

THE SUPREME COURT RESTRICTS ANTITRUST STATE ACTION IMMUNITY

Beginning in the early 2000s, the Federal Trade Commission (“FTC” or the “Commission”) invested significant resources to place appropriate limits on the reach of antitrust immunities, particularly with respect to the state action doctrine.¹ Under the state action doctrine, anticompetitive conduct may escape antitrust liability if the alleged wrongdoer can show that the State displaced competition with an alternative, such as a regulatory regime. The Commission’s 2003 State Action report set out a path to reign in a perceived overly broad reach of this state action defense.² The Supreme Court’s recent decision in *North Carolina State Bd. of Dental Examiners v. FTC.*, 135 S. Ct. 1101 (2015), represents the Commission’s latest—and perhaps most significant—success in reaching this goal.

The North Carolina State Dental Board (“Dental Board”) had mailed out over 40 cease and desist letters to non-dentist teeth whiteners warning them that teeth whitening constituted the practice of dentistry, and that the unlicensed practice of dentistry was a crime. The Dental Board ordered them to stop providing teeth whitening services. At the time of the orders, non-dentists were charging around \$100 for such services. In contrast, many dentists were charging nearly \$500. Because of the growing popularity of teeth whitening services, the potential loss to consumers from the exclusion of these low cost competitive services was significant.

At the administrative trial, the FTC staff argued that the Dental Board’s conduct constituted a conspiracy in restraint of trade and that its claims to be merely promoting public health were unfounded. The Dental Board defended its conduct primarily by claiming immunity under the state-action doctrine.

Expert testimony supported the intuitive proposition that licensing boards controlled by financially-interested market participants, such as the Dental Board, have financial incentives to exclude competitors. Additional testimony undercut the Dental Board’s claim that health risks supported the conduct.

On summary judgment, the Commission rejected the Dental Board’s claim for state action immunity, after which the Administrative Law Judge and the Commission found that the agreement among the Dental Board members to send out the cease and desist orders violated the antitrust laws. The Commission’s decision was affirmed by the Fourth Circuit. The Supreme Court granted *certiorari* on the issue of state action immunity.

The Supreme Court affirmed the Commission and Fourth Circuit. The Court held that anticompetitive conduct by state licensing boards dominated by market participants are not immune from antitrust liability unless the conduct is “actively supervised” by a disinterested person or entity.³

Since most licensing boards are controlled by market participants, states have taken this decision seriously, and rightfully so. Already, there have been a number of cases filed based on *North Carolina Dental*,⁴ and many more are likely to follow. This likelihood is increased by the FTC’s other recent Supreme Court state action success in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013), where the Supreme Court addressed the “clear articulation” prong, and endorsed the Commission’s argument in favor of more stringent requirements on when a state policy actually displaces competition. These new limitations on state action immunity have placed at risk numerous types of conduct formerly thought to be immune.

While there remain states without any supervisory mechanism in place, numerous states already have some type of oversight over financially interested Boards, whether through an overarching Department of Regulation and Licensing, a Department of Consumer Affairs, or the Attorney General’s Office. Regardless, all states now have cause to take a closer look at the extent of their supervisory activities. The FTC recently issued Guidelines to assist the states and private parties in analyzing active supervision,⁵ and states like California and Oklahoma have announced plans to revamp their active supervision.

While there are many ways for a state to provide adequate active supervision in accord with Supreme Court precedent, the FTC Guidance indicates that a reasoned assessment by a financially-disinterested party is generally required to approve or disapprove the conduct in question. The Commission explained that the typical Board decisions about licensure or discipline of particular persons would not likely cause antitrust concern, and therefore would not likely require active supervision. Rather, situations like *North Carolina Dental*, wherein a Board seeks to exclude a whole class of competitors, would require active supervision and are more likely to subject a board to liability.

The new limitations on state action immunity will reverberate throughout the economy. Areas touched by the Commission’s state action agenda already include, in addition to non-dentist teeth whitening, intrastate moving services in Indiana and other states, dental cleaning in South Carolina, hospital services in Georgia, funeral services in Virginia, and numerous other examples. Consumers will benefit from lower prices and increased competition as the impact of the Commission’s state action victories continues to unfold.



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¹ The state action defense is also known as the *Parker* doctrine, named for its origin in *Parker v. Brown*, 317 U.S. 341 (1943).

² <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2003/09/report-state-action-task-force>.

³ *North Carolina Dental*, 135 S. Ct. at 1117 (“If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.”).

⁴ See, e.g., *Teladoc, Inc. v. Texas Med. Bd.*, No. 1-15-cv-343-RP (W.D. Tex.); *LegalZoom.com Inc. v. N.C. State Bar*, 1:15-cv-00439 (M.D.N.C.); *Robb, DVM v. Conn. Bd. of Veterinary Med.*, 2:15-cv-00906 (D. Conn.); *Wallen v. St. Louis Metro. Taxicab Comm’n*, 4:15-cv-01432 (E.D. Mo.); *Henry v. N.C. Acupuncture Licensing Bd.*, 1:15-cv-00831 (M.D.N.C.).

⁵ FED. TRADE COMM’N, *FTC Staff guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (Oct. 14, 2015), available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

From 2000-2004, Rick Dagen was Assistant Director of the FTC’s Anticompetitive Practices Division, which was responsible for numerous cases involving the state action doctrine, and was lead FTC trial counsel on the *North Carolina Dental* case. The article represents his own views and not those of any client, or the FTC.

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