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State Regulation or Merely a “Gauzy Cloak”: A Preview of the North Carolina Board Oral Argument in the Supreme Court

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On October 14, the Supreme Court will hear oral arguments in *North Carolina Board of Dental Examiners v. FTC*, the latest in its long line of cases interpreting the state action exemption to the antitrust laws. Dozens of amici have written briefs supporting both parties. Those briefs reveal significantly different opinions about the costs and benefits of state licensure boards and how their actions should be treated under the antitrust laws.

The state action exemption can be quickly summarized: bona fide state regulation of the economy, even if anticompetitive, is exempt from the federal antitrust laws. Such a quick summary, however, belies the complexities explored in numerous Court opinions since the principle was first announced more than 70 years ago. The Court has developed a two-prong test to help organize the analysis: the 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 and, probably, state agencies, but insists on it for private actors. This case raises the question of when such “active supervision” is necessary.

Under North Carolina law, the Board is “the agency of the State for the regulation of the practice of dentistry.” Its membership consists of six practicing dentists elected by licensed dentists; one practicing hygienist elected by licensed hygienists; and one consumer member appointed by the Governor. The Board issues licenses, enacts rules governing the practice of dentistry, and investigates any potential violations of the laws it enforces. Its members must swear an oath of allegiance to the State and comply with various administrative procedure rules. The Board can enforce the State’s ban on “practicing dentistry” without a license by investigating and then referring the matter for criminal prosecution or bringing a civil suit itself for injunctive relief. “Practicing dentistry” is defined in part as “remov[ing] stains, accretions or deposits from the human teeth.”

In 2006, the Board sent cease and desist letters on its official letterhead to non-licensed teeth whitening providers (and some mall operators that leased them space) because it found the service to be unlicensed dental practice. Some non-dentists stopped offering the service. The FTC investigated and found the Board’s actions to be anticompetitive concerted activity not exempted as state action. The FTC assumed the “clear articulation” prong of the exemption was met but found the Board’s action required “active supervision” by a state actor (which it had not received) because the Board was “controlled by participants in the very industry it purports to regulate.” The

Fourth Circuit agreed that where "a decisive coalition" of the agency "is made up of participants" in the market, the agency is a "'private actor' for the purposes of the state-action exemption" and must be actively supervised to address the danger that members might act to further their private interests.

Because the Supreme Court has written so much about state action in so many cases, both sides have plenty of material to work with – sometimes, even the same concepts or cases. For instance, the Board focuses on the federalism concept: Because the federal antitrust laws do not say otherwise, sovereign state regulatory action falls outside their scope as does the state's "equally sovereign right to staff and structure the agencies that enforce those laws." But the FTC thinks federalism supports its cause: the two-prong test establishes when the normally superior federal law will be subordinate to a state's sovereign policy choice, and the "active supervision" prong ensures that the policy truly is state regulation and not just, as the Court has often said, "a gauzy cloak of state involvement over what is essentially private anticompetitive conduct."

Both parties have a long list of cases in their respective tables of authorities and about a dozen of them are the same. For instance, the FTC cites 1975's *Goldfarb v. Virginia State Bar* a dozen times and highlights its quote that a state bar's status "as a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefits of its members." The Board, on the other hand, points out that the *Goldfarb* Court seemed unconcerned by the presence of practicing lawyers on the state bar body and found no exemption essentially because Virginia, unlike North Carolina here, did not "clearly articulate" a policy that would cover the Bar's anticompetitive private activities.

An impressive array of amici lined up behind the Board: Attorneys-General from 23 states; the National Governors Association; and the American Dental Association, American Medical Association and more than two dozen additional professional associations and licensure boards. For the most part, the legal arguments of these briefs mimic those made by the Board. What these amicus briefs add is a description of the disruption the authors anticipate if the Court were to require "active supervision" of state licensure bodies if many of their members are active participants in the relevant industry.

The FTC also drew a large number of supporters and briefs, although that list is a little more varied and their arguments sometimes differ slightly from those made by the FTC. The amici include entities like LegalZoom.com and the American Association of Nurse Anesthetists who perceive actions of state licensure bodies like the Board to be anticompetitive and damaging to their business models. The brief from We All Help Patients – a group that includes acupuncturists, midwives, and massage therapists as well as some doctors – had an interesting take on why the Court should not simply rely on a state's designation of a state agency to determine when active supervision is necessary. The brief analogized to the Court's *American Needle* opinion and its willingness to look beyond the form of a joint effort to the substance to determine the possibility of an agreement. It urged the Court to similarly look beyond the State's designation and the Board's form here.

The brief from more than 50 antitrust scholars somewhat narrowed the FTC's proposed test for when "active supervision" is required to bodies with a "decisive coalition of financially interested market participants." And in a case of strange bedfellows, the Cato Institute – an organization that has published books that described antitrust enforcement as nothing more than an unsupported "religion" – suggested that the Court not only apply both prongs of the test here but also add a

requirement of proof that the restraint substantially advances an important state interest.

The antitrust community seems to anticipate the Court ruling for the FTC. The brief from so many prominent antitrust scholars certainly is strong evidence of such a prediction. It passionately makes the point that the Fourth Circuit's ruling not only should be but is the law. In addition, my completely unscientific survey of antitrust practitioners drew references to the Court's repeated admonition that exemptions to the antitrust laws are disfavored and the Court's unanimous ruling for the FTC in 2013's *Phoebe Putney* decision.

I am not so certain. North Carolina's articulation of its policy and its designation of the body it chose to pursue that policy seem much clearer than Georgia's statements in *Phoebe Putney*. It would be easier here for the Court to defer to this State's actions. Also, this Court has preferred simpler rules than those suggested by the parties or commentators in cases like *Weyerhaeuser* and *linkLine*. As Chief Justice Roberts said in *linkLine* and again in his *Actavis* dissent, "We have repeatedly emphasized the importance of clear rules in antitrust law." Here, foregoing the "active supervision" prong when a state clearly anoints a body as its agency seems easier than applying the prong when some – or a "decisive coalition" – of its participants are market participants. (What if 40 percent of the Board were practicing dentists? What if the Board members were dental school deans? Or dentists on leave from their practices?)

Despite some comments to the contrary in the amicus briefs, support for the Board's position on the question presented here does not equate to support for all state licensing efforts. As illustrated in recent media articles on the efforts of Uber, Lyft and Tesla to upend current market participants and the state regulatory regime, sometimes such license requirements can be anticompetitive. The FTC has long advised state legislatures of such potential concerns. The question in this case, however, is when to respect the decision of the state when it chooses to ignore such advice.

We might learn more from the arguments on October 14 but will not be certain about the answers to these questions until the opinion comes out later this Term. Even then, it is likely that *North Carolina Board of Dental Examiners* will be only the latest, not the last, word on the state action exemption to the antitrust laws.

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