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## U.S. Supreme Court Rules State Boards Not Precluded From Antitrust Scrutiny

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On February 25, 2015, the United States Supreme Court issued its awaited decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (“FTC”), addressing whether a non-sovereign entity’s actions are excepted from federal antitrust laws under the doctrine of state-action antitrust immunity. In its 6-3 decision, the Court sided with the FTC in ruling that state professional boards that are controlled by active market participants must be subject to active supervision by the State to qualify for immunity under federal antitrust laws.

The North Carolina State Board of Dental Examiners (the “Board”) is comprised of eight members, six of which must be licensed, practicing dentists. Per the North Carolina’s Dental Practice Act (the “Dental Act”), the Board is the state agency responsible for regulating the practice of dentistry and is responsible for the licensing of dentists. While the Dental Act prohibits the unlicensed practice of dentistry, it does not specifically prohibit non-dentists from performing teeth-whitening services. The Board sent multiple cease and desist letters to non-dentists who were performing teeth-whitening services in North Carolina.

In 2010, the FTC filed an administrative complaint alleging that the Board’s actions to exclude non-dentists from the teeth-whitening market in North Carolina constituted an anticompetitive and unfair method of competition, in violation of the Federal Trade Commission Act.<sup>1</sup> An Administrative Law Judge (“ALJ”) denied the Board’s motion to dismiss on the grounds of state immunity and the FTC sustained. After a hearing on the merits, the ALJ found that the Board’s actions violated antitrust law by restraining fair trade. The FTC again sustained and rejected the Board’s public safety argument. The Fourth Circuit affirmed.

States enjoy some immunity from federal antitrust laws for the purpose of protecting public health and welfare objectives. In *Parker v. Brown*, the Court “interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity.”<sup>2</sup> The Board argued that because its members are vested by North Carolina with the power of State to oversee dental practices, its actions were protected under *Parker*. The Court rejected this argument and cited to precedent where the Court ruled that a non-sovereign entity controlled by active market participants only qualifies for *Parker* immunity if (1) the challenged restraint is clearly articulated and affirmatively expressed as state policy, and (2) the policy is actively supervised by the State.<sup>3</sup>

The Court noted that there are tighter limitations on state-action immunity where the State delegates regulatory authority to active market participants, as such active market participants cannot be allowed to self-regulate without any antitrust accountability. In determining whether *Parker* immunity applied in this case, the ultimate

question before the Court was whether the Board's anticompetitive action could be considered state action. To answer this question, the Court applied a two-prong test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminiums, Inc.* which provides that "a state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct."<sup>4</sup>

The Court recognized that there are instances in which an actor can be excused from *Midcal's* active supervision requirement, specifically referencing municipalities with electoral accountability, general regulatory powers, and no private price-fixing agenda.<sup>5</sup> The Board argued that it was exempt from *Midcal's* second requirement because it is a state designated agency. Looking to precedent, the Court likened the Board to a private trade association, vested by States with regulatory authority, which are required to satisfy *Midcal's* active supervision requirement.<sup>6</sup> The Court ruled that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity."

While the Board did not argue that its conduct was actively supervised by the State, the Court did note that the Board's act of sending cease and desist letters to non-dentists performing teeth whitening services was done with no active state supervision. The Court further clarified that active supervision does not require day-to-day involvement in an agency's operation. Rather, active supervision requires that States employ measures to ensure that a non-sovereign entity's anticompetitive actions promote some state policy and do not merely serve the entity's interests. A complete copy of the Court's opinion can be accessed [here](#).

1. See 38 Stat. 719, as amended, 15 U.S.C. § 45.
2. *Parker v. Brown*, 317 U.S. 341 (1943).
3. *FTC v. Phoebe Putney Health System, Inc.* (2013) (slip op. at 7).
4. *California Retail Liquor Dealers Assn. v. Midcal Aluminiums, Inc.*, 445 U.S. 97, 105 (1980).
5. See *Hallie v. Eau Claire*, 471 U.S. 34 (1985). See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).