

State Action Issues in the Wake of North Carolina Board of Dental Examiners

**ABA/AHLA Antitrust in Healthcare
Conference**

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Contents

- Background to *NCD* case
- Supreme Court decision in *NCD*
- FTC guidance on “active supervision”
- State guidance and responses to *NDC*
- Cases brought since *NCD*



Background to NCD

- The North Carolina Legislature created the North Carolina State Board of Dental Examiners “as the agency of the State for the regulation of the practice of dentistry in the state.”
 - The Board is empowered to regulate dentistry, including bringing actions in the name of the State of North Carolina to enjoin the unauthorized practice of dentistry
 - Six of the Board’s eight members must be licensed, practicing dentists. Board members are elected by other dentists licensed in North Carolina
- Starting in 2006, the Board sent cease-and-desist letters to non-dentists in North Carolina providing teeth whitening services in salons and mall kiosks, and to manufacturers of these products.
- Many non-dentist providers stopped offering their services in the state



Background to NCD

- In 2010, the Federal Trade Commission filed an administrative complaint against the Board alleging that issuance of the cease-and-desist letters violated § 5 of the Federal Trade Commission Act.
 - The FTC argued that the Board’s actions amounted to concerted actions aimed at excluding non-dentists from the North Carolina teeth whitening services market.



Background to *NCD*

- The Board filed a motion to dismiss on the grounds that it was immune from antitrust scrutiny because it was a state actor.
 - In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that the federal antitrust laws do not apply to anticompetitive actions taken by states acting as sovereign.
 - The Board argued that because it is a state agency, its actions were that of the sovereign state of North Carolina



Background to NCD

- The FTC denied the Board’s state action defense.
 - The FTC concluded that the Board is controlled by market participants, and should be treated as a “public/private hybrid” entity
 - In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97 (1980), the Supreme Court extended state action protection to private parties, but only where the challenged restraint (1) reflects a clearly articulated state policy that permits the anticompetitive conduct and (2) that the permitted anticompetitive activities are actively supervised by the state.
 - Applying *Midcal*, the FTC held that the Board was not actively supervised by the state and so was not entitled to state action immunity.
 - The Fourth Circuit affirmed the decision in 2013.



The Supreme Court Decision

- The question presented to the Court was whether the FTC erred in extending the active supervision requirement that applies to private parties to a state regulatory board because it is comprised of active market participants.
- The Court affirmed the FTC’s decision in a 6 to 3 ruling.
 - “[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state action antitrust immunity”



The Supreme Court Decision

- The majority held:
 - The active supervision requirement is designed to obtain “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”
 - “[S]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal’s* supervision requirement was created to address.”
 - There is a “structural risk of market participants confusing their own interests with the State’s policy goals.”
 - A board’s actual structure, not its “formal designation” as a state agency, determines whether supervision is required



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The Supreme Court Decision

- The dissent-
 - Justices Alito, Scalia and Thomas, dissenting, called the majority’s opinion a “serious misunderstanding” of how state action immunity is meant to be applied.
 - Expressed concerns about federalism and state sovereignty
 - Expressed concerns about vagueness, e.g., what constitutes a controlling number of decisionmakers, and who qualifies as market participants.



“Active Supervision”

Q: What is being supervised?

A: The exercise of policy discretion by market participants.

Q: Why is supervision necessary?

A: The antitrust court cannot trust that the actions of market participants further state policy.

Q: What is the purpose or function of supervision?

A: To ensure that the restraint at issue advances state policy, as opposed to private interests.

Q: Why is this distinction important?

A: Antitrust enforcement defers only to policy preferences of the state.



FTC Staff Guidance

- In an effort to clarify the central holding of *NCD*, in October 2015 the FTC issued *Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*.
- The Guidance addresses two basic questions:
 - When does a state regulatory board require active supervision in order to invoke the state action defense?
 - What factors are relevant to determining whether the active supervision requirement is satisfied?



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FTC Staff Guidance

- Who is an “active market participant”?**
- Includes
 - a person licensed by the board
 - a person who provides any service that is subject to the regulatory authority of the board
 - When is determination made
 - E.g., temporary suspension of license
 - Method of selection not determinative



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FTC Staff Guidance

Who is an “active market participant”?

- Arguably under-inclusive
 - Dissent in NCD: “Regulatory capture can occur in many ways. So why ask only whether the members of the board are active market participants?”
- Arguably over-inclusive
 - Suppose that board member participates in the occupation that the board regulates, but does not benefit from the challenged restraint?



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FTC Staff Guidance

Do active market participants “control” the board?

- In *NCD*, 6 of 8 board members were market participants (dentists)
- Even where market participants represent a minority of board members, they may exercise control
 - examine decisionmaking rules of the board
 - examine actual operation of the board



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FTC Staff Guidance

What constitutes “active supervision”?

- Inquiry is flexible and context-dependent.
- Supervisor must exercise independent judgment and control over the details of the regulatory scheme.
- Supervisor must have the power to approve, modify, or veto.
- Elements
 - development of an adequate factual record
 - a specific assessment of how board’s action comports with substantive standards established by the state legislature
 - a written decision on the merits



FTC Staff Guidance

What are the required criteria of review?

- Substantive review
- Supervisor is not required to employ an antitrust/consumer welfare standard
- Supervisor should ensure that decision is in accord with the State's chosen policy
- Legislature cannot defer to the policy preferences of the Board
- A determination only that the Board has acted within its statutory discretion is insufficient



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FTC Staff Guidance

Who may act as supervisor?

- Independent official: Supervisor may not be an active market participant
- Potential supervisors:
 - Administrative agency or state official
 - Office of the Attorney General
 - Legislature
 - Court



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Path Forward for FTC

- Enforcement
- Amicus participation in private cases
- FTC Staff advocacy



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State AG Reactions to *NCD*

- California
 - Opinion of CA Attorney General Kamala Harris, September 10, 2015, No. 15-402
 - Any regulatory decisions issued by a state licensing board must be reviewed by a state official to ensure that the decisions “actually further a clearly articulated state policy to displace competition with regulation in a particular market”
 - Official must not be an active member of market being regulated and must have power to approve modify or disapprove the decision
 - Also considered other means to strengthen state action protection



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State AG Reactions to *NCD*

- Oklahoma
 - Governor Mary Fallin executive order No. 2015-33 issued July 17, 2015
 - State boards having a majority of industry participants as members must now submit all licensure or prohibition orders of state attorney general for review and defer to the AG on any modifications
- In 2016, bills also introduced in Maryland, Georgia, Alabama, Idaho



Cases Following NCD

- Sample non-healthcare cases:
 - Wallen (Uber Technologies) v. St. Louis Taxicab Commission
 - Robb v. Connecticut board of Veterinary Medicine
 - Virginia Real Estate Appraiser Board
 - LegalZoom and North Carolina State Bar
 - SolarCity v. Salt River Project (Arizona state utility company)
- Sample healthcare cases:
 - Tennessee Department of Health /hearing instrument specialists
 - Mississippi State Board of Medical Licensure/Axcess Medical Clinic (rules requiring physician ownership of pain management clinics)



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Cases Following NCD

- *Henry v. North Carolina Acupuncture Licensing Board*
 - Board of Physical Therapy Examiners determined that “dry needling” within legal scope of practice for physical therapists
 - After that determination, NCALB issued cease and desist letters to PTs claiming that PTs practicing dry needling were engaging in illegal practice of acupuncture
 - NCABL filed lawsuit against PT board asking for declaration that dry needling is unlawful practice of acupuncture
 - *Henry* plaintiffs are 4 PTs and 2 patients
 - 2 PTs practice dry needling and received cease & desist letters; 2 PTs want to practice dry needling; patients benefit from treatment by PTs
 - Seeking injunction against NCABL taking action against PTs
 - Allege that NCABL engaging in conduct to expel PTs from market



Teladoc v. Texas Medical Board, et al.

(W.D. Tex.)

- The Facts
 - Plaintiff is the largest telehealth service provider in the country. It employs board certified physicians trained in treating and diagnosis via telephone
 - Once a Teladoc physician accepts a request for physician consultation, the physician reviews the patient’s information and medical records through a website, then calls the patient by telephone and consults with him or her when appropriate. The physician can prescribe medications



Teledoc Facts Continued

- The Texas Medical Board (“TMB”) adopted a Medical Practice Act telemedicine rule that prohibits prescription of any “dangerous drug or controlled substance” without the physician first establishing a physician patient relationship which “must include” a face-to-face physical examination
- According to Teledoc, the face-to-face requirement was prompted by Texas physician complaints about competition. The rule effectively blocked Teledoc’s business model.



Teladoc v. Texas Medical Board, et al.

(Continued)

- The Antitrust Claim
 - Teladoc filed an antitrust claim against the TMB and TMB members alleging that the Board engaged in joint action constituting an unreasonable restraint of trade i.e. that allegedly the rule would increase prices, reduce choice, reduce access, reduce innovation, and reduce the overall supply of physician services.



Defense in *Teladoc*

- In a preliminary injunction proceeding, the district court agreed with plaintiffs' contentions of anticompetitive effects. Thus, the burden shifted to the Texas Medical Board to establish justifications for the rule and to persuade the court that, on balance, the rule was procompetitive because it enhanced quality.
- The court was unpersuaded by the board's quality of care defense.
- The court observed that the board had presented only anecdotal evidence consisting of affidavits from medical practitioners detailing deficiencies in telephone- only diagnosis. No statistically reliable evidentiary studies were submitted.



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Teladoc Obtains Preliminary Injunction Against Texas Board and its Rule

- The district court concluded that Teladoc’s antitrust challenge to the Texas Medical Board rule was likely to succeed on the merits.
- Accordingly, the court entered a preliminary injunction that enjoined the Texas Medical Board’s rule from taking effect pending final resolution of the claims brought by Teladoc in its complaint.



Texas Medical Board Files Motion to Dismiss Claiming State Action Immunity

- The parties agreed that following the Supreme Court’s North Carolina Board of Dental Examiners case, active state supervision was required for the Texas Medical Board to have state action immunity.
- The Board contended that it was subject to active state supervision because its decisions were subject to judicial review by the courts of Texas and the State Office of Administrative Hearings, as well as review by the Texas Legislature.



No State Action Immunity for Texas Medical Board

- District Court found:
 - State judicial review was limited to whether the Board complied with the procedural requirements of the state’s Administrative Procedure Act and/or whether the Board’s decision exceeded the statutory authority granted to the Board.
 - This state judicial review did not permit evaluation of the policy underlying the rule. Nor could the supervisor veto or modify particular decisions to ensure they accord with state policy.
 - The court further found that the Texas legislature lacked the authority to veto or modify a rule.
 - Hence, no state action immunity



The Process of Obtaining State Supervisor Approval May Prove Helpful in Defending

Antitrust Claims on the Merits

- Attempts to comply with the active state supervision requirement, even if unsuccessful, would prove helpful in defending an antitrust challenge on the merits. Could encourage boards to develop an administrative record that
 - Documents a legitimate reason for the licensing restriction (e.g. rule promotes state policy by protecting the public, ensuring quality and safety and so on)
 - Explains why the rule is reasonably necessary and narrowly tailored to meeting the legitimate objective.



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AMA Model State Legislation on Encouraging Medical Board Activities

- Requires that the state pay for the defense (by private counsel) of medical licensing board members from the broadest range of claims and demands, including but not limited to intentional tort or antitrust claims.
- Requires that the state indemnify board members from the broadest range of claims and demands, including but not limited to intentional tort or antitrust claims.
- Enables the Medical Licensing Board to purchase and maintain insurance for medical board members against any liability, including but not limited to intentional tort and antitrust liability

