

State-Action Protection For State Licensing Boards?

Law360, New York (July 03, 2012, 12:32 PM ET) -- Recently, the U.S. Supreme Court granted certiorari in *Federal Trade Commission v. Phoebe Putney Health Systems* to consider whether a state statute can immunize otherwise anti-competitive mergers from antitrust inquiry. Another case making its way through the court system could also have wide-ranging implications for the future of antitrust enforcement, in cases that arguably implicate state conduct.

In February 2012, the North Carolina State Board of Dental Examiners filed a petition for review with the United States Court of Appeals for the Fourth Circuit, seeking review of multiple opinions and orders of the Federal Trade Commission, which found that the board was not entitled to protection from antitrust scrutiny under the state-action doctrine. Under the state-action doctrine, also known as the Parker doctrine, the federal antitrust laws do not apply to the acts of the sovereign states.

The underlying proceedings began in early 2010 when the FTC issued an administrative complaint against the board, alleging that it violated the antitrust laws by classifying teeth whitening as the practice of dentistry and by enforcing this determination through cease-and-desist orders that were neither authorized nor supervised by the state and that excluded nondentist teeth whiteners from the relevant market. The board consists of eight members, six of whom are required by statute to be North Carolina practicing dentists. The members of the board are elected by a vote of North Carolina-licensed dentists.

Early in the proceedings, the board, an agency of the state of North Carolina that is charged with regulating the practice of dentistry in North Carolina, filed a motion to dismiss the complaint on the ground that the state-action doctrine exempts the board's conduct from antitrust liability. In an opinion and order dated February 2011, the FTC rejected the board's motion to dismiss based on state-action immunity. In December of 2011 the FTC ruled on the merits that the board's conduct constituted "agreements" that unreasonably restrained trade under the "inherently suspect" standard as well as the full rule of reason.

In response to the board's motion to dismiss based on the state-action doctrine, the FTC framed the issue as whether the board met both of the requirements of the Supreme Court's *Midcal* test, under which private parties may qualify for state-action immunity if they can show that the challenged restraint is (1) pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and (2) actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980).

Although the Supreme Court has never ruled directly on the question of whether state agencies are subject to Midcal's active supervision requirement, the FTC held that whatever the case may be with respect to state agencies generally, "the Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants."

The FTC held "that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of Midcal to be exempted from antitrust scrutiny under the state action doctrine." The FTC found that the board is such a state regulatory body. According to the FTC, because North Carolina law requires six of the eight board members to be North Carolina-licensed dentists, and because those members are elected directly by other licensed dentists in North Carolina, the board is controlled by North Carolina practicing dentists.

The FTC assumed, without deciding, that the board satisfied Midcal's "clear articulation" prong, but because the FTC found no state supervision by the state of the board's challenged conduct (indeed, the FTC found that the board had no authority to issue cease-and-desist orders), it held that the antitrust laws reach such conduct.

On petition for review to the Fourth Circuit, the board seeks reversal of the FTC's orders and opinions. The board presents a series of arguments for reversal, but focuses primarily on the applicability of the state-action doctrine to the board's conduct. The board argues that it is entitled to state-action immunity because its challenged actions were pursuant to a clearly articulated and affirmatively expressed state law, and that it is not required to demonstrate active supervision to qualify for state-action immunity.

Specifically, the board argues that the North Carolina Dental Practices Act prohibits unlicensed persons from providing teeth-whitening services, and that the board's challenged actions thus enforced a state law, not a rule or internal policy. The board further argues that since *Parker v. Brown* — the Supreme Court's seminal decision first establishing the state-action doctrine — every court that has addressed state action immunity has held that state agencies acting pursuant to clearly articulated state laws are not subject to the antitrust laws.

Since the filing of the board's opening brief, the American Dental Association, the American Medical Association and others filed amicus curiae briefs urging the Fourth Circuit to reverse the FTC's underlying decisions. Most recently, on June 27, 2012, the FTC filed its response brief, arguing that the board must show active state supervision in order to qualify for state-action immunity. Because the board has failed to do so, the FTC argues that it properly rejected the board's state-action defense. The FTC dismisses the board's cited authority as inapposite because it does not address the relevant question of whether state regulatory bodies must show active supervision when dominated by private market participants with economic incentives to restrain trade. The FTC further argues that requiring such active state supervision is consistent with the policies underlying *Parker*.

At the moment, the FTC's supporting amicus briefs are due on or before July 5, 2012, and any reply brief of the board is due on or before July 19, 2012. Upon the completion of briefing and oral argument, the issue of the applicability of the active-supervision requirement to state licensing boards composed of market participants will be squarely before the Fourth Circuit. Should the Fourth Circuit decide to base its opinion on that issue, the decision and the Supreme Court's disposition of *Phoebe Putney* may define the contours of the parties' ability to circumvent the precepts of the antitrust laws by cloaking themselves in state authority.

The matter is *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Appeal No. 12-1172, in the United States Court of Appeals for the Fourth Circuit.

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