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ANTITRUST REVIEW 2020

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Preface

Global Competition Review's *Americas Antitrust Review 2020* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – in-house counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Changes from the previous edition include adding a chapter on US class action defence, focusing on the perspective of plaintiffs. Along with the new topics, contributors' roles highlight trends in competition law. For example, the Federal Trade Commission chapter was penned by Daniel Francis, associate director for digital markets – an area of particular interest globally.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

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United States: Private Antitrust Litigation

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Nearly five years since the US Supreme Court's rare and much-anticipated ruling in *North Carolina State Board of Dental Examiners v Federal Trade Commission*[1] explained and limited application of state action immunity – which provides state and local government entities immunity from liability from federal antitrust law violations – the time is now fitting to examine the ruling's effect on private antitrust litigation. After reviewing the immunity and the Supreme Court's ruling, this article identifies private litigation developments following *North Carolina Dental*.

State action immunity

For more than 100 years, Congress has enacted legislation that explicitly exempts everything from specific conduct to entire industries from the reach of federal antitrust laws. During the same time, federal courts developed immunities and exemptions from federal antitrust laws, while both interpreting legislation enacted by Congress and resolving the occasional discord between the antitrust laws, federalism and constitutional principles. Of these judicially created immunities and exemptions, state action immunity is, perhaps, the most widely utilised by private litigants in the United States.

State action immunity, developed in *Parker v Brown*,[2] recognises that states are sovereign entities that may exercise their authority to enact legislation that would otherwise run afoul of federal antitrust laws. In recognising this immunity, the Supreme Court explained that federal antitrust laws (specifically the Sherman Act) were not intended by Congress to 'restrain a state or its officers or agents from activities directed by its legislature'.[3]

1 135 S. Ct. 1101 (2015).

2 317 U.S. 341 (1941).

3 id. at 350-51.

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Since *Parker*, the Supreme Court has recognised at least three different situations where state action immunity may exist.[4] First, a state's own actions, such as legislative enactments, are considered ipso facto exempt from the antitrust laws.[5] Second, government entities below the state level, such as municipalities, 'receive immunity from antitrust scrutiny when they act pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition'.[6] Third, private parties acting through state or local government entities may enjoy state action immunity, provided their conduct meets two prongs: the conduct is undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy, and is 'actively supervised by the State itself', as the Supreme Court explained in *California Retail Liquor Dealers Association v Midcal Aluminum, Inc*.[7]

This third situation – private parties acting within governmental entities – has exploded in number across the United States since *Parker*. Today, state and local governments frequently delegate the management of an array of public services, including water, sewer, schools, utilities and hospitals to boards, commissions or other quasi-government entities. Similarly, many states delegate the regulation of professions to boards consisting of participants in those professions – including regulatory or licensing boards for doctors, dentists, chiropractors, nurses, veterinarians, lawyers, architects, plumbers, engineers, brokers and accountants.[8] California alone recently claimed to have 31 such boards,[9] and studies have shown that market participants constitute a majority on most professional boards.[10] In the course of their operations, these entities often award contracts, issue licences and impose discipline – all of which could be challenged as anticompetitive by the parties not awarded contracts, denied licences or subjected to discipline. Uncertainty with the panoply of claims in situations like these eventually led to the Supreme Court agreeing to review the state action immunity's application to a state regulatory board comprising mostly private market participants who allegedly had acted to preclude competition under the guise of state authority.

The Supreme Court's North Carolina Dental ruling

In *North Carolina Dental*, the Supreme Court provided unusually detailed guidance on state action immunity questions that had vexed lower courts for years.[11] In that case, North Carolina delegated a dentist licensing system to its Board of Dental Examiners. Its members were selected by dentists in the state, with most being dentists with active practices, including providing teeth whitening

4 See generally *S.C. State Bd. of Dentistry v F.T.C.*, 455 F.3d 436, 442 (4th Cir. 2006).

5 *Hoover v Ronwin*, 466 U.S. 558, 568 (1984).

6 *F.T.C. v Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013) (internal quotation marks omitted).

7 *Cal. Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

8 See Brief for Amici Curiae State of W. Va. and 22 other States at 8-9, N.C. Bd. of *Dental Exam'rs v F.T.C.*, No. 13-534 (May 30, 2014).

9 See Brief for Amici Curiae Cal. Optometric Ass'n at 5, N.C. Bd. of *Dental Exam'rs v F.T.C.*, No. 13-534 (May 30, 2014).

10 See, eg, Aaron Edlin & Rebecca Haw, 'Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?', 162 *U. Pa. Law Rev.* 1093, 1157-64 (2014).

11 135 S. Ct. 1101 (2015).

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treatments. After non-dentists began offering teeth whitening services, the board decided these services constituted the practice of dentistry and launched an aggressive campaign to stop non-dentists from providing teeth whitening in North Carolina. The Federal Trade Commission (FTC) claimed the board's actions were anticompetitive, and the board responded by arguing that state action immunity provides state-designated entities with immunity. The Fourth Circuit concluded, with little analysis, that 'when a state agency is operated by market participants who are elected by other market participants, it is a "private" actor' and required to satisfy both *Midcal* prongs.[12] This conclusion effectively decided the case, as the board did not attempt to show it could meet *Midcal*'s second prong.

The Supreme Court affirmed with an opinion addressing the very core of state action immunity and with guidance on how it applies to the numerous government bodies comprising private actors in the United States. The Court explained that the immunity is not 'unbounded' and its application is 'disfavored'. These limits, the Court said, are 'most essential' when a state attempts to delegate its regulatory power to participants in the very market they are regulating due to the risk that those participants will pursue private interests in restraining trade. Consequently, the Court reasoned, the immunity does not automatically apply to non-sovereign actors, even if they are delegated regulatory authority by a state. In blunt terms, the Court observed that 'active market participants cannot be allowed to regulate their own markets free from antitrust accountability'. Despite this, the Court left open the possibility of state-delegated, private actor immunity, but only when there is a process sufficient to attribute that conduct to a state. This process, the Court iterated, must satisfy the two-prong test in *Midcal*, which requires that states must have foreseen and implicitly endorsed the anticompetitive effects as consistent with their policy goals, and state officials must exercise power to review the anticompetitive acts and to disapprove those not in accord with the policy goals.[13]

With this framing of state action immunity, the Supreme Court handily rejected the immunity from suit claimed by the North Carolina State Board of Dental Examiners. The Court noted that teeth whitening did not exist when the board was created, suggesting the state could not have clearly articulated displacement of competition in that market as required by *Midcal*'s first prong. The Court also noted that the state failed to contend that it actively supervised the board's conduct, so *Midcal*'s second prong could not be met. Overall, the Court concluded that with no evidence that the state was aware of the board's conduct, it could not be attributed to the state, and state action immunity could not immunise the board from antitrust suit liability.[14]

12 *N.C. Bd. of Dental Exam'rs v F.T.C.*, 717 F.3d 359, 370 (4th Cir. 2013).

13 See *N.C. Dental*, 135 S. Ct. at 1110.

14 See id. at 1116-17.

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Government and private litigation developments following North Carolina Dental

North Carolina Dental immediately impacted private litigation by reinvigorating ongoing cases against state or local government entities and providing support for new cases by both government enforcers and private litigants. Soon after the ruling, one FTC commissioner called it a 'crucial victory' and predicted it 'could have the most significant impact on competition and consumer welfare'.[15] In the following years, the decision, although informative, has not proven to resolve all questions surrounding state action immunity.

As for government enforcement actions against private parties, *North Carolina Dental* arguably has been the boon that was predicted. Even after a spurt of government enforcement actions in the wake of the decision,[16] enforcers have continued to rely on it. As an example, the FTC recently litigated an administrative action against a real estate appraisal board, challenging its adoption of a rule that required appraisal management companies to pay appraisers a 'reasonable and customary fee'.[17] In rendering its decision, the Commission emphasised that eight of the 10 board members were real estate appraisers,[18] and this 'controlling number of decisionmakers' who are 'active market participants in the occupation the board regulates' requires satisfaction of *Midcal*'s active supervision prong for the state action immunity to apply.[19] For this prong, the Commission considered: the development of an adequate factual record, including notice and an opportunity to be heard; a written decision on the merits; and a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standard established by the legislature.[20] These considerations, the Commission explained, 'accord with the Supreme Court's recent teachings in *NC Dental*', while also explaining they are merely guidelines because 'there is no one-size-fits-all set of immutable characteristics that a state supervising entity must satisfy in every context'.[21] After digging into the substance, the Commission eventually

15 See Statement of Maureen K. Ohlhausen, Comm'r, F.T.C., 'Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity' at 13, 21 (Mar. 31, 2015), available at www.ftc.gov/system/files/documents/public_statements/634091/150403hertiagedental.pdf.

16 For example, shortly after *North Carolina Dental*, the FTC noted the decision's impact in announcing a quasi-government hospital board's decision to abandon a proposed merger rather than continue to resist the FTC's litigation challenge. See 'Statement of F.T.C., In the Matter of Phoebe Putney Health Sys., Inc. et al.', No. 9348 (Mar. 31, 2015), available at www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf. Shortly after, the FTC cited *North Carolina Dental* while voicing disapproval of a New York State regulation that purports to provide antitrust immunity to certain community-level healthcare organisations. See F.T.C. Ltr. to N.Y. State Dep't of Health, Center for Health Care Policy and Res. Dev. (April 22, 2015), available at www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf.

17 Complaint, *In re Louisiana Real Estate Appraisers Board*, Docket No. 9374 (FTC May 13, 2017).

18 id.

19 id. at 6-7.

20 id. at 9.

21 id.

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determined that the state did not actively supervise the board's adoption of the challenged rule because the state legislature did not actively supervise the drafting, adoption or application of the rule and no state official had the authority to reject or amend the rule.[22] 'At most, this shows a "potential for state supervision," which the Supreme Court has held "is not an adequate substitute for a decision by the State".'[23] Accordingly, the Commission held that the board was not entitled to state action immunity.

The Department of Justice (DOJ), through its newly reinvigorated amicus brief policy, has also taken steps to ensure that district courts overseeing private litigation are vigilant in applying *North Carolina Dental*. In one such action, a plaintiff alleged two universities agreed not to 'poach' one another's faculty, in violation of section 1 of the Sherman Act.[24] In response to a university moving to dismiss under state action immunity, the DOJ filed an amicus brief disputing the application of the immunity.[25] First, the DOJ explained that the university is a state agency, not a sovereign, and not entitled to ipso facto exemption from the antitrust laws.[26] Second, the DOJ argued that the university cannot satisfy the *Midcal* prongs.[27] In establishing the university, the legislature merely authorised it to hire faculty; it expressed no intent to displace competition in hiring.[28] Nor did any state official actively supervise the university's hiring. In fact, the DOJ pointed out, the universities denied that the alleged no-poach agreement existed, so it could not argue it was actively supervised. The district court denied the motion to dismiss, and the parties reached a settlement in June 2019.

The DOJ similarly submitted an amicus brief in private litigation challenging the Florida Bar's effort to regulate a new technology service for contesting traffic tickets.[29] The plaintiff alleged that after launching its service, the Florida Bar and affiliated lawyers violated section 1 by pursuing baseless complaints that the plaintiff was engaged in the unauthorised practice of law. After the Florida Bar moved to dismiss the complaint by arguing it is a state agency that does not need to satisfy *Midcal*'s active supervision prong,[30] the DOJ filed an amicus brief arguing that the Florida Bar is not a sovereign entity and must be analysed subject to *North Carolina Dental*.[31] As support, the DOJ cited the amicus brief submitted by the Florida Bar in *North Carolina Dental*, which had

22 id. at 12.

23 id. (quoting *FTC v Ticor Title Ins. Co*., 504 U.S. 621, 638 (1992)).

24 See Statement of Interest of the United States of America, *Seaman v Duke University*, No. 1:15-cv-462, Dkt. 325 (M.D.N.C. Mar. 7, 2019).

25 id.

26 id. at 4-5.

27 id. at 14-19.

28 id. at 14-16.

29 See Complaint, *TIKD Services, LLC v The Florida Bar*, No. 1:17-cv-24103, Dkt. 1 (S.D. Fla. Nov. 8, 2017).

30 The Florida Bar Defendants' Motion to Dismiss, *TIKD Services, LLC v The Florida Bar*, No. 1:17-cv-24103, Dkt. 17 at 4-9, (S.D. Fla. Dec. 1, 2017).

31 *N.C. Dental*, 135 S.Ct. at 1114 (incorporating *Midcal* requirements from *Cal. Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc*., 445 U.S. 97 (1980)).

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warned that if the North Carolina Board of Dental Examiners was not a sovereign entity, state bars would similarly lack immunity and 'will have to defend expensive antitrust suits'.[32] The Supreme Court, of course, did find the board to be a non-sovereign entity.[33]

As for private litigation, multiple cases following *North Carolina Dental* have identified open issues and emerging trends for antitrust actions involving government bodies. One important threshold issue confronted by private litigants is whether claims may be dismissed at the very onset of litigation due to application of state action immunity. Some courts have denied motions to dismiss claims pursuant to Federal Rule of Civil Procedure 12(b)(6), as long as the complaints plausibly allege the immunity is not established. In a case similar to *North Carolina Dental*, for example, a district court recently ruled it would be 'premature' to dismiss an antitrust claim against the Board of Dental Examiners of Alabama where the complaint plausibly alleged that the board was not actively supervised by the state.[34] Other courts have implicitly rejected the notion that parties can plead away application of the immunity. In one such recent case, a district court dismissed an antitrust claim against a public utilities body based on South Carolina's statutes reflecting a clearly articulated policy of displacing competition in and active supervision of the sale of electricity, notwithstanding complaint allegations that the body had exceeded its authority and was inadequately supervised by the state.[35]

Courts have also diverged on whether rulings on the dismissal of claims under state action immunity are immediately appealable. After *North Carolina Dental*, the Ninth Circuit held that a lower court order denying a dismissal motion based on state action immunity is not immediately appealable.[36] The Ninth Circuit accepted that the Fifth and Eleventh Circuits 'have reached the opposite conclusion', but explained that disallowing immediate appeals of the rejection of the immunity defence is 'the better view' given, among other reasons, the Supreme Court's caution against broad assertions of immunity against suits.[37] Similarly, the DOJ has submitted an amicus brief arguing that refusing to dismiss under state action immunity is not immediately appealable.[38]

The most challenging issue since *North Carolina Dental* may continue to be whether the particular facts of individual cases can satisfy the application of state action immunity to government bodies with private actors. The Supreme Court implicitly acknowledged there would be uncertainty when recognising that application of the doctrine requires a 'flexible and context-specific' analysis. Justice Samuel Alito's dissent put a finer point on the uncertainty, identifying

32 Statement of Interest on Behalf of the United States, *TIKD Services, LLC v The Florida Bar*, No. 1:17-cv-24103, Dkt. 115 at 7, (S.D. Fla. Mar. 12, 2018).

33 Ultimately, the DOJ took no position on whether the Florida Bar satisfied *North Carolina Dental*. On 4 December 2018, the court granted the Florida Bar's motion to dismiss without explanation. See Order, *TIKD Services, LLC v The Florida Bar*, No. 1:17-cv-24103, Dkt. 250, (S.D. Fla. Dec. 4, 2018).

34 *Leeds v Bd. of Dental Exam'rs of Ala., Slip Op.*, Case No. 2:18-cv-01679-RPD (N.D. Ala. April 2, 2019).

35 See *Century Aluminum of S.C. v S.C. Pub. Serv. Auth.*, 278 F.3d 877 (S.C. 2017).

36 See *SolarCity Corp. v Salt River Project Agric. Improvement and Power Dist.*, 859 F.3d 720 (9th Cir. 2017).

37 id. at 726, 730.

38 Brief of the United States and the Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellees, *Teladoc, Inc. v Texas Medical Board*, No. 16-50017 (5th Cir. filed Sept. 9, 2016).

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the lack of clarity on what constitutes 'active market participants' or how to define the markets in which they participate.[39] One FTC commissioner agreed that these are 'key questions that need to be addressed'.[40] And they have been, somewhat, in recent years.

As Justice Alito forecasted, litigants and courts have laboured with determining whether government entities include sufficient private participants to require such entities to prove satisfaction of both the 'clearly articulated state policy' and 'active state supervision' state action immunity prongs (as opposed to only the first).[41] A developing approach to this issue among courts focuses on whether the private participants actually exercised control over the governmental entities in question. For instance, following *North Carolina Dental*, the Third Circuit reasoned that a state university does not need to satisfy the active state supervision prong because the private party with which the university allegedly conspired in real estate dealings had not dominated the university's real estate decisions.[42] More recently, a district court determined that a state agency tasked with overseeing certain healthcare programmes, with a board consisting of five healthcare providers and six members who were not healthcare providers, was excused from satisfying the active state supervision prong because the board was not 'controlled' by the private participants who comprised 'only a minority' of the agency board.[43]

A related issue that has proven to be equally challenging is whether the state itself must provide the required active supervision. To illustrate, the Ninth Circuit recently held that 'active supervision must be "by the State itself"' and, consequently, the court ruled that Seattle's ordinance regulating ride-hailing services (eg, Uber) was not eligible for state action immunity because the city of Seattle, rather than the state of Washington, supervised and enforced the ordinance.[44] At the same time, other courts have found active supervision satisfied where provided by municipalities alone.[45] As these and similar cases progress through the courts, further clarity on areas of uncertainty about state action immunity should be realised.

Conclusion

The Supreme Court's decision in *North Carolina Dental* not only provides valuable guidance for the application of state action immunity, it also sets the stage for continued development of the doctrine. In the nearly five years since the decision, government antitrust enforcers have relied on it for broadening their enforcement of the federal antitrust laws against quasi-government actors. Private litigants have also relied on it in pursuing cases that portend widespread impact on state and local government operations. All who believe they operate with state action immunity should proceed with caution and consider reviewing their conformity with the principles explained by the Supreme Court, in addition to assessing whether they remain eligible for immunity.

39 See *N.C. Dental*, 135 S. Ct. at 1122-23.

40 See Ohlhausen Statement at 13.

41 *Cal. Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc*., 445 U.S. 97, 105 (1980).

42 See *Edinboro Coll. Park Apartments v Edinboro Univ. Found*., 850 F.3d 567 (3d Cir. 2017).

43 *Turner v Va. Dep't of Med. Assistance Servs*., 301 F. Supp. 3d 637, 645-46 (E.D. Va. 2018).

44 *Chamber of Commerce of the United States of Am. v City of Seattle*, 890 F.3d 769, 789 (9th Cir. 2018).

45 See, eg, *Alarm Detection Sys. v Orland Fire Protection Dist*., 326 F. Supp. 3d 602 (N.D. Ill. 2018).

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Mr Hittinger is a frequent author and speaker on antitrust topics and developments. He organised and led a day-long seminar on section 5 of the Federal Trade Commission Act that featured representatives from all three branches of government. He is a senior partner practising out of BakerHostetler's Philadelphia and Washington, DC offices.

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