MEMORANDUM

From: AMC Staff

To: All Commissioners

Date: July 11, 2006

Re: State Action Doctrine—Supplemental Discussion Memorandum

The Commission deferred completion of its deliberations regarding the State Action Doctrine on June 7, 2006, so that it could gather additional information about a proposal to recommend the implementation of a sovereign compulsion test to replace the current state action doctrine.[1] This Memorandum summarizes the foreign sovereign compulsion test and sets forth a sample of fact patterns from previously decided state action cases to provide some illustration of the potential analysis and impact of this test in the state action context.

Sovereign Compulsion Test

The "foreign sovereign compulsion" test exempts a private party from liability for acts or failures to act compelled by a foreign government.[2] The acts of the private party "become effectively acts of the sovereign" when compelled.[3] The foreign sovereign compulsion test reflects a judicial recognition that it would be unfair to impose liability on a private party

[1] The existing state action doctrine asks whether the action is 1) clearly articulated, and, if a private party undertakes the conduct in question, whether the state 2) actively supervises its conduct. The proposed sovereign compulsion test would replace both prongs.

[2] *See Inter-American Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

[3] *See id.*

compelled to act by a foreign sovereign where refusal to comply would result in the imposition of significant penalties or the denial of significant benefits.[4] If this standard were imported to the state action doctrine, the state action doctrine would apply only when a state had compelled the action giving rise to the antitrust claim and significant penalties or the denial of significant benefits would result from a failure to comply with the state's mandate.

Analysis

The sovereign compulsion test is, by its terms, more stringent than the current *Midcal* test.[5] It would require actual compulsion by the sovereign, rather than mere "clear articulation" of a policy permitting such conduct by the state. It appears there are no circumstances in which the current state action doctrine would create immunity, but a sovereign compulsion test would not create immunity.

We have found no reported state action immunity cases where the fact pattern includes a state law clearly compelling, rather than merely authorizing, the conduct at issue. This is not surprising, because such fact patterns would so be so likely to enjoy state action immunity under the current test that they are not likely to be litigated. Below, we suggest possible analyses of specific cases under a sovereign compulsion test; although some of those cases might be deemed by a judge to meet a sovereign compulsion test, none is a "slam dunk".

Specific Case Examples:

- *Snake River Valley Electric Association v. Pacificorp*, 238 F.3d 1189 (9th Cir. 2001)—Idaho Code § 61-332B required power companies to obtain the consent of a competitor before providing that competitor's customers with electricity.[6] The court held that the legislature clearly foresaw and thus implicitly accepted the reduction in competition that resulted from such a grant.[7] This case might merit

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4 *See id.* at 1297-98.

5 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

6 *See* 238 F.3d at 1191.

7 *See id.* at 1193.

state action immunity under a sovereign compulsion test, because the state required power companies to obtain consent from competitors. The case does not report whether penalties were associated with a failure to obtain consent.

- *Omega Homes, Inc. v. Buffalo*, 4 F. Supp. 2d 187 (W.D.N.Y. 1998), *aff'd*, 171 F.3d 755 (2d Cir. 1999)—A municipal law provided that "any real or personal property owned by any local government or the state and located within an economic development zone may be resold . . . without public bidding or sale."[8] The government sold such property to a developer, and Omega sued, arguing that the sale completely excluded them from the particular economic development zone.[9] The court found that the sale of the property was immune under the state action doctrine, despite the fact that the legislature might not have foreseen the complete displacement of market forces that would result.[10] A court would be unlikely to find compulsion here because the legislation simply authorized, but did not require, sales without public bidding.

- *Martin v. Memorial Hospital*, 86 F.3d 1391 (5th Cir. 1996)—The state legislature permitted hospitals to enter into exclusive contracts, but did not require them to do so.[11] The court held state action immunity existed.[12] This case would likely not merit state action immunity under a sovereign compulsion test because there was no requirement for exclusive contracts.

- *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994)—The state legislature granted the Hospital Board the power to establish and provide for the operation of public hospitals.[13] The court held that this authority implicitly included the power to authorize hospitals to merge, and thus was sufficient to create state action immunity.[14] This case would likely not merit state action immunity under a sovereign compulsion test because nothing in the authorizing statute compelled a merger.

- *Yeager's Fuel, Inc. v. Pennsylvania Power & Light*, 22 F.3d 1260 (3d Cir. 1994)—A state statute required the Public Utilities Commission to encourage power companies to implement rebate programs, discounting, and other methods of promoting energy conservation and load management.[15] The court found state action immunity.[16] This case would not likely merit state action immunity under

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8 4 F. Supp. 2d at 192.

9 *See id.* at 189-90.

10 *See id*. at 192.

11 *See* 86 F.3d at 1399.

12 *See id.*

13 *See* 38 F.3d at 1188.

14 *See id.* at 1192.

15 *See* 22 F.3d at 1268.

16 *See id.*

the sovereign compulsion test, because although the state statute compels encouragement of energy conservation, it does not compel specific methods of doing so.

- *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985)—State public service commissions are authorized by state statutes to accept joint rate proposals from the collective organizations of common carriers.[17] The court held that this authorization by the legislatures was sufficient to immunize the creation of joint rate proposals under the state action doctrine.[18] Again, this case would likely not merit state action immunity under a sovereign compulsion test, because the conduct was "authorized," but not compelled by the relevant statutes.

As several of these examples illustrate, implementation of a sovereign compulsion test could subject a firm to potential antitrust liability for conduct that is authorized by a state regulatory scheme and would be immune under the existing state action doctrine. Accordingly, implementation of the sovereign compulsion test to determine state action immunity might raise questions whether it would undermine various state regulatory schemes.

17 *See* 471 U.S. at 60.

18 *See id.*