this case, however, as in Patrick, the court need not decide whether traditional judicial review can ever constitute active supervision, because the type of review deemed adequate by

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[3] This does not mean that a state court could never participate in a scheme of active state supervision. A legislature might assign to a court an agency-like role in overseeing private conduct. Absent this kind of legislative mandate, however, traditional judicial review presents substantial obstacles to effective "active supervision" of private conduct.

the panel is too deferential to be considered active supervision. The first aspect of the panel's definition of "sufficiently probing" scrutiny, review for procedural fairness, obviously does not involve consideration of the merits of the decision. The second, review of the criteria used for privilege revocation, while coming closer to the kind of substantive scrutiny mandated by Patrick, also falls short, because the state must look at the merits of the revocation determination itself.

It is not simply the private actors' criteria for revocation that must be measured against the state standards[4] that have replaced competition, but rather the "particular competitive acts," in this case the revocation determination itself. Such further state supervision is essential for the simple reason that facially valid criteria can be employed to eliminate competition beyond the state's intent. Dr. Patrick himself, for example, challenged the use of peer review proceedings whose fundamental, and presumably valid, criterion was the improvement of patient

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[4] See Patrick, 108 S.Ct. at 1663. It is unclear what state standards the panel viewed as applicable to privilege determinations in Florida. In finding the existence of a clear articulation to displace competition, the opinion referred to a statute authorizing privilege revocations for "good cause." See 851 F.2d at 1281 (citing Fla. Stat. § 395.065(1)(1981)). However, the two cases that the panel cited as evidence that Florida courts review the criteria used in privilege decisions for consistency with state policy dealt with alleged violations of an "antidiscrimination" statute, which barred hospitals from discriminating against osteopaths, podiatrists, and dentists. See 851 F.2d at 1283 (citing Sarasota County Public Hosp. Bd. v. Shahawy, 408 So.2d 644 (Fla. Dist. Ct. App. 1981); Hackett v. Metropolitan Gen. Hosp., 422 So.2d 986 (Fla. Dist. Ct. App. 1982)). Such a statute does not provide any standards for evaluating privilege decisions regarding allopathic physicians, such as the plaintiff in this action.

care, alleging that in his case the proceedings were a pretext used to eliminate a vigorous competitor. See 108 S. Ct. at 1661. Unless a state official looks beyond the criteria, and decides whether the decision itself furthers state policy, the state supervision requirement is not satisfied. See id. at 1665.

The third aspect of the panel's standard, review to ensure that there was evidence in the record to support the decision, would not add the necessary scrutiny. While the Court in Patrick did not elaborate on its requirement that the state review "the merits of a privilege termination," review of the evidentiary record compiled by the private decision-maker, whether under a "substantial evidence test" or an "arbitrary and capricious" standard, is not the equivalent of a determination that, "in the judgment of the State, [the particular anticompetitive acts] actually further state regulatory policies." Id. at 1663. In fact, review of the private decision-maker's evidentiary record was part of the standard for review of privilege decisions suggested by the Oregon Supreme Court and held by the Court in Patrick to fall "far short" of satisfying the active supervision requirement. 108 S. Ct. at 1665. Under that standard, a court would "'make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care.'" Id. (quoting Straube v. Emanuel Lutheran Charity Board, 287 Or. 375, 384, 600 P.2d 381, 386 (1979)). Such "constricted" review, Patrick held, would not

suffice to "convert the action of a private party in terminating a physician's privileges into the action of the State." 108 S. Ct. at 1665.

Review to ensure there is adequate evidence to support a decision is the type of "due process" review that courts typically apply to decisions of public officials. Indeed, review of hospital privileges decisions has evolved from the application of constitutional due process requirements to public hospitals. See generally Nodzenski, Medical Staff Decisions in Private Hospitals: The Role of Due Process, 18 Loy. U. Chic. L.J. 951 (1987); Note, Medical Staff Membership Decisions: Judicial Intervention, 1985 Univ. Ill. L. Rev. 473 (1985). The state action doctrine, however, requires that private conduct, unlike action of municipal governments, be subject to "active supervision" by the state, because of the "real danger" that private parties are acting to further their own private interests rather than the governmental interests of the state. Hallie, 471 U.S. at 47. Defining "active supervision" to be essentially the deferential review applied to decisions of public officials ignores this fundamental premise of the active supervision requirement.

Moreover, it is far from clear that Florida actually provides the kind of judicial review contemplated by the panel, or did at the relevant time.[5] Indeed, it appears that during the

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[5] The panel held that the relevant law is that which was in effect when the defendants engaged in the challenged conduct. 851 F.2d at 1281 n.12.

time of the alleged anticompetitive conduct, the Florida courts' view of the scope of judicial involvement in privilege decisions of private hospitals was in a state of confusion. The most recent decision of the Florida Supreme Court addressing the scope of review of hospital privilege determinations was (and is) a 1962 case expressing the traditional view that, while public hospitals are governed by due process requirements, private hospitals have complete discretion in privilege decisions. North Broward Hospital District v. Mizell, 148 So.2d 1, 3 & n.6 (Fla. 1962). A commentator analyzing judicial review of medical staff issues in Florida has suggested that legislation adopted in 1975 by the Florida Legislature should have ended the distinction between public and private hospitals' obligation to provide due process, but that Florida courts continued to apply the traditional rule until 1983. See Katheder, The Medical Staff Privileges Problem in Florida, I2 Fla. State L. Rev. 339, 349, 362-65 (1984). Even the due process review applied to public hospitals has been regarded as highly deferential to hospital boards in matters concerning staff privileges. See, e.g., Sarasota County Public Hospital Board v. Shahawy, 408 So.2d 644, 647 (Fla. Dist. Ct. App. 1981)(Florida law affords great discretion to hospital boards in denying privileges); Katheder, supra, at 344 (substantial deference). Thus, judicial review in Florida does not appear to have been as probing as the panel apparently believed.

In addition, a Florida statute not mentioned by the panel prohibits discovery or introduction into evidence of documents and testimony used in hospital peer review proceedings. See Fla. Stat. § 768.40 (1981). See also Holly v. Auld, 450 So.2d 217 (Fla. 1984). This statute seems to prevent state courts from engaging in a "probing" review of the merits of the private decision to terminate privileges.

In sum, even if the panel were correct in describing the review available in Florida courts, that judicial review does not provide the kind of state involvement in private conduct required by Patrick. State courts today are frequently called upon to intervene in private disputes, and often apply common law standards of due process. The panel's holding that such involvement by a court constitutes active supervision threatens to immunize a broad range of private conduct that cannot be fairly attributed to the state.

CONCLUSION

For the reasons set forth above, the court should hold that the review afforded by Florida courts for hospital privilege terminations does not constitute "active supervision" for purposes of the state action doctrine.

Respectfully submitted,

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January 1989

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