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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Recent Developments In State Action Immunity

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In the past several years, the doctrine of state action immunity has been a target for reform by judges, scholars, and policymakers across the country. After the U.S. Supreme Court issued decisions in 2012 and 2015 heightening judicial scrutiny of state action immunity, bipartisan efforts at both the state and federal levels have emerged in an attempt to minimize the potential for misuse of state action immunity, particularly among state professional licensing boards. With the Supreme Court set to hear oral arguments this month in yet another case involving state action immunity, further reform may be on the horizon.

Originally established in 1943 by the Supreme Court in *Parker v. Brown*, state action immunity exempts state governments from antitrust scrutiny under the Sherman Act. In its 1980 decision in *California Retail Liquor Dealer Ass'n v. Midcal Aluminum*, the Supreme Court established the modern two-part test for courts to use in determining whether anticompetitive actions taken by state and local regulators will receive state action immunity. Under the *Midcal* test, courts will grant immunity to regulations that displace competition so long as the regulator (1) is acting pursuant to a clearly articulated state policy, and (2) receives active supervision from the state government.

Renewed Supreme Court Interest Prompts the Drive For Reform

In 2012 in *FTC v. Phoebe Putney Health Systems*, the Supreme Court declined to extend state action immunity to a Georgia state-authorized hospital's attempted acquisition of the only other hospital in its county. The Supreme Court signaled its skepticism towards immunizing actions pursued by entities under the supervision of state regulators that appear to cause competitive harm without providing any corresponding public benefit. The Supreme Court's most recent decision in the area of state action immunity in 2015, *North Carolina State Board of Dental Examiners v. FTC* (*NC Dental*), further heightened judicial scrutiny of regulatory licensing agencies seeking state action immunity, particularly those which are controlled by active market participants, such as state professional licensing boards.

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State licensing boards are established by state governments to regulate a specific industry, but many are largely autonomous and given broad mandates to regulate. Prior to *NC Dental*, they were largely immunized

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by *Parker* and its progeny. A 2014 study by law professors Aaron Edlin and Rebecca Haw found that nearly 800 professions (comprising nearly one-third of American workers) require a state license to legally perform the job, and concluded that state licensing boards are often controlled by active market participants who use their state-granted authority to insulate themselves from increased competition. Edlin and Haw also highlighted various economic studies claiming that such widespread licensing was estimated to cost American consumers almost $140 billion per year.

At the same time, however, state licensing boards serve a crucial function in a state's regulatory process. In highly technical industries such as medicine or law, licensing boards establish critical baseline quality standards owed to consumers, and the expertise typically provided by practitioners on such boards is vital to improving consumer welfare and safety.

Legislators and Regulators Take Notice

Since *NC Dental* and its limitation on state licensing boards' immunity from antitrust scrutiny, policymakers across the political spectrum have sought to refocus the objectives of licensing boards influenced by active market participants. During the Obama administration, for example, FTC Chairman Edith Ramirez emphasized that the FTC would focus on scrutinizing the public policy justifications behind professional licensing regulations and ensuring that state regulatory frameworks provide sufficient flexibility to allow for new forms of competition. More recently, current acting FTC Chairman Maureen K. Olhausen has made state licensing reform a key priority, establishing the "Economic Liberty Task Force" to encourage reforming overly restrictive state licensing regimes across the country. Similarly, at the Department of Justice, Assistant Attorney General of the Antitrust Division Makan Delrahim announced in January that his division was planning three major roundtable sessions to discuss how to modernize antitrust enforcement, one of which would focus on evaluating and updating current regulatory exemptions such as state action immunity.

State licensing reform has also emerged in legislatures across the country following *NC Dental*, often in coordination with the FTC. Since 2016, states such as Arizona, Mississippi, Delaware, Nebraska, Texas, and Wisconsin have each enacted or considered licensing reform to either roll back certain requirements or more actively supervise regulations passed by such boards to ensure that their regulations adhere to relevant policy objectives. At the federal level, in July 2017, Sen. Mike Lee (R-Utah) introduced the "Restoring Board Immunity Act of 2017," which would (1) offer two pathways for state licensing boards to guarantee state action immunity through either active supervision by the state or judicial review, and (2) encourage states to reform licensing requirements and enact only those which demonstrably promote both public welfare and increase economic competition.

Ultimately, while *NC Dental* both heightened the scrutiny facing state regulators who seek immunity and initiated widespread reform in the area of professional licensing, as Justice Samuel Alito noted in his *NC Dental* dissent, the majority opinion failed to provide a concrete test for how courts should evaluate public entities asserting state action defenses going forward. That may soon change.

State Action Immunity Returns to Supreme Court

On March 19, 2018, the Supreme Court will revisit state action immunity when it hears oral arguments in *Salt River Project Agricultural Improvement and Power District v. Tesla Energy Operations* (*Salt River Project*). Originally filed by solar panel manufacturer SolarCity (now a subsidiary of Tesla) in 2015, the suit alleged that a power utility in Arizona was illegally maintaining its monopoly over local power supply by implementing new pricing rules that punished customers who received some of their power from solar panels, such as those sold by SolarCity. Ruling on the utility's motion to dismiss, the district court rejected the utility's argument that it was immune from the suit under the state action doctrine because it derives its authority from the state of Arizona. The utility immediately

appealed the denial of immunity to the Ninth Circuit under the collateral order doctrine, which allows for interlocutory appeal before a final judgement in certain circumstances. The Ninth Circuit, however, found that the denial of state action immunity was not immediately appealable, because state action immunity only provides immunity from liability, not immunity from suit. The Ninth Circuit's decision further escalated an existing circuit split: The Fifth and Eleventh Circuits have found that such denials are immediately appealable, while the Fourth, Sixth, and now Ninth have held that denials cannot be appealed until a final judgement is issued.

The state action issue before the court is primarily procedural: whether orders denying state action immunity to public entities are immediately appealable under the collateral order doctrine. The court may decide the case narrowly, solely in order to resolve the Circuit split. At time of publication, there were reports that Tesla and the utility were close to reaching a settlement, so the court may not ultimately hear the case. However, if settlement talks fall through, the court's increasing scrutiny of the state action doctrine in recent years, combined with the number of amicus briefs filed by parties on both side of the debate, and the elevation of a state action skeptic to the Supreme Court (Justice Neil Gorsuch) suggests that the court could use the case to further redefine the scope of such immunity going forward.

In support of the utility, The National Governors Association and 24 states have submitted amicus briefs, warning that the case raises significant concerns regarding federalism and state sovereignty. On the other hand, the United States, National Federation of Independent Business, various consumer and environmental advocacy groups, and the American Antitrust Institute have all submitted briefs supporting Tesla, primarily arguing that to allow immediate appeals of rulings on immunity could advantage public and quasi-public entities—which, as noted above, are often self-interested market participants, such as the utility in this case—by imposing significant delays and costs on plaintiffs without first evaluating the potentially anticompetitive conduct in question.

In deciding 'Salt River Project', the Supreme Court has the opportunity to continue modernizing the doctrine to balance promotion of competition and innovation, while preserving state authority to regulate for the public good.

The newest member of the Supreme Court, Justice Gorsuch, may also prove receptive to Tesla's arguments and potentially push the Court to evaluate the current law of state action immunity more broadly. Gorsuch's knowledge of antitrust law is well known, and while serving on the Tenth Circuit, he authored an opinion reversing a district court ruling of state action immunity in *Kay Elec. Coop. v. City of Newkirk*, where he explicitly criticized the doctrine and the lack of clarity in the Supreme Court's jurisprudence in this area. Two years later, writing on behalf of a unanimous Court in *Phoebe Putney*, Justice Sonia Sotomayor favorably cited Justice Gorsuch's opinion and adopted his reasoning.

State action immunity is one of the less commonly discussed, yet undeniably sweeping doctrines in modern American antitrust law. It attempts to balance state sovereignty with the procompetitive goals of the Sherman Act. In deciding *Salt River Project*, the Supreme Court has the opportunity to continue modernizing the doctrine to balance promotion of competition and innovation, while preserving state authority to regulate for the public good. If the court ultimately issues a ruling that goes beyond the procedural question presented to it, do not be surprised if it is Justice Gorsuch writing the majority opinion.