Anti-competition vs. Public Protection: Where do we draw the line?

This article is based on a presentation by Jennifer Ancona Semko, Partner at Baker & McKenzie LLP, at the 2015 FSBPT Annual Meeting.

In February 2015, the U.S. Supreme Court issued its long-awaited ruling in North Carolina State Dental Board v. Federal Trade Commission, concluding that state regulatory boards composed of a "controlling number" of "active market participants" are not immune from federal antitrust laws unless they can demonstrate "active supervision" by the state. The ruling has been celebrated by some and condemned by others.

Individuals and companies unhappy with the actions of regulatory boards already have begun to use the Supreme Court's ruling as justification for filing private lawsuits alleging antitrust violations in a variety of contexts. This presentation provided an overview of the court's ruling and rationale and, perhaps more importantly, discussed the potential implications of the ruling for state regulatory boards. The presentation also included a summary of recent legal actions against boards and a discussion of potential actions boards can take to minimize the threat of antitrust liability.

A state's immunity from federal antitrust lawsuits was established by the U.S. Supreme Court in 1943 and upheld in subsequent lawsuits. Basically, a state is immune from all federal anti-trust laws. Sub-state government entities also are immune, as long as they act pursuant to a "clearly articulated policy to displace competition." Private entities may be immune if they both have a clearly articulated policy and are "actively supervised" by the state.

It was long assumed that state occupational boards fell under sub-state government entity category.

The North Carolina case changed that assumption. After a number of teeth-whitening clinics opened, the North Carolina State Board of Dental Examiners reviewed its dental practice act and determined that only licensed dentists could perform teeth-whitening services. It therefore sent cease-and-desist orders to the clinics. The teeth-whitening industry complained and the Federal Trade Commission (FTC) opened an investigation in 2008. In June 2010, the FTC ruled the Board of Dental Examiners' actions were anticompetitive and brought administrative complaint.

The FTC lawsuit alleged the Board violated antitrust laws that prohibit unfair competition. The Board defended itself under the sub-state government entity immunity, stating it was exempted

from federal antitrust laws because it was established by the state and therefore protected by state-action immunity. The FTC, however, argued the Board was a private entity and therefore must meet the active supervision standard in addition to the clear articulation standard. Its primary reason for the ruling is that the Board is "a regulatory body that is controlled by participants in the very industry it purports to regulate."

In May 2013, the Fourth Circuit Court of Appeals upheld the FTC decision and in March 2014 the U.S. Supreme Court agreed to hear the Board's appeal. Nineteen regulatory and professional organizations filed *amicus curiae* briefs with the Supreme Court, including the FSBPT. Oral arguments were held on Oct. 14, 2014.

The *amicus* briefs argued that state regulatory boards, such as the North Carolina dental board, are clearly state entities; that the Fourth Circuit's ruling imperils states' ability to delegate their authority to expert regulatory boards; and that requiring "active supervision" would negate the efficiency benefits of state boards. They further argued that the Fourth Circuit's test improperly looks behind state action to inquire about the private motives of state board members and improperly presumed state regulatory boards do not act in the public interests; and that the threat of antitrust liability could paralyze boards, deter participation, and chill decision making.

The Supreme Court didn't buy those arguments. On a 6-3 decision, the court ruled that because a "controlling number" of the Board's decision-makers are "active market participants in the occupation the Board regulates," the Board must be treated as a private entity and must show active supervision by the state. The three dissenting justices basically wrote that the majority seriously misunderstands the doctrine of state-action immunity and that the dental board is clearly a state entity.

The ruling places limits on immunity. State agencies are no longer sovereign simply because of their governmental character. Active supervision is required and must be meaningful. The majority compared state occupational boards to trade associations, clearly misinterpreting their role. Because there was no active supervision over the North Carolina dental board because the state neither initiated nor condoned the board's action, it was subject to antitrust laws.

The majority opinion further exclaimed that there would be no chilling effect on citizens serving on boards because there is a long tradition of professional self-regulation and because states may see benefits of staffing agencies with experts. Furthermore, the court said, there was no claim for monetary damages so potential board members do not have to worry about that and, if there was, states can provide for defense and indemnification. States also can ensure immunity by adopting clear policies to displace competition and by providing active supervision if boards are controlled by active market participants.

The amount of "active supervision" is unclear, but the ruling laid out four requirements:

1) Supervisor must review substance, not merely procedures
2) Must have the power to veto or modify a board's ruling
3) The mere potential to supervise is not enough
4) Supervisor cannot be an active market participant

The dissenting justices predicted the decision will “spawn confusion” and be difficult to apply. States now will have to change the composition of its boards to meet the standards of the ruling, “but it is not clear what sort of changes are needed to satisfy the test the court now adopts.” For instance, the dissenting justices wondered, what is a “controlling number”? Is it a majority of the board, a voting bloc, a minority bloc that can nevertheless block a decision, or a powerful agency chair? Who is an “active” market participant? What is the scope of the market? Must the market be relevant to the particular conduct that is challenged? Would the ruling be different if board members did not provide teeth whitening services?

Many boards include practitioner members so the ruling is far-reaching. It is also the second recent Supreme Court ruling that narrowed the state-action defense in favor of FTC regulatory control.

However, the ruling does not mean that all board action is unprotected by state action immunity. It just means there now are two tests instead of one. Nor does the ruling mean that all board actions violate antitrust laws because the ruling does not say anything about what practices are lawful. Participants also were reminded to keep in mind that state action immunity is only one of several defenses to an antitrust claim.

In response to the ruling, board memberships can be changed so they are not controlled by active market participants by adding more public members and removing a practitioner majority. Umbrella boards also could be created by combining boards and therefore diluting market participants. A state supervision czar can be created to provide greater supervision over existing boards. Or, some professional boards can be disbanded.

Rules can be written that clearly define the board’s function, such as their ability to send cease and desist letters versus a notice of potential violation. State programs for the defense and indemnification of board members can be reevaluated or created. Actions that would draw FTC scrutiny can be limited.

Regardless, boards should prepare for increased antitrust lawsuits and be prepared for an emboldened FTC.

The FTC has provided some guidance on two questions. It defined an active market participant as someone licensed by the board or who provides any service that is subject to the regulatory authority of the board. It does not matter if the board member is directly impacted by the ruling. It also does not matter if the board member has temporarily suspended practice in the profession.

The FTC also provided a broad interpretation of “controlling number.” It does not necessarily mean a majority. Rather, the controlling number is settled according to “law, procedure, or fact.” For example, an electrician’s board has seven members, four of whom are public members and three of whom are licensed electricians. If new regulations require a five-vote majority, than a licensed electrician has veto power and would require active supervision. Likewise, if meeting minutes show that the public members routinely refer to the licensees’ expert opinion, active supervision would be required. Also, if the electrician members routinely

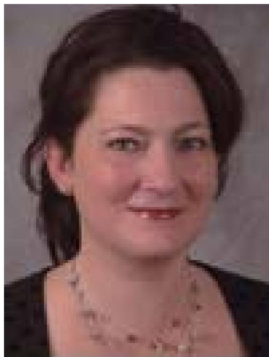
met separate from the public members and issued cease and desist orders without the public members' knowledge, the board would garner FTC scrutiny.

Among the factors to be considered by the FTC for active supervision is that the supervisor is informed and actively collects information through hearings, public comments, and studies. The supervisor also evaluates the merits of board actions and whether they comport with standards established by the legislature. The supervisor also must provide a written decision with rationale. An active state supervisor cannot also be an active market participant.

A number of antitrust lawsuits already have been filed in the wake of the Supreme Court ruling. The one most relevant to the FSBPT is an October lawsuit filed in North Carolina against the Acupuncture Licensing Board and its members by six PTs in response to cease and desist letters ordering the PTs to stop the practice of dry needling. The suit claims the Board's action violates antitrust and due process because the Board is composed of a supermajority of acupuncturists with no showing of active supervision.

Some states have taken action in response to the ruling. Oklahoma's governor, for example, issued an executive order in late July stating that state boards with a majority of industry participants must submit all non-rulemaking actions to the state attorney general for review. Boards also must defer to the AG on any rule modifications.

Much uncertainty remains, and Semko expects to return next year to provide FSBPT members with yet another update.



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