Inside Counsel
AUGUST 4, 2015
REGULATORY
BUSINESS INSIGHTS FOR THE LEGAL PROFESSIONAL

Antitrust liability of professional and state licensing boards: Implications of North Carolina State Board of Dental Examiners

Are state professional boards immune from antitrust scrutiny?

By Robert P. LoBue, Jonathan H. Hatch

Are state professional boards immune from antitrust scrutiny? Although historically state professional boards have freely issued rules and regulations without much court intervention, the tide may have turned with the Supreme Court's recent decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015). Now, government attorneys may be compelled to consider the antitrust implications of any government programs that involve the use of professionals who continue to practice in their fields, and counsel may have new avenues of challenge for regulated entities opposing new government action.

Earlier this year, in *North Carolina State Board*, the Supreme Court held that North Carolina's state board of dental examiners was subject to antitrust scrutiny under the Sherman Act and Federal Trade Commission Act, rejecting the board's claim of immunity as a state actor under *Parker v. Brown*, 317 U.S. 341 (1943). The Court's decision turned primarily on the fact that North Carolina had failed to "actively" supervise the board, which was composed primarily of "active market participants" — six dentists (elected by other licensed dentists), one dental hygienist (elected by other licensed hygienists), and one "consumer," appointed by the governor. The dispute in *North Carolina State Board* related to teeth whitening, a practice that had once been the exclusive province of dentists. The Court found that non-dental practitioners had begun to offer that service to consumers, typically at discounted rates, and in response, certain members of the board, all of whom were dentists, began an inquiry. The board did not issue a rule or regulation as a result of the inquiry, which would have been reviewable by the North Carolina Rules Review Commission, whose members are appointed by the legislature. Instead, the board sent cease-and-desist letters to non-dentist providers and manufacturers and otherwise acted to discourage non-dentists from providing those services. The FTC (Federal Trade Commission) filed an administrative complaint, and ultimately sustained an ALJ's ruling finding that the board did not have state-action immunity and that it had unreasonably restrained trade.

The Court declined, however, to provide further specific guidance on how a state agency or its procedures must be structured to ensure active supervision takes place, stating only that it "suffices to note that the inquiry regarding active supervision is flexible and context dependent," and that a state need only adopt mechanisms that provide a "realistic assurance" that such a board or similar entity "promotes state policy, rather than merely the party's individual interests." Dissenting, Justice Alito predicted that "[d]etermining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion."

It is difficult to predict exactly how future courts will apply the state immunity doctrine. But the Supreme Court's decision has already fostered challenges to certain decisions by government agencies, including a suit by a telemedicine company against the Texas Medical Board related to the board's decision to require physicians to meet with patients in person to prescribe medicine, and a suit by a company offering prepaid legal services against the North Carolina State Bar related to the bar's restrictions on such plans. In the Texas suit, the plaintiff has already obtained a preliminary injunction prohibiting operation of the new rule. And *North Carolina State Board* and some of the earlier cases on which it relies provide some guidance to counsel representing state commissions or considering a challenge to state agency action.

First, the composition and structure of the state agency matters. For instance, Parker concerned a California state program under which farmers growing raisins could adopt joint plans for the marketing of their raisins. Although individual marketing plans

were proposed by raisin producers in the first instance, those plans were supervised by a board consisting of the California Director of Agriculture and eight other members appointed by the Governor and confirmed by the California senate. That program was ultimately sustained as an act of the state. In *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980), by contrast, California merely enforced resale minimum prices established by industry participants, and the program was found to violate the Sherman Act. Courts will likely continue to be concerned whenever there is a risk of industry members harnessing the machinery of the state to limit competition and restrain trade in the market in which they participate. To the extent a rule by a state board protects the financial interests of members of that board (for example, a rule by a state board of accountants imposing heightened licensing restrictions on out-of-state accountants) it will likely be subject to challenge.

Second, process matters as well. Whenever a board comprised of industry members takes action, whether that action will be sustained may depend on whether a clear program is presented to a state authority for approval. In *Parker*, although the raisin producers drafted proposed marketing plans, the Supreme Court noted with approval that the state commission was ultimately responsible for "making the regulation and in prescribing the conditions of its application." In *North Carolina State Board*, the board never proposed a program or submitted a plan to a higher state agency for approval — it simply began enforcing its interpretation of the North Carolina dental laws based on its own evaluation, without seeking approval from the state. Thus, for example, restrictions on the practice of medicine proposed by a state medical board composed of doctors are more likely to survive a challenge if they are ultimately approved by state officials who are not doctors (or by a legislature).

Ultimately, to the extent that an action by a state board composed of professionals raises competitive concerns, merely having the imprimatur of a state may no longer be sufficient to protect it from challenge, and in-house counsel either reviewing or challenging such actions should keep the antitrust laws closely in mind.

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