

NC Board of Dental Examiners v. FTC

On February 25, 2015, the U.S. Supreme Court issued its opinion in North Carolina State Board of Dental Examiners v. F.T.C. As discussed below, the Court's opinion impacts how state professional licensing boards must operate.

Background

North Carolina dentists began teeth-whitening services in the 1990s. By 2003, non-dentist providers began offering the same services in spas and salons. They charged less, prompting dentists to complain to the North Carolina State Board of Dental Examiners (Board). Under North Carolina law, the Board is "the agency of the State for the regulation of the practice of dentistry." North Carolina law further requires that six of the eight Board members must be licensed, practicing dentists.

In response to the dentists' complaints, the Board issued cease-and-desist letters to non-dentist teeth-whiteners, claiming that teeth-whitening was within the scope of practice of dentistry and that the teeth whiteners therefore were practicing dentistry without a license. While North Carolina state law defines the practice of dentistry to include the "removal of stains, accretions or deposits from the human teeth," the state's law is silent about the use of peroxide to whiten teeth.

The Federal Trade Commission filed a complaint against the Board, claiming that the cease-and-desist letters violated federal antitrust law, which prohibits practices that suppress market competition. The FTC contended that the dentists were using their licensing arm to chase competitors out of a lucrative business that required no special medical or scientific training.

The FTC rejected the Board's attempted public safety justification, noting a wealth of evidence that non-dentist teeth whitening is a safe cosmetic procedure.

The Board moved to dismiss the FTC's lawsuit, arguing that states are immune from antitrust suits. The FTC opposed that argument, and the issue ultimately made its way to the U.S. Supreme Court.

The Supreme Court's Decision

A state enjoys "state action immunity" from antitrust liability as long the state was acting in its "sovereign capacity." This means that the action in question must have been an exercise of the state's "sovereign" -- meaning independent, governmental -- power. Anti-competitive conduct by an entity which has some connection to the state, but is not the state itself, does not qualify for state action immunity unless it resulted "from procedures that suffice to make it the State's own." "The question is not whether the challenged conduct is efficient, well-functioning, or wise." Rather, it is whether the conduct "should be deemed state action and thus shielded from antitrust laws."

The test which courts apply to answer this question was set forth in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (Midcal). Under the Midcal test, a nonsovereign actor's anticompetitive conduct is immune from antitrust liability only if:

(1) the State has articulated a clear policy to allow the anticompetitive conduct, meaning that the State foresaw and implicitly endorsed the anticompetitive effects as consistent with its policy goals, and

(2) the State provides active supervision of the anticompetitive conduct, meaning that “state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”

In this case, the parties assumed that the first requirement was satisfied, since, while North Carolina’s state law prohibits the unauthorized practice of dentistry, it is silent on whether that broad prohibition covers teeth whitening.

With respect to the second requirement, the Board admitted that there was no active state supervision of its conduct regarding nondentist teeth whiteners, but argued that the requirement did not apply to the Board in the first place because entities designated by states as agencies are exempt from the requirement. The Supreme Court rejected this argument, ruling that state agencies and boards are not sovereign actors simply because they have a governmental character. “[T]he need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.” The Supreme Court explained that “established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.” As a result, “active market participants cannot be allowed to regulate their own markets free from antitrust accountability.” The Court was careful to mention that “[t]his conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” Although previous court cases have exempted certain state agencies from the active supervision requirement, the agencies in those cases were electorally accountable and had no potential private market agenda. Similarly, municipalities do not need to satisfy the second requirement of the Midcal test in order to be immune from antitrust liability. This is because “where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement.” Further, “municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market.” What matters is whether there are active market participants making market-participation decisions.

Based on this analysis, the Supreme Court ruled that a state board, such as the North Carolina Board, “on which a controlling number of decisionmakers 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.” This is the crux of the Court’s opinion.

The Board conceded that there was no state supervision over its actions concerning the teeth-whiteners. The Court agreed, noting that the Board chose to issue cease-and-desist letters threatening criminal liability rather than using “any of the powers at [the Board’s] disposal that would invoke oversight by a politically accountable official.” Importantly, the Court noted early in the opinion that “[t]he Board’s concern [about the teeth whiteners] did not result in a formal rule or regulation reviewable by the independent Rules Review Commission,” raising the implication that specific board actions which are formalized in state-reviewed rules or regulations might satisfy the active supervision requirement.

Because there was no state supervision in this case for the Court to evaluate, the Court could not issue any particular rules as to what, specifically, qualifies as sufficient “active

supervision” by the state. What the Court did say is that “the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether 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.’”

The Court went on to state that while the adequacy of the supervision depends on the circumstances of the particular case, there are a few constant requirements:

- (1) the supervisor must review the substance of the anticompetitive 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 mere potential for state supervision is not an adequate substitute for a decision by the state, and
- (4) the supervisor may not itself be an active market participant.

Although antitrust claims can result in money damages, there was no claim for money damages in this case. Importantly, the Court said that it was making no determination as to whether state agency officials might, under some circumstances, have immunity from money damages on antitrust claims under other legal theories not addressed in this case.

Implications for State Boards

While the Supreme Court’s decision leaves some important questions unanswered, state boards should be aware of some of the immediate implications of the decision, including:

- This decision means that boards can now be sued under antitrust laws. It does not mean that boards will necessarily be held liable under those laws.
- Only those board actions that are anti-competitive under federal antitrust law are affected by the Supreme Court’s decision. Therefore, Boards need to understand what types of actions could constitute anticompetitive conduct. Antitrust law is complicated, and where boards have concerns they must consult with their legal counsel. In our view, it is unlikely that disciplinary actions by boards would be considered anti-competitive under antitrust law.
- A board can defend an antitrust claim on the basis that the action was motivated and justified by public safety concerns, or based on any other available antitrust defense.
- The Supreme Court’s decision provides no bright line test as to what does or does not constitute adequate state supervision over anticompetitive conduct. Future court cases and legislation will likely clarify states’ duties with respect to supervision. Again, where boards have concerns they should consult with counsel.
- The opinion indicates that the state must supervise individual anti-competitive decisions by boards, not merely have authority over general board procedures.
- The fact that the state has the ability to review the board’s anti-competitive decisions is not sufficient; the state must have actually done so.