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PERSPECTIVE

States must reassess regulatory boards

By Daniel G. Swanson
and Blaine H. Evanson

Last week, the U.S. Supreme Court decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, holding in a 6-3 decision that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must [be actively supervised by the state] in order to invoke state-action antitrust immunity."

The Federal Trade Commission claimed North Carolina's dental board — by issuing cease-and-desist letters to unlicensed teeth whitening services — was engaged in a collective boycott in violation of federal antitrust laws, but the board argued it was shielded from liability by the "state action" exemption from the Sherman Act.

In affirming the 4th U.S. Circuit Court of Appeals, the U.S. Supreme Court rejected the board's defense because the board was a nonsovereign actor controlled by private dentists whose regulatory actions were not actively supervised by North Carolina in a sovereign capacity.

The "active supervision" prerequisite to the state action exemption dates back to the Supreme Court's 1980 decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, where the court conditioned state action immunity for a non-sovereign state entity on the satisfaction of two requirements: (1) "the challenged restraint … [must be] clearly articulated and affirmatively expressed as state policy," and (2) "the policy … [must] be actively supervised by the State."

Justice Anthony Kennedy began his opinion in *North Carolina State Board* by reaffirming that the active supervision requirement is "an essential prerequisite of … immunity for any nonsovereign entity — public or private — controlled by market participants."

With respect to the North Carolina dental board, the Supreme Court found no evidence suggesting the board's allegedly anticompetitive conduct was actively supervised by the state. North Carolina argued the statute formally designates the board an "agency of the State," but the majority opinion rejected the form for what it deemed a lack of substance: "[T]he need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." Accordingly, "immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own."

The court's decision should help ensure agencies staffed with practicing professionals do not use their regulatory authority to advance their self-interest in a way that is anticompetitive. The majority opinion, however, lacks concrete guidance on what a state must do to ensure agencies run by private actors are actively supervised. Indeed, the court noted the "inquiry regarding active supervision is flexible and context-dependent."

As a result, states may find that the court's decision creates uncertainty with respect to whether their agencies are sufficiently supervised and whether state regulators are exposed to potential antitrust liability. And the potential risk of litigation could not only deter professionals from joining state boards, but also discourage those who do join from embracing board actions that, despite arguably serving the public interest, are at risk of being painted as anticompetitive by those adversely affected.

Justice Samuel Alito's pointed dissent (joined by Justices Antonin Scalia and Clarence Thomas) highlights the practical problems with applying the court's decision in the numerous states with regulatory agencies — covering finance, medicine, insurance, and an array of other services requiring licensure — staffed with private parties. The dissent explained the court's state action exemption cases were about state sovereignty — federal antitrust laws "do not apply to state agencies; the [board] is a state agency; and that is the end of the matter." Indeed, the North Carolina statute establishing and specifying the powers of the dental board "represent[s] precisely the kind of state regulation that the … exemption was meant to immunize."

The dissent explained that state medical and dental boards have been staffed with professionals since they were first created, and that states may now "find it necessary to change the composition" of these boards with no clear guidance as to how to satisfy the active supervision standard. The dissent asked, "How will States determine if active market participants constitute a 'controlling number of [the] decisionmakers?' … Who is an 'active market participant?' … What is the scope of the market in which a member may not participate while serving on the board?"

State legislatures looking to bring their regulatory agencies into compliance will need to reassess the composition of their professional boards, and either reduce the number of market participants, or install an additional regulatory layer to exercise oversight over the agency. Without the proper procedures in place, board actions that straddle the line between promoting public safety and serving self-interested professionals might open the door to aggressive antitrust claims.

Daniel G. Swanson *is a partner in the Los Angeles and Brussels offices of Gibson, Dunn & Crutcher LLP, and co-chairs the firm's Antitrust and Competition practice group.*
Blaine H. Evanson *is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP, and practices in the Appellate and Constitutional Law practice group.*

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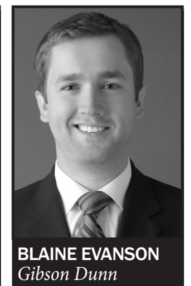
DANIEL SWANSON
Gibson Dunn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Gibson Dunn

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