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North Carolina Board of Dental Examiners v. FTC: How States Will Respond to Improve Competition and Accountability in State Regulatory Boards

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I. INTRODUCTION

The Supreme Court's recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission*[2] will have a real and lasting effect on how state boards regulate and license scores of professions. The case concerned the state action immunity doctrine articulated in the 1943 *Parker* decision, which held that federal antitrust law does not reach anticompetitive actions by states. *Midcal* later clarified that states cannot throw a "gauzy cloak" of immunity over private anticompetitive conduct unless the private parties (1) act pursuant to a clearly articulated state policy to displace competition; and (2) are actively supervised by the state.

North Carolina Dental posed the question whether a state dental board composed primarily of active dentists has to meet *Midcal*'s "active supervision" requirement despite its designation as an arm of the state. The Court sided strongly with federal competition and antitrust law at the expense of formalistic federalism, holding that such boards should be treated like private organizations for *Parker* immunity purposes and are thus subject to both *Midcal* requirements.

States will now be forced to rethink how they delegate their police powers over many occupations that are currently largely self-regulated. There are three general ways that states could react to the *North Carolina Dental* decision: (i) changing the makeup of regulatory boards so that active market participants no longer control them; (ii) providing more active supervision over boards' conduct; and (iii) taking no further action, thereby subjecting some of their boards' conduct to federal antitrust law (which will in turn present its own issues).

While much commentary on the case has focused on the "active supervision" aspect of the case, the other options are also important. Each state is likely to employ a mix of these options, tailoring approaches to their unique needs, and even varying their responses on a board-by-board basis within the same state. However states choose to react, the upshot is that active market participants will no longer be able to so easily shield their actions on professional boards from federal antitrust law.

II. REMOVING CONTROL OF BOARDS FROM ACTIVE MARKET PARTICIPANTS

The *North Carolina Dental* majority first found that state agencies, like cities, are "nonsovereign" actors, and thus not automatically entitled to state action immunity. The majority further found that "prototypical state agenc[ies]," rather than one controlled by active

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[2] *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015).

market participants, receive the same level of immunity as a city and no active supervision is necessary for *Parker* immunity to apply. But when "a controlling number of decisionmakers" on a board are "active market participants in the occupation the board regulates," the board must satisfy both *Midcal* requirements (clear articulation of state policy and active supervision) to qualify for state action immunity from federal antitrust laws; in other words, such boards are treated the same as private trade associations. This included the North Carolina Board of Dental Examiners, where six of the eight board members are practicing dentists.

The first option for states that want to protect their regulatory boards from antitrust scrutiny is to head legal challenges off at the pass by changing who sits on the boards so that "active market participants" do not make up a "controlling number" of its decision makers, obviating any need to look at whether there is any active supervision. Unfortunately, both of those terms are left undefined by the majority opinion—though it does state that it is the existence of economic incentives to restrain competition that matters for determining whether someone is an active market participant. But despite the difficulty of interpreting the Supreme Court's terminology, this option may be attractive to states—at least for some of their boards—because if successfully implemented it would allow the boards to continue to operate largely autonomously, thus minimizing costs to the state of reviewing their decisions going forward.

III. PROVIDING ACTIVE SUPERVISION OF BOARD ACTIONS

States may choose to keep some boards controlled by active market participants. As the Justices discussed at some length during oral arguments, brain surgery patients, for example, probably prefer that neurosurgeons be regulated by those with the most up-to-date and thorough knowledge of their craft—in other words, practicing neurosurgeons themselves, not consumer representatives or former practitioners. These boards will require some form of active supervision to receive *Parker* immunity after *North Carolina Dental*.

The Court's opinion fleshes out the "active supervision" concept more than the terms "active market participants" and "a controlling number," but its exact definition remains hazy. The majority lists four minimum requirements for state oversight to qualify as active supervision:

1. the supervisor must review the substance of the challenged conduct, not just the procedure the board followed,
2. the supervisor must have the power to modify or veto specific decisions to ensure compliance with state policy,
3. there must be more than the "mere potential" of state supervision, and
4. the state supervisor must not itself be an active market participant.

North Carolina did not exercise any supervision at all over the Board of Dental Examiners' anticompetitive conduct at issue in the case, and so the Court declined to go into more detail than laying out those minimum elements of "active supervision." A variety of options are available to states that want to provide active supervision for regulatory boards run by active market participants, though:

- States can appoint a single employee of the state government with relevant expertise in a board's subject area to supervise its activities, and/or house boards within the relevant

state agency and require the director's approval to adopt rules and regulations, as is done in Rhode Island.

- Or states may place their boards inside a state agency that oversees the actions of all professional boards in the state, as is done to different degrees by California and Utah.[3]

Thus, there are a number of models to choose from which provide for more substantive and active supervision than occurred in *North Carolina Dental*, and a number of states likely already have sufficient protocols in place.

IV. ALLOW FEDERAL ANTITRUST LAW TO GOVERN STATE BOARDS

A third possible response to the decision would be for states to let federal antitrust law have relatively free rein to police their boards' anticompetitive action. There is a simplistic appeal to telling boards not to engage in anticompetitive conduct or else they will have to suffer the consequences.

Then again, while the FTC and DOJ might be expected to only challenge anticompetitive board behavior that has broad effects, taking away immunity makes every private party denied a license or harmed by a promulgated rule a potential litigant. Thus, states might also choose to soften this approach by indemnifying individual board members to encourage qualified participants to serve on boards without fear that a wrong step could bankrupt them, an idea the *North Carolina Dental* majority floated. (The Court also pointedly declined to decide whether board members might have individual immunity from antitrust damages claims in some situations.)

Relatedly, some states will probably choose to discontinue a few of their more arcane professional boards. There have been movements in various states over the last few years to remove or consolidate regulatory boards, and *North Carolina Dental* could give them the impetus they need to discontinue, say, Boards of Barber Examiners rather than figure out how best to provide more bureaucratic supervision over them or fund their inevitable legal battles. And while states will decide to keep many of their regulatory boards, they will put added pressure on them to stay away from conduct that could give rise to a colorable antitrust claim.

Some states might look at their system and decide they have a sufficient regime of active supervision (or non-active market participant controlled boards) and thus already comply with *North Carolina Dental*'s requirements. The effect of *North Carolina Dental* on boards in these states will be to encourage them to take existing processes more seriously. For example, one FTC commissioner has pointed out that if the North Carolina dental board had used its state-given authority to promulgate a rule that teeth-whitening services do constitute the unlawful practice of dentistry—rather than immediately sending threatening letters to non-dentist practitioners, an action not subject to any review—the rule would have been reviewed by the state's Rules Review

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[3] *See generally* Brief for Neil Averitt, *North Carolina Board of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015) (No. 13–534).

Commission. Assuming that the Commission approved it, the Board of Dental Examiners would likely have avoided antitrust liability to begin with.[4]

Alternatively, the board could have sought injunctions in state courts against non-dentists offering teeth-whitening services, conduct that would be protected by *Noerr-Pennington* immunity. Regulatory boards now have stronger incentives to carry out their mandates using existing processes that involve active supervision rather than employing informal methods of enforcement (such as cease-and-desist letters) that do not allow for review to take place.

V. IMPLICATIONS AND UNANSWERED QUESTIONS

The general result of all this will be somewhat fewer active market participants on regulatory boards; a greater degree of active, substantive supervision of boards' anticompetitive decisions; boards that have a greater incentive to avoid conduct that would violate antitrust laws; and perhaps even a reduction in the number of questionably useful boards. The chairman of the California Senate's business and professions committee, for example, has stated that providing more active supervision and reducing the number or influence of active market participants are both options that the state is considering in response to the Supreme Court's decision.[5]

In short, *North Carolina Dental* will likely help curb some of the problems with professional boards that economists and others have long documented, though there will also be costs imposed on states as they figure out answers to remaining questions by trial-and-error.

But operationalizing the decision will have its difficulties. The first question will be how to identify an "active market participant." Can a recently retired dentist be trusted to regulate objectively? Or a dentist who takes two years off to chair the state board but then immediately returns to her practice? And once that is determined, states will have to interpret the language about "controlling numbers." How consistently must a bloc of active market participants be able to achieve their desired outcomes to count as a "controlling number" despite being less than a majority? Can the active market participants on a board simply abstain from voting on issues in which they have a financial stake? Litigation will have to answer some of these questions as states try some variation of these potential fixes.

Questions about active supervision also remain. LegalZoom, a website that sells do-it-yourself, customized legal forms for everything from wills to forming corporations, filed an *amicus brief* in the *North Carolina Dental* case describing informal actions (which thus do not trigger any review) taken by state bars against it and other "alternative legal information and service providers," including a cease-and-desist letter the North Carolina State Bar sent to LegalZoom in 2008. The *amicus brief* even alleges that the dental board's practices that ran afoul of the antitrust laws were modeled on those of the state bar. The state bar, for its part, argued in

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[4] *See*, *Reflections on the Supreme Court's* North Carolina Dental *Decision and the FTC's Campaign to Rein in State Action Immunity*, Remarks by Maureen K. Ohlhausen, FTC Comm'r (Mar. 31, 2015), at 15–16, *available at* https://www.ftc.gov/public-statements/2015/03/reflections-supreme-courts-north-carolina-dental-decision-ftcs-campaign.

[5] Michael Hiltzik, *Supreme Court ruling puts state regulatory boards in crosshairs*, L.A. TIMES (Mar. 27, 2015, 8:17 PM), *available at* http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150329-column.html - page=1.

its own *amicus brief* that sending cease-and-desist letters was a more sensible option than suing people it believes are engaged in the unauthorized practice of law without any warning.

It would appear that the North Carolina bar is now on thin ice if it continues sending cease-and-desist letters on its own initiative to LegalZoom or similar entities operating in legal gray areas. How then can the North Carolina bar take action against people and organizations that it believes are engaged in the unauthorized practice of law without immediately inviting an antitrust suit in response? The bar might consider adopting formal rules—which are subject to public comment and must be approved by the state supreme court—defining more precisely the scope of the unauthorized practice of law in North Carolina. Receiving a stamp of approval from the state in such a way would likely qualify as sufficiently active supervision to grant the bar state action immunity for enforcing its rules. Barring that, the state bar is likely to be more hesitant to issue cease-and-desist letters or take other informal action against potential competitors.

Doctors are also likely to face interesting new challenges to their regulatory decisions. There are questions about how doctors on state boards regulate those on the outskirts of the medical profession, such as chiropractors and acupuncturists, and these issues are broadly analogous to tussles between state bars and LegalZoom.

But another area of tension for state medical boards regarding competition is how doctors and nurses work together in situations where both are qualified to provide the same care. Nurses, who are subject to their own extensive regulations and licensing boards, bristle at what they see as purely anticompetitive rules set down by many medical boards prohibiting nurses from offering services they are trained and licensed to provide, or requiring a doctor to "supervise" nurses in their work even though state law does not require it.

These questions implicate the affordability, accessibility, and quality of health care at a time when society is more concerned with these questions than ever. These issues deserve both an insider's medical perspective on best practices, but also a disinterested evaluation of who is qualified to perform those services. Medical boards will likely be forced to adapt to *North Carolina Dental* by granting nurses or consumers more input on their boards, or ensuring that government agencies have the opportunity to substantively review more of the regulations they promulgate.

The *North Carolina Dental* decision also raises interesting questions about situations like those in the *Phoebe Putney* case the Supreme Court decided only two years ago. There, the state of Georgia had created special-purpose public entities known as hospital authorities with the power to operate and maintain hospitals. A unanimous Court found, however, that the hospital authorities as then constituted could not benefit from state action immunity from antitrust law because they failed to meet the first *Midcal* prong—they were not acting pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition.

Given that state hospital authorities actively participate in their local healthcare market, *North Carolina Dental* tees up the question whether even a clear state policy to let them act anticompetitively would be enough to give them state action immunity, or whether active state supervision would be required as well. The *Phoebe Putney* Court seemed to assume that Georgia

hospital authorities were "local governmental entities" akin to cities and thus not subject to the active supervision requirement.[6] But now that it is clear that a state's designation of what is a governmental entity is not the final word for state action immunity purposes, courts may be asked to address whether such entities might be viewed as "market participants" and therefore subject to antitrust challenge absent sufficient active supervision.

VI. CONCLUSION

In the wake of *North Carolina Dental*, states will likely employ diverse combinations of the responses available to them—changing who sits on boards, providing more active supervision, and simply allowing federal antitrust law to reach boards' conduct and adjusting accordingly—and will vary their approach by agency. States will incur real costs in trying to comply with the Supreme Court's broad (and vague) mandate, which will need to be clarified through further litigation. But the end result will be less anticompetitive conduct from regulatory boards.

[6] *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013).