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Antitrust ADVISORY ■

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U.S. Supreme Court Limits Availability of State Action Antitrust Immunity for Certain State Actors

On February 25, 2015, the U.S. Supreme Court, in a 6-3 decision, held that state agencies or boards controlled by active market participants cannot receive immunity from federal antitrust laws unless they are actively supervised by the state. The ruling, in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[1] exposes many state regulatory and licensing entities—including those that oversee medical professionals—to liability for alleged anticompetitive practices absent additional structural reforms.

Case Background

The North Carolina legislature created the State Board of Dental Examiners (the "board") as a state executive agency charged with regulating the practice of dentistry. By statute, at least six of the board's eight members are required to be actively practicing dentists, and the board's dentist members are elected by other practicing dentists. While the board has broad enforcement powers over licensed dentists, the board's authority over unlicensed people practicing dentistry is limited to seeking an injunction or referring the case to the state attorney general for criminal prosecution. The board's actions are only subject to review by another political entity when it promulgates regulations pursuant to its formal rulemaking powers.

In the 2000s, non-dentists in North Carolina began offering teeth whitening services at a lower cost than dentists who offered the same services, including many board members. This led to complaints to the board from dentists. The complaints focused on the low prices offered by non-dentists rather than any health and safety issues related to non-dentist teeth whitening. In response, the board began sending cease-and-desist letters directing the non-dentists to stop offering teeth whitening, stating that teeth whitening constituted the practice of dentistry and warning the non-dentists that the unlicensed practice of dentistry is a crime. As a result of these actions, non-dentists stopped offering teeth whitening in the state.

In 2010, the FTC filed an administrative complaint against the board, alleging that the board's actions were anticompetitive and a violation of federal antitrust laws. The board asserted a state action immunity defense.

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[1] *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, No. 13-534, 2015 WL 773331 (U.S. Feb. 25, 2015).

Under this doctrine, actions of the state as the "sovereign," such as those of the legislature or state supreme court, are automatically exempt from federal antitrust laws based on federalism concerns.[2] Other public actors not clearly considered the sovereign, including hospital authorities or municipalities, have been required to show that the state has articulated a clear policy to allow the anticompetitive conduct (the "clear articulation" requirement) in order to receive antitrust immunity.[3] And a private entity working with the state could receive such immunity if its conduct also was actively supervised (the "active supervision" requirement).[4]

The FTC determined that the board was a public/private hybrid entity required to meet both the clear articulation and active supervision tests. The FTC rejected the argument that the board, as a state executive agency, should be treated as a sovereign actor automatically entitled to immunity under *Parker*. The FTC also rejected the argument that the board, like a municipality, should only be required to show clear articulation. The FTC reasoned that, even if more traditional agencies should only have to show clear articulation, the fact that the board was composed of active market participants made the policy justifications underlying the exemption of some non-sovereign actors from the active supervision requirement inapplicable. On the merits, the FTC determined that, even if the board could show clear articulation, it could not show active supervision and therefore was not entitled to immunity. The U.S. Court of Appeals for the Fourth Circuit affirmed in all respects.[5]

The Supreme Court's Ruling

The Supreme Court, in an opinion by Justice Kennedy, affirmed the Fourth Circuit's ruling. It held "that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity." The Supreme Court first determined, with little analysis, that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." The dissent, authored by Justice Alito, would have determined that the board was an immune sovereign actor and ended the inquiry there.

After determining the board was non-sovereign, the Court explained that the justifications for exempting some substate actors from the active supervision requirement—lack of a private interest in the regulated field and political accountability—did not apply to the board. Instead, the Court determined that, for antitrust purposes, the board was more akin to a private trade association than a traditional state agency. Consequently, the board was required to meet both the clear articulation and active supervision requirements to be entitled to immunity. And because "the board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable

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2 *Parker v. Brown*, 317 U.S. 341 (1943).

3 *See FTC v. Phoebe Putney Health System, Inc.,* 133 S.Ct. 1003 (2013) (finding Georgia hospital authority law did not satisfy this standard).

4 *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980).

5 *N. Carolina State Bd. of Dental Examiners v. F.T.C.,* 717 F.3d 359 (4th Cir. 2013).

official," and made no argument that its activities were in fact actively supervised, the board failed to make the required showing.

While the Court clarified the active supervision requirement applies to state agencies controlled by active market participants, the Court provided limited guidance on what the terms "active supervision," "active market participant" and "control" mean in this context. The Court identified four "constant requirements" for active supervision: (1) substantive review of the decision, (2) the power to veto or modify particular decisions, (3) an actual decision by the supervisor, and (4) a supervisor who is not an active market participant. Beyond that, the Court stated that whether supervision is adequate "is flexible and context-dependent" and depends on "whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy rather than merely the party's individual interests.'" The Court did not attempt to define "control" or "active market participant," leading the dissent to remark that the majority "has headed into a morass." For example, it questioned whether functional "control" by market participants might be sufficient to prevent antitrust immunity even if numerical control of a state board could not be found.

Conclusions and Implications

1. The Supreme Court's decision creates some uncertainty in the short term about the antitrust status of state agencies and boards with a significant number of active market participants, which typically are entities overseeing professionals such as doctors, dentists, chiropractors, nurses, pharmacists, auctioneers, optometrists, veterinarians, lawyers, architects, funeral directors, accountants, plumbers, general engineers, technical professionals, real estate brokers, social workers and appraisers.[6] These agencies and their practitioner members should be aware of the decision and obtain legal advice before taking actions that could be considered potentially anticompetitive (and those affected by them should be aware of the potential to challenge them on antitrust grounds). Although there may not be a clear path to immunity, actions by such entities may still be defensible under traditional antitrust principles.

2. While the parameters are not entirely clear, the decision also provides a path forward for states that want to authorize their executive agencies and bodies to take actions that limit competition. First, the state, through legislative or administrative reform, can implement procedures by which a politically accountable actor reviews potentially anticompetitive agency actions. The Court's decision suggests that this review need not be elaborate or burdensome, and many states have created analogous oversight processes intended to create federal antitrust immunity with programs such as health care certificates of public advantage. Second, states can restructure agencies so that "control" of an agency does not rest with active market participants. This second option may provide less certainty because the Court did not define "control" or "active market participant." And the FTC—which a decade ago made narrowing the state action doctrine a priority and has now won two cases on the subject at the Supreme Court in

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[6] *See* Brief of *Amici Curiae* State of West Virginia and 22 Other States in Support of Petitioner, at p. 9 (noting the prevalence of state regulatory boards controlled by active market participants as part of argument that imposition of active supervision requirement would infringe on states' "sovereign authority to organize their own agencies as they see fit"). As the dissent observes, this form of board staffing has existed for as long as there have been professional regulatory boards.

three years—has shown a willingness to police its boundaries. (The dissent suggested that as a result of the Court's decision, states also might decrease the role of market participants on state oversight entities, impairing their ability to have the technical expertise necessary to regulate certain professions.)

3. The long-term practical impact of the Court's decision may be limited. Like private trade associations, state agencies controlled by active market participants remain free to regulate conduct in procompetitive ways. The state action immunity question only addresses whether these agencies should have free rein to act in potentially anticompetitive ways. States that want their agencies to have the power to restrict competition for public purposes have options to ensure that they can continue to do so.

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