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Antitrust—Immunity

FTC Smiling as High Court Rules Dental Board Lacks Antitrust Immunity

Some states may need to pay more attention to their professional licensing boards to immunize them from antitrust liability following a Feb. 25 decision of the U.S. Supreme Court (*N.C. State Bd. of Dental Examiners v. FTC*, 2015 BL 48206, U.S., No. 13-534, 2/25/15).

In a 6–3 decision written by Justice Anthony M. Kennedy, the court held that the North Carolina Board of Dental Examiners couldn't share in North Carolina's antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), because the state didn't actively supervise the board.

Dissenting, Justice Samuel A. Alito Jr. disagreed with the court's characterization of the board as a public/private ''hybrid'' agency and highlighted the ''many questions'' that the court's ''active supervision'' test raises.

Rick Dagen, a partner at Axinn, Veltrop & Harkrider LLP, Washington, said the decision was ''right in line'' with what he expected. ''If you follow the line of Supreme Court antitrust decisions, they lead right to today's decision,'' he told Bloomberg BNA. Dagen was lead counsel for the Federal Trade Commission at trial and served as second chair at the appeal in the circuit court.

Ilya Shapiro, a senior fellow in constitutional study at the Cato Institute, agreed with the ruling, telling Bloomberg BNA it was a ''positive development both in terms of law and policy.'' He also noted one historic aspect of the case: as far as he knew it was the first time the Cato Institute had ever supported the federal government in litigation, he said.

Scott Nelson, an attorney with the Public Citizen Litigation Group, told Bloomberg BNA that he was ''very happy'' about the decision. He supported the FTC in arguing that ''the board should be treated like a private trade association, and that's exactly what the court said,'' he said in a Feb. 25 phone interview.

Bobby White, chief operating officer of the North Carolina dental board, told Bloomberg BNA he was ''very disappointed'' in the result.

Several professional organizations, including ones representing optometrists, physical therapists and engineers filed amicus briefs in the case. Though the practical effect of this result on the boards that regulate many professions is unclear, its effect on state bar organizations, at least, should be limited.

State bars are generally overseen by state supreme courts, Dagen said. Such oversight—whether interpreted as state action itself, or as ''active supervision''—is likely enough to confer antitrust immunity, he said, pointing to earlier high court decisions in *Hoover v. Ronwin*, 466 U.S. 558 (1984) and *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

Cease Whitening. The FTC brought an antitrust suit against the board because, in its role as the state agency for the regulation of the dental profession, it was sending cease-and-desist letters to nondentists who were offering teeth whitening services.

According to the court, the primary concern of the dentists complaining about such services was price: Nondentists were offering teeth-whitening services more cheaply than dentists.

The cease-and-desist letters had their desired effect and nondentists ceased offering teeth-whitening services, even though it was unclear under North Carolina law whether teeth whitening counted as the practice of dentistry, the court said.

The board consists of eight members—six practicing dentists and one practicing hygienist, elected by their peers, and one consumer, appointed by the governor. The FTC ruled that the board, in sending the letters, had engaged in anticompetitive behavior.

The FTC also held, later affirmed by the U.S. Court of Appeals for the Fourth Circuit (81 U.S.L.W. 1726, 6/11/13), that the board was a public/private hybrid that needed active state supervision to share in the state's antitrust immunity under *Parker*. It was this decision the board appealed.

Active Supervision. The Supreme Court held that ''a nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements,'' drawn from the court's decision in *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

The important element of the test in this case was whether the board was actively supervised by the state. The board argued that as a state agency it wasn't subject to this requirement under *Hallie v. Eau Claire*, 471 U.S. 34 (1985).

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The court disagreed. The *Hallie* court held that state supervision wasn't required for municipalities—and, ''likely,'' for state agencies—to share in a state's antitrust immunity.

The *Hallie* court reasoned that such bodies ''exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field,'' the court said. The court also emphasized that such bodies were electorally accountable.

On the other hand, ''agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing that *Midcal*'s supervision requirement was created to address,'' the court said.

Immunity turned ''not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade,'' it said.

It therefore held 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.''

The other *Midcal* requirement—that the challenged restraint on trade be issued pursuant to a clearly articulated state policy—wasn't at issue.

Going Forward. White said that going forward the board must seek guidance from state officials, especially when regulating in areas that might concern the FTC. He also said that some states would likely need legislative remedies to comply with the court's decision.

Dagen said that North Carolina's model wasn't the only model, however. Some states already have active supervision built in by incorporating their professional boards into broader state agencies. Even in states that have adopted a model similar to the North Carolina model, he said that in some cases no change to the law might be necessary.

In North Carolina, for example, the board could have brought a suit to have a court decide whether teeth whitening was the practice of dentistry, subject to their regulation. ''Boards can use procedure authorized by law,'' he said. ''Here, the cease-and-desist letters were not authorized.''

Legal, Practical Objections. Alito's dissent objected to both the legal foundation and the practical results of the majority opinion.

He argued that under *Parker*, the antitrust laws ''do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter.''

He said that states have long regulated professions as North Carolina regulated dentists here, and that therefore the statutes establishing the board were ''precisely the kind of state regulation that the *Parker* exemption was meant to immunize.''

Alito was also concerned that states ''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 active supervision test.

He criticized the vagueness of the terms ''controlling number'' and ''active market participant,'' and posed a number of questions left open by the majority to which states ''must predict the answers in order to make informed choices about how to constitute their agencies.''

The court was, ''in essence,'' looking to whether the board had been ''captured by the entities it is supposed to regulate.'' Determining when regulatory capture had actually occurred is ''no simple task,'' however, providing a ''reason for relieving courts from the obligation to make such determinations at all,'' he said.

Shapiro suggested that despite Alito's characterization of the issue, the situation here wasn't traditional regulatory capture, but rather ''capture by design,'' where market participants are given a cloak of state power to pursue their ''basic economic incentives to help themselves'' from the outset.

Nelson agreed, saying that the board was ''different in kind'' from a typical state agency. ''It's private industry,'' he said. He called the difference between the two the ''guiding insight'' of the majority decision.

White said that Alito's opinion ''captured fairly well'' the opinion the board had been hoping for.

Dagen said that if this had been the majority opinion, it would have been a ''significant change'' in antitrust law.

As to the volume of questions Alito's opinion raised, Shapiro said that ''any time you announce a new rule, even when it clarifies existing law, it's going to open up questions for litigation.'' He called it a ''risk,'' but ''overall an improvement on the *status quo ante*.''

Alito was joined by Justices Antonin Scalia and Clarence Thomas. All other justices joined the majority in full.

Recruitment Problems? The board also argued that if not afforded immunity, professionals would be discouraged from serving on state boards that regulate their profession, out of fear of personal antitrust liability.

The court acknowledged that, if this were true, ''there would be some cause for concern.'' However, it also said that if concerned, states could provide for the defense of and indemnify those professionals who do serve, or it could provide the active supervision required by *Midcal*, thus granting antitrust immunity.

Nelson called the issue of recruitment for boards ''kind of a red herring,'' saying that professionals would have a ''strong interest'' in the management of their profession, even if they couldn't manage it anticompetetively. He also said that it would be easy for states to, as Kennedy suggested, hold members of such boards harmless and indemnify them if necessary.

White disagreed, saying that, at least anecdotally, some people would be less willing to serve. He said that the court didn't talk about the potential for personal liability for antitrust damages—they weren't at issue in

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this case—and so treble damages remained a possibility.

Even if recruitment were an issue, however, ''that's not a valid interest to justify giving an economic advantage to certain private parties,'' Shapiro said.

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