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Lessons from the North Carolina Dental Board Decision

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On 25 February, the Supreme Court issued its latest decision on the contours of state-action immunity from federal antitrust law. In a 6-3 opinion written by Justice Anthony Kennedy, the court held that because North Carolina's State Dental Board was composed of market participants, it could only claim immunity if it were subject to active supervision by the state. Former Federal Trade Commission competition director and current Boies Schiller & Flexner partner ***Richard Feinstein***** takes a closer look.*

On the facts presented, the Supreme Court's recent decision in *North Carolina State Board of Dental Examiners v Federal Trade Commission* was unsurprising. The six-justice majority of the court had no difficulty finding that the North Carolina Board was not entitled to the antitrust immunity that *Parker v Brown* and its progeny confer on the state itself. In doing so, the majority reaffirmed the longstanding relationship between the state action doctrine and principles of federalism, found unconvincing "the parade of horribles" advanced by petitioners and numerous *amici*, but – in a manner reminiscent of the Actavis decision two years ago – left many of the details regarding the need for and scope of active supervision to be worked out by lower courts.

With respect to federalism, the majority acknowledged the well-established principle that states may displace competition, but only when the actions in question are an exercise of the state's sovereign power. The court rejected the argument advanced by petitioners that principles of federalism required deference to the regulatory regime established by North Carolina because it was unconvinced that the actions of an unsupervised board controlled by market participants were equivalent to the action of the state as sovereign.

This conclusion is consistent with prior expressions by the court (in the course of fleshing out the relationship between federal antitrust law and state regulation) that federalism is best served when there can be assurance

that the displacement of competition is being undertaken pursuant to both the policy and the actions of the state itself. In this way, states are politically accountable "for anti-competitive conduct they permit and control".

Assuming the state policy to displace competition can be established, it is permissible for states to delegate the implementation of that policy to private parties, but only in the presence of active supervision of the private actors by the state. Indeed, "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 anti-competitive motives in a way difficult even for market participants to discern," the court said.

The majority also took on directly the argument – advanced with great force by both petitioners and *amici* – that allowing the FTC order to stand will "discourage dedicated citizens from serving on state agencies that regulate their own occupation". The majority opinion makes clear that the good faith of professionals engaged in self-regulation is not in question. Noting that this case does not present a claim for damages, the court declined to address the question of whether board members "may, under some circumstances, enjoy immunity from damages liability". But even if such damages were theoretically available, the majority observed that states might "provide for the defence and indemnification of agency members in the event of litigation", or – better still – provide active supervision of agencies controlled by market participation, thereby taking antitrust liability off the table altogether.

The decision is also noteworthy for what it does not say. For example, in the run-up to the Supreme Court argument, there had been much speculation about how the court might respond to the concurring opinion accompanying the Court of Appeal for the Fourth Circuit's decision from which the board had appealed. More specifically, Fourth Circuit judge Barbara Keenan had observed that "[i]f the board members here had been appointed or elected by state government officials pursuant to state statute, a much stronger case would have existed to remove the board from the reach of *Midcal*'s active supervision prong". The potential relevance of the appointment process to the need for active supervision was addressed in both the briefs to the Supreme Court and at oral argument, but the court's decision is completely silent on that topic.

Moreover, the court declined to provide additional guidance about what sort of supervision would have been sufficient. Instead, it noted that because there is no claim any supervision occurred, "no specific supervisory systems can be reviewed here", and said it suffices in this case to note that the inquiry about active supervision is "flexible and context-dependent".

The only additional guidance the court provided on the contours of active supervision were reminders from *FTC v Ticor* and *Patrick v Burget* that: (1) "the supervisor must review the substance of the anti-competitive decision, not merely the procedures followed to produce it[;]" (2) "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy[;]" (3) the potential for supervision will not be an adequate substitute for a decision by the state; and (4) "the state supervisor itself may not be an active market participant". Otherwise, "the adequacy of supervision will depend on all the circumstances of a case".

As noted above, this sort of broad guidance is not unlike that provided in *Actavis* and, as observed by the dissent, may require both states and lower federal courts to grapple with a variety of questions about the nature of "control" of state boards, the identification of active market participants and the scope of the market

in question. On the other hand, states that are in doubt about the answers to these questions can reduce the need to resolve them by taking a more aggressive approach to active supervision.

**We note the author served as director of the FTC's bureau of competition during the investigation and litigation of this case at the commission, and therefore probably had a vested interest in its outcome at the Supreme Court.*

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