

Antitrust Alert

No Active State Supervision, No Antitrust Immunity for North Carolina State Dental Board

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On February 25, 2015, in a 6-3 decision authored by Justice Kennedy, the Supreme Court upheld the Federal Trade Commission's (FTC) decision finding that the North Carolina Board of Dental Examiners (Board), although a state agency, was not exempt from federal antitrust laws when it sent 47 official cease-and-desist letters to non-dentist teeth whitening service providers. *North Carolina State Board of Dental Examiners vs. FTC*, No. 13-354, slip op. (U.S. Feb. 25, 2015). In doing so, the Court made clear that the antitrust laws would apply to — and the state action exemption would not protect — activities of state agencies or boards made up of market participants, absent active state supervision of the Board's challenged conduct. The Supreme Court affirmed the United States Court of Appeals for the Fourth Circuit's opinion upholding the FTC's ruling that state-action immunity was inapplicable.

Facts

The North Carolina State Board of Dental Examiners was established by state law to regulate the practice of dentistry. The Board creates and enforces a licensing scheme for dentists. Six of its eight members must be licensed, practicing dentists.

The lynchpin of this case are teeth whitening services. The North Carolina statutory scheme does not specify that teeth whitening is "the practice of dentistry." In the past, it was a service often offered by licensed dentists. Eventually, however, non-dentists began offering such services, often at kiosks located at shopping malls, and usually at prices lower than those charged by dentists.

After dentists complained to the Board, the Board opened an investigation, led by a practicing dentist member. The Board's chief operations officer remarked that the Board was "going forth to do battle" with non-dentists. The Board thereafter issued at least 47 official cease-and-desist letters to non-dentist teeth whitening service providers and product manufacturers. The letters directed the recipients to cease all activity constituting the practice of dentistry, warned that the unlicensed practice was a crime, and strongly implied (or expressly stated) that teeth whitening constituted "the practice of dentistry." Later, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the law and advising that the malls consider expelling violators from their premises. As a consequence, non-dentists stopped offering such services in North Carolina.

Enter the FTC. They brought an administrative complaint alleging that the Board's concerted action to exclude non-dentists from the market for teeth whitening services was anticompetitive and in violation of the FTC Act. The Board defended itself principally by arguing that as a state agency, its actions were immune from federal antitrust scrutiny, a defense the FTC rejected. It 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 whether teeth whitening in fact constituted the practice of medicine.

The Fourth Circuit affirmed the FTC in all respects. The Supreme Court granted certiorari.



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Analysis

For over 70 years, the Supreme Court has attempted to harmonize the reach of the antitrust laws with federalism and recognizing the powers of state and local governments. Beginning with its decision in *Parker v. Brown*, 317 U.S. 341 (1943), the courts have fleshed out the contours of a judicially created doctrine of state-action antitrust immunity. In *Parker*, the Supreme Court interpreted the antitrust laws to confer immunity on anticompetitive conduct by the states when acting in their sovereign capacity. The exemption is not unbounded. In fact, the Court reaffirmed just two years ago that “state action immunity is disfavored.” *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013). As *Parker* itself cautioned, “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.” *Parker*, 317 U.S. at 314.

When dealing with an actor that had been delegated authority by the state, the Court had established a two-part test in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*: “A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to all the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct.” 445 U.S. 97 (1980). The “clear articulation” requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” *North Carolina State Board of Dental Examiners*, slip op. at 9. The active supervision requirement demands, *inter alia*, “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.” *Id.* at 9. As the Court put it here, 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.” *Id.* at 10.

And that is what the majority evidently thought was happening here. The Board principally defended itself by arguing that as a bona fide state entity, it need only demonstrate the “clear articulation” prong of *Midcal*, and since it was a state agency, the “active supervision” requirement did not apply to it. The majority disagreed, noting that “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*’s supervision requirements was created to address.” *Id.* at 13. Justice Kennedy declared that “[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.” *Id.* at 14.

Since the Board did not contend that its anticompetitive conduct was actively supervised by the state, the Court concluded that the state action exemption was therefore unavailable.

The Court did not set forth bright-line standards as to what constituted “active supervision,” characterizing it as a “flexible and context-dependent” inquiry. It did note that active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. The Court identified a few constant requirements of 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 state supervisor may not itself be an active market participant.

Implications

There are dozens of state boards in dozens of states that are made up of market participants and regulate the markets in which their members participate. These boards and their actions — past and future — are likely to come under scrutiny. If history is prologue, the FTC has probably several other investigations pending that will lead to additional consent decrees. Industries will likely seek modifications in their state board schemes to insert “light touch” supervision that would provide the necessary antitrust protection.

In response to the Supreme Court’s decision, FTC Chairwoman Edith Ramirez issued a statement expressing pleasure “with the Supreme Court’s recognition that the antitrust laws limit the ability of market incumbents to suppress competition through state professional boards.” The FTC has a long-standing advocacy program in which it sends statement of opposition to state legislatures considering laws that limit practices to certain professionals, where unnecessary. The Supreme Court’s *North Carolina State Board of Dental Examiners* decision gives additional ammunition to the FTC’s advocacy and enforcement activities to open up services to lower cost providers.

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

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