Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity

Maureen K. Ohlhausen[1]
Commissioner, U.S. Federal Trade Commission

members—was "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services" in North Carolina.[3] After deciding that whitening teeth constitutes the practice of dentistry, the Board issued at least forty-two letters to non-dentist teeth whitening providers, informing them that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing those services.[4] The Board also issued at least eleven letters to various third parties, including mall owners and property management companies, with interests in approximately twenty-seven shopping malls, stating that teeth whitening services offered at mall kiosks are illegal.[5]

The Commission alleged that the Board's activities constituted an unlawful restraint of trade under the standards governing Section 1 of the Sherman Act and thus an unfair method of competition under the FTC Act.[6] The result of this concerted effort, as alleged in the complaint, was to deprive consumers of the benefits of price competition and increased choice provided by non-dentist teeth whiteners.[7]

Prior to the administrative trial in this matter, the Board filed a motion to dismiss, arguing that its conduct was protected by the state action doctrine. In a unanimous opinion written by then-Commissioner William Kovacic, the Commission held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of

---

[2] *In re* N.C. Bd. of Dental Exam'rs, Docket No. 9343, Complaint (June 17, 2010) [hereinafter *N.C. Dental* Compl.], available at https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf.

[3] *Id.* at 1. The Board consists of six licensed dentists, one licensed hygienist, and one "consumer member," who is neither a dentist nor a hygienist. *Id.* ¶ 2.

[4] *Id.* ¶ 20.

[5] *Id.* ¶ 22.

[6] The FTC enforces Section 1 of the Sherman Act through the FTC Act. *See, e.g.* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 762 n.3 (1999) ("The FTC Act's prohibition of unfair competition . . . overlaps the scope of § 1 of the Sherman Act . . . .") (citation omitted).

[7] *N.C. Dental* Compl. ¶ 25.

Midcal to be exempted from antitrust scrutiny under the state action doctrine."[8] That is, to benefit from state action immunity, the Board must show not only that the state of North Carolina has "clearly articulated and affirmatively expressed" a state policy in favor of regulation and against competition with respect to teeth whitening services, but that the Board's activities—like those of private parties—are "'actively supervised' by the State itself."[9] The Commission further found that the Board failed to demonstrate that "its decision to classify teeth

must satisfy Midcal's active supervision requirement in order to invoke state-action antitrust immunity."[14] Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.

The Court reiterated the crucial role that antitrust plays in our economy, noting that "[f]ederal antitrust law is a central safeguard for the Nation's free market structures."[15] And, citing its recent decision in Phoebe Putney, another Commission victory in this area, the Court explained that, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'"[16]

The Court also focused on the important issue of political accountability. It first rejected the idea that state agencies, such as the Board, are sovereign actors that automatically qualify for state action immunity, as the state itself. The Court in Parker v. Brown,[17] in establishing the state action doctrine, recognized the importance of our federal system of government, including the sovereignty of the states. Thus, anticompetitive conduct is immunized only when it legitimately represents the state acting in its sovereign capacity. However, immunity for state agencies, the Court explained, "requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."[18] In other words, "Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State

[14] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015).

[15] Id. at 1109.

[16] Id. at 1110 (citing FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1010 (2013)).

[17] 317 U.S. 341 (1943).

[18] N.C. State Bd., 135 S. Ct. at 1111.

to regulate their own profession, result from procedures that suffice to make it the State's own."[19]

The Court also contrasted state agencies with municipalities, which it has held are not obligated to meet the active supervision prong to benefit from state action immunity. In particular, the Court noted that "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market."[20] Further, municipalities tend to address issues "across different economic spheres, substantially reducing the risk that

supervision. Those two requirements and their underlying rationale, the Court found, should apply to the Board, just as they were held to apply to the medical peer review board in Patrick v. Burget,[25] where the Court directed to the legislative branch any challenges to the wisdom of applying the antitrust laws to the sphere of medical care.[26]

Finally, the Court briefly addressed the issue of active supervision and how the Board, or any other agency controlled by market participants, can meet this prong of the Midcal test. The Board did not argue before the Court that North Carolina exercised active supervision over its conduct regarding non-dentist teeth whiteners, and thus the Court was not reviewing any particular supervisory system. The Court, however, made clear that the supervision inquiry is "flexible and context-dependent."[27] The state's "supervision need not entail day-cular 8nd 0.004 vd el tgncbyuls

not the public" did not bother the dissenting Justices; "that is not what Parker immunity is about," they retorted.[30] The dissenters' reading of Parker was clearly different from the majority's. They noted that the regulation of the practice of medicine and dentistry has fallen "squarely within the States' sovereign police power" since before the Sherman Act was passed in 1890.[31] Thus, the state statutes that created, and conferred regulatory authority on, the Board "represent precisely the kind of state regulation that the Parker exemption was meant to immunize."[32]

The dissent also took issue with the practical problems that the majority opinion will supposedly create for state regulatory regimes, maintaining that it is unclear what changes to state boards will be necessary in light of the Court's decision. The dissent further identified several questions left unanswered by the decision, including: (1) "What is a 'controlling number' [of decision makers]?"; (2) "Who is an 'active market participant'?"; and (3) "What is the scope of the market in which a member may not participate while serving on the board?"[33] Finally, the dissent noted that regulatory capture of a state agency can occur in many ways and asked why the inquiry should be limited to the question of whether an agency includes active market participants.[34]

III. The FTC's Long-Term

efforts spanned multiple administrations—both Republican and Democratic. They also reflect the use of the Commission's unique tools and composition to develop the antitrust laws.

A. The FTC's State Action Program

The modern state action program at the FTC began with the State Action Task Force.[35] When Tim Muris became Chairman of the agency in 2001, one of the central pieces of his affirmative agenda was reigning in antitrust exemptions and immunities. Thus, in July 2001, he convened the State Action Task Force, which I was privileged to be a part of.[36] I would note that our host, Alden Abbott, also served on the Task Force, as did then-Director of the Office of Policy Planning (OPP) Ted Cruz.

The work of the Task Force culminated in a September 2003 report that made several recommendations for the Commission to pursue to clarify and re-affirm the original purposes of the state action doctrine and thus better protect competition and consumers.[37] The three central recommendations of the report were to: (1) "[r]e-affirm a clear articulation standard tailored to its original purposes and goals";[38] (2) "[c]larify and strengthen the standards for active supervision";[39] and (3) "[c]larify and rationalize the criteria for identifying the quasi-

[35] For an overview of the Commission's litigation efforts in the state action area during the 1980s and 1990s, for

eliminate such requirements. The Commission thus concluded that the board's conduct was not the foreseeable result of the relevant state statute. The Fourth Circuit subsequently affirmed the Commission,[45] and the matter was eventually settled.

During the early to mid-2000s, the Commission also engaged in competition advocacy, one of its most effective non-enforcement tools, to move the courts toward an interpretation of the state action doctrine that was more hospitable to competition and consumer welfare. We filed amicus briefs in several private suits where state action issues arose.[46] In 2005, I testified—in my capacity as OPP Director—on the proper scope of the state action doctrine before the Antitrust Modernization Commission (AMC).[47] Our advocacy before the courts, the AMC, and elsewhere fin

of twelve, that is a record of which any appellate litigator would be envious. It is even more impressive when one considers that, first, defendants in FTC cases can appeal the Commission decision to any circuit court in which they do business, giving them a potentially significant advantage, and, second, the Commission was designed to address—and in fact has addressed—complex issues arising under the antitrust laws, not merely run-of-the-mill cases.[50]

To me, however, it comes as no surprise that we have been so successful in the appellate courts. The unique institutional features of the FTC, including our research capabilities, administrative litigation tools, and the composition of the Commission, have allowed us to develop and improve the antitrust laws over time. More specifically, the agency's design gives it the singular ability to identify a potential competition problem in the market, develop empirical research to determine whether (and to what extent) a problem actually exists, and then plan and execute a multi-year advocacy and enforcement agenda to address the problem. In addition, the bipartisan, multi-member composition of the agency allows us to build consensus on questions of antitrust law over a longer timeframe—that is, one that may span multiple administrations.

The state action area is one of the best examples of the Commission leading the courts and others in the development of competition law toward better outcomes for competition and consumers. Of course, there are areas outside the state action doctrine that one can point to where we have accomplished the same thing. Those include hospital mergers and pharmaceutical pay-for-delay agreements. The Commission's efforts in those two areas have involved multi-year, and in fact, multi-administration efforts at moving the law in a more

[50] See, e.g., Jonathan Nuechterlein, Gen. Counsel, Fed. Trade Comm'n, How the FTC Works: Lessons from the Commission's Supreme Court Trifecta, Prepared Remarks before the Admin. Law Rev. Annual Symposium, at 10 (Mar. 20, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf ("The Commission does not typically end up litigating slam dunk cases in Part 3. Instead, it uses its Part 3 authority to tackle the most challenging or complex issues in competition policy.").

So, what are the most important implications of the opinion?

injunctions from the North Carolina courts, rather than issuing cease-and-desist letters directly to those parties. If the Board had chosen that path, it would have been shielded from antitrust liability under the Noerr-Pennington doctrine.[59] Alternatively, the Board could have promulgated a rule defining the practice of dentistry to include teeth whitening. Under North Carolina law, that rule would have been subject to review and approval by the Rules Review Commission, which could very well have constituted sufficient supervision under the state action doctrine.[60] Thus, the Board was subject to antitrust scrutiny because it opted to bypass its statutorily provided powers in favor of coercive measures that were not authorized under state law.

In any case, the Supreme Court in North Carolina Dental reiterated its view that active supervision is a flexible test. And, it is a test that the Court has now imposed on financially interested boards. States can do a lot to meddle with the free market. Under our federal system, that is their choice to make. However, states need to be politically accountable for whatever market distortions they impose on consumers.[61]

B. Implications for Occupational Licensing Regimes More Generally

Another potential implication of the North Carolina Dental decision is the re-evaluation of the excessive state licensing regimes that have developed over the years. As the states take a step back to reconsider the composition and oversight of their regulatory boards, I would

[59] See Brief for the Respondent at 49-50, N.C. State Bd. of Dental Exam'rs v. FTC, No. 13-534 (U.S. July 30, 2014).

[60] See id at 50.

[61] See e.g.

commend them also to take a very hard look at their occupational licensing regimes to see if they are on balance helping or harming consumers.[62]

As is well documented, there has been a tremendous growth in such licensing over the past several decades.[63] As of 2011, at least 1,100 occupations were licensed in at least one state.[64] Among the professions with state licensure requirements are florists, interior designers, tour guides, barbers, hair braiders, and even "shampoo specialists."[65] In fact, roughly thirty percent of U.S. workers are required to obtain a license to pursue their occupation—up from less than five percent in the 1950s.[66] Multiple studies have found that prices increase—by as much as thirty-three percent—as a result of occupational licensing.[67] That might be tolerable if those price increases reflected improved quality in the services being provided; however, "economic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than where it has improved the quality and

brief written by antitrust scholars from across the political spectrum,[77] a brief submitted by the American Antitrust Institute,[78] a brief submitted by the Institute for Justice on behalf of several public choice economists,[79] and a brief filed jointly by the Pacific Legal Foundation and the Cato Institute.[80] (To be fair, though, the amicus brief filed by twenty-two states in support of the North Carolina Dental Board was signed by some very red states as well as some very blue states.[81])

V. Conclusion

In conclusion, given the extensive reach of state regulations and regulatory boards throughout our economy, North Carolina Dental ultimately could have the most significant impact on competition and consumer welfare of any of the Commission's several court victories in the state action area. My hope is that, not only will this decision prevent the type of abuse that occurred in North Carolina, but it will also give states throughout the country the impetus and the opportunity to re-evaluate their occupational licensing regimes to ensure that they are truly serving consumers' best interests.

---

[77] See Antitrust Scholars Brief, supra note 70, at 1 ("While having a diverse range of antitrust views, [amici] all share the position taken in this brief.").

[78] See Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondent at 4, N.C. State Bd. of Dental Exam'rs v. FTC, No. 13-534 (U.S. Aug. 6, 2014) (arguing that the FTC's position "is fully in accord with this Court's state-action precedents, good public policy, and the weight of academic scholarship across the ideological spectrum").

[79] See Brief of Amici Curiae Scholars of Public Choice Economics in Support of Respondent at 6-7, N.C. State Bd. of Dental Exam'rs v. FTC, No. 13-534 (U.S. Aug. 6, 2014) ("When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, should we expect that group to use its power in the service of legitimate governmental interests, or should we instead expect that group to promote its own private interests and those of its friends? One does not need a Ph.D. in economics – or even a particularly keen insight into human nature – to guess the answer to this question.").

[80] See Pacific Legal Foundation/Cato Institute Brief, supra note 56, at 21 ("Whatever one's opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight.").

[81] See West Virginia Brief, supra note 54, at 18-20.

Thank you very much for your attention. I would be happy to entertain any questions you may have.