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Antitrust Alert

Supreme Court Examines Boundaries of Antitrust Immunity in *North Carolina State Board of Dental Examiners v. FTC*

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On October 14, 2014, the United States Supreme Court heard oral arguments in *North Carolina State Board of Dental Examiners v. FTC*, a U.S. Court of Appeals Fourth Circuit decision upholding an FTC finding that the North Carolina State Board of Dental Examiners (the "Board") did not qualify for antitrust immunity after excluding non-dentists from providing teeth-whitening services. The question presented is whether regulatory bodies comprised of market participants are considered private actors, thus requiring active state supervision before receiving antitrust immunity.

This case is noteworthy because it marks the second time in two years that the Supreme Court has considered the state action doctrine. If the Supreme Court elects to impose "active supervision" on private regulatory bodies, the decision could have broad implications for the structure and operation of state professional review boards and associations. It could conceivably impact everything from the composition of such boards, how states oversee and regulate such boards, and the costs states may incur to oversee the activities of their regulatory bodies.

History of the State Action Doctrine

The Supreme Court first established state action immunity in the 1943 decision *Parker v. Brown*, 317 U.S. 341 (1943), where the State of California was charged with violating the Sherman Act by enacting legislation that permitted raisin growers to fix prices. The Court held there was no Sherman Act violation as the antitrust laws were not intended to restrict the sovereign capacity of states to regulate their economies. Decisions following *Parker* extended this immunity to political subdivisions of the state, such as municipalities, when their actions were taken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition.

In 1980, the Supreme Court further clarified that state-authorized private action may also be shielded from the antitrust laws under the state action doctrine. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980) ("*Midcal*") the Supreme Court set forth a two-prong test for determining whether private action warranted antitrust immunity: (1) the challenged conduct must be clearly articulated and affirmatively expressed as state policy, and (2) the policy must be actively supervised by the state.[1] After numerous conflicting interpretations of the state action doctrine by lower courts, the Supreme Court weighed in on the issue in *FTC v. Phoebe Putney Health System*, 133 S. Ct. 1003 (2013), concluding that a hospital merger approved by a Georgia County hospital authority violated the antitrust laws and was not subject to state action immunity because the law failed the first prong of *Midcal* requiring a clearly articulated state policy. Prior to *Phoebe Putney*, state action immunity often applied if the anticompetitive effect was the foreseeable result of what the state authorized. The Court narrowed the state action doctrine and essentially its application to political subdivisions of states, holding "clear articulation" requires that a state not only permit the conduct at issue, but also affirmatively contemplate displacing competition in order for the challenged anticompetitive effects to be attributed to the state.

Private Actor or Public Agency? The Substance of the Parties' Arguments

The Board, designated a "state agency" by statute, is comprised of six licensed dentists, one licensed dental

hygienist and one consumer member. The governor appoints the consumer member, while dentists elect the dental members and dental hygienists elect the hygienist member. The Board is tasked with enforcing North Carolina's Dental Practice Act, which governs the licensing of dentists and their professional conduct. The statute says that only licensed dentists can practice dentistry.

During oral arguments, the justices engaged in lively discussions with counsel for the Board (Petitioner) and the FTC (Respondent) as to the purpose of the active supervision requirement, the criteria the Court should consider to characterize the Board as public or private, whether or not it was appropriate to subject the Board to the active supervision requirement, and what type or degree of state supervision of the Board would be required to satisfy the second prong of the *Midcal* test.

Counsel for Petitioner argued, in part, that: (1) a "State regulatory agency does not lose its State action immunity simply because the agency is run by part-time public officials who are also market participants in their personal capacities;" (2) the principle of federalism "requires deference to a State's sovereign choices concerning how to structure and manage its own regulatory agencies;" (3) the "regulatory conduct of public officials who are also market participants cannot properly be equated to the conduct of private business people;" and (4) requiring too much supervision would cause massive and significant disruptions because market participants would cease serving on boards. According to Petitioner, the "fundamental key" to determining the Board's status as a private or public entity is not just that its members are "designated as State officials," but that they "are charged with a State law duty, have sworn an oath to the State to enforce State law," and are not "acting pursuant to their unfettered private discretion…" Petitioner further argued that the active supervision prong need not apply because "fundamentally, it is a question for the State to determine whether it wants to bear the risk" and it was already presumed that a clearly articulated State policy to displace competition exists and thus, application of the active supervision requirement was unnecessary. Justice Kagan took issue with Petitioner's suggestion that the active supervision prong be removed from the analysis. In disagreeing with Petitioner's characterization of the purpose of the active supervision requirement and challenging Petitioner's assertion that it was inapplicable to the case, Justice Kagan stated, "the two prongs of *Midcal* are supposed to operate in tandem with each other. They both have a role to play in ensuring that an actor is in accord with the State policy and is not acting solely to further his own interest." Petitioner asserted that there is a grave risk that "no one will serve on these boards" if the Court requires too much supervision as a condition of antitrust immunity, arguing that the issue is not whether these boards will be supervised, but who will determine the level of supervision, stating, "it is fundamentally up to the state to determine how to bear the risk."

Counsel for Respondent argued that the dental board's designation as a private agency would "be a paradigmatic case illustrating the reasons that active supervision is required." According to Respondent, the majority of the Board's members are required to be practicing dentists, and they have an obvious "self-interest in the manner in which the dental profession is regulated and in regulations that might keep other people from competing with dentists." In addition, the dental board is largely selected by the community of dentists, not by the governor or by the public. The justices probed the extent to which the method of selection of the dentists was essential to Respondent's analysis, and Justice Alito pressed Respondent to outline the contours of the rule being advocated, expressing concern that Respondent's position could lead to "a case [by case], State by State, board by board, inquiry by the federal courts as to whether the members of a regulatory body are really serving the public interest or whether they have been captured by some special interest." Chief Justice Roberts weighed in with similar questions that tested the boundaries of what might satisfy the active supervision requirement, while Justice Sotomayor further pressed for clarity surrounding how the Court should approach articulating the rule Respondent advocates, stating, "you're being asked for the rule that we're going to announce not just in this case, but to guide the decision-making for future courts." Respondent asserted that it would be appropriate for the Court to rule that "at least where the members are selected by other practicing dentists, there is no State action immunity," noting that the Court could "leave for another day the question whether the outcome would be different if the members were selected by the government." Acknowledging Justice Sotomayor's point that the Court does not merely announce decisions that are good for one case leaving every other question unresolved, Respondent encouraged the Court to proceed incrementally, stating "the Court doesn't feel disabled from announcing the right rule simply because it can foresee that difficult cases will arise in the future…" Respondent, addressing Justice Kennedy's concern that a ruling in the FTC's favor could result in professionals declining to

serve on government boards, expressed doubt that significant de-participation from boards was a likely outcome of a ruling for the FTC.

Conclusion

The FTC has been a strong advocate for many years of narrowing the scope of the state-action immunity doctrine. It was successful in persuading the Court to do so just last year in *Phoebe Putney* when the Court essentially made it more difficult for private parties and local government entities to successfully assert state action immunity. Thus, the Court's decision here is clearly of significant interest and will undoubtedly be closely watched by health care industry participants, various state regulatory bodies, and antitrust practitioners. The decision is likely to provide these constituencies much needed guidance regarding the parameters of the "active supervision" requirement under the state action doctrine and its proper application.

If you have any questions about this topic, please contact the author or your principal Mintz Levin attorney.

Endnotes

[1] In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) the Supreme Court indicated that the need for state supervision of local government entities was unnecessary. Thus, while local governments have been required to satisfy the "clear articulation" prong of the *Midcal* test in order to qualify for antitrust immunity, they have typically not been required to meet the "active supervision" prong of *Midcal*.

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