No State Action Antitrust Immunity for North Carolina Dental Board: Implications for the Health Care Sector

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On February 25, 2015, the Supreme Court of the United States held that the North Carolina Dental Board ("Board") was not insulated from federal antitrust liability under the so-called “state action” doctrine when it engaged in anticompetitive conduct to restrain non-dentists from performing teeth whitening services. ¹ The Supreme Court reaffirmed that state action antitrust immunity for professional board regulatory actions has two prerequisites: the actions must be conducted under “active state supervision,” and they must follow a “clearly articulated state policy” to displace competition.

Although the North Carolina case involved a dental board’s attempt to restrict activities of non-dentists, the Court’s opinion has broader implications for how states regulate and “actively supervise” not only professional boards (including those in the health care sector), but also other state programs requiring active state supervision—such as certificate of public advantage (“COPA”) regulations or other innovative “ACO”-like structures that are being sanctioned by states. This decision also illustrates how an individual or entity, subject to perceived over-regulation by a professional board, might mount a defense by scrutinizing whether the board meets the “state action” requirements to be insulated from liability for anticompetitive regulatory actions.

Shortly after the Court’s opinion was released, Federal Trade Commission ("FTC") Chairwoman Edith Ramirez issued the following statement—making clear that the FTC will continue to scrutinize arrangements where market participants act as regulators that are unsupervised by the state:

Today, the Supreme Court affirmed the Federal Trade Commission’s position in recognizing that a state may not give private market participants unsupervised authority to suppress competition even if they act through a formally designated “state agency.” . . . We are pleased with

¹ N.C. State Bd. of Dental Examiners vs. FTC, No. 13-534 (Feb. 25, 2015) [hereinafter “Board of Dental Examiners”].
the Supreme Court’s recognition that the antitrust laws limit the ability of
market incumbents to suppress competition through state professional
boards. . . .

Indeed, this is consistent with the way in which the FTC, in October 2014, urged the
Texas State Board of Dental Examiners to reject two proposed rules that impose new
restrictions on the ability of Texas dentists to contract with non-dentists (such as dental
service organizations) for the provision of nonclinical, administrative services—warning
that its potential actions were likely to run afoul of the Federal Trade Commission Act.

The Texas board, as a result, withdrew its proposals.

Case Background

North Carolina’s Dental Practice Act ("Act") established the Board to regulate the
practice of dentistry. Although the Board has indisputable authority over licensed
dentists, it has limited authority over non-licensed persons. The Act requires that six of
the Board’s eight members be licensed dentists engaged in the active practice of
dentistry; the seventh member is required to be a licensed dental hygienist and the
eght a "consumer." Eighty percent of the dentists serving on the Board offered teeth whitening services and
were affected by the competition of non-licensed individuals offering teeth whitening
services at significantly lower prices, often at shopping mall kiosks. When non-licensed
individuals began entering the teeth whitening market offering significantly lower prices,
dentists submitted complaints to the Board about the low prices. In response, the Board
opened an investigation into teeth whitening services by non-dentists, stating that it was
"going forth to do battle" with non-dentists. The Board then started issuing cease-and-desist letters to non-dentist teeth whitening service providers and product
manufacturers, and the result was that non-dentists ceased offering teeth whitening
services in North Carolina.

In 2010, the FTC brought an administrative complaint alleging that the Board violated
Section 5 of the Federal Trade Commission Act by excluding non-dentists from the
teeth whitening services market in North Carolina—constituting an anticompetitive and

References:

2 Statement by FTC Chairwoman Edith Ramirez on U.S. Supreme Court Ruling Regarding North Carolina
3 15 U.S.C. § 45; see FTC STAFF COMMENT TO TEXAS STATE BOARD OF DENTAL EXAMINERS, Oct. 4, 2014,
4 N.C. GEN. STAT. ANN. § 90–22.
5 N.C. GEN. STAT. ANN. § 90–40.1; Board of Dental Examiners, supra note 1, at 2.
6 N.C. GEN. STAT. ANN. § 90–22. The licensed dentists and dental hygienist are elected by other practicing
dentists and dental hygienists; the consumer is appointed by the governor.
7 Board of Dental Examiners, supra note 1, at 2.
8 Id. at 2–3.
9 Id.
unfair method of competition. The FTC alleged that the Board’s concern arose from the low prices charged by non-dentists, not from safety or other professional concerns. The ALJ determined (and the Commission ultimately sustained on appeal) that the Board’s actions had unreasonably restrained trade and violated the antitrust laws. The U.S. Court of Appeals for the Fourth Circuit affirmed the FTC, the Board appealed and the Supreme Court then granted certiorari.

**Opinion of the Supreme Court**

Justice Kennedy authored the 6-3 opinion, upholding the FTC’s application of antitrust laws to activities of state agencies or boards comprised of market participants that lack active state supervision—a requirement for receiving state action immunity.

Although first articulated in *Parker v. Brown*, the Supreme Court has interpreted the antitrust laws to confer “state action” immunity for anticompetitive conduct by the states when acting in their sovereign capacity. The test for determining whether state action antitrust immunity applies has two parts: (1) whether the state has a “clear articulation” of policy to allow anticompetitive conduct, and (2) whether the policy is “actively supervised” by the state. The “clear articulation” requirement is met “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” The active supervision element requires that “state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” The supervision rule “stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”

Here, the Board asserted that it had state action antitrust immunity because North Carolina had established a statutory scheme for the regulation of dentistry, which delegated to the Board authority to regulate the practice of dentistry. Because of this statutory authority, the Board argued it was an “agency” of the state—not a private actor—and was therefore only required to meet the “clear articulation” element of the state action test (which it contended was satisfied). The FTC disagreed, contending that the Board’s composition of practicing dentists (i.e., market participants with private interests) meant that the Board must also meet the test’s active supervision requirement. The Board did not contend that its alleged anticompetitive conduct was actively supervised by the state.

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11 The ALJ ordered the Board to stop sending communications stating that non-dentists may not offer teeth whitening services and to issue notices to those who had received its previous letters, which would indicate, *inter alia*, that recipients had a right to seek declaratory rulings in state court on whether teeth whitening in fact constituted the practice of medicine. *Board of Dental Examiners, supra* note 1, at 4.
12 *Board of Dental Examiners, supra* note 1, at 4.
14 *Board of Dental Examiners, supra* note 1, at 9.
16 *Id.* at 10.
17 *Id.* at 17.
The Supreme Court majority sided with the FTC, holding that the Board must establish the “active supervision” element to receive state action immunity. Since the Board was comprised of market participants with private interests, whose actions were not directly supervised by the state, the Court found that the “need for supervision is manifest” and that the state’s statutory scheme to regulate dentistry was not a substitute for the “active supervision” requirement.\(^\text{18}\) In rebuffing the Board’s position, the Court explained that “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing [that the] supervision requirement was created to address.”\(^\text{19}\)

The Court likened state agency boards with market participants to private trade associations and explained that anti-competitive concerns are not assuaged (and state action immunity is not conferred) merely because the board has been designated as an “agency” by the state. Specifically, the Court asserted that the need for supervision “turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.”\(^\text{20}\) Since the parties all agreed that the Board did not meet the supervision requirement, the Court held that the Board failed to satisfy the state action requirements, and therefore could not be afforded state action immunity from the antitrust laws.

Finally, the Court provided guidance on various circumstances that tend to satisfy the “active state supervision” requirement—explaining that the doctrine does not require day-to-day involvement in an agency’s operations or involvement in all agency decisions. Although perhaps unearthing more issues and questions than it resolves, the Court provided guidance on a few “constant requirements” of what constitutes “active supervision”:

- the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it;
- the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy;
- the mere potential for state supervision is not an adequate substitute for a decision by the state; and
- the supervisor may not itself be an active market participant.\(^\text{21}\)

\(^{18}\) Id. at 14.
\(^{19}\) Id. at 13. The Court applied the two-part test set out in \textit{Midcal}: “[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.” \textit{See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.}, 445 U.S. 97, 105 (1980).
\(^{20}\) \textit{Board of Dental Examiners}, supra note 1, at 13.
\(^{21}\) Id. at 18.
Takeaways

Most state boards are comprised of market participants that regulate the markets in which their members participate, i.e., they regulate their competitors. The upshot of the case is that anticompetitive regulation will be scrutinized carefully by the courts before state action immunity is approved. However, this case leaves open certain questions in assessing the construct of state regulatory boards, including what percentage of members of a Board constitute “control by active market participants,” who counts as an “active market participant,” how to define the market in which they participate, and who qualifies as a “supervisor” of a board’s or agency’s decisions. Thus, as the Court’s opinion states, the “active supervision” determination will “depend on all the circumstances of a case.”

Those open questions notwithstanding, this case provides a potentially useful weapon to organizations offering innovative services that might not be well received by state boards of competitors who are wedded to the status quo and look to preserve their economic place in it. Novel managed care organizations in both the medical and dental areas, accountable care organizations, and other new players in the field who might find themselves subject to over-regulation or exclusion should be poised to benefit from this statement of the law and should take heart in the potential assistance of the FTC and other federal antitrust regulators.

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This Client Alert was authored by Stuart M. Gerson, Patricia M. Wagner, Daniel C. Fundakowski, Selena M. Brady, and M. Brian Hall, IV. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.

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22 Id. at 11–12 (Alito, J., dissenting).
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