

State and Local Governments Grapple with Challenges of New Limits on Antitrust State Action Immunity

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State and local governments have long utilized regulatory boards comprised of practicing professionals to enact and enforce standards of professional competency and ethics. Many of these boards' activities, such as deciding who may and may not practice a particular profession, would raise antitrust questions if not undertaken with the imprimatur of the government, and it was commonly believed that these boards were immune from antitrust liability under the state-action doctrine. In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,¹ however, the U.S. Supreme Court held that regulatory boards and other non-sovereign actors controlled by "active market participants," enjoy antitrust immunity only when their actions are (1) "clearly articulated and affirmatively expressed as state policy;" and (2) such policy is "actively supervised by the state." The *NC Dental* decision has raised a number of questions about the circumstances under which a regulatory board's actions are immune from antitrust attack. At the same time, companies promoting disruptive technologies, like ride-sharing apps and online medical exams, are increasingly challenging regulatory board attempts to limit their operations. State and local governments are therefore taking a hard look at the way in which their regulatory boards are structured and how to preserve antitrust immunity for their sanctioned conduct. The challenges faced by these governments were recently the subject of in-depth discussion at this year's Fall Forum, which was put on by the American Bar Association's Antitrust Section and included panels on the implications of *NC Dental* and responses by the states.

NC Dental involved a Federal Trade Commission (FTC) challenge to the North Carolina Dental Board's (the Board) efforts to prevent non-dentists from providing teeth whitening services. The eight-member Board was comprised of six practicing dentists elected by other licensed dentists, a practicing dental hygienist elected by other hygienists, and a "consumer" appointed by the Governor. Following complaints by licensed dentists that non-dentists were charging lower prices than dentists for whitening services, the Board sent cease-and-desist letters to non-dentist teeth whitening providers and product manufacturers. The letters warned that the unlicensed practice of dentistry is a crime and strongly implied or expressly stated that teeth whitening constitutes the practice of dentistry. The Board also sent letters to mall operators stating that it was a violation of the law to operate teeth whitening kiosks and urging the malls to expel tenants operating such kiosks. The FTC sued the Board alleging that the Board's actions constituted a conspiracy to exclude non-dentists

from the market for teeth whitening services in North Carolina in violation of the federal antitrust laws. The Board countered that its conduct was in furtherance of its state granted authority to enforce a licensing system for dentists and therefore protected by state-action immunity.

The Supreme Court rejected the Board's state-action immunity claim, drawing a distinction between conduct by a state acting in its sovereign capacity and conduct by a non-sovereign actor delegated control over a market by a state. The Court described a non-sovereign actor as "one whose conduct does not automatically qualify as that of the sovereign State itself."² The Court went on to explain that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity."³ Rather, for state agencies to enjoy antitrust immunity, "it is necessary . . . to ensure the States accept political accountability for anticompetitive conduct they permit and control."⁴ This "requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own." The Court then outlined a two-part test for determining whether state-action immunity applies to non-sovereign entities controlled by market participants. First, the challenged conduct must be the result of a clearly articulated policy by the state to allow the conduct, *i.e.*, "the displacement of competition [must be] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."⁵ Second, the state must provide active supervision of the anticompetitive conduct. Since the Board did not contend that its actions were actively supervised by the State, the Court affirmed the lower court's ruling that the Board's conduct violated the antitrust laws.

The *NC Dental* decision has spawned a spate of antitrust lawsuits challenging actions by regulatory boards, including medical, dental and pharmacy boards, a state health department, a state university, and municipal taxicab commissions. In some places, regulatory board members have also resigned out of concern for the expanded liability exposure.

In response to the *NC Dental* decision, a variety of legislation is under consideration to address the increased potential liability. Some of the options reported at the ABA Fall Forum that are under consideration include:

- Making board decisions advisory
- Requiring regulatory board actions to be reviewed by the governor or attorney general
- Reducing the number of active market participants that serve on regulatory boards
- Combining boards with different practice areas (*e.g.*, cosmetologists and barbers) in order to reduce the potential for board control by "active market participants"
- Creating an umbrella agency to supervise regulatory boards
- Adjusting the laws regarding representation and indemnification of board members for antitrust violations
- Providing antitrust compliance training to board members and their staff advisors

It is still early days for the states' response to *NC Dental*, and it remains to be seen whether any of the above or other options will withstand judicial scrutiny. What is clear, though, is that with the rise of the "sharing economy," peer-to-peer platforms like Uber, Lyft and Airbnb, are increasingly

challenging traditional regulation of various industries. State and local lawmakers and regulators will therefore be wise to consider carefully the antitrust implications of their actions as they address the impact of new technologies on regulated industries.

1. 135 S.Ct. 1101 (2015).

2. N.C. Dental, 135 S.Ct. at 1111.

3. *Id.*

4. *Id.*

5. *Id.*

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