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Expert Analysis

# Supreme Court Rules State Licensing Board Violated Antitrust Laws

By
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The U.S. Supreme Court recently issued a decision that is likely to prompt some states to review the makeup of their professional licensing boards. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[1] involved unusual facts, and as the dissent points out, the court's decision has left many questions unanswered.

### Background

North Carolina's Dental Practice Act provides that the state's Board of Dental Examiners has authority to regulate the practice of dentistry. Six of the board's eight members must be licensed, practicing dentists who are elected by other licensed dentists in North Carolina in elections conducted by the board. The seventh member is a licensed dental hygienist elected by other licensed hygienists, and the eighth member represents consumers and is appointed by the governor. Board members swear an oath of office and must comply with the state's Administrative Procedure Act and Open Meetings Law. The board is authorized to promulgate rules and regulations governing the practice of dentistry within the state.

Around 2003, non-dentists began offering teeth-whitening services in North Carolina at lower fees than those charged by dentists. As a result, the board received numerous complaints from dentists. Few of these complaints warned of possible harm to patients; most were primarily concerned with the low prices charged by the non-dentists. The board responded to the dentists' complaints by issuing at least 47 "cease and desist" letters to the non-dentists, warning them to cease the practice of dentistry, informing them that the unlicensed practice of dentistry is a crime, and indicating or implying that teeth-whitening constitutes the practice of dentistry. These and other board actions allegedly resulted in the cessation of non-dentist teeth-whitening services in North Carolina.

In 2010, the Federal Trade Commission (FTC) charged the board with violating Section 5 of the FTC Act, alleging that the board's actions to exclude non-dentists from performing teeth-whitening services in North Carolina constituted an anti-competitive and unfair method of competition. The board moved to dismiss, claiming it was immune from antitrust scrutiny by virtue of being a state agency. The FTC's Administrative Law Judge (ALJ) denied the board's motion, and the ALJ's decision was sustained by the FTC on appeal.

> Justice Kennedy wrote that an entity may not invoke Parker immunity unless the actions in question are a clear exercise of the state's sovereign power.

Following a hearing on the merits, the ALJ determined that the board had unreasonably restrained trade in violation of the antitrust law, which finding was also upheld on appeal by the FTC. The FTC noted that non-dentist-provided teeth-whitening services are a safe cosmetic procedure. It ordered the board to stop sending the cease and desist letters stating that non-dentists may not offer the teeth-whitening services, and to issue notices to all earlier recipients of cease and desist orders advising them of the board's proper sphere of authority, and clarifying that the notice recipients had a right to such declaratory rulings in state court. On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the FTC's actions in all respects.[2]

The Supreme Court affirmed the Fourth Circuit in a 6-3 decision written by Justice Anthony Kennedy and joined by Chief Justice John Roberts, and Justices Stephen Breyer, Ruth Bader Ginsburg, Sonya Sotomayor and Elena Kagan. In his opinion, Kennedy first reviewed the doctrine of state immunity from antitrust laws for anti-competitive conduct when states act in their sovereign capacity, a doctrine set forth in the Supreme Court's decision in *Parker v. Brown*.[3]

He found that such immunity does not extend to a state board on which the controlling number of decision-makers are active market participants in the occupation that the board regulates unless the state actively supervises the board.

> While North Carolina prohibits the unauthorized practice of dentistry, … its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to non-dentist teeth whiteners.

Kennedy wrote that "Parker immunity is not unbounded," and that an entity may not invoke Parker immunity unless the actions in question are a clear exercise of the state's sovereign power. Such immunity is not always conferred, he noted, when a state delegates control over a market to a non-sovereign actor:

> Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker's* rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. [Citation omitted.] Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anti-competitive motives in a way difficult even for market participants to discern.

Justice Kennedy then applied a two-part test set forth in the court's decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum*:[4]

> Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anti-competitive conduct, and second, the State provides active supervision of [the] anti-competitive conduct."

Kennedy found that the "clear articulation" requirement by itself rarely would achieve the goal of deter-

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mining whether an anti-competitive policy is actually the policy of the state. Instead, he focused on the second requirement—active supervision—as requiring the state to review and approve policies made by the state agency claiming immunity. The Midcal case involved California's delegation of price-fixing authority over wine to wine merchants, not to a state agency. However, Justice Kennedy saw the same threat to competition when a state agency like the board is made up of interested parties:

> State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirement was created to address.
>
> …When 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.

Accordingly, he concluded that a further qualification for state action immunity was necessary:

> The Court holds today that a state board on which a controlling number of decision makers 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.

**Dissent**

In a strongly worded dissent joined by Justices Antonin Scalia and Clarence Thomas, Justice Samuel Alito wrote that the Parker decision had clearly determined that the Sherman Act and the FTC Act do not apply to state agencies. He then inventoried the factors evidencing that the North Carolina board is a state agency:

- The North Carolina Legislature determined that dentistry should be regulated and controlled in order to ensure that only qualified persons practice dentistry.
- The Legislature created the board as the state agency to regulate dentistry in the state.
- The Legislature specified the board's membership, defined what constitutes the practice of dentistry, set standards for licensing dentists, and set standards under which the board could initiate disciplinary action against dentists who engage in certain improper acts.
- The Legislature empowered the board to bring legal proceedings to enjoin the unlawful practice of dentistry and to conduct investigations and hire legal counsel, and required that any notice or charges against a dentist be public record.
- The Legislature empowered the board to enact rules and regulations governing the practice of dentistry consistent with relevant statutes, and required that such rules and regulations would not be effective until included in the board's annual report and filed with North Carolina's attorney general, secretary of state, and the Legislature's Joint Regulatory Reform Committee.

Accordingly, Justice Alito concluded that the board is not a private or non-sovereign entity that North Carolina has attempted to immunize from federal antitrust scrutiny. Instead the board:

> …is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The majority's decision, he continued, crafts a test under which state agencies that are controlled by active market participants must now demonstrate active state supervision in order to be immune from federal antitrust law, and thereby treats state agencies like private entities.

Alito pointed out that municipalities, which are not sovereign, benefit from a more lenient standard for state action immunity than private parties. Yet in this case, he continued, the majority's decision treats the board—"a full-fledged state agency"—like a private actor, and requires that it demonstrate that the state actively supervises its actions.

In dissent, Justice Alito pointed to the practical problems that the majority's decision would pose, noting that states may find it necessary to change the composition of their medical, dental and other professional boards.

Aside from its significant departure from *Parker*, Alito pointed to the practical problems that the majority's decision would pose, noting that states may find it necessary to change the composition of their medical, dental and other professional boards.

> Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

He also took aim at Justice Kennedy's focus on how the board's "active market participants" constituted "a controlling number of [the] decision makers" and the many questions such a test raises.

> What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting block that is generally able to get its way? How about an obstructionist majority or an agency chair empowered to set the agenda or veto regulations?
>
> Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

In his dissent, Alito nowhere condoned the board's attack on non-dentist teeth whiteners, but he pointed out that, until now, Parker immunity had never been conditioned on the proper use of state regulatory authority. He cited the court's decision in *Columbia v. Omni Outdoor Advertising*[5] as one precedent where "we refused to recognize an exception to *Parker* for cases in which it was shown that defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest." In its Omni decision, the court noted that the Sherman Act is not an anti-corruption or good government statute. Justice Alito concluded:

> We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. [Citation omitted.] But that is essentially what the Court has done here.

**Analysis**

There is no question that the board's actions in this case were compromised from both an anti-competitive and an ethical point of view. When a state Legislature creates a regulatory board to supervise a profession such as medicine or dentistry, it does so in the expectation that the board will act at all times in the interest of public health and safety, and to assure the highest standards of professional practice.

Licensed professionals who are appointed or elected to the board should be chosen for the professional expertise and experience that they bring to policing the profession for the benefit of the public, and not to build regulatory barriers that are designed solely to protect their financial interests and those of the licensed professionals that they supervise.

In the face of the board's wayward action here, the North Carolina Legislature should have re-constituted the board and clarified that its purpose and authority included the regulation of the dental profession including competitive dental hygiene providers as alternatives to dentistry. It further should have declared that teeth-whitening services for hire other than personal home care are within the definition of the practice of dentistry for which competition is intended to be displaced by regulation.

The improper conduct of a professional board in one state has now resulted in, the imposition of a stricter federal standard of "active state supervision," and an increased potential for antitrust challenges to state licensing board activities. State legislatures, aided by their attorneys general, will have to review the structure of professional licensing agencies made up of "active market participants" to determine if they meet the "active supervision" standard set forth by the Supreme Court. It remains to be seen whether this new standard will enhance public health and safety, the quality and integrity of the professions, or protect competition.

1. No. 13-534, decided Feb. 25, 2015.
2. *FTC v. North Carolina State Board of Dental Examiners*, 717 F.3d 359 (4th Cir. 2013).
3. 317 U.S. 341 (1943).4. 445 U.S. 97 (1980).
5. 499 U.S. 365 (1991).