

**LEGALZOOM: CLOSING THE JUSTICE GAP OR UNAUTHORIZED
PRACTICE OF LAW?**

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Over the past several years, legal services provided through online platforms have become a popular, low cost alternative to traditional legal services. LegalZoom offers a range of legal services, through its website, at a more affordable price than traditional legal services. Affordable legal services help to remedy the current disparity in the United States between low-income individuals with legal needs and the resources available to them. Although LegalZoom's business model provides affordable legal services, the North Carolina State Bar has tried to stop the company from operating by arguing that LegalZoom is engaged in the unauthorized practice of law. This Recent Development argues that the State Bar's actions against LegalZoom were in violation of federal antitrust laws and LegalZoom should be able to operate in North Carolina unimpeded because it works to remedy the justice gap without threatening the legal profession.

I. INTRODUCTION

For three years, Tina Pope and her son rented a decrepit home in Henderson, North Carolina, that the landlord refused to repair.¹ The home had broken windows, no furnace, moldy walls, rats, exposed electric wiring, and an infestation of bugs.² Ms. Pope's

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¹ Gene Nichol, Op-Ed., *Most of NC's Poor Cannot Afford Legal Services*, THE NEWS AND OBSERVER (Oct. 26, 2013 8:00 PM) <http://www.newsobserver.com/opinion/op-ed/seeing-the-invisible/article10281929.html>.

² *Id.*

son required a nebulizer to control his coughing brought on by the mold.³ Despite Ms. Pope's repeated requests for repairs to these dangerous and defective living conditions, her landlord refused to act.⁴ Because of the exceptionally horrific conditions in Ms. Pope's home, Legal Aid attorneys agreed to handle her case on a priority basis.⁵ However, free legal assistance such as Ms. Pope received is not available to all who need it given the limited resources of legal aid organizations.⁶ Over eighty percent of low-income people in North Carolina who face serious legal challenges cannot get representation.⁷ This distorted system makes those facing the most pressing situations feel lucky, because they might be able to beat the justice crisis and access legal assistance.⁸ Unfortunately, those who cannot afford traditional legal services are left to fend for themselves.⁹

Funding for legal aid programs for low-income citizens has steadily declined as the need for assistance grows each year.¹⁰ National poverty rates are at one of the highest levels in fifty years.¹¹ This means low-income individuals are being faced with high rates of foreclosure, eviction, and job loss.¹² As poverty and unemployment rates are on the rise, public resources for civil legal assistance have declined.¹³ The justice gap is defined as the

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Louis Rulli, *Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients*, 17 U. PA. J. L. & SOC. CHANGE 347, 349 (2014).

¹¹ The United States Census Bureau's latest report states the 2014 poverty rate was 14.8%, meaning 46.7 million people were living in poverty during that year. UNITED STATES CENSUS BUREAU, *2014 Highlights*, <https://www.census.gov/hhes/www/poverty/about/overview/> (last visited March 27, 2016).

¹² See Rulli, *supra* note 10 at 349 (emphasizing that when low-income individuals cannot afford to keep their house they certainly cannot afford legal services, even in an emergency).

¹³ *Id.*

disparity between what legal services people living in poverty can afford and what resources are available to them.¹⁴

One potential method of closing the justice gap is the use of online, legal service platforms that provide legal assistance at a significantly discounted rate over traditional private attorney or firm prices. These online platforms provide do-it-yourself packets and common court documents. One such company is LegalZoom.¹⁵ LegalZoom's mission is to provide "an easy-to-use, online service that help[s] people create their own legal documents."¹⁶ LegalZoom wishes to make the law more accessible and affordable so that people have an easier time drafting a living will or starting a business.¹⁷ However, the North Carolina State Bar has accused LegalZoom of unauthorized practice of law since 2003 in an attempt to restrain the company from operating in the North Carolina legal market.¹⁸ The two parties reached a consent agreement in 2015 but the terms are temporary, pending the passage of a House Bill¹⁹, and a permanent solution is still necessary to allow LegalZoom to continue long-term operation.²⁰ However, some state bar associations, including that of North

¹⁴ Patricia E. Roberts, *From the "War on Poverty" to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans*, 34 B.C.J.L. & SOC. JUST. 341, 342 (2014).

¹⁵ See *About Us*, LEGALZOOM.COM INC., <https://www.legalzoom.com/about-us> (last visited March 27, 2016) (providing customers with automatic software that assists the customer in filling out and filing legal documents).

¹⁶ *Id.*

¹⁷ See *id.* When customers cannot afford traditional legal services, LegalZoom provides a viable alternative. Necessities such as a last will and testament can be completed totally online and save the customer hundreds of dollars. With public libraries providing computers to the public, it is easy to access the website even without a home computer. See *id.*

¹⁸ Terry Carter, *LegalZoom resolves \$10.5 M antitrust suit against North Carolina State Bar*, ABA JOURNAL (Oct. 23, 2015 3:15 PM) (2015), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar.

¹⁹ H.B. 436, 2015–16 Gen. Assemb., Reg. Sess. (N.C. 2015).

²⁰ Carter, *supra* note 18.

Carolina, have taken the position that Legal Zoom's activities constitute unauthorized practice of law.²¹

The State Bar may control LegalZoom actions as an agency of the state, authorized by statute, to regulate the practice of law in North Carolina.²² Specifically, the State Bar has the authority to investigate and bring an action against parties engaged in the unauthorized practice of law.²³ A large facet of unauthorized practice of law regulation is ensuring that non-lawyers are not offering legal advice.²⁴ Most recently, websites that provide legal services have been under attack as conducting unauthorized practice of law.²⁵ While regulating unauthorized practice of law does help to protect the public from poor quality legal services, the regulations also restrain competition and consequently monopolize legal services.²⁶ As the State Bar restricts competition, the price for legal services increases and consequently legal services are unaffordable for many low-income people.²⁷ The unaffordability of legal services has created an access to justice crisis where citizens who need legal representation simply cannot afford it.²⁸

This paper argues that LegalZoom should be able to continue operations because providing access to affordable legal services works to close the justice gap without significantly threatening the legal profession. This paper argues that the State Bar's unauthorized practice of law regulations should be amended to

²¹ *Id.* (stating the North Carolina State Bar has been trying to restrict LegalZoom's operations since 2003, claiming the services are unauthorized practice of law).

²² N.C. GEN. STAT. § 84-37 (2013).

²³ *Id.* The State Bar initiates its own investigations and responds to complaints or allegations from the public. *See id.*

²⁴ RULES OF PROF'L CONDUCT R. 5.5 (N.C. STATE BAR ASS'N 2003).

²⁵ Carter, *supra* note 18.

²⁶ *See* Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553, 565 (2015) (discussing monopolization of legal services as a consequence of unauthorized practice of law regulations which restrains competition).

²⁷ *See* Nichol, *supra* note 1 (over 80% of poor and low-income citizen cannot afford legal services).

²⁸ *See id.*

include an exception to the definition of “practice of law” and that the State Bar’s actions violated antitrust laws. This paper will proceed in six parts. Part II outlines the function of the State Bar and examines the definition of practice of law. Part III lays out the antitrust law applicable to LegalZoom’s case. Part IV introduces the history between LegalZoom and the North Carolina State Bar and analyzes the most recent consent judgment agreement between the two parties. Part V analyzes and applies antitrust law to the State Bar’s unauthorized practice of law regulations with regard to LegalZoom. Finally, Part VI will consider the policy ramifications underlying the issues presented, and Part VII concludes.

II. UNAUTHORIZED PRACTICE OF LAW

This section gives a brief overview of the Practice of Law statutes in North Carolina. In addition, this section explores the rationale behind North Carolina’s statutes and details the motivations behind prohibiting unauthorized practice of law.

A. *Defining Practice of Law*

The North Carolina State Bar attempted to regulate LegalZoom’s operations as the agency authorized to regulate attorneys and the practice of law in North Carolina. The State Bar was created by statute and is made up of practicing attorneys.²⁹ In order to enforce rules and regulations, the State Bar has the power to administer disciplinary action such as disbaring or suspending attorneys.³⁰ One of the many activities of the State Bar is to investigate and prevent the unauthorized practice of law.³¹

The North Carolina State Bar has an Authorized Practice Committee (“APC”) that oversees and addresses any allegations or complaints of unauthorized practice of law.³² In order to engage in

²⁹ See N.C. GEN. STAT. § 84-15 (2013).

³⁰ See *id.* § 84-28 (2013).

³¹ See *id.* § 84-37 (2013).

³² See *Unauthorized Practice of Law*, NORTH CAROLINA STATE BAR, <http://www.ncbar.com/programs/upl.asp> (last visited March 27, 2016) (stating duties and powers of the APC and explaining the rationale behind creation of the committee).

the practice of law in North Carolina, one must be an active member of the North Carolina State Bar or a professional corporation properly registered with the State.³³ Any action that constitutes the practice of law and is committed by an unregistered agency or individual is subject to disciplinary action.³⁴ North Carolina statutes set forth the parameters for determining what action constitutes the practice of law.

North Carolina defines the practice of law as “performing any legal service for any other person, firm or corporation, with or without compensation.”³⁵ The practice of law includes, but is not limited to, “assisting by advice, counsel, or otherwise in any legal work.”³⁶ In addition, North Carolina statute specifically prohibits corporations from practicing law without being registered with the State Bar.³⁷ The State Bar has the authority to investigate any charges or complaints of unauthorized practice of law.³⁸ In addition, the State Bar may enjoin any uncertified, unqualified, and unregistered corporations or individuals from continuing to practice.³⁹ Furthermore, any person who is damaged by unauthorized practice of law is entitled to a private right of action to recover reasonable damages and attorney’s fees.⁴⁰ In addition to state statutes controlling the practice of law, common law plays a

³³ N.C. GEN. STAT. §§ 84-4, 84-5 (2013).

³⁴ *See id.* For example, the Wake County Superior Court enjoined Lighthouse Title Agency Inc. from continuing its operations after determining that its conduct constituted the practice of law. The Lighthouse Title Agency was preparing real estate titles, providing loan closing services, advertising these services, and collecting a fee. The Court held that without licensed attorneys, this conduct constituted the unauthorized practice of law. *See* Consent Order of Permanent Injunction at 1, N.C. State Bar v. Lighthouse Title Agency Inc., No. 05CVS10637 (2005), http://www.ncbar.com/PDFs/upl_Lighthouse_Title.pdf.

³⁵ N.C. GEN. STAT. § 84-2.1 (2013).

³⁶ *Id.*

³⁷ *Id.* § 84-5.

³⁸ *Id.* § 84-37.

³⁹ *Id.* (enjoining a company requires a court order before the State Bar can act).

⁴⁰ *Id.* § 84-10.1.

vital role in determining what specific conduct constitutes the practice of law.⁴¹

In North Carolina, there are two main exceptions, other than representing one's self, which constitute the practice of law.⁴² The first exception is the sale of self-help packets and services.⁴³ Self-help documents do not constitute unauthorized practice of law as long as the preparer of documents has a primary interest in the transaction.⁴⁴ For this exception to apply, there must be more than an incidental interest and rise to the level of a primary interest.⁴⁵ For example, the grantor or the beneficiary in a deed or trust may prepare the documents without liability if the beneficiary is extending credit to the grantor.⁴⁶ The named trustee, however, does not have the same exemption from liability because his interest is only incidental.⁴⁷ The second exception is called the "scrivener exception."⁴⁸ The scrivener exception refers to the mere recording of customer-supplied information, which does not constitute the practice of law.⁴⁹ The scrivener exception, however, will not apply

⁴¹ See *State v. Pledger*, 127 S.E.2d 337, 340 (1962) (defining and clarifying what conduct constitutes the unauthorized practice of law and filling in the gaps left by the statutes).

⁴² See *id.* at 337.

⁴³ See *id.*

⁴⁴ See *id.* (holding "[a] person, firm or corporation having primary interest, not merely incidental interest, in transaction, may prepare legal documents necessary to furtherance and completion of transaction without violating [the law]."). For states other than North Carolina, see *New York County Lawyers' Ass'n v. Dacey*, 234 N.E. 2d 459 (1967) (holding the sale of self-help materials does not constitute the practice of law); *Oregon State Bar v. Gilchrist*, 538 P.2d 913 (1975) (holding the sale of self-help materials does not constitute the practice of law); *State Bar v. Cramer*, 249 N.W.2d 1 (Mich. 1976), *abrogated by* *Dressel v. Ameribank* 664 N.W.2d 151 (2003) (holding the sale of self-help materials does not constitute the practice of law).

⁴⁵ See *Pledger*, 127 S.E.2d at 337.

⁴⁶ *Id.* at 339.

⁴⁷ *Id.*

⁴⁸ See *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *13 (N.C. Super. Ct. Mar. 24, 2014) (explaining and discussing the scrivener exception).

⁴⁹ North Carolina Appellate courts have not yet considered the scrivener exception but the federal bankruptcy court in North Carolina has described the exception as "merely typing or 'scrivening' a petition or legal document for

to anything that goes beyond mere recording, such as offering advice.⁵⁰ Conduct that does not fall within one of these exceptions is likely to constitute the practice of law.⁵¹ While the State Bar should allow LegalZoom to continue operations under the scrivener exception, it is important to note why the State Bar has practice regulations in place.

B. *Rationale for Unauthorized Practice of Law Regulations*

LegalZoom's operations do not pose a risk to the State Bar's primary motivation behind practice regulations, which is protecting the public from unqualified legal services. Clients have a distinct interest in being protected from unqualified or fraudulent individuals holding themselves out as attorneys.⁵² Regulations hold individuals accountable for their actions and this deters unqualified persons from committing violations.⁵³ The State Bar works to ensure that the public receives only well-qualified advice from registered and licensed attorneys.⁵⁴ Unfortunately, the most affordable option often turns out to be a fraudulent legal services provider.⁵⁵ For example, unscrupulous "notarios" have become a serious problem in immigrant communities across the United States.⁵⁶ Notarios fraudulently hold themselves out as qualified to assist immigrants with legal matters and then use fraudulent contracts and legal forms.⁵⁷ The notarios frequently accept

another person." *In re Graham*, No. 02-81930C-7D, 2004 Bankr.LEXIS 1678, at *19 (M.D.N.C. Feb. 10, 2004).

⁵⁰ See *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *13 (N.C. Super. Ct. Mar. 24, 2014).

⁵¹ See *id.*

⁵² *Unauthorized Practice of Law*, *supra* note 32 (discussing the danger of fraudulent individuals promising qualified legal advice only to receive payment and either no advice or unqualified advice).

⁵³ See *id.* (making the unauthorized practice of law a misdemeanor serves to further deter fraudulent activities).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *Fight Notario Fraud*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html (last visited Mar. 7, 2016).

⁵⁷ See *id.* (holding themselves out as attorneys but conducting no legitimate legal services).

payment and then either process false documents or never complete any work, often jeopardizing any chance for the immigrant to gain legal status in the future.⁵⁸ These are the types of scenarios that the State Bar attempts to restrain by prohibiting the practice of law by non-lawyers and unlicensed practitioners. While the State Bar might argue that LegalZoom cannot provide the same protections for its customers from unqualified or fraudulent advice, LegalZoom can regulate its own internal system for vetting and choosing its employees.⁵⁹ In addition, with automatic software, the services are self-help and there is no need for employee assistance. Thus, as long as the software is providing a self-help service, there is no need to protect the public from using it.⁶⁰ In addition, the prepaid services do not pose a risk to the public because it would connect customers to independent attorneys who are regulated by the State Bar.⁶¹

The public also has an interest in affordable legal services, such as the services from LegalZoom. Critics point out that non-lawyers can be just as effective as lawyers in resolving some legal issues and a free market system, with both lawyers and non-lawyers, would promote competition and drive prices down.⁶² A free market system where clients can choose either a licensed attorney or a non-lawyer would provide the client with more affordable options.⁶³ In addition, unauthorized practice of law

⁵⁸ See *id.* (receiving payment is the only goal of notarios and once they have received funds there is typically no further communication with the customer).

⁵⁹ See Original Complaint, *LegalZoom.com v. N.C. State Bar*, No. 11 CVS 15111, 2011 WL 8424700, (N.C. Super. Ct. Sept. 30, 2011) (explaining that software controls the customer's information and LegalZoom has control over who the company hires and can therefore ensure every employee conducts business legally).

⁶⁰ See *id.* at *24.

⁶¹ *Id.* at *11.

⁶² See Matthew Longobardi, *Unauthorized Practice of Law And Meaningful Access to the Courts: Is Law Too Important To Be Left To Lawyers?*, 35 CARDOZO L. REV. 2043, 2049 (2014).

⁶³ See *id.* An example of price discrepancy shows LegalZoom offers divorce filings starting at \$299.99, while a Raleigh, NC law firm's amicable divorce services start at \$7,000. *Compare Divorce*, LEGALZOOM.COM INC., <http://www.legalzoom.com/personal/marriage-and-divorce/divorce-overview.html>

regulations so severely limit an individual's options for legal representation that impoverished people cannot afford representation at all.⁶⁴ Allowing non-lawyers or online legal service providers to operate as an alternative to licensed attorneys would make legal services more accessible to individuals who would otherwise not be able to afford legal representation.⁶⁵ For example, LegalZoom provides a low cost legal services alternative to a traditional attorney.⁶⁶ Customers can purchase wills, trusts, and other documents online.⁶⁷ The website's software puts the customers' answers into the document for them and the customers never have to meet with a lawyer.⁶⁸ The automatic software saves the customer's money while still obtaining the same end result.⁶⁹

While the main purpose of the State Bar regulations is to protect the public, the regulations are advantageous to attorneys as well. Unlike non-lawyers who attempt to provide legal services, attorneys are subject to specific ethical regulations and discipline by the State Bar.⁷⁰ The unauthorized practice of law is punishable as a misdemeanor and this threat serves to deter individuals from engaging in misconduct.⁷¹ One benefit to lawyers is that everyone

(last visited Mar. 8, 2016), with *How Much Is A Divorce?*, ROSEN LAW FIRM, <https://www.rosen.com/pricing/> (last visited Mar. 8, 2016). Another example shows LegalZoom offering a last will and testament starting at \$69.00 while a law firm in Weddington, NC, starts their pricing at \$1500.00. *Compare Last Will and Testament*, LEGALZOOM.COM INC., <http://www.legalzoom.com/personal/estate-planning/last-will-and-testament-overview.html> (last visited Mar. 8, 2016), with *Estate Planning*, PROVIDENCE WILLS AND TRUSTS, <http://providencewillsandtrusts.com/> (last visited Mar. 8, 2016) [hereinafter *Price Comparison*].

⁶⁴ See Longobardi, *supra* note 62, at 2047.

⁶⁵ See *id.* at 2049.

⁶⁶ See LEGALZOOM.COM INC., *supra* note 15.

⁶⁷ See *id.* (listing all of the services LegalZoom offers).

⁶⁸ See *id.*

⁶⁹ See *Last Will and Testament*, LEGALZOOM.COM INC., <http://www.legalzoom.com/personal/estate-planning/last-will-and-testament-overview.html> (last visited Mar. 8, 2016) (displaying hundreds of positive reviews from customers who received a desired end result).

⁷⁰ See Longobardi, *supra* note 62, at 2049.

⁷¹ *Preventing Unlicensed Legal Practice*, NORTH CAROLINA STATE BAR, <http://www.ncbar.gov/public/upl.asp> (last visited Mar. 8, 2016).

practicing law in North Carolina must abide by the same regulations.⁷² Because the rules are universally applied to all individuals attempting to practice law, there is assurance that no dishonest actions or misconduct occurs in the legal profession. In addition, the judicial system functions more efficiently when advocates can expect their opponents to have a basic understanding of law and procedure.⁷³ The regulations require all lawyers to be qualified and this ensures that everyone who is licensed to practice is at least trained from attending law school and passing the state bar exam.⁷⁴

III. ANTITRUST LAW

One significant reason that the State Bar's position on Legal Zoom is problematic is that it violates federal antitrust laws by impermissibly stifling the market for legal services.⁷⁵ The Sherman Act serves to suppress anticompetitive and monopolistic trade practices and promote competition between industries and countries by making unfair trade practices illegal.⁷⁶ Section One of the Sherman Act prohibits "concerted action that unreasonably restrains" trade.⁷⁷ This section has been broadly applied to anticompetitive conduct but requires "concerted action."⁷⁸

⁷² N.C. Gen. Stat. § 84-17 (2013) (stating that all attorneys must abide by the State Bar regulations).

⁷³ *Unauthorized Practice of Law*, *supra* note 32.

⁷⁴ *Id.*

⁷⁵ 15 U.S.C. §§ 1, 2 (2013). *See generally* WILLIAM HOLMES AND MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK (2015) (explaining Sherman Act definitions, the application of different sections, and elements of an antitrust suit).

⁷⁶ 15 U.S.C. §§ 1, 2 (2013) (prohibiting unfair trade practices and anticompetitive conduct); N.C. State Bd. of Dental Exam'rs v. F.T.C., 135 S. Ct. 1101, 1109 (2015) (holding that the North Carolina State Board of Dental Examiners violated the Sherman Act when it attempted to restrain non-dentists from offering teeth whitening services).

⁷⁷ HOLMES AND MANGIARACINA, *supra* note 75, at § 2:2.

⁷⁸ *Id.* Examples include horizontal price fixing in which competitors agree on a floor price to keep prices high, vertical price fixing where competitors fix prices at different levels of the market, horizontal and vertical allocations of territories, competitively motivated refusals to deal, and exclusive dealing arrangements. *Id.*

Concerted action requires more than one entity to contract and conspire to restrain competition.⁷⁹ Since the State Bar makes unilateral decisions, its conduct falls under Section Two.⁸⁰ Section Two is similar to Section One but extends to unilateral actions, with no requirement for concerted conduct.⁸¹ In order to prove monopolization, or an attempt to monopolize, the relevant market is key.⁸² The relevant market classifies the area of trade that the defendant is accused of monopolizing.⁸³ The definition of the relevant market serves to show that there is no other viable, alternate market for customers to go to.⁸⁴ The relevant market is made up of the product market and the geographic market.⁸⁵ The product market is determined by interchangeability and cross-elasticity of demand.⁸⁶ If a product can be interchanged with another without significant differences, they are likely in the same product market.⁸⁷ Likewise, for cross-elasticity, if a product's price change would have an effect on another product's price, they are likely in the same market.⁸⁸ The geographic market focuses on what geographic area of customers is affected by changes to the product.⁸⁹ For the State Bar, the product is defined as legal services and the geographic region is North Carolina. The State Bar's main

⁷⁹ *Id.*

⁸⁰ *Id.* at § 3:2.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Areas of trade indicate a select market such as cell phones, laptops, or furniture. HOLMES AND MANGIARACINA, *supra* note 75, at § 3:2.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* See generally *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (defining cross-elasticity and discussing its application to relevant markets).

⁸⁷ HOLMES AND MANGIARACINA, *supra* note 75, at § 3:2.

⁸⁸ *Id.*

⁸⁹ *Id.*; see *Brown Shoe Co.*, 370 U.S. at 298 (explaining the type of effects in a geographic region would indicate the product was in that market). See generally *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) (discussing a six state region that was affected by product monopolization and the indicators that all six states were affected).

defense would likely be an exception to the Sherman Act that provides immunity for conduct that is state action.⁹⁰

Under *Parker v. Brown*, states have immunity from the Sherman Act when acting in their “sovereign capacity.”⁹¹ Nevertheless, when “active market participants control a non-sovereign actor,” such as lawyers controlling the State Bar, there must be “active state supervision” by the state to get *Parker* immunity.⁹² The United States Supreme Court recently filed a decision in regards to *Parker* immunity as applied to the North Carolina State Board of Dental Examiners, an agency created by the state similar to the State Bar.⁹³

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the State Board of Dental Examiners (“State Board”) had been issuing cease and desist letters to non-certified dental businesses offering teeth whitening services.⁹⁴ The Federal Trade Commission was concerned that the State Board was violating antitrust laws and infringing on competition in the dental industry.⁹⁵ While the State Board argued that they were protected by immunity, the Supreme Court held that when active market participants control a state agency, such as dentists controlling the State Board, there must be active supervision by a state official to ensure proper conduct.⁹⁶ To meet the burden of constituting state supervision, state officials must be able to review anti-competitive

⁹⁰ 15 U.S.C. § 25 (2013) (holding that state action is immune from Sherman Act restrictions); see *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

⁹¹ 15 U.S.C. § 25; *Parker*, 317 U.S. at 350–51.

⁹² N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1117 (2015) (holding that actively practicing dentists in control of the North Carolina State Board of Dental Examiners could not claim state action immunity without active supervision by the state).

⁹³ See *id.* at 1114.

⁹⁴ *N.C. Board of Dental Examiners v. Federal Trade Commission*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/north-carolina-board-of-dental-examiners-v-federal-trade-commission/> (last visited Mar. 10, 2016).

⁹⁵ *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1114 (stating that the Federal Trade Commission was concerned that the North Carolina State Board of Dental Examiners sent out cease and desist letters as a ploy to control prices in the field of dentistry).

⁹⁶ *Id.*

acts and disapprove of those acts that do not meet Sherman Act and state requirements.⁹⁷ Since practicing dentists controlled the State Board and there was no active state regulation or oversight, the Supreme Court held that in sending cease and desist letters to the non-dentist practices, the State Board was violating the Sherman Act by restraining competition. This holding affects LegalZoom because it makes it very unlikely that the State Bar could claim *Parker* immunity if faced with an antitrust suit. Thus, the State Bar would likely not be able to claim state action immunity in defense of antitrust violations.

IV. LEGALZOOM AND THE NORTH CAROLINA STATE BAR

The decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* helps to demonstrate that the State Bar has been violating antitrust laws with its actions against and communications with LegalZoom since 2003. This section gives a brief description of LegalZoom's operations and then delves into the history between LegalZoom and the State Bar that led up to their 2015 consent agreement. The history between the two parties demonstrates the anticompetitive and monopolistic conduct the State Bar engaged in and shows that LegalZoom's operations should be allowed to continue because they do not pose a risk to the public or the profession.

A. *LegalZoom Background*

LegalZoom is a nationwide company that sells self-help legal documents to the public through an online platform.⁹⁸ The company advertises that it saves customers time and money in common legal matters.⁹⁹ LegalZoom presents clickable options on

⁹⁷ See *id.* at 1112.

⁹⁸ See Cody Blades, *Crying over Spilt Milk: Why the Legal Community Is Ethically Obligated to Ensure Legalzoom's Survival in the Legal Services Marketplace*, 38 HAMLINE L. REV. 31, 33 (2015) (explaining the functions of LegalZoom); Moxley, *supra* note 26 at 554; Zachary C. Zurek, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 242, 267 (2013) (giving a basic outline of LegalZoom's services); LEGALZOOM.COM INC., *supra* note 15.

⁹⁹ See LEGALZOOM.COM INC., *supra* note 15.

its home screen that will lead the customer to various areas of the law.¹⁰⁰ The website offers assistance with wills, trusts, incorporations, trademark registrations, divorces, and more.¹⁰¹ The customer chooses a document, a last will and testament for example, which prompts the software program to ask a series of questions to help the customer fill the form out.¹⁰² LegalZoom employees then review the documents upon completion for accuracy, consistency, spelling, and completeness.¹⁰³ Customers pay a fee for the documents and then the papers are mailed to them.¹⁰⁴

B. *Background from 2003 to 2016*

In March 2003, the APC opened an inquiry to determine whether LegalZoom's Internet based legal document preparation service constituted the unauthorized practice of law by going beyond self-help kits and into the realm of legal advice.¹⁰⁵ The APC sent a letter to LegalZoom notifying the company of its inquiry.¹⁰⁶ LegalZoom responded with a letter explaining that its services were self-help, run by automated software, and designed to give the public a general understanding of the law.¹⁰⁷ The LegalZoom website also offered several disclaimers stating that its services were not a substitute for an attorney.¹⁰⁸ The APC

¹⁰⁰ *See id.*

¹⁰¹ *See id.* (displaying a menu of options for customers to choose what services they need).

¹⁰² Customers are prompted and asked questions and then the software takes the answers and automatically inserts them into the customer's document of choice. *See id.*

¹⁰³ *See id.* (stating that employees do not assist customers with filling out their documents).

¹⁰⁴ *See id.*

¹⁰⁵ *LegalZoom.com v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *2 (N.C. Super. Ct. Mar. 24, 2014) (stating that the State Bar argued LegalZoom and its employees were giving out legal advice to customers when they assisted them with filling out documents).

¹⁰⁶ Original Complaint at 20, *LegalZoom.com v. N.C. State Bar*, No. 11 CVS 15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

¹⁰⁷ *Id.* at 21 (requiring no action by the employee for the customer to complete his documents).

¹⁰⁸ *Id.* at 21(b).

responded and stated that after careful consideration of the information provided by LegalZoom, the APC committee voted to dismiss the complaint.¹⁰⁹ In addition, the APC stated in a letter to LegalZoom that based on available information, they voted to dismiss the complaint because they found that there was insufficient evidence to support a finding of probable cause that LegalZoom was engaged in authorized practice of law.¹¹⁰

In 2007, the APC initiated another inquiry on the grounds that LegalZoom was being named as the incorporator of North Carolina corporations that were formed by customers, indicating practice of law.¹¹¹ LegalZoom responded by stating that its business model had not changed since the 2003 inquiry was closed and the company still did not offer legal advice or practice law.¹¹² Despite LegalZoom's response, APC sent a cease and desist letter, which concluded that it had enough evidence to proceed with an inquiry into LegalZoom's alleged practice of law.¹¹³ LegalZoom responded with another letter that outlined several inaccuracies in the State Bar's description of its business practices in the cease and desist letter.¹¹⁴ The State Bar argued that LegalZoom was transcribing information for the customers and making choices for them such as which document to use and which answers to give.¹¹⁵ LegalZoom made clear in its response that LegalZoom made no choices for the

¹⁰⁹ *LegalZoom.com, Inc.*, No. 11 CVS 15111 at *2.

¹¹⁰ *Id.*

¹¹¹ Original Complaint ¶ 24, *LegalZoom.com v. N.C. State Bar*, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014). LegalZoom offers incorporation services that help customers form and start their business. Customers can file documents with the state, personalize the bylaws, and begin running their company. *Business Formation*, LEGALZOOM.COM INC., <https://www.legalzoom.com/business/business-formation/inc-overview.html> (last visited Mar. 10, 2016).

¹¹² *See* Original Complaint ¶ 10, *LegalZoom.com v. N.C. State Bar*, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014) (arguing that the State Bar had already decided that LegalZoom was not engaging in authorized practice of law in 2003 and since nothing in the business model had changed there should not be a new investigation).

¹¹³ *See id.*

¹¹⁴ *Id.* ¶ 28.

¹¹⁵ *See id.*

customer and did not assist with any answers.¹¹⁶ The company explained that its automatic software put the customer's information into the form with no employee choices necessary.¹¹⁷ LegalZoom emphasized that it still did not offer more than self-help legal services.¹¹⁸ The specific challenge from the State Bar was that LegalZoom went beyond simple document preparation and into the realm of giving legal advice when employees reviewed customer documents for errors.¹¹⁹ The State Bar confirmed they received the letter but offered no further response to the content of the letter.¹²⁰

Starting in 2010, LegalZoom attempted to register its prepaid legal services with the State Bar and was rejected at every turn.¹²¹ The prepaid plan would allow a customer to pay a fixed fee every month in exchange for the advice of an independent attorney whenever the customer needed it.¹²² For this plan, LegalZoom merely connects the customer with an independent attorney.¹²³ LegalZoom and the State Bar exchanged letters but the State Bar was concerned with the APC's cease and desist letter from 2008 and refused to approve LegalZoom's service plan.¹²⁴

¹¹⁶ *Id.* (stating that the software is responsible for allowing the customer to use self help services, not the employees).

¹¹⁷ Original Complaint ¶ 24, *LegalZoom.com v. N.C. State Bar*, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014).

¹¹⁸ *Id.* ¶ 28. The State Bar's cease and desist letter stated that LegalZoom transcribed customer's responses and determined what form the customers should use. LegalZoom made a point to correct this and emphasize that the corporation uses automated software that is a fixed process, which leaves no room for LegalZoom to make decisions for the customers. Customers make their own decisions, much like a self-help kit, about which forms they need to use. *Id.* at 28(a).

¹¹⁹ *See id.* ¶ 17.

¹²⁰ *Id.* ¶ 49.

¹²¹ *See id.* ¶ 39.

¹²² *Id.* at 11. The prepaid plan offers unlimited, thirty-minute consultations with an attorney for a fixed monthly fee. The pricing is as low as \$9.99 per month and LegalZoom provides the name and information of the attorney you can contact. LEGALZOOM.COM INC., *supra* note 15.

¹²³ *See* Original Complaint ¶ 11, *LegalZoom.com v. N.C. State Bar*, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014).

¹²⁴ *See id.* ¶ 45.

In 2011, LegalZoom brought action through a complaint for Declaratory and Injunctive Relief, in which the company claimed that the State Bar had intentionally and knowingly engaged in monopolistic and anti-competitive conduct in violation of Article I, Section 34 of the North Carolina Constitution by sending the cease and desist letter without the benefit of final judgment.¹²⁵ In other words, LegalZoom complained that the State Bar never had the authority to issue a cease and desist letter.

The State Bar replied to this complaint by claiming that the State Bar had the power to issue cease and desist letters. The State Bar argued that it was warranted in issuing its letter to LegalZoom because LegalZoom was giving legal advice without being registered with the state.¹²⁶ The Superior Court of North Carolina Business Court¹²⁷ denied LegalZoom's motion as to the claim that sought to declare the State Bar had exceeded its statutory powers.¹²⁸ The Court deferred "ruling on the issue of whether LegalZoom is engaged in the unauthorized practice of law until the State Bar elected whether to file a counterclaim seeking to enjoin LegalZoom."¹²⁹

The State Bar sought to enjoin LegalZoom from continuing its operations, arguing that the services are in fact the practice of law. The State Bar continued to argue that the services provided by LegalZoom were not the equivalent of self-help services and did constitute the practice of law.¹³⁰ LegalZoom once again argued that the company does no more than copy customer answers into the

¹²⁵ Original Complaint ¶ 60, LegalZoom.com v. N.C. State Bar, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014); *see* N.C. CONST. art. 1, § 34.

¹²⁶ *See* LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *2 (N.C. Super. Ct. Mar. 24, 2014).

¹²⁷ This Court handles complex corporate and commercial issues and a special superior court judge handles the case from start to finish. NORTH CAROLINA BUSINESS COURT, <http://www.ncbusinesscourt.net/> (last visited Mar. 9, 2016).

¹²⁸ LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *17 (N.C. Super. Ct. Mar. 24, 2014).

¹²⁹ *Id.* at 16.

¹³⁰ The State Bar filed its Answer, Counterclaim, and Motion for Preliminary and Permanent Injunction on September 21, 2012, and an Amended Answer and Counterclaim on October 1, 2012. *See id.* at 1.

documents without providing any advice or assistance.¹³¹ Then, LegalZoom filed its Motion for Partial Judgment on the Pleadings, which was limited to the issue of the State Bar registering LegalZoom's prepaid service plan.¹³² Lastly, The State Bar filed its Motion for Judgment on the Pleadings, hoping the Court would decide there was enough information already presented to determine that LegalZoom was engaged in unauthorized practice of law.¹³³

LegalZoom's complaint presented several claims, but they each "either depend[ed] on or involve[d] consideration of the central issue: whether LegalZoom engages in the unauthorized practice of law by offering its internet-based document preparation service."¹³⁴ The Court denied LegalZoom's Motion for Partial Judgment on the pleadings and determined that a greater factual record was needed and that the issue of unauthorized practice of law could not be decided at that time.¹³⁵

As for the State Bar's motions, the Court denied in part and granted in part.¹³⁶ The Court denied the State Bar's Motion for Permanent Injunction, pending further factual inquiry.¹³⁷ The Court then denied the motion as to LegalZoom's equal protection and corresponding petition for declaratory judgment because, again, the claims depended on the determination of the unauthorized practice of law issue.¹³⁸ The Court held that any ruling on the matters between the State Bar and LegalZoom would be predicated on whether or not LegalZoom was engaged in authorized practice

¹³¹ LegalZoom replied to the counterclaim on October 31, 2012. *Id.*

¹³² Then, on December 20, 2012, LegalZoom filed its Motion for Partial Judgment on the Pleadings. *Id.*

¹³³ *See id.* (showing that the State Bar was hoping for an early determination that LegalZoom was engaged in unauthorized practice of law).

¹³⁴ *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *10 (N.C. Super. Ct. Mar. 24, 2014) (stating that the Court could not make further determinations without further fact finding as to whether LegalZoom was engaged in the unauthorized practice of law).

¹³⁵ *Id.* at 15.

¹³⁶ *Id.* at 15–17.

¹³⁷ *Id.* (requiring the determination of whether LegalZoom was engaged in the unauthorized practice of law).

¹³⁸ *Id.*

of law.¹³⁹ After these motions were decided, the Supreme Court of the United States decided on *North Carolina State Board of Dental Examiners v. Federal Trade Commission*¹⁴⁰ and LegalZoom saw its opportunity, based on that holding, to file an antitrust suit against the State Bar.¹⁴¹

C. 2015 Consent Agreement

On October 22, 2015, LegalZoom filed suit in the United States District Court for the Middle District of North Carolina, seeking damages and injunctive relief from the State Bar.¹⁴² LegalZoom relied this time on federal antitrust law, focusing on the claims that the State Bar's actions were anti-competitive and amounted to monopolizing the legal industry.¹⁴³ After the filing of this \$10.5 million antitrust suit, the State Bar and LegalZoom agreed to enter into a consent judgment with agreed-upon terms.¹⁴⁴ Both parties agreed to waive the entry of findings of fact and conclusions of law and decided to settle all disputes.¹⁴⁵ The agreement laid out several conditions for both parties to follow, including the dismissal of the federal antitrust suit.¹⁴⁶

The most important terms for the consent judgment are as follows: Both parties agree that the definition of “practice of law” does not include LegalZoom’s software that asks customers

¹³⁹ LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *9–10 (N.C. Super. Ct. Mar. 24, 2014).

¹⁴⁰ N.C. State Bd. of Dental Exam’rs v. F.T.C., 135 S. Ct. 1101, 1109 (2015).

¹⁴¹ LegalZoom.com, Inc. v. N.C. State Bar, et al., 1, 6 (No. 1:15–CV–439, M.D.N.C.) (stating that Legal Zoom filed the antitrust suit in federal court based on the holding in *North Carolina State Board of Dental Examiners* asserting that the State Bar was engaged in anticompetitive conduct similar to the State Board of Dental Examiners).

¹⁴² Carter, *supra* note 18.

¹⁴³ LegalZoom.com, Inc. v. N.C. State Bar, et al., 1, 6 (No. 1:15–CV–439, M.D.N.C.)

¹⁴⁴ Carter, *supra* note 18.

¹⁴⁵ LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015) (meaning the two parties settled without deciding if LegalZoom’s conduct was unauthorized practice of law or fell within an exception to the rule).

¹⁴⁶ *Id.* (dismissing the federal suit allowed the State Bar to escape without any holding as to their actions without any state supervision or review).

questions and then uses the responses to fill in legal documents;¹⁴⁷ LegalZoom must provide the blank or completed document to the customer for review before the customer pays in full;¹⁴⁸ A licensed North Carolina attorney must review each document and the attorney contact information must be kept on file and distributed at the request of a customer;¹⁴⁹ LegalZoom must communicate that the documents are not a substitute for legal advice, disclose its location, legal name, and address to North Carolina consumers; and LegalZoom does not disclaim any warranties or liabilities and cannot limit recovery damages;¹⁵⁰ LegalZoom agrees that plaintiffs suing LegalZoom have a right to a North Carolina venue;¹⁵¹ Both parties agreed to support and use best efforts to obtain passage by the North Carolina General Assembly of House Bill 436,¹⁵² clarifying the term “practice of law,” in the form currently pending before the House Judiciary Committee.¹⁵³

While LegalZoom is free to continue operations for now, pursuant to the consent judgment, the North Carolina State Bar may revisit the unauthorized practice of law issue again in the future.¹⁵⁴ LegalZoom, and companies like it, need a permanent solution to operate unimpeded by state bar associations.

¹⁴⁷ *Id.*

¹⁴⁸ *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 WL 6441853 (N.C. Oct. 22, 2015).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² H.B. 436, 2015-2016 Gen. Assemb., Reg. Sess. (N.C. 2015).

¹⁵³ *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015) (stating that the House Bill should detail the definition of practice of law and make clear for LegalZoom and similar websites what conduct does and does not constitute the practice of law).

¹⁵⁴ If at the end of two years the General Assembly has not passed the House Bill 436, the two sides have the right to resume litigation. Jeff Jeffrey, *LegalZoom, N.C. State Bar settle \$10.5M lawsuit*, TRIANGLE BUSINESS JOURNAL (2015), <http://www.bizjournals.com/triangle/news/2015/10/26/legalzoom-nc-state-bar-settle-10-5m-lawsuit.html>.

V. APPLYING ANTITRUST LAW TO UNAUTHORIZED PRACTICE OF LAW REGULATIONS

The State Bar's use of unauthorized practice of law regulations to restrain competition within the legal profession is a violation of the Sherman Act. The State Bar is construing and applying the unauthorized practice of law regulations to best fit its need to control the competition for legal services. In LegalZoom's antitrust suit complaint, the company alleged antitrust violations with regard to its prepaid legal services plan that the State Bar refused to register.¹⁵⁵ The antitrust violations, however, started before the refusal to register LegalZoom's prepaid services program. The violations began with the cease and desist letters the State Bar first sent to LegalZoom in 2003.¹⁵⁶ In addition, the State Bar should recognize the scrivener exception as well.¹⁵⁷ Recognizing this exception would help tailor the unauthorized practice of law regulations to ensure the State Bar is not arbitrarily applying the regulations.¹⁵⁸

There are two main factors that point toward a violation of the Sherman Act by the State Bar. First, pursuant to *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, the State Bar violated the Sherman Act by sending cease and desist letters to LegalZoom in an attempt to

¹⁵⁵ LegalZoom.com, Inc. v. N.C. State Bar, et al., 1, 6 (No. 1:15-CV-439, M.D.N.C.). LegalZoom claimed that the State Bar exceeded its statutory powers when it refused to register the prepaid program. LegalZoom further argued that the State Bar should only be keeping track of what services register, not defining who may register. *Id.*

¹⁵⁶ LegalZoom.com, Inc., 19 (No. 1:15-CV-439, M.D.N.C.) (arguing that not only is the failure to register the prepaid plan anticompetitive conduct but the cease and desist letters are as well).

¹⁵⁷ See e.g., discussion *supra* Part I.A. See generally *State v. Pledger*, 127 S.E.2d 337 (1962) (explaining when self-help operations are an exception to the practice of law); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *13 (N.C. Super. Ct. Mar. 24, 2014) (explaining and discussing the scrivener exception).

¹⁵⁸ Without further statutory clarification, no Internet based companies will be able to appreciate if their services constitute the practice of law in North Carolina.

inhibit competition.¹⁵⁹ LegalZoom's operations revolve around programmed software that assists the customer in filling in court documents.¹⁶⁰ This automatic software is the epitome of the scrivener exception, merely recording information provided by customers or clients.¹⁶¹ LegalZoom does not offer legal advice to customers, instruct them how to answer questions, or hold itself out as an attorney.¹⁶² LegalZoom employees do not assist with filling out documents, because the software completes them without additional employee assistance.¹⁶³ Customers do not consult with representatives of LegalZoom to determine what answers to give.¹⁶⁴ LegalZoom is simply the medium used to get the customer's information into the legal document, without modification or alteration.¹⁶⁵ With the additional disclaimers cautioning customers throughout the website, this is a clear example of the scrivener exception.¹⁶⁶ The State Bar in North Carolina already considers self-help services to be outside the scope of practice of law.¹⁶⁷ Now, the State Bar should consider the adoption of the scrivener exception and analyze LegalZoom's services as operating within the bounds of that exception.

In adopting the scrivener exception, state bar associations would provide much needed clarity and further define the

¹⁵⁹ See N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1117 (2015) (holding that the North Carolina State Board of Dental Examiners violated the Sherman Act when it issued cease and desist letters to local non-dentists offering a teeth whitening service).

¹⁶⁰ See Original Complaint at 24, LegalZoom.com v. N.C. State Bar, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014).

¹⁶¹ See *id.* at 25 (stating that the software does not change customers' answers but merely records them and transfers them into a legal document).

¹⁶² See LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *13 (N.C. Super. Ct. Mar. 24, 2014).

¹⁶³ See Original Complaint at 24, LegalZoom.com v. N.C. State Bar (2014), (No. 11-CVS-15111, 2011 WL 8424700 (stating that the software does not change customer's answers but merely records them and transfers them into a legal document).

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See LEGALZOOM.COM INC., *supra* note 15.

¹⁶⁷ See *State v. Pledger*, 127 S.E.2d 337 (1962) (explaining when self-help operations are an exception to the practice of law).

definitions of both “self help” and “practice of law.” LegalZoom is one of many Internet based legal service companies.¹⁶⁸ With emerging technologies changing the traditional landscape of legal services, practice of law regulations must be amended and adapted.¹⁶⁹ The State Bar should consider and adopt the scrivener exception to make clear that LegalZoom’s and similar companies’ operations, are in fact an exception to practice of law and fall outside the scope of practice of law regulations. In addition to improperly labeling LegalZoom’s services as practice of law, the State Bar also engaged in anti-competitive conduct when it issued a cease and desist letter to LegalZoom.

The State Bar’s issuance of a cease and desist letter and the refusal to register LegalZoom’s prepaid service plan are in violation of the Sherman Act.¹⁷⁰ The State Bar was engaged in similar conduct with regards to LegalZoom, issuing cease and desist letters advising LegalZoom to stop operations.¹⁷¹ The State Bar has the authority to “inquire into and investigate” claims of unauthorized practice of law, but it is not statutorily authorized to prohibit conduct by issuing a cease and desist letter.¹⁷² In addition,

¹⁶⁸ The following companies offer similar services to LegalZoom, and all operate primarily online. ROCKET LAWYER, <https://www.rocketlawyer.com/>; MYCORPORATION, <http://www.mycorporation.com/>; NOLO, <https://www.nolo.com>.

¹⁷⁰ Discussion of the Sherman Act, *supra* Part III Antitrust Law.

¹⁷¹ Original Complaint at 10, LegalZoom.com v. N.C. State Bar, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014) (cautioning LegalZoom to cease operations with the threat of enjoining the company from continuing its services).

¹⁷² N.C. Gen. Stat. § 84-37(a) (2013). The statute allows:

The Council or any committee appointed by it for that purpose may inquire into and investigate any charges or complaints of (i) unauthorized or unlawful practice of law or (ii) the use of the designations, ‘North Carolina Certified Paralegal,’ ‘North Carolina State Bar Certified Paralegal,’ or ‘Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification,’ by individuals who have not been certified in accordance with the rules adopted by the North Carolina State Bar. The Council may bring or cause to be brought and maintained in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any person or entity against any person or entity that engages in rendering

N.C. J.L. & TECH. ON. 219, 243
LegalZoom

the State Bar's proper method of prohibiting conduct is to bring suit to enjoin companies from operating.¹⁷³ Furthermore, the State Bar has even less power in regulating non-lawyers.¹⁷⁴

The State Bar needed a court to decide if LegalZoom was prohibited from operating.¹⁷⁵ In addition, the State Bar's refusal to register LegalZoom's prepaid services plan overstepped the powers granted to the State Bar.¹⁷⁶ The State Bar is merely supposed to keep a list of registered plans.¹⁷⁷ When the State Bar unilaterally decided on a definition of prepaid services plans, it exercised a power it does not have.¹⁷⁸

The combination of a cease and desist letter and the refusal to register the prepaid plan is anti-competitive conduct in the legal services product market in North Carolina. The relevant product market that the State Bar and LegalZoom both conduct business in is legal services. The State Bar regulates attorneys that practice law and LegalZoom offers self-help legal services to the same customer base. Another indication that the product market is the same is the correlation between LegalZoom's low prices and LegalZoom's profitability, because the customers will choose whomever they can best afford from the same product market.

any legal service, holds himself or herself out as a North Carolina certified paralegal by use of the designations set forth in this subsection, or makes it a practice or business to render legal services that are unauthorized or prohibited by law. No bond for cost shall be required in the proceeding.

Id.

¹⁷³ N.C. Gen. Stat. § 84-37 (2013) (requiring a court order as opposed to unilateral action by the State Bar without court approval).

¹⁷⁴ The State Bar is an agency of the state created to regulate the behavior and ethics of lawyers. *Id.*

¹⁷⁵ N.C. Gen. Stat. § 84-37 (2013).

¹⁷⁶ See *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *15 (N.C. Super. Ct. Mar. 24, 2014) (overstepping the statutory powers granted by skipping the necessary step of getting a court order and filing suit to have a company enjoined from operating).

¹⁷⁷ See *LegalZoom.com, Inc. v. N.C. State Bar*, 1, 6 (No. 1:15-CV-439, M.D.N.C.).

¹⁷⁸ It is not stated in the statute that the State Bar has the power to define and manage what is or is not a prepaid services plan. See generally N.C. Gen. Stat. § 84-37 (2013).

While attorneys do choose their prices, the State Bar regulates what prices are appropriate. In addition, the relevant geographic market is the same with the State Bar regulating all of North Carolina and LegalZoom offering services across the state as well. With the relevant market being the same for both parties, the State Bar's monopolization of the market certainly affects LegalZoom's ability to compete and offer a viable alternative to traditional legal services.

The actions of the State Bar to restrict LegalZoom from operating is a clear violation of the Sherman Act in that the State Bar is unreasonably restraining competition in the relevant market by limiting who can operate as a self-help legal services company.¹⁷⁹ The exclusion of the prepaid plan from the relevant market "has injured competition in the [relevant market] and caused LegalZoom to lose more than \$3,500,000" in sales in North Carolina.¹⁸⁰ The State Bar's anticompetitive activity is in violation of the Sherman Act, and the State Bar should not have broad authority to restrain trade in the legal services industry.¹⁸¹ While the Sherman Act provides immunity for state action through *Parker* immunity, the State Bar does not fit the criteria to invoke the doctrine.¹⁸²

Under *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, the State Bar cannot invoke immunity.¹⁸³ The State Bar operates in a similar fashion to the North Carolina State Board of Dental Examiners.¹⁸⁴ The State Bar is non-sovereign entity run by active market

¹⁷⁹ See 15 U.S.C. §§ 1, 2 (2013) (prohibiting unfair trade practice and anti-competitive conduct).

¹⁸⁰ *LegalZoom.com, Inc. v. N.C. State Bar, et al.*, 1, 7 (No. 1:15-CV-439, M.D.N.C.).

¹⁸¹ See 15 U.S.C. §§ 1, 2 (2013).

¹⁸² *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) (finding that an entity requires state supervision for its conduct to be considered state action); 15 U.S.C. § 25 (2013) (providing for state action immunity).

¹⁸³ See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1123 (2015).

¹⁸⁴ See *id.* (describing the State Board of Dental Examiners as an association made up of dentists that regulates the dentistry market with no state supervision).

participants.¹⁸⁵ In other words, the State Bar, while authorized as a state agency, is not run by the State but instead controlled by practicing attorneys.¹⁸⁶ The practicing attorneys have a conflict of interest in that they want to protect the public from unqualified advice in their role with the State Bar but also want to have a profitable personal practice. The council is charged with protecting the public from unqualified attorneys but they are also benefited by an exclusive industry, in which prices stay high and competition is low.¹⁸⁷ To invoke immunity as a non-sovereign entity run by active market participants, the Supreme Court ruled that two elements are necessary.¹⁸⁸ The challenged restraint must “be one clearly expressed as state policy,” and state officials must actively supervise the state agency.¹⁸⁹ As stated above, actively supervise requires that the “supervisor must review the substance of the anticompetitive decision; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, and the mere potential for state supervision is not an adequate substitute for a decision by the State.”¹⁹⁰

In this instance, there is no state policy being furthered by restraining LegalZoom from competing in the legal market.¹⁹¹ The State Bar never articulated a state policy as its motivation, and, in fact, its actions are contradictory to a state policy in favor of fair trade and competition.¹⁹² In addition, the State Bar is “wholly unsupervised” by the state.¹⁹³ The State Bar acted individually, as it

¹⁸⁵ See *id.* at 1110 (acting as an entity made up of practicing lawyers that controls and regulates the legal profession).

¹⁸⁶ N.C. Gen. Stat. § 84-18 (2013).

¹⁸⁷ See Moxley, *supra* note 26 at 565 (explaining the conflict of interest that exists for lawyers that serve on the State Bar).

¹⁸⁸ See N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1116–17 (2015).

¹⁸⁹ *Id.* (stating that protecting the public from non-dentists performing teeth whitening was not a state policy).

¹⁹⁰ *Id.* at 1107.

¹⁹¹ See LegalZoom.com, Inc. v. N.C. State Bar, 1, 7 (No. 1:15–CV–439, M.D.N.C.).

¹⁹² *Id.*

¹⁹³ *Id.* The State Bar has no state supervisor to oversee decisions and retain veto power to ensure anticompetitive conduct does not occur. *Id.*

usually does, with no state oversight or veto power. Therefore, the State Bar meets none of the criteria to qualify for *Parker* immunity and is in violation of the Sherman Act.

The solution here is to formally define the State Bar's powers and initiate a state supervisory program. For the State Bar's powers, it needs to be clear if cease and desist letters carry the enforcement power of a court or just the State Bar. A possible clarification would be to call the letters something other than cease and desist letters. The State Bar could refer to these letters as "letters of caution" or "letters of warning" without sounding as if the association is authorized to prohibit conduct without the action of the court.¹⁹⁴ For state supervision, there needs to be constant, active supervision by a state official.¹⁹⁵ It should be a full time position for a state official to monitor State Bar complaints and actions and possess a veto power as well. This would ensure that an entity controlled by active market participants is not swayed by the council members' own personal interests. In addition, the veto power would guarantee the state's involvement in deciding what actions are appropriate and sanctioned by the state.

VI. PUBLIC POLICY

The State Bar and the decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* raise similar policy concerns.¹⁹⁶ For the State Board of Dental Examiners, the pivotal issue was a balancing act between regulating dentistry to ensure safety for the public and avoiding the monopolization of the industry.¹⁹⁷ The Court held that the dental board had overstepped its bounds, and consumers were being deprived of the benefits of

¹⁹⁴ The warning letters could be similar to those issued by the Food and Drug Administration which serve to give the individual or corporation a chance to voluntarily correct the violations pointed out in the letter. FOOD AND DRUG ADMINISTRATION, *Warning Letters*, <http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176870.htm#SUB4-1>.

¹⁹⁵ *Parker v. Brown*, 317 U.S. 341, 350–351 (1943); 15 U.S.C. § 25 (2013).

¹⁹⁶ Jeffrey, *supra* note 154.

¹⁹⁷ *See id.*

competition.¹⁹⁸ The United States Supreme Court recognized the competing interests.¹⁹⁹ The State Board has an important interest in keeping dental patients safe by allowing them to see only well-qualified dentists.²⁰⁰ In addition, when dentists are registered with the state board, it facilitates regulation, and discipline if necessary, in order to ensure a safe environment.²⁰¹ Ensuring the protection of quality of service is the main reason professions have an interest in keeping membership regulated.²⁰² The competing interest, however, is a more widely available service.²⁰³ Many people cannot afford dental care, especially a teeth whitening treatment, at a conventional office. Permitting other professionals to provide similar services promotes competition and results in more affordable options.

Similarly, in the legal profession, there must be a balance between regulation and accessibility. The significant judicial access crisis in North Carolina, in which many people have no access to affordable legal assistance at all, must be addressed.²⁰⁴ The litigation history between LegalZoom and the State Bar clearly demonstrates a hesitation and an unwillingness to include new, more affordable methods of legal services on the part of the State Bar.²⁰⁵ LegalZoom is a viable option for providing affordable legal assistance with services starting lower than one hundred dollars.²⁰⁶ According to U.S. antitrust laws, competition “enhances consumer choice and promotes competitive prices [so that] society

¹⁹⁸ *See id.* (allowing for competition results in lower prices as companies and offices compete for the customers).

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *See id.*

²⁰² Jeffrey, *supra* note 154.

²⁰³ *Id.*

²⁰⁴ Rulli, *supra* note 10 at 349.

²⁰⁵ *See* Original Complaint at 10, LegalZoom.com v. N.C. State Bar, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014) (detailing the long history of communication and disputes between the State Bar and LegalZoom as the State Bar attempted to enjoin LegalZoom from continuing its operations).

²⁰⁶ *See* LEGALZOOM.COM INC., *supra* note 15 (showing the low prices offered by LegalZoom making it an affordable option).

as a whole benefits from the best possible allocation of resources.”²⁰⁷ State Bar monopolization of the legal profession and anti-competitive enforcement of unauthorized practice of law regulations are in direct conflict with such goals.²⁰⁸ The State Bar continues to prioritize the mitigation of risk to the public while simultaneously devaluing the need for competition within the profession and the would-be result of more affordable services.²⁰⁹ While minimizing risk to the public is of significant importance, the dire need for affordable access to legal services outweighs those interests. If citizens cannot afford an attorney to assist them in basic necessities such as drafting a will or initiating a divorce, they have no need for protection from the State Bar.²¹⁰ Accessing legal services must come before protecting the client in those services.²¹¹

Allowing Internet-based services such as LegalZoom to operate will help close the justice gap and increase accessibility to affordable legal services.²¹² In North Carolina, “80% of the civil legal aid needs of the poor—domestic violence, divorce, child custody, housing, consumer protection, employment, benefits, health—go unmet.”²¹³ There is only one Legal Aid attorney for every 13,170 low-income individuals, while there is one private attorney for every 562 North Carolinians.²¹⁴ Eighty percent of low-income North Carolinians cannot afford legal services and struggle to secure adequate representation from an alternative source.²¹⁵ In addition to the unaffordability of legal services creating an access to justice crisis, unauthorized practice of law regulations further

²⁰⁷ U.S. DEP’T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT GUIDELINE FOR INTERNATIONAL OPERATIONS (1995), <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>.

²⁰⁸ See Moxley, *supra* note 26 at 554.

²⁰⁹ *Id.* While the risk to the public is certainly significant, there is no need for protecting people if they cannot even afford the services at all.

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.* at 568.

²¹³ NC EQUAL ACCESS TO JUSTICE COMMISSION (2015), <http://ncequalaccesstojustice.org/>.

²¹⁴ *Id.*

²¹⁵ *Id.*

restrict access to legal services by attempting to exclude internet services as an option for legal services.²¹⁶ LegalZoom's automated software requires fewer employees than a traditional law firm and allows the company to operate at a low cost.²¹⁷ That low operating cost translates into affordable services.²¹⁸ Despite the benefits of a low-cost alternative that works to lessen the justice gap, there are risks to having a service provider that does not fall within the definition of practicing law.²¹⁹ The State Bar would point out that LegalZoom operating in North Carolina, with its operations outside the scope of the definition of practicing law, makes the company immune to regulatory protections.²²⁰ Thus, while practicing lawyers are subject to protective regulations, LegalZoom is outside the State Bar's reach and that lapse in regulation poses a risk to the public.²²¹ The total inability to access legal services, however, far outweighs the risk to the public, because providing qualified legal services that the public cannot afford only exacerbates the access to justice crisis.

VII. CONCLUSION

The North Carolina State Bar, and other state bar associations, should make two changes: (1) adopt the scrivener exception and (2) provide an oversight committee by the state that supervises the conduct of the State Bar. By doing these two things, competition in the legal profession will increase and companies like LegalZoom will be better able to provide affordable legal services. The result will be better access to legal services for low-income individuals.

The State Bar's unauthorized practice of law regulations, as currently defined, give the State Bar too much deference in deciding what constitutes authorized practice of law. The regulations should be amended to include the scrivener exception, which would further clarify what conduct is an exception to the

²¹⁶ See Moxley, *supra* note 26 at 565.

²¹⁷ See *id.*

²¹⁸ See *id.*; see also *Price Comparison*, *supra* note 63.

²¹⁹ See Moxley, *supra* note 26 at 569 (discussing the risk of LegalZoom, and similar companies, from operating without regulation by the State Bar).

²²⁰ *Id.*

²²¹ See *id.*

definition of practice of law. In addition, the State Bar should consider LegalZoom's services and operations to fall within that exception. Companies with similar platforms, where customers enter information and the company merely transfers it to legal documents, should also fall within the exception. While adding the scrivener exception would help increase competition in the legal market, the State should also implement an oversight committee for the State Bar as well.

An oversight committee, made up of non-lawyers, would ensure that state bar associations do not violate the Sherman Act by engaging in anti-competitive conduct. With strict oversight, state bar associations will be unable to make decisions that restrict competition in favor of practicing attorneys when it is not necessary to protect the public. State bar associations must consider all of the competing interests involved, including the need for affordable legal services. In a legal market where the controlling entity is made up of practicing attorneys, an oversight committee would provide the assurance needed to guarantee fair trade and a competitive market.

LegalZoom, and similar companies, have the potential to close the growing justice gap in the United States and especially in North Carolina.²²² The consent agreement between the State Bar and LegalZoom was a small start to the necessary next steps. With just a two-year cap on the agreement if the House Bill²²³ definition of practice of law is not passed, there is no guarantee that LegalZoom will be able to continue operations in North Carolina.²²⁴ With the above suggestions implemented, LegalZoom can continue to offer affordable legal services, and more people will have access to the justice system. Some of the burden will be lifted from legal aid and pro bono services and the end result will be increased access to legal services for low-income individuals.

²²² See Moxley, *supra* note 26 at 569 (discussing the justice gap and potential for online services to close it).

²²³ H.B. 436, (N.C. 2015).

²²⁴ Jeffrey, *supra* note 154 (explaining that if the definition is not passed so that LegalZoom can continue operations permanently, the State Bar can file suit to enjoin the company at a later date).