That Argument Don't Hunt

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On October 14, the Supreme Court heard oral argument in *North Carolina State Board of Dental Examiners v. FTC* ("*North Carolina State Dental Board*"). At the argument, Justice Breyer asked the Board's counsel whether a trade association could rely on the state action doctrine to avoid antitrust liability for anticompetitive conduct, provided it swore to uphold state law. The Board's counsel replied "absolutely," implying that the state need not actively supervise such an association, while also ignoring the economic interest of the trade association and its members.

In a decision not cited by either side, Chief Justice Burger's opinion for a unanimous court in *Hunt v. Washington State Apple Advertising Commission*,[2] considered whether state characterization of a trade association as a state agency for some purposes was dispositive for all purposes, and concluded it was not. Although *Hunt* did not involve antitrust issues, the statements in the case bear a striking resemblance to the Court's decision two years earlier in *Goldfarb* v. *Virginia State Bar*,[3] that a state bar's status as "a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." As a result, the Court may draw from *Hunt* in its decision.

The *North Carolina State Dental Board* case involves the second prong of the state action doctrine that originated with *Parker v. Brown.*[4] That doctrine permits a state to displace competition otherwise mandated by the federal antitrust laws. Where the state allows private actors to engage in otherwise unlawful conduct, such as collective rate setting to further some state goal, that conduct will escape antitrust liability where: (1) the state clearly articulates its intent to displace competition, and (2) the conduct is actively supervised by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*.[5] Where the conduct is not undertaken by private parties, but by the state itself, for example, by a traditional public utility commission or municipality, then active supervision (prong 2) is not required.[6]

The North Carolina State Board of Dental Examiners maintains that the Board, created by the state's Dental Practice Act and composed of dentists, elected by dentists, and funded by dentists, is a "state agency" and therefore prong 2 does not apply. The FTC held that an entity such as the Board was financially interested in the market that it "regulated" and hence required some supervision by the state to preserve an antitrust defense to anticompetitive conduct.[7]

The Board's conduct at issue consisted of sending letters styled as cease and desist orders to non-dentists who provided teeth whitening services to consumers in North Carolina. Numerous providers stopped after receiving the orders. The FTC found that this conduct violated the antitrust laws as a conspiracy in restraint of trade and that the Board had not sustained its state action defense.[8] The Board appealed to the Fourth Circuit, which affirmed the FTC's decision.[9] The Supreme Court granted cert.

on the issue:

> Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants…

Nearly 20 amici were filed in connection with this case. As far as I can tell, no brief, including those for which I was responsible while leading the litigation for the FTC's Bureau of Competition and assisting with the Appeal to the Fourth Circuit, cited to *Hunt*.

Hunt is not an antitrust case. Instead, *Hunt* involved the question whether the Washington State Apple Advertising Commission had standing under the Commerce Clause to challenge a North Carolina statute regulating the labeling of crates containing apples shipped into North Carolina. North Carolina argued that the case should be dismissed because the Apple Advertising Commission did not have standing. Of particular interest for the Dentist case is the following discussion by Chief Justice Warren Burger:

> The only question presented, therefore, is whether, on this record, the Commission's status as a state agency, rather than a traditional voluntary membership organization, precludes it from asserting the claims of the Washington apple growers and dealers who form its constituency. We think not. The Commission, while admittedly a state agency, for all practical purposes, performs the functions of a traditional trade association representing the Washington apple industry.
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> Moreover, while the apple growers and dealers are not "members" of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views

> and protect their collective interests. Nor do we find it significant in determining
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> whether the Commission may properly represent its constituency that
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> "membership" is "compelled" in the form of mandatory assessments.
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> Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency.[10]

This passage can be compared with the passage from the brief of the FTC and the Solicitor General in *North Carolina State Dental Board*:

> Although petitioner thus possesses some of the formal characteristics of a typical state agency, in other respects it more closely resembles a private trade association. Most significantly, petitioner's constituent members are private actors, a controlling majority of whom are practicing dentists chosen by other dentists rather than by the public or by any politically accountable state official. Six of petitioner's eight seats are reserved for licensed dentists, who must be "actually engaged in the practice of dentist
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> ry." N.C. Gen. Stat. § 90-22(b) (2013); Pet. App. 4a- 5a. Because they must be active practitioners while they serve, each dentist-member has a significant financial interest in the business of the profession. Pet. App. 72a. Those dentist-members are nominated
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> and elected by the State's licensed dentists to three year renewable terms. N.C. Gen. Stat. § 90-22(b) (2013); Pet. App. 4a-5a, 40a. The DPA provides no mechanism for the dentist-members' removal by the Governor or by any other state official. In addition,
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> petitioner is funded exclusively by dues and fees paid by its private licensees.[11]

Although the cases are not on all fours, the resemblance between these passages is striking. In *Hunt*, as in *Goldfarb*, the Court looks beyond the formal designation as state agency to determine its status for the particular issues at hand. In *Hunt*, *Goldfarb* and *North Carolina State Dental Board*, the "state agencies" each involved financially interested boards elected and funded by market participants.[12] The Board's own expert acknowledged that the Board "is concerned about the financial interests of North Carolina dentists" and that such interest may have influenced the decision to exclude non-dentist teeth whiteners.[13] In this regard, the economic testimony seemed to be in line with Justice Breyer's apparent skepticism that an oath of allegiance would transform these economic incentives of a trade association into a financially disinterested state actor.

Under the argument set forth by those in support of the Board, the Apple Advertising Commission in *Hunt* and similar "state agencies" would not be subject to the active supervision requirement. The Board essentially argued that it is the state's prerogative to grant a financially interested trade association the right to monopolize a market with no supervision other than that of economically interested mar-

ket participants. Thus, if North Carolina clearly articulated in a statute that the Board was to fix prices to maximize the profits of dentists, it could do so without any supervision. At least Justices Kennedy, Kagan and Breyer appear to have understood that such a position is contrary to precedent. In *Town of Hallie* v. *City of Eau Claire,*[14] the Court found that the City, through its employees, was likely to pursue the public interest, not private interests. *Hunt* is to the same effect: the Court will look at the structure of the state agency to determine whether it is more akin to the state or a private party. As the Board conceded at oral argument, the question is one of federal law, not state law or nomenclature. The answer to this federal question, as in *Hunt* (and *Goldfarb*) and unlike in *Hallie*, is that for the issue before the Court the entity should be treated like a private party.

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1 Richard Dagen is a partner at Axinn, Veltrop & Harkrider, LLP. Mr. Dagen was formerly at the FTC and served as Complaint Counsel at the trial but did not participate in the Supreme Court briefing. The views expressed herein are the author's own and do not necessarily reflect the views of any client.
2 432 U.S. 333 (1977).
3 421 U.S. 773 (1975).
4 317 U.S. 341 (1943).
5 445 U.S. 97 (1980).
6 *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48, 64-65 (1985).
7 151 F.T.C. 607 (2011).
8 *Id.*
9 *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013).
10 *Hunt*, 432 U.S. at 344-45 (emphasis added).
11 Brief for the Respondent, at 5-6 (emphasis added).
12 In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Supreme Court concluded that it violated due process for the financially-interested Alabama Board of Optometry to take action against salaried optometrists.
13 Pet. App. at 113a n.14.
14 471 U.S. 34 (1985).