North Carolina State Board of Dental Examiners v. FTC, No. 13-534

The judicially created state-action doctrine exempts anticompetitive actions taken by states from the federal antitrust laws. The doctrine also shields municipalities and private parties, but only in limited circumstances. To claim an exemption from the antitrust laws, municipalities must show that their actions reflected clearly articulated state policy, while private parties must show both that they acted pursuant to state policy andthat the state actively supervised their behavior. Today, in *North Carolina State Board of Dental Examiners v. FTC*, No. 13-534, the Supreme Court held that to enjoy immunity under the state-action doctrine a state agency controlled by active market participants must make the same showing as is required of private parties.

The North Carolina State Board of Dental Examiners regulates the practice of dentistry in North Carolina. Six of the Board's eight members are active dentists elected by other dentists. Beginning in 2003, the Board successfully used cease-and-desist letters, some of which threatened criminal liability for the unauthorized practice of dentistry, to stop non-dentists from providing tooth-whitening services. The Federal Trade Commission filed an administrative complaint against the Board, alleging that its actions had unreasonably restrained trade in violation of the Sherman Antitrust Act and the Federal Trade Commission Act. An administrative law judge found that the Board had violated the FTCA, and the FTC affirmed that determination. The Fourth Circuit also affirmed, holding that the Board should be treated as "a 'private' actor" for purposes of the antitrust laws because it "is operated by market participants who are elected by other market participants." *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 370 (4th Cir. 2013). The Fourth Circuit further held that the Board could not invoke immunity under the private-actor standard because "the cease-and-desist letters were sent without state oversight." *Id*.

In an opinion by Justice Kennedy, the Supreme Court affirmed. The Court held that "[a] nonsovereign actor controlled by active market participants—such as the Board"—may invoke the state-action exemption only if it makes the two-part showing required of private parties: "first that the challenged restraint … be one clearly articulated and affirmatively expressed as state policy, and second that the policy … be actively supervised by the State." The Court reasoned with respect to the second requirement that "the 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"—a risk clearly posed by "[s]tate agencies controlled by active market participants." And, the Court explained, the Board had not satisfied the second requirement because it "did not receive active supervision by the State."

Justice Alito filed a dissenting opinion in which Justices Scalia and Thomas joined. In the dissenters' view, the applicability of the state-action doctrine does not depend on the way that a state agency is structured. Rather, state-action immunity applies to all state agencies, including the Board, "and that is the end of the matter."

Any questions about this case should be directed to Andrew Tauber (+1 202 263 3324) in our Washington office.