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Bruce Sokler & Helen Kim
Mintz Levin Cohn Ferris Glovsky & Popeo PC

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I. INTRODUCTION

The Supreme Court's recent decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[2] potentially exposes hundreds of state regulatory and licensing entities nationwide to liability for alleged anticompetitive practices. As was the case with the North Carolina Dental Board, dozens of state boards in dozens of states are made up of market participants and regulate the markets in which their members participate, including entities overseeing professionals such as doctors, dentists, chiropractors, nurses, pharmacists, auctioneers, optometrists, veterinarians, lawyers, architects, funeral directors, accountants, plumbers, general engineers, technical professionals, real estate brokers, social workers, and appraisers.

By granting certain state agencies the same status as private parties for the purpose of state action immunity, the Court's decision opens up the decision-making of these boards—past and future—to further scrutiny. This article explores the impact of the *North Carolina State Board of Dental Examiners* decision on the antitrust status of state agencies and boards with a significant number of active market participants, and discusses how states can authorize their executive agencies and bodies to take actions that limit competition.

II. BACKGROUND

For over 70 years, the Supreme Court has attempted to harmonize the reach of the antitrust laws with federalism and recognizing the powers of state and local governments. Beginning with its decision in *Parker v. Brown*,[3] the courts have fleshed out the contours of a judicially created doctrine of state-action antitrust immunity. In *Parker,* the Supreme Court interpreted the antitrust laws to confer immunity on anticompetitive conduct by the states when acting in their sovereign capacity. However, the exemption is not unbounded. In fact, the Court reaffirmed just two years ago that "state action immunity is disfavored."[4] As *Parker* itself cautioned, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[5]

When dealing with an actor that had been delegated authority by the state, the Court had established a two-part test in *California Retail Liquor Deals Assoc. v. Midcal Aluminum, Inc.*: "A

[1] Bruce Sokler is Member and Chair of the Antitrust Section of Mintz Levin; Helen Kim is Associate in the same section.

[2] No. 13-354, slip op. (U.S. Feb. 25, 2015).

[3] 317 U.S. 341 (1943).

[4] FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013).

[5] 317 U.S. at 314.

state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to all the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct."[6] The "clear articulation" requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals."[7]

The active supervision requirement demands, *inter alia,* "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[8] As the Court put it here, the supervision rule "stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."[9]

Thus, the Court has granted State legislatures and state supreme courts automatic state action immunity for anticompetitive actions, while municipalities receive state action immunity only if the anticompetitive conduct they authorize is pursuant to a clearly articulated state policy to displace competition.[10] Finally, private parties receive state action immunity only if their anticompetitive actions are pursuant to a clearly articulated state policy and are actively supervised by the state.[11] But professional boards, unlike cartels in commodities or consumer products, are sanctioned by the state—even considered part of the state—and so have been often assumed to operate outside the reach of the Sherman Act.

III. *NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS*

The North Carolina State Board of Dental Examiners was established by state law to regulate the practice of dentistry. The Board creates and enforces a licensing scheme for dentists. Six of its eight members must be licensed, practicing dentists. The lynchpin of this case was teeth-whitening services, which the North Carolina statutory scheme does not specify is part of "the practice of dentistry." In the past, teeth-whitening was a service often offered by licensed dentists. Eventually, however, non-dentists began offering such services, often at kiosks located at shopping malls, and usually at prices lower than those charged by dentists.

After dentists complained to the Board, the Board opened an investigation, led by a practicing dentist member. The Board's chief operations officer remarked that the Board was "going forth to do battle" with non-dentists. The Board thereafter issued at least 47 official cease-and-desist letters to non-dentist teeth-whitening service providers and product manufacturers. The letters directed the recipients to cease all activity constituting the practice of dentistry, warned that the unlicensed practice was a crime, and strongly implied (or expressly stated) that teeth-whitening constituted "the practice of dentistry." Later, the Board sent letters to mall operators, stating that kiosk teeth-whiteners were violating the law and advising that the malls

[6] 445 U.S. 97 (1980).
[7] *North Carolina State Board of Dental Examiners*, Slip op. at 9.
[8] *Id.*
[9] *Id*. at 10.
[10] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).
[11] *California Retail Liquor Deals Assoc. v. Midcal Aluminum, Inc*., 445 U.S. 97 (1980).

consider expelling violators from their premises. As a consequence, non-dentists stopped offering such services in North Carolina.

Enter the Federal Trade Commission ("FTC"). They brought an administrative complaint alleging that the Board's concerted action to exclude non-dentists from the market for teeth-whitening services was anticompetitive and in violation of the FTC Act. The Board defended itself principally by arguing that, as a state agency, its actions were immune from federal antitrust scrutiny, a defense the FTC rejected. It ordered the Board to stop sending communications stating that non-dentists may not offer teeth-whitening services and to issue notices to those who had received its previous letters that would indicate, *inter alia*, that recipients had a right to seek declaratory rulings in state court whether teeth-whitening in fact constituted the practice of dentistry.

In a 6-3 decision authored by Justice Kennedy, the Supreme Court upheld the FTC's decision finding that the Board, although a state agency, was not exempt from federal antitrust laws when it had sent the 47 official cease-and-desist letters to non-dentist teeth-whitening service providers. In doing so, the Court made clear that the antitrust laws would apply to—and the state action exemption would not protect—activities of state agencies or boards made up of market participants, absent active state supervision of the Board's challenged conduct. The Supreme Court affirmed the United States Court of Appeals for the Fourth Circuit's opinion upholding the FTC's ruling that state-action immunity was inapplicable.

IV. ACTIVE SUPERVISION

State professional regulatory boards throughout the country have long been composed of a majority of active market participants, yet the Court had never applied the active-supervision requirement to such boards (nor had any lower court until the Fourth Circuit's decision in this case). Previous cases involved state mandates calling for the regulation of entry and good standing in a profession, which easily met *Midcal*'s low bar for clear articulation since all licensing restricts competition by reducing the number of competing professionals in the field.[12] For example, in *Benson v. Arizona State Board of Dental Examiners*, the court considered Sherman Act claims challenging a state dental board's refusal to recognize out-of-state licenses, with the court easily finding clear articulation in the state's statute giving the Board discretion to adopt reciprocity rules.[13]

Thus, the Court's opinion in *North Carolina State Board of Dental Examiners* is a significant development. In *North Carolina State Board of Dental Examiners,* the Board argued that as a bona fide state entity, it need only demonstrate the "clear articulation" prong of *Midcal*,

[12] *See, e.g., Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1044 (5th Cir. 1998) (noting that, in establishing a permissive policy with respect to the State Board of Certified Public Accountants Board of Louisiana, "the state rejected pure competition . . . in favor of establishing a regulatory regime that inevitably has anticompetitive effects"); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 n.2 (1975) (The Supreme Court held that although a state bar association was a state agency for the purpose of "investigating and reporting the violation" of ethical rules promulgated by the Supreme Court of Virginia, it could not enjoy immunity for its price-fixing because it acted contrary to the state's clearly articulated competition policy.).

[13] 673 F.2d 272 (9th Cir. 1982).

and since it was a state agency, the "active supervision" requirement did not apply to it. The majority disagreed, noting that "[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirements was created to address."[14] Justice Kennedy declared that "[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest."[15] Since the Board did not contend that its anticompetitive conduct was actively supervised by the state, the Court concluded that the state-action exemption was therefore unavailable.

The "active supervision" requirement—the most notable limit on *Parker* immunity—provides that states may only exempt private parties from the antitrust laws if state officials oversee their acts to prevent them from using their powers for self-interested purposes. This requirement is meant to ensure that states do not "thwart[]" the "national policy in favor of competition" by "casting … a gauzy cloak of state involvement" over the self-interested cartel behavior of private actors.

In *North Carolina State Board of Dental Examiners*, the Court did not set forth bright-line standards as to what constituted "active supervision," characterizing it as a "flexible and context-dependent" inquiry. However, the decision does provide a path forward for states that want to authorize their executive agencies and bodies to take actions that limit competition. The Court noted that active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision; however, the Court did identify a few constant requirements of active supervision:

- The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it. The Court's decision suggests that this review need not be elaborate or burdensome, and many states have created analogous oversight processes intended to create federal antitrust immunity with programs such as health care certificates of public advantage;
- The supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy so that "control" of an agency does not rest with active market participants;
- The mere potential for state supervision is not an adequate substitute for a decision by the state; and
- The state supervisor may not itself be an active market participant.

If history is prologue, the FTC has probably several other investigations pending that will lead to additional consent decrees. Industries will likely seek modifications in their state board schemes to insert sufficient "light touch" supervision to provide the necessary antitrust protection.

[14] *North Carolina State Board of Dental Examiners*, Slip op at 13.
[15] *Id*. at 14.

In response to the Supreme Court's decision, FTC Chairwoman Edith Ramirez issued a statement expressing pleasure "with the Supreme Court's recognition that the antitrust laws limit the ability of market incumbents to suppress competition through state professional boards." The FTC has a long-standing advocacy program in which it sends statements of opposition to state legislatures considering laws that limit practices to certain professionals, where unnecessary. The Supreme Court's *North Carolina State Board of Dental Examiners* decision gives additional ammunition to the FTC's advocacy and enforcement activities to open up services to lower cost providers.