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Exemptions

Lack of Active Supervision by State Dooms Dental Board's Assertion of *Parker* Immunity

By Tiffany Friesen Milone

Feb. 25 — The U.S. Supreme Court on Feb. 25 decided, 6-3, that the state action doctrine does not shield the North Carolina State Board of Dental Examiners from an antitrust attack under Federal Trade Commission Act §5 (*North Carolina State Board of Dental Examiners v. FTC,* U.S., No. 13-534, 2015 BL 47849, 2/25/15).

Justice Anthony M. Kennedy, writing for the majority, held that, because "a controlling number of the Board's decisionmakers are active market participants in the occupation the board regulates," the board could invoke state action immunity only if it was subject to active supervision by the state, which exercised none in this case.

The board can't qualify for *Parker v. Brown*, 317 U.S. 341 (1943), immunity under *Calfiornia Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980) because there was no active supervision by the state when the board interpreted the Dental Practice Act to cover teeth whitening services and to exclude non-dentists from performing this function.

Donald I. Baker, who served as Chief of the Justice Department's Antitrust Division in the Ford and Carter Administrations, said the decision is "an important step in erecting somewhat higher boundaries around what I have long believed was the most unsatisfactory area of modern antitrust law—where private parties, … sometimes with only a thin veneer of state authorization, have been able to carve themselves profitable exemptions from the normal competitive process."

BNA Snapshot

North Carolina State Board of Dental Examiners v. FTC, 2015 BL 47849, U.S., No. 13-534, 2/25/15

Holding: The state action doctrine does not shield the North Carolina State Board of Dental Examiners from antitrust attack under Federal Trade Commission Act §5 because the board isn't actively supervised by the state.

Takeaway: The FTC may be encouraged to expand its enforcement program to challenge anticompetitive rules by state boards populated with regulated professionals.

Parker's Reach

Here, the state delegated regulatory power to an entity dominated by active market participants, with six of the board's eight members required to be active, licensed dentists, appointed by other active, licensed dentists, with the remaining two members required to be a dental hygienist, appointed by other dental hygienists, and a "consumer," appointed by the governor.

While the resulting entity is an agency of the state, it is not guaranteed immunity under *Parker*, which extends antitrust immunity to anticompetitive conduct by states acting in their sovereign capacity.

In *Midcal*, however, the Court held that a non-sovereign actor may still invoke state action immunity if it can satisfy a two-prong test—specifically, immunity will extend where: (1) the challenged restraint is "one clearly articulated and affirmatively expressed as state policy"; and (2) the state "actively supervise[s]" that policy.

In a case such as this, where a non-sovereign entity is dominated by active market participants, Justice Kennedy held that *Midcal*'s "limits on state-action are most essential" because "established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern."

In determining "whether an anticompetitive policy is indeed the policy of a State," the clear articulation requirement "rarely will achieve that goal by itself," Justice Kennedy said, "for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated."

Those acting under state authority, he continued, may "diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self dealing," which the second prong "seeks to avoid."

Subsequent decisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365 (1990) make clear to the majority that "*Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants."

"This conclusion does not question the good faith of state officers," Justice Kennedy said, "but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals," as was the case in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In that case, the Court denied immunity to the Virginia State Bar, which was controlled by market participants who had engaged in "what is essentially a private anticompetitive activity" for "the benefit of its members."

No Supervision

In order to alleviate any perceived "risks" the holding places on the willingness of private citizens to participate in such boards,

the Court said, states not only can "provide for the defense and indemnification of agency members" but also can ensure immunity by actively supervising any boards comprised of market participants tasked with interpreting or enforcing anticompetitive policies.

Here, there was no such active supervision of the board's activities, Justice Kennedy held.

The board was established by the state through the Dental Practice Act as an "agency of the State for the regulation of the practice of dentistry," which included licensing duties. The Act made no mention of teeth whitening, "a practice that did not exist when it was passed." As to unlicensed practitioners, however, its authority was expressly limited to filing suit to "perpetually enjoin any person from … unlawfully practicing dentistry."

In the early 2000s, the board undertook to stop non-dentists from performing teeth whitening services in the state by sending cease-and-desist letters, persuading the state's Board of Cosmetic Art Examiners to warn cosmetologists against providing such services, and by contacting mall operators to report that kiosk teeth whiteners were violating state law.

The board, however, did not use "any of the powers at its disposal that would invoke oversight by a politically accountable official," Justice Kennedy said, and thus "North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes 'the practice of dentistry' and sought to prohibit those who competed against dentists from participating in the teeth whitening market."

"Whether or not the Board exceeded its powers under North Carolina law," the Court concluded, "there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists."

Guidance?

Justice Kennedy observed that there are "only a few constant requirements of active supervision" that have been identified by the Court:

(1) "[t]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it";

(2) "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy"; and

(3) the "mere potential for state supervision is not an adequate substitute for a decision by the State."

Additionally, "the state supervisor may not itself be an active market participant," the Court added. However, "the adequacy of supervision otherwise will depend on all the circumstances of a case."

'A Serious Misunderstanding.'

Justice Samuel A. Alito, joined in dissent by Justices Antonin Scalia and Clarence Thomas, lamented that the majority's decision "is based on a serious misunderstanding of the doctrine of state-action antitrust immunity."

Furthermore, the majority "takes the unprecedented step of holding that *Parker* does not apply to the [board] because [it] is not structured in a way that merits a good-governmental seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists."

Under *Parker*, antitrust laws "do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that," Justice Alito insisted, "is the end of the matter." To stray "from this simple path, the Court has not only distorted *Parker*; it has headed into a morass."

He found *Midcal* to be inapposite here because the board is neither a private entity nor a trade association, but rather a state agency. Furthermore, "for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina."

As the board's structure is not unique, Justice Alito also predicted that the decision "will create practical problems and is likely to have far-reaching effects on the State's regulation of professions," as boards may need to be restructured, but without clear guidance as to what restructuring would satisfy the majority's test.

A Simpler Path?

Both Robert M. Langer, of Wiggin and Dana LLP in Hartford, Conn., and Arthur N. Lerner, of Crowell & Moring LLP's Washington, D.C. office, recognized that the majority could have—and did not—take an easier path toward its ultimate decision.

The Court weighed on the fact that, in North Carolina, the dental board's members were elected by other dentists, not appointed by the governor or another state official, Lerner said. Langer, agreeing, pointed out that such an approach was proposed by Judge Barbara Milano Keenan of the Fourth Circuit in her dissent.

Langer, who formerly served as chief of the antitrust enforcement section of the Connecticut Attorney General's Office, cautioned that the majority's decision "has the potential to alter the very nature of state occupational/professional licensing regulation" by requiring active supervision of a board dominated by active market participants by another state official who is not such a participant. The narrower approach expressed by Judge Keegan would have served to constrain boards such as the one at issue here, he said.

One way to obtain the required supervision, Lerner said, may be for states like North Carolina to "requir[e] that rules adopted by state regulatory boards go through a central state agency review before becoming final."

In the current case, he said, "the Board bypassed that process and sent out threatening letters that were not subject to that review. It could presumably also have contacted the attorney general and asked for an advisory opinion, or simply encouraged state prosecutors to look into the issue."

Vindication

FTC Chairman Edith Ramirez expressed gratitude that the Court adopted her agency's position that "a state may not give private market participants unsupervised authority to suppress competition even if they act through a formally designated 'state agency.'"

Support for FTC

Richard Brunell, Vice President and General Counsel of the American Antitrust Institute (AAI), praised the Court for embracing the FTC's position, which was supported by the AAI in its amicus brief.

Brunell asserted: "Today's decision is the culmination of a project to narrow and rationalize the state action doctrine that began with Chairman Tim Muris and was brought to fruition by successive Republican and Democratic commissions."

Risk Recognition

Deborah Gersh, co-chair of the health care practice group in the Chicago office of Ropes & Gray LLP, noted that the Court recognizes the risk that market participants acting as state agencies, such as the N.C. Dental Board, could use their authority to further their own self-interest and thus risk suppressing health care competition that results in higher quality, increased efficiency, and reduced costs."

She added: "The Court found such non-sovereign actors should not be permitted to regulate their own markets without antitrust accountability and concluded that, in such instances, the active supervision requirement is an essential condition of state action immunity."

'Bootstrapping'?

Richard M. Steuer, of the New York City office of Mayer Brown LLP, said the majority "could be criticized for bootstrapping."

"Once the [C]ourt characterized the State Board as a 'nonsovereign actor,' the rest of the analysis inevitably followed," he said. By changing the words "private parties" to "nonsovereign actors," "the Court transplanted the test applicable to private boards and applied it to state agencies controlled by market participants."

"The harder question is when a bona fide state agency should not be treated as the State itself for purposes of the state action doctrine, and the answer provided by the Court's decision is 'when the State seeks to delegate its regulatory power to active market participants.'"

"The court avoided this question," Steuer continued,

> by holding that (a) not all state agencies are necessarily "sovereign actors," (b) state agencies controlled by active market participants with "dual allegiances" fall within the definition of "nonsovereign actors," and (c) therefore "it follows" under the Supremacy Clause that a state may not delegate the power to eliminate competition to such an agency without active supervision by the State itself. Yet, in framing a principle, the Court defined a "nonsovereign actor" only as "one whose conduct does not automatically qualify as that of the sovereign State itself."

The majority "also never explained precisely what State supervision would suffice," Steuer pointed out, "other than to observe that active supervision does not require 'micromanagement.'"

'No Surprise.'

Steven J. Cernak, of the Ann Arbor, Mich., office of Schiff Hardin LLP, was not surprised at the decision, "[g]iven the comments at oral argument."

"All the justices seemed concerned about a state just blessing bad conduct by private actors," he said. "But where to draw the line was the key question—and the fact that, just like the parties and their respective amicus supporters, the majority and dissent quote the same cases extensively to reach opposite conclusions shows how difficult the question was."

"What we now know is that a state agency that regulates a profession and has members of that profession on it can no longer simply rely on state designation as a 'state agency' to receive antitrust immunity," Cernak said. "Instead, that agency will need to determine if those professionals constitute a 'controlling number' of the entity and are 'active participants' in the profession."

"If the answer to both is yes," he continued, "then some other state actor will need to be 'actively supervising' the actions of that agency in order to avoid antitrust issues."

"Many such entities should now be asking those questions and, perhaps, changing the way they do business."

Different Result?

Donald I. Baker, of the Washington, D.C., office of Baker & Miller PLLC, also questioned whether the case would have been different had there been money damages on the table. He believes that the Court "punts" on the issue.

Specifically, the Court said only that, as such damages weren't at issue here, the case "does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability."

State Control

Mark Waxman, of the Boston office of Foley & Lardner LLP, said that the Supreme Court "continues a trend that shows it is paying increasing attention to supporting the framework to preserve and enhance competition through an expanded reach of the antitrust laws."

While the Court recognized that state action immunity remains a valid doctrine, one important way to accomplish this goal is to ensure that the immunity is limited to those circumstances where the state, and not just an agency or entity that merely operates under the state's umbrella, is directly involved, he posited.

"This means, as applied here, and undoubtedly to countless other boards authorized by the state legislatures to fulfill some regulatory role, that the state itself—through mechanisms not fully articulated—must either make the final decisions, or at least have a review mechanism which provides it with a meaningful opportunity to do so when 'market actors' are in a position to 'control' the decision of the state authorized entity in question," Waxman explained.

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For More Information

Text of the court's decision is at http://www.bloomberglaw.com/public/document/North_Carolina_Bd_of_Dental_Examiners_v_FTC_No_13534_US_Feb_25_20 — at Bloomberg Law's website.

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