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Supreme Court Requires State Supervision of Professional Boards to Secure Antitrust Immunity

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I. INTRODUCTION

In an important decision, *North Carolina State Board of Dental Examiners vs. FTC*,[2] the U.S. Supreme Court has held that, where a state professional regulatory board is controlled by active market participants in the profession the board regulates, the board cannot claim "state action" antitrust immunity unless it is actively supervised by other state officials who are not active market participants. The opinion has broad implications for state professional boards hoping to avoid antitrust liability and the entities they regulate seeking either to challenge or to invoke their authority.

Having represented the North Carolina State Board in the Supreme Court, Jones Day is especially familiar with the issues and implications raised by the case. *North Carolina Dental*, along with *Phoebe Putney*,[3] is the second time in three years that the Court has rejected a claim of state-action antitrust immunity.

II. BACKGROUND

The North Carolina Legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in the State." The Board is empowered to create, administer, and enforce a licensing system for dentists, including bringing actions in the name of the State of North Carolina to enjoin persons from unlawfully practicing dentistry. Of the Board's eight members, six must be licensed, practicing dentists, who are elected by other North Carolina licensed dentists.

Starting in 2006, the Board sent official cease-and-desist letters to non-dentist teeth-whitening service providers and product manufacturers in the state. The letters stated or implied that teeth-whitening constitutes "the practice of dentistry" and warned that the unlicensed practice of dentistry is a crime. Non-dentists thereafter left the market.

In 2010, the Federal Trade Commission ("FTC) filed an administrative complaint challenging the letters as an anticompetitive practice and unfair method of competition under § 5 of the Federal Trade Commission Act. The FTC argued that the Board's actions amounted to concerted action to exclude non-dentists from the North Carolina teeth-whitening services market.

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[2] *North Carolina State Board of Dental Examiners vs. FTC*, No. 13–534 (U.S. Feb. 25, 2015).

[3] *FTC v. Phoebe Putney Health System, Inc.*, (2013).

The Board moved to dismiss on the grounds that it was a state actor and therefore immune from antitrust scrutiny under Supreme Court precedents, beginning with *Parker*,[4] that have interpreted the federal antitrust laws, in light of principles of federalism, not to apply to anticompetitive actions taken by the states in their governmental capacities as sovereign regulators. Under this line of cases, state actors are immune from antitrust scrutiny so long as they are acting pursuant to a clearly articulated and affirmatively expressed state policy of displacing competition with regulation.

The Court further held in *Midcal*[5] that *Parker* immunity extends to non-state actors implementing such a clearly articulated state policy, but only where they also are actively supervised by the State. The Court recently observed in *Phoebe Putney* that *Midcal's* active-supervision requirement is a particularly important condition when non-state actors have "an incentive to pursue their own self-interest under the guise of implementing state policies."

The FTC denied the Board's state-action defense. The FTC, assuming without deciding that the Board acted pursuant to a clearly articulated state policy to displace competition, reasoned that, because the Board was controlled by market participants, it should be treated as a "public/private hybrid" and subjected to the active-supervision requirement, which it failed to satisfy. In 2013, the Fourth Circuit affirmed in all respects.

III. SUPREME COURT DECISION

The question presented to the Court was whether the FTC erred in extending the active-supervision requirement that applies to private parties to a state regulatory board simply because the board's members are also active market participants. In a 6 to 3 ruling penned by Justice Kennedy, the Court affirmed the FTC's decision: "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity."

The Court reasoned that the supervision requirement is designed to obtain "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." And the Court found that "state agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirement was created to address." The Court cautioned that its "conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals."

The Court thus emphasized that a board's actual structure, and not its "formal designation," determines whether supervision is required. Regardless of the designation, the analysis turns on "the risk that active market participants will pursue private interests in restraining trade." "Immunity for state agencies … requires more than a mere facade of state involvement, for it is necessary … to ensure the states accept political accountability for anti-competitive conduct they permit and control." In reaching this conclusion, the Court did not, as

[4] *Parker v. Brown*, 317 U. S. 341 (1943).

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

some commentators had suggested it might, base its analysis on whether Board members were elected by their peers or appointed by elected officials.

In response to concerns that antitrust liability would discourage professionals from serving on state regulatory boards, the Court noted that states can defend and indemnify board members, and further suggested that "board members, may, under some circumstances, enjoy immunity from damages liability." Alternatively, the Court noted, states can provide active supervision.

The court did not review a specific supervisory system, as the Board had not argued that it was actively supervised. Justice Kennedy nonetheless, drawing upon *Patrick v. Burget*[6] and *FTC v. Ticor*,[7] provided useful guidance. He stated that "the inquiry regarding active supervision is flexible and context-dependent" and "will depend on all the circumstances of a case." Active supervision does not require "day-to-day involvement in an agency's operations or micromanagement of its every decision," but must "provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'"

Justice Kennedy further noted that the Court has identified "a few constant requirements of active supervision." A supervisor must not be an active market participant; must "review the substance of the anticompetitive decision, not merely the procedures;" "have the power to veto or modify particular decisions to ensure they accord with state policy;" and make an actual decision, not just have an opportunity to do so, as "mere potential for state supervision is not an adequate substitute for a decision by the State."

Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined the majority opinion. Justice Samuel Alito, joined by Justices Antonin Scalia and Clarence Thomas, dissented.

IV. IMPLICATIONS

The Court's opinion is a significant development. As the dissent stressed, without dispute by the majority, state professional regulatory boards throughout the country have long been composed of a majority of active market participants, yet the Court had never applied the active-supervision requirement to such boards (nor had any lower court until the Fourth Circuit's decision in this case). The new regime has important implications for both regulators and the regulated.

As for regulators, states that want to avoid antitrust liability for their professional boards will have three options:

1. States could reduce the number of active market participants serving on their boards. But of course doing so risks diminishing the expertise of the board members. That risk potentially can be mitigated if States select retired professionals, academics in the field, or perhaps even market participants who suspend their practice while they serve on the

[6] *Patrick v. Burget*, 486 U. S. 94, 100 (1988).
[7] *FTC v. Ticor Title Insurance Co.*, 504 U. S. 621 (1992).

board. However, doing so may well prompt additional litigation over whether the active-supervision requirement should further be extended to boards constituted in this manner.

2. States could actively supervise those boards that are controlled by active market participants. Whether states currently supervise those boards may vary across professions and states. Some state professional boards may already be subject to active supervision, such as state bars subject to extensive oversight by state supreme courts; others may be subject to much less oversight, especially for professions that are further from the public and political eye like cosmetologist, barber, and florist boards. Likewise, states will probably differ in whether they want to begin actively supervising additional boards, depending both on their general resource constraints and on their specific ability to meaningfully supervise the work of market participants in a given field.
3. States can give up state-action immunity for their professional boards if they believe that they can sufficiently limit their boards' exposure to substantive antitrust liability for their regulatory conduct. Whether they can do so will turn on the specific types of activity that the boards perform. One important question will be whether such boards' most traditional function—granting and denying licenses to practice for specific individuals—can give rise to antitrust liability on, for example, a group boycott theory. And more systematic actions by boards—such as general rules and regulations attempting to exclude an entire set of competitors from a market—may bring more significant antitrust exposure.

As for market participants who are regulated by these boards, the Court's novel ruling brings both potential benefits and costs. On the one hand, the decision provides a potential basis for regulated parties to challenge a state professional board's unfavorable anticompetitive decisions if the board is controlled by active market participants and has inadequate state supervision.

On the other hand, the decision potentially exposes regulated parties who lobby state professional boards to antitrust liability. So-called *Noerr-Pennington* immunity, based on the First Amendment, protects persons who petition the government from liability for the direct anticompetitive effects of any laws enacted due to their successful petitions as well as for any indirect anticompetitive effects that flow from their attempts to influence lawmakers. But given that the Court's decision here treated state professional boards as analogous to private trade associations for purposes of state-action immunity, courts may similarly conclude that lobbying such boards is more analogous to lobbying a private standard-setting organization for purposes of *Noerr-Pennington* immunity.