

Antitrust Issues for Regulators in the Wake of N.C. State Board of Dental Examiners v. FTC

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Note from Executive Director: In 2015, the United States Supreme Court issued an opinion in *North Carolina State Board of Dental Examiners V. Federal Trade Commission*. In that decision, the Court held that there was no antitrust immunity for the North Carolina state agency regulating the practice of dentistry. This decision immediately raised concerns all over the country among state regulatory agencies, not only because of the possibility that decisions by the agencies might run afoul of antitrust law, but also the possibility that board members might be held liable for damages. Six months later, the Federal Trade Commission issued a guidance document for state agencies regarding the FTC's interpretation of N.C. Dental Board.

State Action Immunity Doctrine Prior to N.C. Dental Board

- Parker v. Brown, 317 U.S. 341 (1943). Recognizing states' rights to regulate their economies, Court conferred antitrust immunity on anticompetitive conduct by states acting in their sovereign capacities.
- Immunity is disfavored, and may not be invoked unless the actions in question are an exercise of the State's sovereign power.
- State legislation and decisions of a state supreme court acting legislatively rather than judicially "ipso facto are exempt from the operation of the antitrust laws."
- But state agencies are not simply by their governmental character sovereign actors. Court is concerned about political accountability and structural risk of self-dealing.

N.C. Dental Board –The (BAD) Facts

- North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015).
- 6 of 8 Board members were dentists, elected by other dentists
- Board got complaints from dentists about low-price tooth whitening
- Documents/evidence of intent
- Board didn't engage in rulemaking, rather:
- Sent Cease & Desist letters to whiteners asserting that whitening was "practice of dentistry" and potentially criminal

- Convinced other Board to warn cosmetologists
- Sent letters to mall operators
- It worked! Board “acted to expel the dentists’ competitors from the market.”

N.C. Dental Board –Active Supervision Required

- Limits on state action immunity are most essential when the State delegates regulatory power to active market participants, especially those authorized by the State to regulate their own profession.
- Not about whether the conduct is “efficient, well-functioning, or wise.” It’s whether the conduct should be deemed state action because it is the result of procedures that suffice to make it the State’s own.
- “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 [state] supervision is manifest.”

FTC Staff Guidance

- FTC issued (nonbinding) Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants –October 2015
- States can “avoid all conflict with the federal antitrust laws” by making all boards advisory or composed of only non-market participants
- Attempts to answer when active supervision is necessary and how to assess whether test is satisfied
- Clarifies that lack of active supervision doesn’t necessarily equal an antitrust violation, just no immunity
- Lays out factors FTC staff would consider in evaluating active supervision

Which Boards are Implicated?

- Active supervision is required where the State delegates control over a market to a non-sovereign actor on which a controlling number of decision makers are active market participants in the occupation the board regulates.
- Active market participant means a board member who is licensed in the profession regulated by the board.
- FTC Staff Guidance: includes those who provide any service subject to the board’s regulatory authority
- FTC Staff Guidance: regardless of specialty, method of selection to board, or inactive/retired status

- Controlling number may mean less than a numerical majority. Supreme Court also uses the term “dominated.”
- FTC includes de facto control; fact-bound, case-by-case inquiry, including veto power, tradition, or practice

Requirements for State Action Immunity

- Clear Articulation. The State has articulated a clear policy to allow the anticompetitive conduct; the challenged restraint is affirmatively expressed as state policy.
- “the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature,” such that
- “the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with state policy goals.” and
- Active Supervision. The conduct must be actively supervised by the State to provide a “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”

Active Supervision

- State officials must have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.
- The “constant requirements” of active supervision:
- The supervisor (not an active market participant) must review the substance of the anticompetitive decision, not merely the procedures used to produce it.
- The supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.
- The mere potential for state supervision is not an adequate substitute for a decision by the State.
- FTC Staff Guidance: supervision must precede implementation; supervisor should have adequate information, evaluate substantive merits and issue written decision approving, modifying or disapproving the recommended action.

Why Antitrust Laws Are Important

- Protect functioning free markets and promote competition
- Foundation of U.S. economy; delivers allocative efficiency (the most efficient mix of products and services delivered to consumers based on demand)
- Agreements in restraint of trade (conspiracies) among competing businesses adversely affect competition

- Consumer harm: higher prices, reduced output, lower product or service quality, decreased innovation or product improvement
- Automatic treble damages remedy for deterrence

Sherman Antitrust Act, Section 1

- Conspiracies (agreements) in restraint of trade prohibited
- Requires proof of agreement among horizontal competitors (here, the active market participant board members)
- “Unreasonable” restraint
- rule of reason analysis (balancing pro-competitive and anti-competitive effects)
- per se violations: price fixing, bid rigging, customer allocation, territory allocation, group boycott
- Per se violations deemed inherently unreasonable; no economic benefit derived from these types of agreements (based on courts’ experience and economic analysis)

Identifying Potential Antitrust Problems

- Board actions that regulate the conditions of market entry, prices, or output (including quality) may raise antitrust issues.
- eliminates an entire type of competition or an entire type of competitor
- prohibits firms from offering a particular quality-level of a product or service
- restricts advertising or makes it more expensive or less effective
- has a substantial downward effect on the number of firms or providers that can serve a particular set of customers
- has a substantial upward effect on prices in the market

Certain Board Actions Not Likely to Raise Antitrust Concerns

- Reasonable restraints on competition are not illegal, even where a competitor is injured economically. For example:
- Prohibitions on regulated person engaging in fraudulent business practices
- Prohibitions on regulated person engaging in untruthful or deceptive advertising
- Non-Discretionary (ministerial) actions that implement an anticompetitive statutory regime
- Denial of license for failure to submit required fee

- Denial of license for failure to submit proof of education
- Actions against a single licensee; de minimis market effect so unlikely to unreasonably harm competition.
- Actions compelled by clear state law or policy.

Potential Pro-Competitive Justifications

- board action prevents firms from taking advantage of uninformed or unsophisticated consumers
- consider the source of any complaints
- documented evidence of consumer harm best
- relying on experts ok, but consider the source and supporting evidence
- consider the magnitude of consumer harm and access
- not all consumers are the same
- “Competition is bad” is not an acceptable justification
- National Society of Professional Engineers v. US, 435 U.S. 679 (1978); prohibition on competitive bidding to prevent inferior engineering contrary to antitrust policy
- Less restrictive alternative? For information failures, consider improving consumers’ access to information.