

Antitrust Trade and Practice

Expert Analysis

Uber Seeks Antitrust Scrutiny Of Taxicab Commission

Uber, well-known as a disruptive force in the vehicle-for-hire industry, has decided to cause some disruption in the world of antitrust. In September, Uber filed an antitrust lawsuit against the St. Louis Metropolitan Taxicab Commission (MTC), the organization's commissioners and a number of St. Louis taxi companies. The suit, *Wallen v. St. Louis Metropolitan Taxicab Commission*, alleges those groups' regulatory conduct constitutes an illegal combination in violation of Section 1 of the Sherman Act.¹ Central to Uber's claim is the U.S. Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.² Uber, relying on *N.C. Dental*, alleges the MTC's conduct is not immune from antitrust scrutiny because active market participants control the MTC and no government agency or official actively supervises its conduct.

The MTC recently moved to dismiss the lawsuit claiming that active market participants do not control the commission, and therefore state-action immunity applies to the antitrust claims even without active supervision from a government body.³

In March, we wrote about the Supreme Court's *N.C. Dental* decision, predicting possible ripple effects on the professional regulatory regimes of several industries, including vehicle-for-hire services.⁴

Uber's case is one of several testing the implications of the decision. The District Court will have to determine whether the MTC is controlled by active market participants and as a result, likely subject to antitrust scrutiny. Below, we discuss some of the issues the court will have to consider and address possible implications.

'North Carolina Dental'

To recap, in *N.C. Dental* the Supreme Court found that North Carolina's dental regulatory body, comprised of a majority of active market participants, was not immune from antitrust scrutiny.⁵ It held that if a state "rel[ies] on active market participants as regulators" state-action immunity from the antitrust laws will only apply where the state also provides active supervision of those market participants. Thus, where such participants control a regulatory

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board, that board ceases to be a state actor, and as a result, antitrust immunity only applies where the state clearly articulates a policy of regulation and actively reviews and approves policies to assure that the conduct promotes state policy, not just private interests.

In *N.C. Dental*, neither party disputed that the dental board was controlled by active market participants as a majority of the board's members were statutorily required to be licensed professionals in the regulated field. As a result, the court's opinion discussed how a

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state can articulate policy allowing a potentially anti-competitive action and actively supervise a board. It did not guide courts on who qualifies as an "active market participant" and when those participants constitute a "controlling number" of a regulatory body.

Writing in dissent, Justice Samuel Alito suggested this lack of guidance would create practical problems with far-reaching effects for state regulation of professions.⁶ For example: What is a "controlling number"? If control requires something different than a simple majority, a strong voting bloc or an obstructionist minority group could also plausibly "control" the board. Similarly, who is an "active market participant"? Are board members who withdraw from practice in an industry but typically return once their term ends active participants? And how much participation makes a person "active"? While *N.C. Dental* presented an easy answer to whether active market participants

controlled the board, Alito warned that with other state boards, "[t]he answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies."

'Wallen'

Wallen—Uber's lawsuit against the MTC—follows on the heels of *N.C. Dental* and raises exactly the questions that Alito posed in his dissent. To avoid state-action antitrust immunity, Uber argues that active market participants control the MTC, and thus, under *N.C. Dental*, the state must clearly articulate a policy to displace competition with regulation and actively supervise the commission, both of which it has not done.⁷ In its motion to dismiss the claims, the MTC argues that active market participants do not control the MTC, and thus, active state supervision is not required.⁸

Differences from '*N.C. Dental*.' *N.C. Dental* presented clear issues of active participation and control of the regulatory body. As discussed above, the North Carolina dental statute required a majority of the dental board's members to be active market participants.⁹ In *Wallen*, the issues are less clear. Four of nine commissioners must be active market participants (i.e., either taxi drivers or taxi cab company owners/operators). However, the MTC's enabling statute provides that each of the "five remaining commissioners...shall not be a representative of the taxicab industry or be the spouse of any such person nor be an individual who has a direct material or financial interest in such industry."¹⁰ Also, unlike *N.C. Dental*, members of the MTC are appointed by city or county chief executives, not members of the regulated profession.¹¹

Uber's Argument. Given these facts, Uber made two allegations concerning control: First, it alleges one of the non-representative commissioners had lobbied on behalf of taxi companies in the past and has close personal relationships with taxi industry participants.¹² Thus, that commissioner provides the fifth "pro-taxi vote" necessary for majority control of the MTC. Alternatively, Uber alleged that even without that fifth vote, active market participants have controlled individual votes at about half the MTC's meetings either because the market participants constituted a majority of members present or at least one market participant's vote was required to reach the quorum necessary to take any action.

FTC Guidance

Uber's arguments may have received a boost from recently issued FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants.¹³ In its guidance, the FTC advances a broad understanding of who should be considered an active market participant and how it would define a controlling number of those participants.

Active Market Participants. The FTC stated it will consider regulatory board members active participants whether or not they are directly affected by the challenged restraint and even if the person "temporarily suspends her active participation in an occupation" to serve on the board. Moreover, the method of appointment—whether by elected officials or members of the licensed profession—is not determinative of whether the person is an active market participant.

Controlling Number. The FTC also stated that a controlling number need not constitute a majority of actual decision makers. Market participants can control "either as a matter of law, procedure or fact." The FTC listed several factors that may indicate control: the structure of the board, whether active market participants have actual or effective veto power, differences in the level of participation, engagement or authority of non-market participant members and whether active market participants in fact have exercised, controlled or usurped the decision-making power of the board. The FTC's guidance also notes that active market participants can control either the entire regulatory board or a specific decision made by the board.

Potential Implications

Uber and the FTC take a broad view of both the active market participant and control requirements. If adopted, these positions could result in extensive antitrust review of state board decisions in any number of industries.

How Active a Participant? Both Uber and the FTC suggest that even state board members not currently active could be considered active market participants if it is unclear whether the participant permanently intends to cease active participation or if he has close ties with the regulated industry.¹⁴ Uber advances this argument even though the MTC's enabling statute prohibits five of nine members from holding a direct material or financial interest in the industry.

This approach may appeal to courts because it looks beyond formalities and acknowledges the potential for regulatory capture on state boards. In turn, if inactive market participants or those with only peripheral attachment to a regulated industry count as controlling active market participants, it would become much more difficult for state boards to avoid antitrust challenge. But many states understandably rely on practitioners with technical expertise to regulate their own profession, and these individuals will almost inevitably have some tie to active market participants. Moreover, in many circumstances, it may not be possible or desirable to have technical professions regulated by lay individuals. Without clear lines dividing participants and non-participants in an industry, it will be very challenging for states to rely on those with experi-

ence to regulate an industry without subjecting their boards to antitrust review or actively supervising the board.

As a practical matter, the issue is not easy to resolve in a principled way. For example, a current or former lobbyist for a regulated industry might fairly be considered an active participant, but what about those with purported "close personal relationships" to market participants based on past history? This broad definition might result in long-retired members of an industry serving on state boards being construed as market participants. In *Wallen*, the MTC maintained a strong restriction which prohibited a majority of board members from maintaining a direct or financial interest in the regulated industry. Yet, if courts decide even those who meet such restrictions may be market participants, a fact-intensive inquiry into active participation might be inevitable.

Further, both Uber and the FTC maintain that

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even where the legislature maintains responsibility for selecting members of a state board, the method of selection does not determine whether the person is an active market participant. As the FTC explains, a licensed dentist should be considered an active market participant regardless of whether elected to a state dental board by the state's licensed dentists or appointed by the governor.¹⁵ The FTC does not address, however, whether appointment by an elected official should be a factor in whether a board member who is not currently an active industry member should be considered a non-participant. Such a consideration might be appropriate where, as in *Wallen*, the elected official has a responsibility not to appoint commissioners if they have direct ties to the regulated industry.

When Do Active Participants Control? The FTC and Uber both suggest the control inquiry cannot be governed merely by the state board's structure and must account for how the board functions. The extensive list of factors for consideration, and the fact-intensive nature of some of those inquiries, suggests the control inquiry would inevitably be made ad hoc. To that end, the FTC suggests that where non-market participants "routinely defer to the preferences" of active participants, the active participants may control. It also suggests that differences in participation or engagement levels between market and non-market participants might also be enough to suggest the market participants control. Uber raised this issue in its complaint against the MTC, noting that few meetings are attended by all commissioners and suggested that "taxi representatives" are more likely to take an active interest in meetings.¹⁶

An ad hoc standard presents similar difficulties to the standards proposed for active participants.

From the state's perspective, it makes it challenging to set up a committee immune from antitrust scrutiny even when it intends to do so. While a state legislature can control the structure of its boards, it cannot legislate board members' level of interest, engagement or expertise. The issues are exacerbated if the control inquiry is applied to each decision, as suggested by both the FTC and Uber. Potential litigants can challenge a decision of little import to the board when made and argue that because certain members were not present at the meeting, or even more subjectively, failed to inform themselves on the issues, market participants controlled the decision.

Conclusion

We suspect that most readers are unaware that their (or, often, their children's) Uber rides are at the heart of a complex antitrust issue emanating from the Supreme Court. Yet if Uber's arguments are credited, regulatory boards of hundreds of occupations subject to various licensing regimes may need to be reconstituted in the wake of litigation following *N.C. Dental*.

While most regulatory activity should not implicate antitrust concerns, it is prudent for state boards to regulate with knowledge that antitrust challenge is possible. Further, in this uncertain climate, states looking to minimize litigation risk may decide to limit the number of active participants to undermine any argument that they control or provide active supervision of its regulatory boards. Finally, it would be helpful if courts could provide objective criteria for state regulatory boards to follow if they wish state action antitrust immunity to apply—a challenge easier to highlight than resolve.

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1. Compl. ¶9, *Wallen v. St. Louis Metro. Taxicab Comm'n*, Case No. 4:15-cv-01432 (E.D. Mo. Sept. 18, 2015).
2. 135 S. Ct. 1101 (2015).
3. Mot. to Dismiss at 8-9, *Wallen* (Oct. 16, 2015).
4. See Shepard Goldfein & James A. Keyte, Court Demands State Oversight Over Agencies for Antitrust Immunity 253 N.Y.L.J. 47 (March 12, 2015) reprint available at <https://www.skadden.com/sites/default/files/publications/070031520Skadden.pdf>.
5. *N.C. Dental*, 135 S. Ct. at 1106-09.
6. *N.C. Dental*, 135 S. Ct. at 1122 (Alito, J. dissenting).
7. *Wallen*, Compl. ¶9.
8. *Wallen*, Mot. to Dismiss at 6-7, 9.
9. *N.C. Dental* at 1108 (noting that six of eight Dental Board members were required to be licensed, actively practicing dentists and a seventh must be a licensed and practicing dental hygienist).
10. Mo. Ann. Stat. §67.1806 (West).
11. *Wallen*, Mot. to Dismiss at 5.
12. *Wallen*, Compl. ¶48.
13. Fed. Trade Comm'n, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (October 2015) available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.
14. *Wallen*, Compl. ¶48-49.
15. FTC at 7.
16. *Wallen*, Compl. ¶¶53-58.