

The Forum for America's Ideas

“ACTIVE SUPERVISION” AFTER NC DENTAL

THURSDAY, JANUARY, 21, 2016

1:00 PM ET/NOON CT/

11:00 AM MT/10:00 AM PT

January 21, 2016



NATIONAL CONFERENCE *of* STATE LEGISLATURES

“Active Supervision” After *NC Dental*

Presented by the **State and Local Legal Center**

Hosted by the **Legal Services Staff Section** of the
National Conference of State Legislatures

Featuring **Geoffrey Green** and **Sarah Oxenham Allen**

About the Webinar

- Q & A at the end using the “Chat” box
- A recording will be available on the NCSL and SLLC websites
- The views expressed in this webinar do not necessarily reflect the views of the SLLC member groups

About the SLLC

- Members:
 - National Governors Association
 - National Conference of State Legislatures
 - Council of State Governments
 - National Association of Counties
 - National League of Cities
 - U.S. Conference of Mayors
 - International City/County Management Association
- Associate members: International Municipal Lawyers Association and Government Finance Officers Association

About the SLLC

- Since 1983 the SLLC has filed over 300 briefs
- The SLLC will file at least eight briefs before the Supreme Court this term
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example

Speakers

- Geoffrey Green, Assistant Director, Bureau of Competition, Federal Trade Commission
- Sarah Oxenham Allen, Senior Assistant Attorney General in the Antitrust Unit of the Virginia Attorney General's Office

Recent Competition Complaints Concerning State Regulatory Boards

- “Unreasonable” entry requirements
- “Abusive” disciplinary actions
- “Questionable” actions defining boundaries of the profession
- “Arbitrary” restrictions on offering innovative services

Competitor Exclusion

- Exclusion is central to a licensing regime
 - Define boundaries of occupation
 - Restrictions on entry
 - Rules governing discipline and maintaining licensure
- Exclusion, in antitrust, is viewed as a mechanism of potential anticompetitive harm

State Action Doctrine

- *Parker v. Brown* (1943): Federal antitrust laws do not reach actions of the State acting as sovereign
- *Town of Hallie* (1985): Municipality (and most state actors) exempt where acting pursuant to clearly articulated state policy to displace competition
- *Midcal* (1980): State action defense available for private parties implementing state policy where
 - Clear articulation
 - Active supervision

Discretion

- *North Carolina Dental State Board of Dental Examiners v. FTC* (2015)
 - Statute prohibits a person from engaging “in the practice of dentistry” except with a license issued by the state Dental Board; statute specifies acts constituting the practice of dentistry (1935)
 - Modern teeth whitening techniques developed decades later
 - Board decided that teeth whitening was exclusive to dentists; directed non-licensed persons to cease and desist

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.

Active Supervision

- *Hoover v. Ronwin* (1984)
 - Unsuccessful candidate for admission to legal practice sued members of Committee established by the Arizona Supreme Court to administer bar admissions process
 - Allegation that Committee adopted a grading formula designed to limit the number of lawyers in the state
 - Committee had discretion in administering and grading the bar exam, and in making recommendations to the Court
 - BUT, Court specified subjects to be tested, approved formula, and retained sole authority to determine admission to practice of law

FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants

- Effort to clarify the central holding of *NC Dental*:

“[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 immunity.”

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

Who is an “active market participant”?

- Arguably under-inclusive
 - Dissent in *NC Board*: “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?

Do active market participants “control” the board?

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

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

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

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

Path Forward

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

State responses and concerns after *NC Dental*

Sarah Oxenham Allen

Senior Assistant Attorney General

Antitrust Unit, Virginia Attorney General's Office

January 21, 2016

Pre-NC Dental perception of boards

Subordinate state entities:

- Created pursuant to state law;
- Within umbrella, traditional state agencies;
- Board members often appointed by Governor;
- Rule-making review pursuant to state APA;
- Disciplinary decisions subject to administrative and judicial review;
- Public board members; and
- Meetings and records subject to open-government laws.

POST NC *Dental* state cases

- **Connecticut:** *Robb v. Connecticut Board of Veterinary Medicine*
- **Louisiana:** *Rodgers v. Louisiana State Board of Nursing*
- **Mississippi:** *Axxcess Medical Clinic v. Mississippi State Board of Medical Licensure*
- **North Carolina:** *Legalzoom, Inc. v. North Carolina State Bar*
- **Ohio:** *Express Lien, Inc. v. Cleveland Metropolitan Bar Association; Ballinger v. Ohio State Board of Registration*
- **Puerto Rico:** *Rivera-Nazario v. CFSE*
- **Tennessee:** *Belton Hearing Aid Center v. Tennessee Department of Health*
- **Texas:** *Teledoc, Inc. v. Texas Medical Board*
- **Virginia:** *Coester, VMS v. Virginia Board of Real Estate Appraisers; Colonial Downs v. Virginia Racing Commission*

Risk analysis for adding active supervision

- Percentage of the decisions made by the Board that potentially have any competitive impact
- Non-discretionary/ministerial task v. discretionary interpretation of statute
- Cost of adding an active supervisor
- Cost of defending an antitrust challenge
- Ability of State to indemnify individual Board members for potential treble damage liability
- Amount of legislative amendments necessary to add active supervision

Single disciplinary actions by boards

FTC Guidance:

Reasonable restraints on competition do not violate the antitrust laws, even where a competitor is injured economically. (p. 6)

- **Suspension of a single licensee** unlikely to unreasonably harm competition.
- Disciplinary actions affecting single licensees typically have only a **de minimis effect** on competition. (p. 12)

Petrie v. Va. Board of Medicine

A chiropractor sued the Board of Medicine, the Executive Director of the Board, and 5 of the members on her hearing panel in federal district court in 2014

- she alleged a **group boycott** against chiropractors who act as primary care providers by the medical doctors on the Board

- she was disciplined by the Board for exceeding the statutory definition for the scope of chiropractic

- the composition of the Board is dictated by statute

- the Board of Medicine regulates 16 healthcare professions

Complaint, *Petrie v. Va. Bd. of Med.*, No. 1:13-cv-01486, 2014 U.S. Dist. LEXIS 166228 (E.D. Va. Dec. 1, 2014), *appeal docketed*, No. 15-1007 (4th Cir. Jan. 14, 2015).

Petrie v. Va. Board of Medicine

Summary judgment for the Board was granted because the plaintiff:

- did not have **antitrust standing** under the Clayton Act,
- could not show evidence of an illegal **agreement** in restraint of trade, and
- could not show any **anticompetitive effects** from her sanction.

State action immunity not relevant because there is no underlying antitrust violation to immunize.

4th Circuit appeal is still pending, but oral argument scheduled for March 22nd.

Possible state responses

- Reconstitute board membership for more public representation – appears disfavored
- Make all board decisions initially advisory
 - **Connecticut:** Public Act 15-05 in July 2015
special legislative session
- Executive Order of the Governor
 - **Oklahoma:** Executive Order 2015-33
- Statutory fixes

Judicial Review as active supervision

Two potential problems with *NC Dental* requirements:

- Supervisor must review the **substance** of a board's anticompetitive decision
 - Review limited to procedural/due process
fairness probably not sufficient
- “**Mere potential**” for state supervision not an adequate substitute for a decision by the State

Questions?

Contact kae.warnock@ncsl.org

