

## **U.S. Supreme Court Says State Professional Boards may be Subject to Federal Antitrust Laws**

On February 25, 2015, the U. S. Supreme Court held that a state professional board controlled by “active market participants” was not protected from antitrust scrutiny by the “state-action immunity” doctrine, and upheld the Federal Trade Commission’s right to challenge a state dental board’s anticompetitive policies under federal antitrust laws. The impact of this decision may extend broadly to a diverse array of state boards staffed and controlled by active professionals, including licensing boards for doctors, lawyers, and other professionals.

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No. 13-534, the North Carolina dental board argued that its actions in blocking non-dentists from offering teeth-whitening services were protected by state-action immunity, which grants states immunity from certain antitrust challenges. The Court disagreed, holding 6-3 that a state board controlled by active market participants – in this case, an eight-member board made up of six dentists, one dental hygienist, and one consumer – “cannot be allowed to regulate their own markets free from antitrust accountability.” Instead, where a state board is a “nonsovereign actor controlled by active market participants,” the Court held that the board could only enjoy immunity where two requirements are met: (1) its actions follow a clearly articulated state policy to replace competition with regulation; and (2) its actions are taken under “active supervision” by the state. Writing for the majority, Justice Anthony M. Kennedy explained: “Limits on state-action immunity are most essential when the state seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.”

The Court did not review specific standards for “active supervision” by states, since the North Carolina dental board had not argued that it was supervised by the state. Nevertheless, Justice Kennedy stated that the adequacy of such supervision would require a “flexible and context-dependent” analysis, with the ultimate question being: “[W]hether the state’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’” Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan joined in the majority decision. Writing for the dissent, Justice Samuel A. Alito Jr. wrote that the majority “has headed into a morass” with a “crude” and difficult to apply test for determining whether boards are controlled by market participants. Justices Antonin Scalia and Clarence Thomas joined in the dissent.

In light of the *North Carolina State Board of Dental Examiners* decision, state professional boards can no longer simply rely on state-action immunity to protect their actions and policies from antitrust scrutiny. Instead, boards must consider: (1) whether they are controlled by active market participants; (2) whether their actions follow a clearly articulated state policy; and (3) whether the state has undertaken “active supervision” of the board’s activities and decisions. The analysis of each of these factors is likely to require careful consideration, in light of the “flexible” standards described by the Court and the lack of clear guidance on the application of those standards.

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