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State Licensing Agency Must Also Face Antitrust Scrutiny, FTC Rules

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In a case before the commission itself, the Federal Trade Commission recently held that the North Carolina State Board of Dental Examiners is subject to the antitrust laws, just like any other private entity.

The FTC rejected the state agency's attempt to invoke the "state action immunity" doctrine as a shield to an agency antitrust challenge of its attempt to exclude non-dentists from the market for teeth-whitening services.

In the United States, the antitrust laws virtually ignore an entire category of restraints that are very often anti-competitive — government restraints. These restraints receive much less attention, not because they are any less anti-competitive, but because a doctrine has developed that has made many of these restraints off-limits to antitrust scrutiny. This state action immunity doctrine originated from a 1943 U.S. Supreme Court case called *Parker v. Brown* that interpreted the federal antitrust laws to not apply to the activities of the state.

This doctrine is rooted in principles of federalism and state sovereignty, and its application depends mostly upon the state actor at issue. The theory is that within our federal system, the sovereign state has a right to take anti-competitive actions and should not be regulated by the federal antitrust laws. Activities by the state legislature and state supreme court (in its legislative capacity) typically receive a free pass from the antitrust laws because they represent actions by the sovereign itself.

Interestingly, the state action immunity doctrine — as it currently stands — does not make an exception for activities with interstate effects even though a state's place within our federal system does not give it the unfettered right to act in ways that have effects outside of its borders. For example, the Dormant Commerce Clause jurisprudence limits certain state activities that discriminate against interstate commerce.

Other government activities are subject to what is called the *Midcal* test after the U.S. Supreme Court's 1980 decision in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.* That test sets forth two requirements for all other state-related actions to receive immunity: First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." Second, the policy must be "actively supervised" by the state itself. The purpose of this test is to determine whether the restraint comes from state policy itself (i.e. the sovereign). Notably, only the first aspect of the test — clear articulation — applies to activities that are considered public. In contrast, entities partaking in "private" activities (with some state involvement) face both prongs of the *Midcal* test. The question of whether an activity is public or private is therefore an important one.

Anti-competitive activities from municipalities are usually considered public, while activities from private entities are easily classified as private. It is the activities of state agencies that are tricky and controversial under the state action immunity doctrine. Some courts take a formal approach that examines a laundry list of government-entity attributes like open meetings, public records and general ethical oversight to determine whether the entity should receive the easier public test. Other courts, however, determine whether the members of the particular agency have public or private interests. For example, a state licensing board made up of members of a particular profession may have private (not necessarily public) interests when enacting rules to govern the profession, including the scope of the profession's monopoly over certain services.

The Supreme Court has not answered the question of whether state agencies are subject to both prongs of the *Midcal* test, or just the "public" version that looks only to whether the restraint is clearly articulated and affirmatively expressed as state policy. In a case preceding *Midcal* , however, the Supreme Court in *Goldfarb v. Virginia State Bar* held that a legal bar association, "which is a state agency for some limited purposes," is subject to the antitrust laws when it provides that deviation from county bar minimum fees may lead to disciplinary action. The court concluded that even though the bar association is a state agency, it does not possess "an antitrust shield that allows it to foster anti-competitive practices for the benefits of its members."

But adding a little ambiguity to the issue, a later Supreme Court decision, *Town of Hallie v. City of Eau Claire* , stated in dicta that in "cases in which the actor is a state agency, it is likely that active state supervision would not be required, although we do not here decide that issue." That dicta could be interpreted as if the court — although not deciding the issue — is weighing in on the side of only requiring the limited *Midcal* test for state agencies.

The same decision, however, characterized the bar association in *Goldfarb* as a "private party," even though the *Goldfarb* court acknowledged that the bar association was, by law, a state agency. Thus, it is possible that *Town of Hallie* meant that state agencies are subject to the limited *Midcal* test, unless they are considered "private," as in *Goldfarb* , because their members have private interests. Ultimately, however, we should probably just take *Town of Hallie's* statement that it is not deciding the issue at face value.

Therefore, it is still unclear whether state agencies that include members with private interests are subject to the more lenient "public" test to invoke the state action immunity shield.

Enforcement Aggressiveness

In the most recent display of the FTC's increased enforcement aggressiveness, it ruled that the state-action immunity doctrine does not protect a state dental board from antitrust scrutiny because it is run by practicing private dentists. In doing so, the FTC took the position that the requirements to invoke the state-action immunity defense "vary depending on the extent to which a tribunal is concerned that decision-makers are pursuing private rather than sovereign interests." The FTC, therefore, rejected the formal approach to the issue that looks at whether the body has governmental characteristics like public records and open meetings.

The North Carolina Board of Dental Examiners is a state agency that is charged with regulating the practice of dentistry in the interest of the public health, safety and welfare of North Carolina. Its members include six licensed dentists, one licensed hygienist and one consumer member who is neither a dentist nor a hygienist.

Both dentists and non-dentists perform teeth-whitening services, but non-dentists are often substantially cheaper. The board, however, recently made a determination that non-dentists who provide teeth-whitening services in North Carolina are committing the unauthorized practice of dentistry. Thus, the state agency — composed mostly of practicing dentists — allegedly sought to exclude the lower-priced competitors of dentists from the entire market for teeth-whitening services. The FTC concluded that this action was anti-competitive and after a lengthy investigation filed an administrative complaint on antitrust grounds.

The dental board responded by seeking a dismissal based upon the state action immunity doctrine. But it did not stop there. In an unusual move, on Feb. 1, the board filed its own lawsuit against the FTC in federal court, seeking declaratory and injunctive relief to stop the FTC's administrative action. The board was very clear about its view of the FTC's action against it: "The purpose of this action is to stop a pointless, baseless, and predetermined federal administrative proceeding that has impaired and continues to impair the ability of the State to protect its public, contravenes federal and state statutes, directly encroaches upon the State's sovereignty assured under the Tenth Amendment ... and defies very, very well-established Supreme Court holdings." The district court judge declined to issue immediate injunctive relief.

Eight days after the board filed its lawsuit against the FTC, the entire commission (deciding the issue) rejected its attempt to dismiss the administrative lawsuit on state action immunity grounds. Treating the dental board's decision to reserve teeth whitening to dentists only as a private activity, the FTC held that the board must satisfy both prongs of the *Midcal* test to invoke state action immunity. The FTC did not discuss the first prong — clear articulation — because it held that the dental board did not satisfy the second requirement, active state supervision. The FTC explained that the "active supervision requirement exists to guarantee that self-interested parties are restricting competition in a manner consonant with state policy." Thus, "the active supervision converts private conduct, which is subject to antitrust review, into a sovereign policy choice, which is not."

The generic oversight present in this case was not enough to satisfy the active supervision requirement, the FTC held. Instead, for a private action to achieve state action immunity, the state must review and approve the particular anti-competitive act. The FTC found that did not occur here. So the FTC said it will treat the state agency like any other private entity subject to the antitrust laws.

This epic battle, however, is just beginning. The fact that the dental board took the unusual initiative to sue the FTC in federal court while the administrative action with the FTC was still pending suggests that the dental board is understandably taking the gloves off with the FTC. Stay tuned. •

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