
Antitrust “State Action” Exemption: *North Carolina State Board of Dental Examiners v. Federal Trade Commission*

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On February 25, 2015, the U.S. Supreme Court issued its decision in [North Carolina State Board of Dental Examiners v. Federal Trade Commission](#), holding that a regulatory board made up of market participants is exempt from federal antitrust laws under the “state action” doctrine only if it is actively supervised by the State, and the North Carolina State Board of Dental Examiners was not. Though no nonprofit organization was involved in the case, the decision could have implications for associations or other nonprofits that are delegated or act pursuant to any governmental authority.

Background

The North Carolina State Board of Dental Examiners is a State of North Carolina agency that regulates the practice of dentistry. Beginning in 2006, the Board issued approximately 47 cease-and-desist letters to non-dentists who were providing teeth-whitening services. The Board also issued 11 letters to mall operators, asking them to not lease space to non-dentist providers.

The Federal Trade Commission (FTC) filed a complaint against the Board in 2010 alleging anticompetitive conduct and unfair competition. In the initial decision by an Administrative Law Judge (ALJ) on July 14, 2011, the ALJ found that the Board’s actions to exclude non-dentists violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The ALJ rejected the Board’s affirmative defense that its conduct was protected by the state action doctrine. Because the Board was controlled by licensed dentists and there was no evidence that the State actively supervised the Board, the ALJ concluded that the federal antitrust laws applied to the Board’s actions.

On December 2, 2011, the FTC issued a final order prohibiting the Board from blocking non-dentists from providing teeth-whitening services and requiring that the Board distribute disclosures to those affected by the final order, including parties who previously received cease-and-desist letters from the Board.

The U.S. Court of Appeals for the Fourth Circuit affirmed the FTC order on May 31, 2013, holding that the Board was made up of—and elected by—dentists and was not sufficiently overseen by the State to make its actions “state action” and thus afford it an antitrust exemption for action of State government. The U.S. Supreme Court affirmed on February 25, 2015.

Supreme Court Decision

The U.S. Supreme Court held that if “a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.” In this case, the Board was controlled by active market participants in the occupation regulated by the Board—professional dentistry—and the requirement for active State supervision was not met.

Federal antitrust law prohibits anticompetitive restrictions on trade; however, there are some exceptions and exemptions to that general rule. For example, pursuant to *Parker v. Brown*, 317 U.S. 341, States acting in their sovereign capacity are immune from such restrictions under the “state action exemption” from the antitrust laws. However, a nonsovereign actor (one other than a town or municipality) that is delegated State authority may claim immunity under the state action exemption only if: (1) there is a clear articulation by the State displacing competition, and (2) the State actively supervises the actor. The Court noted in the instant case that the determination of whether supervision is active is “flexible and context-dependent,” but usual requirements are that the supervisor must have the power to overrule or change particular decisions to ensure they are consistent with the State’s policy, and not only must the supervisor have such power, he or she must actually review the substance of any anticompetitive decision.

North Carolina’s Dental Practice Act provides that the Board is “the agency of the State for the regulation of the practice of dentistry,” but six of the eight members of the Board must be licensed, practicing dentists, and they are elected by other dentists. Thus the Board is a “nonsovereign actor,” controlled by market participants. The Act does not provide for regulation of non-dentists. Further, the Court found that there were no “specific supervisory systems” to be reviewed in this case, and “no evidence of any decision by the State to initiate or concur with the Board’s actions against the nondentists;” thus the Board’s actions were not protected by the state action exemption from the antitrust laws because the Board was not actively supervised by the State.

Impact on Nonprofit Organizations

The Supreme Court ruling has limited impact on typical nonprofit membership organizations (i.e., “associations”), as the underlying case involved a group of licensed practitioners serving on a State licensing board, not a nonprofit board. However, in addition to state licensing boards, nonprofits that are delegated State authority must take care to operate in accordance with the antitrust laws; and they should not assume their actions are protected by the state action doctrine, unless (1) the State clearly articulates a policy that displaces competition in the regulated industry, and (2) the State actively supervises the actions, including by reviewing each one, not just maintaining authority to review.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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