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Requested by: James M. Vukelic
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- QUESTION PRESENTED -

Whether promulgation of minimum settlement damages and fees guidelines by a surface owners association, for oil exploration and development activities would violate state antitrust law.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that promulgation of such guidelines would violate the state's antitrust law as found in chapter 51-08, N.D.C.C.

- ANALYSIS -

Section 51-08-01, N.D.C.C., reads:

51-08-01. POOLS AND TRUSTS PROHIBITED. It shall be unlawful for any corporation organized under the laws of this state or doing business in this state, or any partnership, association, or individual, to create, enter into, or become a member of, or a party to, any pool, trust, agreement, contract, combination, or confederation, to regulate or fix the price of any article of merchandise, commodity, or property, or to fix or limit the amount or quantity of any article, property, merchandise, or commodity to be manufactured, mined, produced, exchanged, or sold in this state.

There is no North Dakota case law decided under this statute. The statute is, however, similar to the Sherman Antitrust Act 15 USC Sections 1-7 (1977). Drawing from the body of knowledge developed in the federal system provides instruction as to what courses of action are permissible, and what courses of action are prohibited.

The federal law states that contracts, combinations, and conspiracies in restraint of trade are illegal. This law has been judicially refined to mean that only unreasonable restraints of trade are unlawful. Standard Oil Co. v. U.S., 211 U.S. 1 (1911). A "rule of reason" test was developed.

Even in the face of this "rule of reason," some activities were deemed so anticompetitive as to constitute per se violations of the law. These per se activities need not be subjected to the analysis of reasonableness. Price fixing is one such per se activity. Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

Section 51-08-01, N.D.C.C., likewise specifically lists price fixing as a prohibited activity. This statutory language and the developed body of federal law clearly points to the

conclusion that price fixing is anticompetitive and a violation of the antitrust laws of the state. Therefore, the actions of pooling efforts and fixing a price is an apparent violation of the state law.

Owners of the surface and mineral estates have the right of fee owners of realty to determine who may enter onto their property, and what activities may be conducted thereon. Individually, each owner may enter into any agreement with licensees upon the land for fixing damages and defining the scope of activities to be conducted. These agreements can be characterized as a sale or exchange of a license from the owner of the land to the licensee.

A somewhat analogous relationship exists in the area of patent law. The holder of a patent has exclusive right, by law, to determine who may make use of a patent during the patent period. The consenting of a patentholder to another to make use of the patent has been held to be a license. General Motors Corporation v. Dailey, 93 F.2d. 938 (sixth Cir., 1937).

Just as the landholder may exercise complete monopoly control over the property owned, so too has the patentholder the individual right to enjoy a monopoly on the patent owned.

Although it is legal for the individual patentholder to fix any price for a patent, it is a per se violation of Section 1 of the Sherman Act for two or more patentholders to combine their patents and authorize a fixed price for the use of their patents. U.S. v. Line Material Co., et al., 333 U.S. 287 (1948).

If it is unlawful per se for two or more patentholders to combine together and fix prices on the licensing of their patents, by analogy, it is reasonable to conclude that two or more fee owners of realty cannot combine and fix prices on the licensing of the use of their real property. To do so would amount to a combination to fix the prices of property, and as such is a violation of the state's antitrust law.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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