AntitrustConnect Blog

North Carolina Dentists is in the Hizzouse, Y'all! Woot Woot!

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So, the only real surprise about yesterday's opinion in *North Carolina State Bd of Dental Examiners v. FTC* is that it wasn't unanimous. The strongly worded six-member majority opinion, already receiving early applause (see here and here), is further proof that the only thing the current Supreme Court dislikes more than antitrust plaintiffs is state government pork.

For those of us passionate dorks who follow immunities issues closely (I, for one, only recently emerged from the ashes of this epic book project), *North Carolina State Board* is a candy store, really much more so than the Court's other very recent, pro-enforcement state action smackdown, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The only doctrinal question in *North Carolina State Board* was a narrow one: whether this defendant must show "active supervision" by the state government to enjoy antitrust immunity. But the Court clarified a whole series of little tidbits, and among other things adopted what I'm here going to christen the **presumption against *Hallie***.

1. The Case and Its Utter Foreordination

The technical question was whether a nominally public body like this State Board, comprised as it was of private actors active in the regulated market, must satisfy both elements of *Cal. Retail Liq. Dlrs. Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in order to enjoy "state action" antitrust immunity. The parties presumed on appeal that there had been "clear articulation" under *Midcal*, and assumed before the Supreme Court that there was no "active supervision," but disagreed bitterly whether a state "agency" like this board had to show that second requirement. The issue might be thought of as the *Hallie* issue. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court held that while municipalities can be sued in antitrust, and do not enjoy the same full immunity as state governments (which automatically enjoy *Parker* immunity, for *Parker v. Brown*, 317 U.S. 341 (1943)), they can be immune on only a showing of the first *Midcal* element, "clear articulation." Much uncertainty lingered about the countless other kinds of public but sub-state entities out there that might restrain trade—state agencies, boards, commissions, counties, school boards, sewer districts and what-have-you. *Hallie* seemed to tip a pretty significant hand in dicta, adding in a footnote that where "the actor is a state agency, it is likely that active state supervision would also not be required," *id.* at 46 n.10. A companion case decided the same day said, also in dicta, that "of course, public agencies like municipalities need only establish that their anticompetitive conduct is taken pursuant to a clear[] articulat[ion]," *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 67 n.2. *See also id* at 57 ("[t]he circumstances in which Parker immunity is available to private parties, and to state agencies or officials regulating

the conduct of private parties, are defined most specifically by our decision in [*Midcal* and *Hallie*].").

And yet, the Commission's victory yesterday was utterly unsurprising. Despite *Hallie* and *Southern Motor Carriers*, a whole range of other cases had made clear the Court's great distaste for pork-barrel programs in which self-regulating firms are only nominally overseen by some flimsy, insubstantial state review. *Parker* and *Midcal* themselves had stressed that because "a state does not give immunity to those who violate the Sherman Act by [just] authorizing them to violate it," *Parker*, 317 U.S. at 351, "[t]he national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement," *Midcal*, 445 U.S. at 105. Moreover, *Patrick v. Burget*, 486 U.S. 94 (1988)—a case notably involving physician peer-review activities that presumably are as sensitive and important as those in *North Carolina State Board*—the Court held that not only is "active supervision" required, but it must be done by "state officials [who] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* at 101. And, really most importantly, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) went even further, holding that it is not enough even that some program of state review

> is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy . . .

Id. at 636. Even when all that it is true, there is still no active supervision if the agency fails in practice to use its authority. *Ticor* further stressed that the two *Midcal* elements are really just two components of the same essentially evidentiary inquiry—into whether the challenged conduct is just private trade restraint, and not state policy. And so, if ever there had been doubt before, *Ticor* made clear that if the conduct looks "too private," it won't be immune. In the interim between *Ticor* and *North Carolina State Board*, a good-sized body of lower court caselaw had built up considering all the myriad, sundry other sub-state entities. It generally held that genuine state "agencies" under a governor's control were subject to the more deferential *Hallie* standard, but that other nominally public bodies, especially when they are comprised or subject to the influence of self-interested private actors, must usually show both *Midcal* elements. That was fully summarized in a masterful, scholarly opinion by law professor William Kovacic, back when he was a Federal Trade Commissioner, in rejecting state action immunity in the *North Carolina State Board* case itself (see esp. pp. 6-14 & n.7).

And anyway, who could really have doubted that *North Carolina State Board* would affirm, after the unanimous, also-strongly-worded decision last year in *Phoebe Putney*? There the Court rejected a similarly broad claim of state action immunity, and emphasized in pretty broad and majestic language, as it had done many times in the past, that antitrust immunity is disfavored. The Court took two cases on state action immunity, very close in time but coming more than twenty years after its last state action case, one addressing the first *Midcal* factor and the other addressing the second, and the first of them had ended in a strongly worded, unanimous smackdown of a broad immunity claim. The North Carolina State Board of Dental Examiners was pretty much destined to lose.

This all matters, in any event, and even *North Carolina State Board*'s narrow holding isn't just a minor technical issue. As Professors Aaron Edlin and Rebecca Haw recently observed in a comprehensive survey of these entities—in an article cited in *North Carolina State Board*—there are a *ton* of these things out there, all over the place. There are a ton of state boards, public commissions, licensing authorities, and what-not, not just in the professions, but regulating all kinds of businesses. *North Carolina State Board* is going to trigger a large-scale reconsideration of these thousands of state regulatory regimes in the United States, which hold licensing authority over millions of jobs, and lots of other things.

2. The Anti-*Hallie* Presumption, Public-Choice Cynicism, and the Victory of Kennedy over Powell (and Scalia)

Uncertainties remain, but even as to them, there is something special in the opinion. The Court specifically held only that "active supervision" must be shown by a "nonsovereign actor *controlled by active market participants*" (slip op. at 6, emphasis added), and did not say what happens when some state board is *not* controlled by current competitors. And who knows, there could be any number of other sub-state bodies with some claim to public status but whose composition is unusual, and nevertheless not controlled by current market participants. Just as a fr'instance, what about the municipal "hospital authorities" in *Phoebe Putney*? The Court didn't address there whether active supervision would be required, and *North Carolina State Board* wouldn't (it seems to me) answer it. But there is something awfully interesting running throughout *North Carolina State Board* that will play a role in subsequent cases dealing with those many issues: an open hostility to *Hallie* and, perhaps, to the reasoning of an importantly related case, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

The conservative revolutionary Lewis Powell, he of the infamous Powell Memo, wrote both *Hallie* and *Southern Motor Carriers*, as companion opinions issued on the same day. He clearly intended to expand *Midcal* pretty broadly, and in *Southern Motor Carriers* in particular he envisioned a broad freedom to set up state-sanctioned, superficially regulated cartels, of the kind one might have thought precluded by strong language in *Parker* and *Midcal*. *City of Columbia* then added a political viewpoint of an altogether darker and more cynical flavor. The Court there applied *Hallie* to the work of a city council, and rejected a number of possible exceptions to immunity that would have reflected its council members' apparent collusion with a local business. In and of themselves, rejection of the purported exceptions makes perfect sense. For example, it would be a mess if there were a "conspiracy" or "corruption" exception to *Midcal*, because most policy can be said deliberately to favor some preferred special interest. But what was striking was the flavor of the Court's reasoning. The Court explained itself in language of darkly resigned public-choice fatalism. We cannot make it illegal for state and local governments to be craven conspirators against the public weal, the Court seemed to say, because that's just what they are.

And then comes *North Carolina State Board*. The Court began by repeating something striking from *Ticor*—a case that, like *North Carolina State Board*, also happened to be written by Justice Kennedy: that "state action immunity is disfavored." (Slip op. at 7). Later, in explaining why it would require active supervision, the Court said that clear articulation alone "*rarely* will achieve" *Midcal*'s goals, "for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions" (*id.* at 9-10; emphasis added). The Court then pointed out that under *City of Columbia* it had precluded itself from asking whether city governments actually did a good or bad job with the leeway that *Hallie* gives them. *City of Columbia* permits courts to ask only the ex ante structural question whether the state gave a grant of authority, not the ex post

question whether the state was thereafter vigilant against abuses of it. And then the Court dropped this minor little bomb: *that consequence in itself is now reason to apply* Town of Hallie *only sparingly* (*see id.* at 11-12).

In other words, because *City of Columbia* permits such crappy government under some circumstances, we should have a strong presumption against permitting those circumstances!!!

The dissent contains one narrow little colloquy with the majority that goes to this point, and is very interesting.

In general terms, the dissent is just, well, dumb. Written by Justice Alito and joined by Justices Scalia and Thomas, the dissent rather insipidly stresses that "the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter." You know something is an "agency," they tell us, whenever a state does no more than say that it is an "agency," specifies its membership, and authorizes it to take legally enforceable actions (dissent at 6-7). We're then told that "[n]othing in *Parker* supports [any further] inquiry" into whether "state agencies . . . are 'controlled by active market participants,' " (*id.* at 8).

That pretty much boggles the ol' melon. It has never been the law and it could be seriously flipping bad if it were. You literally can't understand *Midcal* without carefully analyzing the difference between private control of policy in that case and the lack of private control in the otherwise factually very similar *Parker*. And so the "inquiry" the dissenters consider forbidden was baked deeply into *Midcal* itself. And think about the consequences were Justice Alito correct. If a state can immunize private cartels by just labeling them "agencies," specifying their membership, and giving them legally enforceable power, then you've just repealed the Sherman Act.

But the interesting thing about the dissent is that it was joined by Justice Scalia, author of *City of Columbia*, the Justice who wrote that we ought to exempt governments from antitrust because they'll be dens of craven villainy whether we like it or not. But as if to ensure clarity that the law *does* permit antitrust courts to consider the risk of "capture[] by private interests," the dissenters complain that under *City of Columbia* it had been made clear that application of state action immunity should *not* depend on that risk (dissent at 10). It is now clear just how far Justice Scalia believed in *City of Columbia* that antirust courts should have no concern for private influence in government, for all government is a irredeemable cesspool anyway. This explicit little dispute between majority and dissent makes clear that courts *should* now explicitly consider the degree of private influence in nominally public bodies, and presume against immunity because of it.

3. What's Next? And Does It Make Any Difference?

But all that said, an interesting question will be whether all the state legislative re-jiggering this opinion is likely to invite, that no doubt will be urged and drafted by the regulated occupations themselves, will accomplish any meaningful good. Won't the states just be able to tweak their statutory oversight just a wee bit, making sure that they give *just enough* oversight to trigger immunity, even though it might still result in grossly anticompetitive intrusions in markets and oversight that remains pro forma and insubstantial?

Well, yes. That's always the question in state action cases. Even in North Carolina dentistry, this opinion suggested that had this board simply used its existing rule making power to define teeth whitening as "dentistry," it would have been subject to sufficient supervision.

Likewise unanswered is a related policy problem, posed by Justice Breyer at oral argument in *North Carolina State Board*, in which he asked whether a state could allow a board of neurologists to decide who can practice brain surgery. As he said, that kind of licensing authority has plain anticompetitive potential, but "I don't want a group of bureaucrats deciding that. I would like brain surgeons to decide that." (See oral argument transcript).

A requirement of active supervision presumably would mean either that non-doctor state officials would substantively review the medical decisions (though it wasn't before the Court, *North Carolina State Board* says at the very end that active supervision must be substantive), or a body of genuine state officials who are themselves non-practicing doctors. The former would be intolerable, and the latter would be both much more expensive and might well constitute no very meaningful limit on anticompetitive exclusion.

So does this do any good?

The answer is emphatically yes, and some reasons for it are captured in *North Carolina State Board*. The consequence of a meaningful *Midcal* requirement, under which state governments can't just give away dangerous power to favored interests, is that the state policy-makers themselves are brought more closely face-to-face with an awkward political problem. *Midcal* can't keep them from doing it, and when they do it, *Midcal* can't do anything about the substantive harm they cause. But *Midcal* can make them spend money, and it can make it harder for them to do this sort of thing in secret. And above all, it can put pressure on the recipients of the power they give away. Those are folks who, by the very fact that they've received grants of state power, are likely to hold influence in state legislatures. And now that they face expanded exposure to antitrust liability (though with the twist of *North Carolina State Board*'s brand new suggestion, in dicta, that they might enjoy a special immunity from money damages), they won't be likely to sit on these boards any more unless state governments start doing their jobs. And remember, what they have to ask for is not just any old government oversight, but a state agency that "ha[s] and exercise[s] power to review."

Who knows, maybe once these boards are in the hands of comparatively disinterested, non-practicing state officials, and once they're being meaningfully regulated in ways they can't control, they'll finally just decide occupational restraints are not worth it any more?

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