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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Court Demands State Oversight Over Agencies for Antitrust Immunity

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On Feb. 25, 2015, the U.S. Supreme Court upheld the Fourth Circuit's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, finding the state's Board of Dental Examiners capable of conspiring and lacking immunity under the state-action doctrine. The board had appealed the Federal Trade Commission's decision below that the board conspired to prevent non-dentists from offering teeth whitening services in the State of North Carolina. The board argued that as a state agency, it enjoyed immunity from federal antitrust laws.[1]

It remains to be seen what ripple effect, if any, will occur from this decision. But many states allow practitioners to be heavily involved in the regulatory oversight of their fields, often with little active government oversight. As a result of the court's opinion, many industries—e.g., cosmetology, therapy, taxi/limousine services, and even the practice of law—may have to rethink their professional regulatory regimes currently in place nationwide.

Background

The North Carolina Dental Practice Act established the Board of Dental Examiners, which consists primarily of licensed dentists actively engaged in the practice of dentistry, as "'the agency of the State for the regulation of the practice of dentistry.'"[2] The act gives the board broad authority to create, administer and enforce a licensing system for dentists.[3] The board possesses less authority over enforcing the unlicensed practice of dentistry, however, and may file suit to enjoin such practice just like "'any resident citizen.'"[4]

The board is also given the power to promulgate rules and regulations governing the practice of dentistry, but such regulations must be approved by a separate Review Commission appointed by the Legislature. Importantly, the act itself does not define teeth whitening as "the practice of dentistry."[5]

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The actions at issue before the court were three steps taken by the board starting in 2006. Although the board could have passed a regulation actually defining teeth-whitening as the practice of dentistry and had that regulation approved by the Review Commission, it never did.[6] Thus, without passing such a rule, the board first issued at least 47 cease-and-desist letters to non-dentists engaging in teeth-whitening, warning that teeth-whitening constitutes the practice of dentistry and that the unlicensed practice of dentistry is a crime.[7] Second, the board convinced the state board governing Cosmetic Art Examiners to deter cosmetologists from providing teeth-whitening services.[8] Third, the board sent letters to mall operators, informing them that kiosk teeth whiteners violated the law and recommending that the malls expel such vendors.[9] In 2010, the FTC filed an administrative complaint against the board for these actions, alleging a conspiracy to exclude non-dentists from the teeth-whitening market.[10]

Lower Courts' Decisions

Within the FTC, an ALJ denied the board's motion to dismiss, which had invoked state-action immunity since the board, by statute, is a state agency. On appeal, the FTC upheld the ruling, holding that such a regulatory board must be actively supervised by the state in order to claim such immunity.[11]

The FTC ultimately ordered the board to rectify its past actions by stopping the sending of cease-and-desist orders and informing all prior recipients of such letters that they could seek a declaratory ruling against the board in court. The U.S. Court of Appeals for the Fourth Circuit upheld the FTC's decision, and the Supreme Court granted certiorari.

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The Supreme Court's Decision

As a threshold matter, the court observed that, when acting in the state's sovereign capacity, state conduct enjoys immunity from federal antitrust laws so that these laws do not risk inhibiting values which the state may deem fundamental.[12] By contrast, limits on state immunity are most important where the state has chosen to delegate its regulatory powers to active participants in the market. As such, "a nonsovereign [regulatory] actor controlled by active market participants" may only enjoy immunity if 1) the state clearly articulates a policy allowing the potentially anti-competitive action in question and 2) the state provides active supervision of the conduct.[13] These two limits serve to determine whether the anticompetitive action in question is actually the policy of the state, or whether the market participants have instead acted to further their own interests.[14]

A Clearly Articulated Policy. The court explained that a state policy is clearly articulated where the state foresaw the potential anticompetitive effects as consistent with the policy goals of the state. The displacement of competition should be the "'inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.'"[15] Yet, the court recognized that this first step, on its own, cannot adequately ensure that the actions taken by the nonsovereign regulators will remain in line with the stated policy. Thus, the court's decision also requires active supervision.

Active Supervision. The active supervision requirement serves to prevent active market participants, cloaked with sovereign power, from pursuing their "'own self-interest under the guise of implementing state policies.'"[16] Hence, there must be "'[a]ctual state involvement, not deference to private pricefixing arrangements under the general auspices of state law.'"[17]

In order to achieve active supervision via a mechanism providing "'realistic assurance'" that the actions of the non-sovereign entity promote state policy instead of self-interests, the court set forth a number benchmark guidelines.[18] First, the supervising entity must review the actual substance of the potentially anti-competitive decisions, and not just the adequacy of the procedures.[19] Second, the supervisor must hold the power to reject or amend particular decisions to assure they are in accordance with state policy.[20] Third, the "'mere potential for state supervision'" is insufficient; the supervision must be active rather than potential.[21] After these guideposts, as a general rule, the adequacy of supervision will depend on the circumstances of the case.

The court made clear that "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."[22] The court then gave guidance to states, albeit vague, in order to ensure immunity is granted where the state intends that effect. States should "adopt[] clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision."[23]

A Lack of Supervision. Applying the law to the facts, the court determined that the act did not define teeth-whitening as the practice of dentistry, nor did teeth-whitening even exist at the time the act was passed.[24] Thus, while the board interpreted the North Carolina Dental Practice Act to include such teeth-whitening services, the interpretation was never overseen by the Review Commission before the board took the anticompetitive actions against non-dentist teeth-whitening service providers. Further, the court observed that the board's actions were tied more directly to complaints from dentists about price competition from the non-dentists, rather than any issues of safety or public concern.[25]

Reaction

North Carolina's framework for overseeing the board actually could warrant antitrust immunity, so long as the framework were actually put into action. Even though the act did not narrowly define the field of dentistry, this alone would not defeat antitrust immunity if the non-sovereign board's interpretations and implementations of the act were actively supervised. Here, the board's interpretation should have been overseen by the Review Commission under the direction of the act, so the act was not defective on its face. Instead, the particular actions of the board were insufficiently reviewed in this instance.

To summarize, had the Review Commission (a) reviewed the interpretation of teeth-whitening as the practice of dentistry, with the dentists showing that public policy and health required the skill of dentists to perform the service, and (b) overseen the three actions taken by the board, then nothing in the court's opinion would strip the board's actions of antitrust immunity. Accordingly, many states may need to review not only the laws on the books, but also the actual implementation of such laws as they relate to regulatory boards, both to protect the public from anticompetitive actions by self-interested market participants and to protect board members, who are likely well-meaning public servants, from antitrust liability.

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Potential Ramifications

A Lack of Clarity. The court's decision likely holds ramifications for many state regulatory agencies, which may now have to change their structure. In dissent, Justice Samuel Alito noted that, as a result of the court's decision, "[s]tates may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts."[26] Alito focuses on this latter point, arguing that the majority opinion does not clearly instruct states how to properly construct antitrust-immune regulatory agencies. For example, does an "active market participant" include a practitioner who briefly leaves practice to serve on a board but intends to return? And what is the proper scope of activities in which a board member may not engage during board service: "[w]ould the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services?"[27]

The Legal Profession. Interestingly, the decision could soon impact the legal profession itself. Indeed, the court reasoned that the lack of supervision in *Goldfarb*[28] by the Virginia Supreme Court over the Virginia State Bar (also a state agency) was the principal reason for denying immunity in that case. In *Goldfarb*, the Supreme Court found that a minimum fee schedule proscribed by the Virginia State Bar constituted anticompetitive conduct; this conduct did not warrant state action immunity because the law did not call for such a fee schedule and the Virginia Supreme Court did not adequately supervise the state bar's actions.

Further, writing as amici curia, Legalzoom.com and a number of law professors wrote of the "ongoing and worsening access-to-justice crisis in the United States…caused, in large part, by overregulation of the legal market.…[by] [b]ar associations, similar to the dental board[, which] are often run by active participants in the very market they are empowered to regulate and control, without meaningful state policy direction or active oversight."[29] As such, many currently accepted policies in the legal profession, such as the issuance of cease-and-desist letters for the unauthorized practice of law, could lack antitrust immunity.

Clearly, state bar associations should ensure that their activities and practices comply with the directives of the court, but the legal profession provides a particularly difficult profession for the government to oversee without the use of lawyers. State bar associations often are overseen by the Supreme Court or highest court in the state. But the judges and justices on these courts are themselves lawyers, and potential active participants themselves under the court's ruling. The dissent hinted at this idea when it questioned how to define an active market participant.

Should a judge, who is not currently practicing law, qualify as an inactive market participant? And if the courts are too self-interested in the legal profession to serve as independent supervisors, then who can handle the task? If lawyers are not only the judges, but also the legislators, the executives, and the heads of agencies, then how can there ever be inactive market participants to oversee the legal profession? Could it be that the profession that has built and supported the current legal regime is now incapable of independently and objectively policing itself?

The lack of guidance by the court as to the definition of an "active market participant," causes a slight dilemma. Courts should be entrusted with the supervision of the state bar associations, just as courts and judges are similarly called upon as objective triers of fact and interpreters of law on a day-to-day basis throughout the country. However, the fact still remains: Even with the judiciary actively supervising state bar associations, this may still leave the fox guarding the courthouse.

Ratification. The court also did not address whether later state ratification of a prior policy provides retroactive immunity in these cases. This leaves liability for past actions, prior to the court's clarification, unknown in the event that states later ratify certain actions to assure compliance with the state-immunity antitrust doctrine.

Conclusion

All professional regulatory boards will likely face scrutiny in light of the court's recent decision. Legislators must take immediate corrective action to ensure clear statutory directives, clear methods of state supervision, and actual supervision over these boards. Further, within the legal profession, legislators must determine whether courts can adequately supervise state bar associations under the new holding, and should install additional safeguards in the event that a later decision decides that they cannot.

1. *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, No. 13-534, 2015 WL 773331 (Feb. 25, 2015).
2. Id. at *5 (citing N.C. GEN. STAT. ANN. §90–22(b) (West 2013)).
3. See N.C. GEN. STAT. ANN. §§90–29 to 90–41.
4. *Dental Exam'rs*, 2015 WL 773331, at *5 (quoting N.C. GEN. STAT. ANN. §40.1).
5. See id.
6. See id.
7. See id. at *6.
8. See id.
9. See id.
10. See id.
11. See id. (citing Appendix to Petition For Certiorari 49a.).
12. See id. at *7 (noting the need to balance competition with federalism).
13. Id. at *8 (citing *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97, 100 (1980)).
14. See id. at *10.
15. Id. at *9 (quoting *F.T.C. v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1013 (2013)).
16. Id. at *11 (quoting *Phoebe Putney*, 133 S. Ct. at 1013).
17. Id. at *11 (alteration in original) (citing *F.T.C. v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176 (1992)).
18. *Dental Exam'rs*, 2015 WL 773331, at *15 (quoting *Patrick v. Burget*,, 108 S. Ct. 1658, 1663 (1988)).
19. Id. at *15 (citing *Patrick*, 108 S. Ct. at 1663).
20. See id.
21. See id. (quoting *Ticor*, 112 S. Ct. at 2172).
22. Id. at *12; see also *Midcal*, 445 U.S. 97 (1980).
23. Id. at *14.
24. Id.
25. See id. Such analysis seems irrelevant, however, because even if the doctors had acted out of clear interests to public safety, the holding of the case seems to nonetheless require a court to find a lack of immunity due to the lack of state oversight.
26. Id. at *21 (Alito, J., dissenting). The board's Chief Operations Officer Bobby D. White echoed these sentiments, stating that the decision will require change from "virtually every professional regulatory board in the country." Melissa Lipman, "Justices Say State Boards Need Review For Antitrust Shield," LAW360 (Feb. 25, 2015), http://www.law360.com/articles/608879/justices-say-state-boards-need-review-for-antitrust-shield.
27. *Dental Exam'rs*, 2015 WL 773331, at *21-22 (Alito, J., dissenting).
28. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).
29. Brief of Legalzoom.com, Inc., Responsive Law, Fileright LLC, Justanswer LLC, Justia Company, Shake, Inc., and Law Professors as Amici Curiae in Support of Respondent, *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 2014 WL 3895926, at *6 (2014) (alleging that "[t]he dental board's letter campaign closely resembled—indeed, was modeled after—the North Carolina State Bar's enforcement practices in the legal services market").