

Client Alert

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But Who Will Supervise the Supervisors? The Supreme Court's *North Carolina State Board of Dental Examiners* Decision Expands the "Active Supervision" Requirement for State Action Immunity, Potentially Creating Antitrust Exposure for State Regulators and Regulated Entities

In a 6-3 decision, the Supreme Court ruled on February 25 in favor of the Federal Trade Commission and imposed new limitations on the availability of the state action defense to antitrust liability. This landmark decision could have significant implications for states and private entities, forcing states to review their professional licensing boards while potentially exposing both regulators and regulated entities to antitrust claims.

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the FTC challenged the North Carolina State Board of Dental Examiner's efforts to prohibit nondentists from providing teeth whitening services without the involvement of a dentist. The board's primary defense was that as a statutorily established state regulatory board its conduct (including implementing the rules at issue) was immune from antitrust scrutiny under the state action doctrine first announced by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). The FTC argued that because the board was largely comprised of practicing dentists, *Parker* immunity required that the board be supervised by some other state entity — supervision all parties agreed had not occurred. The FTC prevailed in the US Court of Appeals for the Fourth Circuit, and on February 25, the Supreme Court agreed.

The Court's Expansion of the "Active Supervision" Requirement

Under *Parker v. Brown* and its progeny, conduct of a state-related entity, such as the Board of Dental Examiners, is immunized from antitrust scrutiny if it is a foreseeable result of a clearly articulated state policy to displace competition with regulation. A second element historically has applied only to private actors: that the conduct was "actively supervised" by the state.

In *Board of Dental Examiners*, the Supreme Court expanded the application of the "active supervision" requirement to certain state-related entities. Specifically, the Court held that even though the Board was a statutorily established state regulatory agency, the "controlling number" of "active market participants" on the Board meant that it needed to be actively supervised by the state in order for its conduct to be shielded from antitrust liability. Put differently, the Court effectively held that the control exerted on the Board by private competitors effectively transformed the Board itself into a private entity.

Practical Effects of Expanding the "Active Supervision" Requirement

The Court's decision creates significant uncertainty regarding the application of the state action defense for both past and future conduct of state boards.

As noted by the dissent, for nearly two centuries states have routinely staffed regulatory boards with active market participants. An amicus brief filed by ten states demonstrates that this practice is ongoing

today in various medical professions, the funeral business, the accounting profession, massage therapists and other professional regulatory boards. The Court's decision opens a number of avenues for potential litigation with boards possessing "active market participants." Such boards could themselves face potential litigation (since it seems unlikely that most regulatory regimes provide for regulatory supervision of the regulators). Moreover, private actors who have relied and acted upon boards' decisions on the assumption that supervision by a state board conferred antitrust immunity may face dramatically expanded antitrust risk. Although the Supreme Court did not directly address this issue, the validity of "active supervision" by entities that themselves have now been deemed to require "active supervision" may be subject to doubt.

This decision may also inspire states to overhaul their professional board regulations, but gives them little guidance in doing so. The Court did not elaborate on the requirements of "active supervision" because the Board of Dental Examiners did not argue that it was supervised. Also, the Court did not define the scope of "active market participant" or what a "controlling number" of active market participants is, and expressly left open whether states can bar money damages claims against professionals sitting on such boards. As such, further action over state action immunity in the context of state regulatory boards seems likely.

Hunton & Williams LLP regularly counsels clients regarding the antitrust implications of proposed actions and in antitrust litigation. We would be pleased to discuss with you in more detail the specific implications of this decision for your business.

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