



Combined Board Chairs & Administrators Meeting: “Adjusting to the Supreme Court Decision”

This article is based on a presentation by Jennifer Ancona Semko, Partner at Baker & McKenzie LLP, at the 2016 FSBPT Annual Meeting.

It’s been a year and a half since the FTC vs North Carolina State Board of Dental Examiners decision. This session recapped the facts of the case and summarized the Supreme Court ruling. But mostly it looked at where we’re at now. The FTC guidance was issued just before the 2015 FSBPT Annual Meeting. There has now been time to digest it. There have been a number of litigation cases since the ruling. States have responded with legislation, executive orders, and attorneys general opinions. And, a State Licensing Board Antitrust Act has been proposed by a coalition of which the Federation is a member.

The heart of the February 2015 Supreme Court ruling was: “If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity ... is to be invoked.”

Back in the mid-2000s, The North Carolina State Dental Board noticed an increase in teeth-whitening kiosks in malls and other places and had some concerns that that may constitute the practice of dentistry by non-dentists. It looked at its practice act, which said the removal of stains and accretions from teeth is dentistry and subsequently sent cease-and-desist orders to non-dentists who were engaged in the teeth-whitening industry — those running the kiosks, those selling teeth whitening products to non-dentists, and the mall landlords.

Several complaints were lodged with the FTC, which launched an investigation in 2008. In June 2010, the FTC concluded the Board’s actions were anti-competitive and filed an administrative lawsuit against the Board.

That triggered the question of state action immunity to antitrust liability. State action immunity to antitrust liability is a doctrine established by the Supreme Court in 1943 and elaborated upon in subsequent cases.

Up until the 2010 ruling, three categories of immunity existed. States are categorically immune to federal antitrust laws. Sub-state government entities also were exempt, as long as they were acting pursuant to a “clearly articulate policy to displace competition.” The third category involved private entities. They were exempt if they were acting pursuant to a “clearly articulate policy to displace competition” and were “actively supervised” by the

state.

Until the 2010 ruling, most boards believed they fell into the sub-state category. The FTC, however, argued that the Board violated antitrust laws prohibiting unfair competition, but most importantly, that it be treated as a private actor and therefore must meet the highest standards. The FTC's primary reason for its argument is the Board is "a regulatory body that is controlled by participants in the very industry it purports to regulate."

The Supreme Court ruled 6-3 against the Dental Board, with Justices Samuel Alito, Antonin Scalia, and Clarence Thomas dissenting. The majority concluded that because a "controlling number" of the Board's decision makers are "active market participants in the occupation the Board regulates," the Board is treated as a private actor and must show active supervision by the state. The majority further ruled that the "active supervision" requirement was not met in this case. The dissenting justices said the majority seriously misunderstands the doctrine of state-action immunity. The Board is a state entity. Period.

The court said the test is "flexible and context-dependent." The supervisor does not need to have day-to-day involvement in operation or micromanage every decision. However, the review mechanism must provide "realistic assurance" the board's conduct "promotes state policy, rather than merely the party's individual interests." They issued four requirements: the supervisor must review substance, not merely procedures; the supervisor must have the power to veto or modify; the mere potential for supervision is not enough; and the supervisor cannot be an active market participant.

The dissenting justices stated that based on the ruling, states may now have to change the composition of boards, "but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts."

The dissenters also posed a number of unanswered questions in the majority opinion: What is a "controlling number?" Is that a majority, a voting bloc, an obstructionist minority, or a powerful agency chair? Who is an "active market participant" and how much participation makes a person "active" in the market? What is the scope of the market? Must the market be relevant to the particular challenged conduct? Would the result be different if Board members did not provide teeth whitening? Why stop at the structure of the board when evaluating "board capture"?

The broader issue of "state action" is relevant to all regulatory boards. Many boards, including PT boards, include practitioner members. The amount of interface with the state varies state to state. This is the second Supreme Court ruling that narrows the state-action defense. The FTC strongly disfavors state action defense and seeks a high bar for "active supervision."

The ruling does not mean that all board action is no longer protected by state action immunity. It does mean that in many cases it will have to meet two tests instead of one. The ruling also does not mean all board actions are in violation of antitrust laws. The ruling says nothing about what practices are lawful beyond the Dental Board actions. State action immunity is one of several defenses to an antitrust claim.

There are several potential responses to the ruling. Board membership could be changed so it is not controlled by active market participants, possibly by adding more public members.

Umbrella boards can be created by combining boards to dilute market participants. New oversight over existing boards could be implemented by creating a state supervision czar, a legislative committee, a state court, or other disinterested state officials. Or, boards could seek state endorsement of decisions with significant effects on competition. For some professions, boards may not be necessary and could be abandoned. Or change nothing and see what happens.

The October 2015 FTC guidance document sought to answer two questions left open by the court: When does a state regulatory board require active supervision to invoke state action immunity? And, what factors are relevant to determining whether there has been enough active supervision?

The FTC included some caveats in its guidance. First is that state legislatures should empower a regulatory board to restrict competition only when it's necessary to protect against a credible risk of harm, such as health and safety risks. It also stated the active state supervision may not be required; legislatures may prefer that boards be subject to antitrust laws. It reiterated what the court said, that antitrust analysis is fact-specific and context-dependent. Further, it said that not following FTC guidance doesn't necessarily mean there is no immunity or an anti-trust violation. It is, after all, just guidance.

There were some good items in the guidance. The FTC stated that reasonable restraints on competition are OK even when a competitor is harmed, such as suspending an electrician's license for performing substandard work. It also ruled that ministerial or non-discretionary acts do not give rise to antitrust liability, such as denying a license to someone who has failed to submit his diploma and pay his fees. Litigation brought by a board does not create antitrust liability unless it's a sham. And, disciplinary action affecting a single licensee will have a *de minimis* effect on competition, but watch out for patterns.

The FTC interpreted an "active market participant" as anyone who holds a license or provides any service that is subject to the board's authority. It does not matter if the board member is not directly or personally affected by the board's action. If the Dental Board had been composed of orthodontists who couldn't care less about teeth whitening, it still would have needed active supervision because the orthodontists are licensed. It also doesn't matter if a board member has temporarily suspended practice in the profession.

The FTC also provided a broad interpretation of a "controlling number." A controlling number, according to the FTC, doesn't necessarily mean a majority. It means controlled by a matter of "law, procedure, or fact," or veto power, tradition, or practice. The FTC provided three examples as a matter of explanation surrounding a board composed of four non-electricians and three electricians.

In the first example, new regulations require the approval of five members. Since at least one electrician would have to vote in the affirmative, the electricians therefore have veto power and active supervision is required. In the second example, a simple majority is required for approval. But the non-electricians routinely defer to the professionals and meeting minutes show the non-electricians are not informed or knowledgeable. In that scenario, the FTC may determine supervision is required. The third FTC example shows a nefarious board where the three professional members sneak off and issue cease and desist orders without input or the knowledge of the public members. In that case, the FTC also may determine supervision is required.

An active supervisor is one who is informed and collects information through hearings, public comments, and studies — but need not repeat the board’s own investigation. The supervisor evaluates the merits and determines if the board decision comports with the standards set by the legislature. And, the supervisor issues a written decision with rationale and provides meaningful review and creates political accountability.

In the Dental Board case, the Board reviewed and interpreted an existing regulation and issued cease and desist letters. What the FTC would have liked is for the legislature to have designated an executive agency to review the new regulation recommended by the Board. There would have been public notice and comment period, an investigation and information gathering, and written submissions would have been solicited. Public studies would have been obtained, as would information on the historic and current cost, price, and availability. Then there would have been a public hearing and a written decision.

Although the FTC said disciplinary actions against licensees would have a *de minimis* effect on competition, absent a pattern, it still wants active state supervision. The supervisor cannot be an active market participant. The supervisor reviews the evidentiary record, supplements the record if appropriate, conducts a complete review of the merits, and issues a written decision approving, modifying, or disapproving the board decision.

The FTC also provided examples of insufficient supervision. They include: the supervisor is controlled by active market participants; the state official monitors but lacks veto authority; and the state official serves on the board with full voting rights, but is one of many members and lacks veto authority. Other examples include ongoing advice from the attorney general or state official, the supervisor is really just a rubber stamp, or the supervisor reviews the procedure followed but does not conduct a substantive review of the actions.

As was expected, litigants have been suing. Everything from a routine disciplinary action to a more significant broad rule affecting the scope of practice are potential targets for antitrust claims. Most, but not all, have resulted in wins for the boards.

Only two cases have analyzed the issue raised in the Supreme Court case. In *Teledoc, Inc. vs Texas Medical Board*, the national telemedicine provider sued the Board in April 2015 seeking to stop the rule requiring doctors to meet new patients in person before writing prescriptions. Teledoc alleged the Board only adopted the rule when Teledoc began to be a competitive threat to traditional practices.

The 14-member Texas Medical Board, which includes 12 practicing physicians, voted 13-1 for the new rule. When the public comments were analyzed, 203 of the 206 comments opposed the new rule. Of the three supportive comments, two came from the Texas Medical Association. The Board argued the new rule actually clarifies and expands opportunities for telemedicine because the only scenario prohibited is treating a previously unknown patient without objective diagnostic data or the ability to follow up with the patient.

In May 2016, the court ruled in favor of Teledoc and that the Board failed to prove entitlement to state action immunity or active state supervision. The court further concluded the Board carried the burden of proof that it had immunity or active state supervision; the plaintiff did not have to prove it did not. The parties had conceded that active state supervision was required of the Board, but the Board argued it was adequately

supervised because all its decisions are subject to review by the courts, State Office of Administrative Hearings, and the legislature. The court rejected those arguments, ruling those bodies had limited ability to review and did not have the power to veto or modify.

The court's opinion stated judicial review of board rulemaking is limited to whether the board exceeded its statutory authority and followed procedural requirements, but does not permit evaluation of the policy underlying the rule. It also stated the appeal of disciplinary decisions is limited because the court cannot evaluate whether the rule is in accord with state policy and the court cannot modify. The court can, however, evaluate if the board decision violated the Constitution or a statute, if the board exceeded its authority, followed unlawful procedure, committed an error of law, if the ruling is supported by substantial evidence, and whether the rule was arbitrary or capricious. Legislative oversight is also insufficient because it is limited to a five-year "sunset review" and it could review the rules but could not veto or modify them.

The second case had a different outcome. *Rivera-Nazario vs Corporacion del Fondo del Seguro del Estado (CFSE)* was decided a few months before *Teledoc*. The CFSE is a government-created board that oversees and provides mandatory worker's compensation insurance. A sub-council develops guidelines for medical treatments covered by worker's compensation insurance. A group of chiropractors sued, alleging antitrust and discrimination because chiropractic services were never recommended.

This court concluded CFSE is a sub-state entity. No active supervision is required because it is a "public corporation with a public mission and its board members are appointed by the Governor of Puerto Rico." The court further ruled there was no risk market participants will pursue anticompetitive conduct in their private interests. It is not controlled by market participants. At most, two of the seven board members could compete with chiropractors, but that is unlikely given the board's focus on labor and insurance expertise. The court rejected the argument the physicians on the sub-council are active market participants because any kind of physician can serve on the sub-council, they are prohibited from receiving CFSE patients, and they lack authority over the full board. The court also noted the governor can remove board members at any time.

There has been other fallout. In response to the Supreme Court ruling, some states have proposed legislation. Arizona has pending legislation to deregulate certain professions, including athletic trainers, geologists, and landscape architects. A Connecticut bill would add another level of review for boards. All board decisions would be considered proposed and would need to be submitted to the commissioner of Consumer Protection for approval, modification, rejection, or further review. In Georgia, a bill would give the governor the ability to veto or modify any rule passed by a licensing board to ensure antitrust immunity. In addition, anyone can appeal a rule or other board actions to the governor.

Other states have issued executive orders. Alabama established the office for Regulatory Oversight of Boards and Commissions. It's a voluntary program boards can participate in and Oklahoma was the first state to act via executive order. It requires all disciplinary actions, but not rulemaking, to be reviewed by the attorney general's office before a formal hearing can occur.

Attorneys general have issued opinions in some states. California's opinion basically says the standard is flexible and fact-specific and there are a lot of options. Idaho's opinion was

more specific. Its attorney general said there should be an increase in public membership on boards, while striking a balance on the need for subject matter expertise and the board controlling market access. The Attorney General also opined on the possibility of assigning an independent state official with authority over board decisions. And, perhaps, boards and commission should be evaluated and those not needed discontinued.

Other action is pending. The FSBPT is part of a coalition advocating for passage of a State Licensing Board Antitrust Act. Others in the coalition include the Federation of State Medical Boards, National Board for Certification in Occupational Therapy (NBCOT), National Association of State Boards of Accountancy (NASBA), and Federation of Associations of Regulatory Boards (FARB). The act is modeled after the bipartisan Local Government Antitrust Act of 1984 (LGAA). The LGAA removed local governments from the provisions of antitrust laws that allow for recovery of treble damages and attorney fees. They can still be sued, but crippling damages are limited.

The LGAA was in response to a 1982 Supreme Court ruling against local governments similar to the Dental Board. As a result of that ruling, by 1984, hundreds of antitrust suits had been filed against local governments. In one, a jury awarded \$28.5 million in antitrust treble damages against the Village of Grayslake, Illinois, which at the time had an annual operating budget of just \$1.6 million. In response, associations representing local governments went to Congress to get the LGAA enacted. The coalition seeks to expand that exclusion to include “state licensing boards.”



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