

Slower Crony Capitalism: The Immediate Aftermath of NC Board

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When the FTC prevailed in narrowing the state action exemption in *North Carolina Board of Dental Examiners* in February 2015, the hope of many commentators was that the result might be a reduction in excessive or unnecessary local regulation. While that still might be the ultimate result, the immediate reaction of some state legislatures has been to add a layer of bureaucratic oversight to ensure “active supervision.” So the case, so far, has expanded application of the federal antitrust laws, triggered more lawsuits and resulted in more, not less, state oversight of economic activity.

The state action exemption is easy to summarize but difficult to apply: bona fide state regulation of the economy, even if anticompetitive, is exempt from the federal antitrust laws. Mere state blessing of private cartels is not. The Court has developed a two-prong test to organize the analysis: the state’s anticompetitive policy must be “clearly articulated” by the state legislature and the action must be “actively supervised” by another state entity. The Court has waived the need for “active supervision” for state subdivisions like municipalities, but insists on it for private actors.

In *NC Board*, the Court majority decided that the Board, though explicitly designated a state agency by the legislature, required “active supervision” because a “controlling number” of the Board members were “active market participants.” In that case, six of the eight members were practicing dentists. The dissent disagreed substantively on federalism and state sovereignty grounds. More practically for the numerous such boards around the country, the dissent criticized

the majority opinion for providing little guidance on the terms quoted above or on how to comply with the decision generally.

Since then, the effect of the decision has been the subject of many predictions. Some thought that, eventually, these boards might end up “in the hands of comparatively disinterested, non-practicing state officials” and the participants might “decide occupational restraints are not worth it anymore.” Others saw the decision as a strong message to such boards and “a game-changer” that could significantly help startups like Uber, Lyft, and Airbnb break incumbents’ regulatory hold on the market. The dissent foresaw states tweaking policies by predicting answers to the many questions left open by the majority while the accuracy of such guesses was “worked out by the lower courts and the” FTC. Thus far, the dissent’s clairvoyance seems better.

In April, Teladoc sued the Texas Medical Board over the latter’s rules requiring face-to-face patient interaction because they interfered with Teladoc’s business approach. The Texas Board, like the board in *NC Board*, is populated by a majority of market participants; however, the members of the Texas Board are appointed by the governor, not elected by other doctors, and its actions are subject to legislative and judicial supervision. It is not yet clear if those distinctions will make a difference.

Similarly, in June, LegalZoom sued the North Carolina State Bar for not allowing it to sell its prepaid legal services plan. The North Carolina legislature had considered changes to the way lawyers were regulated but had not yet made them by the time the suit was filed.

In July, Oklahoma’s governor implemented changes recommended by that state’s attorney general. For such boards where a majority of the members are market participants (a term still left undefined), the state determined that the rulemaking actions of such boards were already subject to active supervision because both the governor and legislature have the power to review, veto, and modify any rules. For licensure and other non-rulemaking activities of such boards, however, the state determined that changes were necessary to ensure “active supervision” by a “politically accountable actor.” As a result, all such actions by such boards in Oklahoma shall be submitted to the attorney general for a review and written analysis. The boards must defer to that analysis, even if the attorney general suggests rescinding the action.

An online check of the Oklahoma Board of Medical Licensure and Supervision shows seven of the nine current members with MD after their names. Similarly, eight of the eleven members of the Oklahoma Board of Dentistry have DDS after their names. Both boards seem to supervise numerous occupations. The Medical Board supervises licensure in fifteen of them. Now, any such decisions by those boards of medical professionals will await review and written analysis by the attorney general, currently a lawyer with an undergraduate degree in political science and communications.

In June, the Connecticut legislature passed a change to the operations of the boards that work under the state's Department of Public Health (though, curiously, not the Department of Consumer Protection). Section 493 of the legislation states that any complaint about the actions of any of the sixteen boards under the DPH shall be forwarded to the Commissioner of Public Health. That individual, within fifteen days, may notify the board that its decision shall be considered a "proposed decision" and subject to later review, modification, or rejection by the Commissioner or her designee. While the current Commissioner is a medical doctor, it is not clear that she would be considered an "active market participant" for any of the boards she supervises.

If the desired result of *NC Board* was reduced state regulation of these occupations, then that deregulation has not happened yet. If the desired result was "better" state regulation, well, then that depends on your definition of "better." As the Oklahoma governor stated, the attorney general is "best equipped ... for review of violations of antitrust statutes" and so, presumably, would stop anticompetitive actions of the boards. On the other hand, even some of the justices in the majority in *NC Board* were concerned about putting the licensure of, say, brain surgeons in the hands of someone not trained in brain surgery.

But if the desired result was more antitrust litigation and additional bureaucratic oversight of a wide swath of the economy, then that goal is being met.