PUBLICATION

Open Season on Provider-controlled Licensing Boards [Ober|Kaler]

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In a closely followed decision with significant consequences for state licensing boards and their members, the Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), recently announced that state agencies "controlled" by market participants no longer enjoy immunity from antitrust liability. Members of professional licensing boards should take note and act accordingly.

The North Carolina State Board of Dental Examiners (the Board) is a state agency created pursuant to North Carolina's Dental Practice Act for the purpose of regulating the practice of dentistry. Among other things, it is charged with the responsibility to create, administer and enforce a licensing system for dentists in the state of North Carolina. Pursuant to its enabling statute, the Board consists of eight members, six of whom must be engaged in the active practice of dentistry. Board members are elected by other licensed dentists in North Carolina, serve three-year terms, swear an oath of office, and are subject to the State's Administrative Procedure Act and open meeting requirements.

At issue before the Board were complaints by licensed dentists over the provision of teeth whitening services by nondentists, including cosmetologists and mall kiosk operators. Some complaints warned of potential harm to consumers, but most complaints related to concerns about low prices charged by nondentists for the same or similar teeth whitening services provided by dentists.

The Board's response was swift and effective. It issued at least 47 cease-and-desist letters to nondentists offering teeth whitening services implying (or explicitly stating) that they were engaged in the unlawful practice of dentistry. Recipients of these letters stopped providing such services as directed.

The Federal Trade Commission challenged the Board's conduct in an administrative proceeding claiming that the Board's actions were anticompetitive and violated section 5 of the FTC Act. The Board moved to dismiss the administrative complaint alleging that as an agency of the state, its conduct was protected by the state's sovereign immunity pursuant to the state-action doctrine.

The FTC took the position, in opposition to the Board's motion to dismiss, that despite being an "agency of the state," the Board was a "public/private hybrid" agency and, therefore, sovereign immunity was not automatic. Instead, and equating this state agency to a private party, the FTC claimed that state-action would apply only if the Board's conduct was (1) pursuant to a clearly articulated state policy to displace competition, and (2) subject to active state supervision. Furthermore, the FTC argued, as there was no active supervision of the Board's conduct, its actions were not protected. Although not necessarily apparent during the pendency of the litigation, recent speeches from FTC Commissioners confirmed that the FTC's challenge was part of a long-term plan to narrow the scope of available antitrust immunities including the state-action doctrine.

The Supreme Court, in considering whether to subject the state agency to antitrust liability, could have adopted one of three approaches. It could have followed longstanding precedent, as argued by the Board, and confirmed that the federal antitrust laws do not apply to state agencies. *See Parker v. Brown*, 317 U.S. 341 (1943). Or, it could adopt the FTC's position and treat this particular state agency like a private party and subject it to the two-pronged test first established in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,*

Inc., 445 U.S. 97 (1980). And, finally, the Supreme Court could have adopted some middle ground approach equating this particular agency with a nonsovereign arm of the state such as a municipality, requiring only that the conduct at issue be pursuant to a clearly articulated state policy, but dispensing with the need for active supervision. *See Hallie v. Eau Claire*, 471 U.S. 34 (1985).

Ultimately, the Supreme Court concluded that a state agency comprised of market participants is a nonsovereign entity much like any other private party due to the inherent risks with private anticompetitive motives. In this regard, and according to the Supreme Court, a state agency controlled by market participants is no more deserving of antitrust immunity than a private trade association vested by the state with regulatory authority. According to the Supreme Court, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. As a result, a clearly articulated state policy to displace competition and active supervision are essential prerequisites for state-action immunity to apply to any public or private nonsovereign entity controlled by active market participants.

In an effort to blunt the blow from its decision, the Supreme Court indicated that active state supervision need not require day-to-day involvement in the agency's operations, but rather a review sufficient to provided "realistic assurance" that the nonsovereign entity's anticompetitive actions "promote state policy, rather than merely the party's individual interests." In this regard, the supervisor must: (1) review the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) be vested with the power to veto or modify particular decisions to ensure they accord with state policy; and (3) may not itself be an active market participant.

As pointed out in the dissenting opinion, the Supreme Court's decision adds a new wrinkle to the state-action doctrine, and will likely create practical problems "and far-reaching effects on the state's regulation of professionals." The most obvious of course is the fact that members of state licensing boards controlled by market participants now face potential antitrust liability for their decisions. Less obvious, but no less important, are the practical implications of trying to fill gaps created by this decision, such as attempting to define the terms *control* and *active market participants* in order to determine whether a particular state agency has been stripped of its sovereign immunity. Lower courts may have their hands full in the years to come trying to apply this decision to the multitude of professional licensing boards throughout the country.