Reflections On The Supreme Court And State Action Immunity

The Supreme Court has heard arguments strikingly similar to those in *North Carolina State Board of Dental Examiners v FTC* before, and the Court did not seem persuaded that such boards should be shielded from antitrust law. Former Federal Trade Commission attorney and current Axinn Veltrop & Harkrider partner **Richard Dagen** explores the case law.

The Supreme Court recently heard oral argument in *North Carolina State Board of Dental Examiners v FTC*, which questioned whether a regulatory board consisting of market participants (here, practising dentists) can exclude competitors (here, non-dentists who provided less expensive, competing teeth whitening), without supervision from a financially disinterested party, like someone from the State Department of Health, or the State Attorney General's Office.

Based on the questioning and Supreme Court precedent, the justices seem unlikely to permit such boards to claim such conduct was free from antitrust scrutiny under the state action doctrine unless the board's conduct is supervised. This is prong two of the doctrine; the first prong, which the board argued was sufficient, requires that the state, typically through a law, clearly articulate a policy to displace competition.

Nonetheless, the justices gave some credence to the statements from amici such as medical associations and the Association of Governors that the medical community would cease to serve on boards if the court found that supervision was necessary. The court should not, and likely will not, be taken in by these concerns for several reasons.

First, the Supreme Court has heard this refrain before. For example, as the FTC explained in its brief, in a prior Supreme Court case (*Patrick v. Burget*), "various medical associations argued that the state action doctrine should shield hospital peer-review boards from antitrust scrutiny, on the grounds 'that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating

openly and actively in peer-review proceedings.'" There is no indication that medical care was adversely affected by the *Patrick* decision, that participation in peer-review has been adversely affected, or that treble damage actions involving peer review decisions have swamped the courts.

Here, the Court should respond as it did in *Patrick:* "[t]his argument... essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch." The court continually hears the same "sky-is-falling" argument. For example, in another case, *National Society of Professional Engineers* v *United States,* the Court heard a slight variation – the "bridge is falling".

Second, the medical community argument presumes that requiring supervision will reverse the status quo. The board and its friends assert this, but it is not true. As the court observed at oral argument, its precedent already suggested that private actors need supervision.

At a minimum, contrary to the board's position, the court's statement in *Town of Hallie* reserving on this precise issue shows that the issue was unresolved. Given decisions in various circuit courts (including the First and Ninth), together with *Hallie*, *Patrick*, and other Supreme Court cases, the most that could be said is that the active supervision question had not been decided definitively. For example, then Judge Breyer wrote in 1987:

[The Massachusetts Board of Registration in Pharmacy] seems to take the view that this [state action] immunity protects its original regulations from investigation no matter how harmful to competition or to consumers they may turn out to be. This, however, is not so. . . . Whether any "anticompetitive" Board activities are "essentially" those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists. . . . Again, we cannot now say, without knowing more facts, whether or not this additional "state supervision" condition will apply.

Surprisingly, the North Carolina Board's primary support for its argument that the federal government should not second-guess the state, *City of Columbia v Omni Outdoor Adver, Inc*, provides that even a municipality might require active supervision when it operates as a competitor in the market. If a city might be subject to prong two, it could hardly be settled law that financially-interested boards may go unsupervised. Further, the Court's decisions in *Goldfarb v Virginia State Bar, Hoover v Ronwin* and *Bates v State Bar of Arizona* held that a disinterested sovereign actor (there, the State Supreme Courts) must be the responsible actor to support immunity for conduct by bar associations.

Yet, despite the existing precedent in favour of requiring active supervision for professional boards, medical professionals continued to serve on such boards. In short, no tectonic change in state action doctrine will occur when the Supreme Court affirms decisions by the FTC and the Fourth Circuit. As a result, predictions of doom are, as is typically the case, unfounded.

On the other hand, a decision establishing immunity for boards without active supervision by the state may increase participation in medical boards to the extent that the decision enables boards to better advance the financial interests of those regulated.

Finally, though it did not come up in oral argument, the record was undisputed that numerous states already supervise dental and medical boards. Indeed, had the board followed the statutory framework laid out in North Carolina law, there would have been no case against it.

North Carolina, like numerous other states, will not have to increase the level of supervision. Such supervision is not necessarily onerous. Moreover, supervision does not mean that lay people decide who qualifies as a neurosurgeon; rather, it assures that state policy is being carried out.

That is part of the reason that in numerous states consumers are free to purchase services from non-dentist teeth whiteners. At the time of the trial in 2012, non-dentist teeth whitening was permitted in numerous states, including

Florida, California, New York, Illinois, Ohio, Indiana, Wisconsin, Tennessee and Texas, encompassing approximately half the population of the United States. Interestingly, the brief filed on behalf of the states was only joined by 23 states.

There should be no surprise to either the legal community or, more importantly, the medical community if the court finds that boards comprised of the regulated require some degree of supervision from a party who doesn't represent a group that stands to directly benefit from anticompetitive conduct.

I note that I helped lead the litigation while I was at the FTC, but was not involved in the Supreme Court briefing or argument, and that the views expressed here represent my views and not necessarily those of any Axinn client. We all look forward to the decision.