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Regulation of Bar

Regulatory Boards' Antitrust Shield Dented; What Effect Might It Have on Bar Groups?

State boards filled with members of the profession they regulate are subject to antitrust liability if their actions aren't ''actively supervised'' by the state, the U.S. Supreme Court made clear Feb. 25 (*N.C. State Bd. of Dental Exam'rs v. FTC*, 2015 BL 48206, U.S., No. 13-534, 2/25/15).

The ruling allows the Federal Trade Commission to go after the North Carolina State Board of Dental Examiners, which the commission claims acted illegally by using cease-and-desist letters to try to stop nondentists from offering teeth whitening services in that state.

Writing for the six-justice majority, Justice Anthony M. Kennedy said the board was not protected by the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), which immunizes nonstate entities and individuals from antitrust liability when (1) their restraint on trade reflects a state policy and (2) the state actively supervises that policy. Those two conditions were identified in *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Pursuing Private Interests. Kennedy said ''agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing that *Midcal*'s supervision requirement was created to address.''

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JUSTICE ANTHONY M. KENNEDY

Immunity 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,'' he said.

The court therefore held that ''a state 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.''

The board failed to establish that its actions regarding teeth whitening were sufficiently supervised by the state, Kennedy said. ''[A]ctive market participants cannot be allowed to regulate their own markets free from antitrust accountability,'' he stated.

The court made clear that the FTC is seeking purely injunctive relief in this matter. It declined to speculate whether the board would have had a stronger argument if board members were being sued for money damages for their alleged anti-competitive conduct.

'Far-Reaching Effects.' Justice Samuel A. Alito, joined in dissent by Justices Antonin Scalia and Clarence Thomas, said the majority's decision ''is based on a serious misunderstanding of the doctrine of state-action antitrust immunity.''

Furthermore, he said, the majority ''takes the unprecedented step of holding that *Parker* does not apply to the [board] because . . . it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists.''

Under *Parker*, antitrust laws ''do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that,'' Alito insisted, ''is the end of the matter.''

He found *Midcal* to be inapposite here because the board is neither a private entity nor a trade association, but rather a state agency. Furthermore, Alito said, ''for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.''

Alito predicted the ruling ''will create practical problems and is likely to have far-reaching effects on the State's regulation of professions,'' as boards may need to be restructured without clear guidance as to what restructuring would satisfy the majority's test.

What It Portends. Kennedy's opinion barely touched on the implications of the court's ruling for practicing lawyers whose service on bar association panels might be construed as anti-competitive.

He did point out, however, that in *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), the court said the state bar's enforcement of a county bar association's minimum-fee schedule constituted price-fixing that was not protected by the state action doctrine because the

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state supreme court had no involvement in that endeavor.

One former participant in this case told Bloomberg BNA he does not foresee the court's decision causing a major problem for state bar associations.

State bars generally are overseen by state supreme courts, said Richard Dagen of Axinn, Veltrop & Harkrider LLP, Washington, D.C. Such oversight—whether interpreted as state action itself, or as ''active supervision''—is likely enough to confer antitrust immunity, he said, pointing to earlier high court decisions in *Hoover v. Ronwin*, 466 U.S. 558 (1984), and *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

Dagen was lead counsel for the FTC at trial on this case and served as second chair at the appeal in the Fourth Circuit.

Bar Groups, Look Out. Dagen's take on the ruling wasn't universally shared.

''The Court's decision means that state bars will no longer be able to use unauthorized practice of law (UPL) restrictions to shut down non-lawyer competition without state oversight,'' according to Tom Gordon of Responsive Law, which filed an amicus brief in the case along with LegalZoom.com and others.

''Now,'' Gordon said in a media release, ''such anticompetitive action will be subject to antitrust liability in states where the bar had been previously unchecked.''

Responsive Law identifies itself as ''working to make the legal system more accessible, affordable, and accountable.''

Crucial Role of State Involvement. According to another observer, the court's decision highlights the need for bar associations to align their activities with the jurisdiction's courts.

In an e-mail to Bloomberg BNA, George Washington University Law School professor emeritus Thomas D. Morgan identified two regulatory functions in particular that should continue to pass muster under *Parker*:

- restrictions placed on lawyers by the rules of professional conduct, which Morgan said probably qualify for state action immunity ''because they are imposed by the state's Supreme Court''; and
- efforts to curb unauthorized law practice, ''so long as the challenges are subject to judicial analysis and resolution.''

But if this kind of judicial supervision is lacking, Morgan said, Kennedy's opinion serves as a warning:

> What *Dental Examiners* puts in doubt would be efforts by lawyers to regulate their own competitive behavior such as the state and county bar associations tried to do in *Goldfarb*, or as the ABA did in facilitating law schools' exchange of salary information, a practice ended only by a federal consent decree. Attempts by lawyers to define the ''practice of law'' authoritatively would also now be subject to challenge.

Morgan, who taught classes in professional responsibility as well as antitrust law, added that overall he does not see this case as posing much of a threat to the existing system for regulating lawyers and law practice.

''[B]ecause most authoritative lawyer regulation is imposed by state Supreme Courts that qualify as institutions of states acting in their sovereign capacity, it seems unlikely that *Dental Examiners* will have significant practical effect on lawyer regulation,'' he said.

Public/Private Friction. Steven J. Cernak, of the Ann Arbor, Mich., office of Schiff Hardin LLP, told Bloomberg BNA he wasn't surprised by the decision, ''[g]iven the comments at oral argument.'' (See 30 Law. Man. Prof. Conduct 682.)

''All the justices seemed concerned about a state just blessing bad conduct by private actors,'' he said. ''But where to draw the line was the key question—and the fact that, just like the parties and their respective amicus supporters, the majority and dissent quote the same cases extensively to reach opposite conclusions shows how difficult the question was.''

''What we now know is that a state agency that regulates a profession and has members of that profession on it can no longer simply rely on state designation as a 'state agency' to receive antitrust immunity,'' Cernak said. ''Instead, that agency will need to determine if those professionals constitute a 'controlling number' of the entity and are 'active participants' in the profession.''

''If the answer to both is yes,'' he continued, ''then some other state actor will need to be 'actively supervising' the actions of that agency in order to avoid antitrust issues.''

''Many such entities should now be asking those questions and, perhaps, changing the way they do business.''

Full text at http://www.bloomberglaw.com/public/document/NC_State_Bd_of_Dental_Examiners_v_FTC_No_13534_2015_BL_48206_US_F.

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