



NC Dental: What Did the Supreme Court Say and What Can States Do?

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In 1943 in *Parker v. Brown* the U.S. Supreme Court created the state action doctrine, which grants states and state actors immunity from federal antitrust liability. In 2015 in *North Carolina State Board of Dental Examiners v. FTC* the Supreme Court held that when a controlling number of state board members are market participants, the board must be “actively supervised” to be immune from antitrust law.

What Did the Supreme Court Say?

Q. Why does this case matter to state government?

A. Hundreds of boards and commissions in each state regulate every profession from athletic trainers to veterinarians. To make it more likely state regulatory board members are exempt from antitrust liability, states may have to change the composition of the boards and/or actively supervise them. Either of those actions might reduce boards’ effectiveness and efficiency. Yet without such changes, state boards may be subject to antitrust liability for actions that are deemed to be anticompetitive.

Q. What is the background of this case?

A. The North Carolina State Board of Dental Examiners (the Board) is a state agency which regulates the practice of dentistry. Per state law, six of its eight board members must be actively practicing dentists.

The Board issued cease-and-desist letters to non-dentist teeth whitening providers stating or implying that teeth whitening was the “practice of dentistry,” which non-dentists are prohibited from engaging in.

The Federal Trade Commission (FTC) charged the Board with violating federal antitrust law.

The Board defended its actions by invoking the state action doctrine and arguing that because it is a state board acting on behalf of North Carolina, it is exempt from antitrust liability.

Q. What is the state action doctrine?

A. The Supreme Court created the state action doctrine in *Parker v. Brown*. It makes states and state actors immune from liability for antitrust violations. States may grant non-sovereign entities state action immunity if (1) states have a clearly articulated and affirmatively expressed state policy to displace competition (clear articulation requirement) (2) that is actively supervised by the state (active supervision requirement).

Q. Why did the Court conclude that the state action doctrine did not apply to the Board in this case?

A. A majority of the Court concluded that a board controlled by market participants should be treated like a non-sovereign actor. Accordingly, supervision by the state is necessary to avoid anticompetitive self-dealing. (The parties agreed that, although the clear articulation requirement was met in this case, the board wasn't actively supervised.)

Q. Which state boards and commissions does this decision apply to?

A. It applies to state boards and commissions to which states have delegated regulatory authority over an industry—not only dental or medical boards.

The Court provided no guidance on whether *North Carolina Dental Board* applies equally to boards that issue rules and boards that issue licenses. However, it is safe to assume that the decision would apply to both, since anticompetitive self-dealing is just as likely if a board with a controlling number of market participants issues licenses or rules.

So, broadly, this case applies to boards that have the authority to issue licenses, make rules prohibiting or requiring certain industry practices, or make other decisions that may impact the ability of someone to participate in the industry.

Q. Does it matter if boards are elected or appointed?

A. No. While the board in this case was elected the Supreme Court did not indicate it would have ruled differently had the board been appointed.

What Can States Do?

States have three options for complying with this ruling. First, they can choose not to put a controlling number of active market participants on boards. Second, they can actively supervise boards where market participants make up a controlling number of members. Third, they can forgo state action immunity by not actively supervising boards and keeping a controlling number of market participants on boards.

Option 1: Reduce the controlling number of market participants

Q. What are the pros and cons/risks of this option?

A. Pros: Per this option the board can maintain state action immunity. Under *North Carolina Dental Board*, if less than a controlling number of its members are market participants a state board receives state action immunity.

Cons/risks: State law often requires a certain number of certified, practicing members of an industry on a board. And a board composed of fewer market participants may be less knowledgeable and capable of effective and efficient regulation of an industry.

Q. Might state laws have to be changed to reduce the number of market participants on a board?

A. Yes. State law will have to be changed if it specifies that boards must consist of a controlling number of professionals in the field being regulated.

Q. What is a “controlling number”?

A. The Court did not give a specific definition. Because the Court used the term “controlling” in its opinion rather majority, it is possible that a controlling number may be less than a majority.

Q. Who are “active market participants”?

A. Again the Court did not say. In this case licensed dentists actively practicing dentistry while concurrently serving on the Board were active market participants. It is possible that the FTC, lower courts, and the Supreme Court may interpret “active market participants” more broadly.

Option 2: Actively supervise boards and commissions

Q. What are the pros and cons/risks of this option?

A. Pros: State action immunity would apply and states would not have to significantly overhaul the composition of boards.

Cons/risks: Instituting a new framework for supervision of boards could be costly and time-consuming and could compromise the efficiency of regulatory boards.

Q. What is “active supervision”?

A. The Court offered no comprehensive definition of active supervision but stated that it is flexible and context-dependent. Generally, active supervision must provide “realistic assurance” that if a board or commission is engaged in anticompetitive conduct that it promotes state policy rather than members’ individual interests.

The Court also identified a few “constants” regarding active supervisors: they must review the substance and not just the procedure of anticompetitive decisions; they must have the power to modify or veto anticompetitive decisions; and they must provide actual supervision.

Option 3: Forgo state action immunity

Q. What are the pros and cons/risks of this option?

A. Pros: This strategy does not require changing the composition of boards or actively supervising them. It makes the most sense with respect to boards whose actions pose little risk of antitrust violations. For example, boards that have little role in industry regulation or already have a non-controlling number of market participants.

Cons/risks: This leaves state boards vulnerable to liability for antitrust violations. If the board is high-risk for antitrust violations the state may have difficulty attracting members to it.

Putting It All Together

Q. Might a state want to decide on a board-by-board basis which option or options it should pursue?

A. Yes. Each option has a number of disadvantages and uncertainties, each regulatory board may present different levels of risk for antitrust violations, and some boards may already be actively supervised or not controlled by market participants.

Q. Might using a combination of options even on a board-by-board basis make sense?

A. Yes. For example, in light of the uncertainty over how many board members are “controlling” and what is active supervision, reducing the number of market participants and adding supervision might make sense for some boards.

Q. Might statutory language giving boards and commissions clearer authority to act anti-competitively reduce the likelihood of antitrust lawsuits?

A. Yes. If the North Carolina statute had explicitly stated that the practice of dentistry includes teeth whitening it is unlikely the FTC would have brought this case. To avoid antitrust liability state statutes giving boards and commissions authority to regulate various practices could be more specific about the definition of a practice.

Q. If a board or commission acts anti-competitively and is not eligible for state action immunity has it necessarily violated federal antitrust law?

A. No. Only unreasonable restraint on competition violates federal antitrust law.