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United States: Private Antitrust Litigation

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Out of the many immunities and exemptions precluding or limiting the application of antitrust laws in the United States, state action may be the most widely relied upon immunity. It offers numerous state and local government entities immunity from federal antitrust law challenges. In a rare and much-anticipated decision, the Supreme Court recently explained and limited the application of this immunity where private parties purport to act pursuant to government authority. This ruling invigorated and encouraged other lawsuits, and will likely inspire litigants to continue to bring claims against government entities into the immediate future. These emerging cases, however, also offer valuable guidance to government entities on how to avoid antitrust problems.

The state action immunity

For more than 100 years, Congress has enacted legislation that explicitly exempts everything from specific conduct to entire industries from the reach of federal antitrust laws. At the same time, federal courts developed immunities and exemptions from federal antitrust laws, while both interpreting legislation enacted by Congress and resolving the occasional discord between the antitrust laws, federalism and constitutional principles. Of these judicially created immunities and exemptions, state action immunity is, perhaps, the most widely relied upon in the United States.

The state action immunity, developed in *Parker v Brown*, recognises that states are sovereign entities that may exercise their authority to enact legislation that would otherwise run afoul of federal antitrust laws.¹ In recognising this immunity, the Supreme Court explained that federal antitrust laws (specifically the Sherman Act) were not intended by Congress to ‘restrain a state or its officers or agents from activities directed by its legislature.’²

Since *Parker*, the Supreme Court has recognised at least three different situations where state action immunity may exist.³ First, a state’s own actions are considered, ipso facto, exempt from the antitrust laws.⁴ Second, government entities below the state level, like counties and municipalities, ‘receive immunity from antitrust scrutiny when they act pursuant to a ‘clearly articulated and affirmatively expressed’ state policy to displace competition.’⁵ Third, private parties acting through state or local government entities may enjoy state action immunity provided their conduct meets two prongs explained in *California Retail Liquor Dealers Association v Midcal Aluminum, Inc.*⁶

- the conduct is undertaken pursuant to a ‘clearly articulated and affirmatively expressed’ state policy; and
- is ‘actively supervised by the State itself’.

This third situation – private parties acting within governmental entities – has exploded in number across the United States since *Parker*. Today, state and local governments frequently delegate the management of an array of public services, including water, sewer, schools, utilities, and hospitals to boards, commissions, or other quasi-government entities. Similarly, many states delegate the

regulation of professions to boards consisting of participants in those professions – including, regulatory or licensing boards for doctors, dentists, chiropractors, nurses, veterinarians, lawyers, architects, plumbers, engineers, brokers, and accountants.⁷ California alone claims to have 31 such boards,⁸ and studies have shown that market participants constitute a majority of the members on most professional boards.⁹ In the course of their operations, these entities often award contracts, issue licences and impose discipline – all of which could be challenged as anti-competitive by the parties not awarded contracts, denied licenses, or subjected to discipline. Whether such actions by private parties fall within the state action immunity is the subject of frequent antitrust litigation, most recently, before the Supreme Court.

The Supreme Court’s North Carolina Dental Ruling

In *North Carolina State Board of Dental Examiners v Federal Trade Commission*, the Supreme Court provided unusually detailed guidance on state action immunity questions that had vexed lower courts for years.¹⁰ In that case, North Carolina delegated a dentist licensing system to its Board of Dental Examiners. Its members were selected by dentists in the state, with most being dentists with active practices, including providing teeth-whitening treatments. After non-dentists began offering teeth-whitening services, the Board decided that teeth whitening is the practice of dentistry and then launched an aggressive campaign to stop non-dentists from providing teeth whitening in North Carolina. The FTC claimed the Board’s actions unreasonably restrained trade. The Board responded by arguing the state action doctrine provides state-designated entities with immunity from the FTC’s lawsuit. The Fourth Circuit concluded, with little analysis, that ‘when a state agency is operated by market participants who are elected by other market participants, it is a “private” actor’ and required to satisfy both *Midcal* prongs.¹¹ This conclusion effectively decided the case, as the Board did not argue it could meet *Midcal*’s second prong.

The Supreme Court affirmed with an opinion addressing the very core of the state action doctrine. The Court explained that the doctrine is not ‘unbounded’ and its application is ‘disfavoured’. These limits on state action, the Court said, are ‘most essential’ when a state attempts to delegate its regulatory power to participants in the very market they are regulating due to the risk that those participants will pursue private interests that restrain trade. Consequently, the Court reasoned, immunity does not automatically apply to non-sovereign actors, even if they are delegated regulatory authority by a state. In blunt terms, the Court observed that ‘active market participants cannot be allowed to regulate their own markets free from antitrust accountability’. Despite this, the Court left open the possibility of state delegated, private actor immunity from the antitrust laws, but only when there is a process sufficient to attribute that conduct to a state. This process, the Court iterated, must satisfy the two-prong test in *Midcal*, which requires that states must have foreseen and implicitly endorsed the anti-competitive effects as consistent with

its policy goals, and state officials must exercise power to review the anti-competitive acts and to disapprove those not in accord with the state's policy goals.¹²

With this framing of state action, the Supreme Court handily rejected the immunity claimed by the North Carolina State Board of Dental Examiners. The Court noted that teeth whitening did not exist when the Board was created, suggesting the state could not have clearly articulated displacement of competition in that market as required by *Midcal's* first prong. The Court also noted that the Board failed to contend that the state actively supervised the Board's conduct, so *Midcal's* second prong could not be met. Overall, the Court concluded, with no evidence that the state was aware of the Board's anti-competitive teeth-whitening conduct, it could not be attributed to the state, and the state action doctrine could not immunise the Board from an antitrust suit.¹³

Litigation developments following North Carolina Dental

The Supreme Court's forceful state action ruling reinvigorated ongoing cases and encouraged new cases by both government enforcers and private litigants, and will likely inspire litigants to test and define remaining state action uncertainties in the immediate future.

As for government enforcers, *North Carolina Dental* is a boon. One FTC commissioner called the ruling a 'crucial victory' and predicted it 'could have the most significant impact on competition and consumer welfare' of any FTC case on state action.¹⁴ Soon after *North Carolina Dental*, the FTC noted the opinion's impact in announcing a quasi-government hospital board's decision to abandon a proposed merger rather than continue to resist the FTC's litigation challenge.¹⁵ More recently, the FTC cited *North Carolina Dental* while voicing strong disapproval of a New York state regulation that purports to provide antitrust immunity to certain community-level health-care organisations.¹⁶ Given the FTC's embrace of *North Carolina Dental*, government enforcers will likely continue to rely on it to support ongoing and new antitrust challenges to private parties acting pursuant to state delegated authority.

As for private litigation, multiple cases have been filed challenging the decisions of market participants acting through government entities as falling outside the state action immunity as explained in *North Carolina Dental*. In June 2015, for instance, online legal services provider LegalZoom revived long-running litigation with the North Carolina State Bar,¹⁷ alleging that the Bar's actions to exclude LegalZoom from the North Carolina legal market is an unlawful restraint of trade and monopolisation. In that action, LegalZoom contends the Bar's actions are not immunised by the state action doctrine because the Bar is comprised almost exclusively of lawyers who practice law in North Carolina, and none of them are actively supervised by government officials.¹⁸

In another June 2015 case, a veterinarian sued Connecticut's State Board of Veterinary Medicine after the Board voted to bring disciplinary proceedings against the plaintiff for allegedly administering less-than-recommended doses of a vaccine to dogs.¹⁹ The plaintiff claims the Board's disciplinary decision constitutes an unlawful conspiracy to monopolise that does not fall within the state action immunity because the Board is comprised of market participants that are not actively supervised by the state. These cases illustrate the most likely challenges government entities with market participant members will face – seemingly straightforward allegations that such entities are not adequately supervised by government officials and do not qualify for state action immunity. Considering the sheer number of government entities with a market participant majority, cases with these allegations may be filed with regularity.

Parties will also likely explore the state action doctrine uncertainties remaining after *North Carolina Dental*. The Supreme Court implicitly acknowledged some uncertainty when recognising that application of the doctrine requires a 'flexible and context-specific' analysis. Justice Alito's dissent put a finer point on the uncertainty, identifying the lack of clarity on what constitutes 'active market participants' or how to define the markets in which they participate.²⁰ One FTC commission agreed that these are 'key questions that need to be addressed'.²¹ The battle has already begun in *Teladoc, Inc v Texas Medical Board*, in which Texas is vigorously contesting allegations that its physician licensing board comprised mostly of physicians in Texas who cannot qualify for state action immunity.²² Focusing on questions left unanswered by *North Carolina Dental* (eg, whether judicial review of quasi-government decisions is adequate state supervision) and facts that are different than in *North Carolina Dental* (eg, no physicians on Texas board compete directly against the party excluded from the market), Texas seeks dismissal of the case on the rationale that the physician board is immune. As this and similar cases progress through the courts, further clarity on these and other areas of uncertainty about the state action doctrine should be realised.

Considerations for non-sovereign actors after North Carolina Dental

Even while the state action doctrine continues to develop in the courts, non-sovereign actors should carefully consider the apparent implications of *North Carolina Dental* and any possible steps necessary to avoid clashing with its key principles as identified by the Supreme Court.

The Supreme Court reaffirmed that the state action immunity is limited to the anti-competitive effects that states had clearly anticipated and endorsed as consistent with their policy goals.²³ Quasi-government entities should consider reviewing the legislation that established them to verify whether it authorises or at least implicitly endorses actions that may have an anti-competitive effect, and whether the legislation articulates a policy rationale for the anti-competitive effect. Of course, entities should avoid acting outside the scope of their founding legislation or consider seeking an expansion of legislation or other form of government-delegated authority as needed to encompass their functions.

The Supreme Court emphasised that state action immunity may apply only to conduct actively supervised by the state.²⁴ While this concept remains somewhat undefined, the Court itself provided valuable guidance. It explained that 'day-to-day involvement' or 'micromanagement' by the state of non-sovereign decisions is not required; instead, the state need only establish review mechanisms sufficient to provide 'realistic assurance' that any non-sovereign's anti-competitive conduct promotes state policy.²⁵ This can be achieved by the state retaining the power to veto or modify any non-sovereign decision resulting in anti-competitive effects, and actually reviewing any such decision. Consistent with the Court's guidance, quasi-government entities should consider verifying that the substance of their decisions is actually reviewed by state officials with the authority to reject or change decisions. If decisions are not reviewed pursuant to an established mechanism, prudent entities should consider other means of obtaining meaningful government review, such as asking state officials to approve potential decisions that could result in anti-competitive effects, or proactively seeking the establishment of a mechanism that would result in the state adopting decisions.

While the Supreme Court ruled state action should be applied flexibly, the Court urged caution when considering immunity for

quasi-government entities controlled by market participants.²⁶ These situations can be especially problematic, the Court explained, because such entities are incentivised to make decisions that benefit the interests of those in control of the entities rather than the market at large, and self-regulation is generally contrary to federal antitrust policy. Entities controlled by market participants would be well-advised to proceed cautiously. These entities should also consider taking steps to eliminate the potential for actual or apparent anti-competitive self-dealing. They could, for example, establish procedures that screen members from participating in decisions with potential to impact direct competitors, encourage participation by non-market actors, or establish a method for review of decisions by disinterested members or outside advisers. These entities should also consider establishing or strengthening processes for the disclosure of members' conflicts of interests, as well as the maintenance of a robust antitrust training, compliance and review regimen that could prevent or contain potential anti-competitive situations.

Conclusion

The Supreme Court's recent decision in *North Carolina Dental* not only provides valuable guidance for quasi-government entities seeking state action immunity, it also sets the stage for continued development of the doctrine in the courts. These cases have begun to demonstrate the types of claims quasi-government entities may face and provide a roadmap for how these entities can avoid antitrust trouble – including making sure their actions are consistent with state policy and actively supervised by the state. As *North Carolina Dental* and its progeny promise wide-spread impact on state and local government operations, all who believe they operate with state action immunity should proceed with caution and consider reviewing their conformity with the principles explained by the Supreme Court, in addition to assessing whether they remain eligible for immunity.

Notes

- 1 317 US 341 (1941).
- 2 *Id.* at 350-51.
- 3 See generally *SC State Bd of Dentistry v FTC*, 455 F.3d 436, 442 (4th Cir 2006).
- 4 *Hoover v Ronwin*, 466 US 558, 568 (1984).
- 5 *FTC v Phoebe Putney Health Sys, Inc*, 133 S Ct 1003, 1011 (2013) (internal quotation marks omitted).
- 6 445 US 97, 105 (1980).
- 7 See Brief for Amici Curiae State of W Va and 22 other States at 8-9, *NC Bd. of Dental Exam'rs v FTC*, No. 13-534 (May 30, 2014).
- 8 See Brief for Amici Curiae Cal. Optometric Ass'n at 5, *NC Bd of Dental Exam'rs v FTC*, No. 13-534 (May 30, 2014).
- 9 See, eg, Aaron Edlin & Rebecca Haw, *Cartels by Another Names: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U PA LAW REV 1093, 1157-64 (2014).
- 10 135 S Ct 1101 (2015).
- 11 *NC Bd of Dental Exam'rs v FTC*, 717 F.3d 359, 370 (4th Cir 2013).
- 12 See *NC Dental*, 135 S. Ct. at 1110.
- 13 See *id.* at 1116-17.
- 14 See Statement of Maureen K Ohlhausen, Comm'r, FTC, *Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity* at 13, 21 (31 March 2015), available at https://www.ftc.gov/system/files/documents/public_statements/634091/150403_hertiagedental.pdf.
- 15 See Statement of FTC, *In the Matter of Phoebe Putney Health Sys, Inc et al*, No. 9348 (Mar. 31, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf.
- 16 See FTC Ltr to NY State Dep't of Health, Center for Health Care Policy and Res Dev (April 22, 2015), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyork_health.pdf.
- 17 See, eg, Suzanne Monyak, *LegalZoom Rides Teeth Whitener Case to Fight with North Carolina Bar*, DAILY REPORT, June 15 2015; Jacob Gershman, *LegalZoom Sues North Carolina State Bar*, THE WALL STREET JOURNAL, 7 June 2015.
- 18 See *LegalZoom, Inc v NC State Bar, et al*, Complaint, No. 1:15-CV-439 (MDNC 2015).
- 19 See *Robb v Conn Bd of Veterinary Med, et al*, Complaint, 3:2015cv00906 (D Ct 2015).
- 20 See *NC Dental*, 135 S Ct at 1122-23.
- 21 See Ohlhausen Statement at 13.
- 22 No. 1:15-cv-00343-RP (WD Tex 2015).
- 23 See *NC Dental*, 135 S Ct at 1112.
- 24 See *id.* at 1114.
- 25 See *id.* at 1116.
- 26 See *id.* at 1111.



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Bob Abrams leads BakerHostetler's antitrust and trade regulation practice team and guides a team of attorneys with great depth and strength in the litigation and trial of antitrust cases, including class actions. The antitrust group also has significant experience in mergers and acquisitions, and its partners have been point persons in dealing with the Department of Justice (DOJ) and the Federal Trade Commission (FTC) on the antitrust aspects of clearing transactions. Bob has more than 30 years of experience litigating and trying antitrust and complex commercial and government enforcement matters. He is a fellow of the American College of Trial Lawyers and is ranked in *Chambers USA: America's Leading Lawyers for Business* in the area of antitrust.

Bob's experience as a trial and litigation strategist spans practice areas, and he has been lead counsel in lengthy antitrust, intellectual property, trade secret and breach-of-contract jury trials, and has represented both plaintiffs and defendants. He has argued in most of the US courts of appeals, presenting cases involving distribution and other business practices, the Alien Torts Claims Act and constitutional law issues. He has also defended clients in enforcement actions initiated by the DOJ, FTC, Environmental Protection Agency and the California Air Resources Board. He was counsel in one of the largest FTC proceedings ever filed and lead counsel in one of the largest Clean Air Act enforcement actions in history. Bob tried a major class action on behalf of the defendant, ExxonMobil and, as lead plaintiffs' counsel, settled a major class action for more than US\$300 million and effective conduct changes on behalf of dairy farmers in 14 south-eastern states that was recognised as one of the six leading antitrust cases in 2012 by *Global Competition Review*.



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