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High Court Drills Dental Examiners Board

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In a case that could affect thousands of state licensing boards, the U.S. Supreme Court on Tuesday wrestled with whether a panel that drove nondentists offering teeth-whitening services out of the market violated federal antitrust laws.

The North Carolina State Board of Dental Examiners, whose members are practicing dentists elected by practicing dentists, is asking the high court to reverse an antitrust violation found by the Federal Trade Commission and affirmed by the U.S. Court of Appeals for the Fourth Circuit. The board, represented by Jones Day's Hashim Mooppan, argued that it is exempt from antitrust laws because it is a state actor.

"A state regulatory agency does not lose its state-action antitrust immunity simply because the agency is run by part-time public officials who are also market participants in their personal capacities," Mooppan told the high court.

But deputy solicitor general Malcolm Stewart, speaking for the Federal Trade Commission, countered, "The board members, the majority of them at least, are required to be practicing dentists; they have an evident self-interest in the manner in which the dental profession is regulated and in regulations that might keep other people from competing with dentists. That natural self-interest is reinforced by the method of selection."

The board, responding to complaints from dentists, sent cease-and-desist letters to nondentists offering whitening services and products; some letters indicated it was a misdemeanor offense for them to perform the service, and other letters went to property owners discouraging them from leasing space to nondentists who offered the service.

At the heart of the dispute in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* is the state-action doctrine, which holds that state and local governments are immune from antitrust laws for certain acts that have anticompetitive effects. The Supreme Court in a 1980 ruling said that, when the state does not directly regulate the activity but delegates it to another body, a two-prong analysis applies to determine whether there is antitrust immunity.

The test asks whether the action taken was pursuant to a "clearly articulated and affirmatively expressed state policy" and whether it was actively supervised by the state itself. The government conceded the board met the first prong, but the fight in the high court was over the active-supervision test.

Justice Elena Kagan told board attorney Mooppan that the active-supervision test is needed when there is a real danger that a party is acting to further his own self-interest.

“And here that suggests that the question is: Is this party, this board of all dentists, is there a danger that it’s acting to further its own interests rather than the governmental interests of the state?” she said. “And that seems almost self-evidently to be true.”

Mooppan, insisting that the board is not subject to the active-supervision prong, said it operates like every other state agency, subject to administrative procedure rules, open-record laws and ethics rules.

“If these people are acting contrary to the state’s interest, the state can deal with it and the state has chosen to deal with it in a certain way,” he told the justices. “And the fundamental question in this case is: Does federal law second-guess how the state has chosen to deal with this problem?”

Justice Ruth Bader Ginsburg said that the board, whose members must be private practitioners, is “not your typical state agency,” and that is why the court’s 1980 precedent looks to whether there is state supervision.

Mooppan said if state officials misapply state law or deviate from state policy, that should be handled through administrative review, not through federal antitrust law.

While some justices seemed skeptical of Mooppan’s position, others voiced concern about the government’s position that there must be active supervision to merit antitrust immunity.

“What troubles me,” Justice Samuel Alito Jr. told the government’s counsel, Stewart, is that his position “seems to lead to a case-[by-case], state-by-state, board-by-board inquiry by the federal courts as to whether the members of a regulatory body are really serving the public interest or whether they have been captured by some special interest.”

Stewart told the justices that the North Carolina Legislature made the decision “many decades ago” to prohibit unlicensed individuals from removing stains or accretions from teeth. But determining whether teeth-whitening falls under that category, he said, is discretionary decision-making.

“And our point is [that] we want those interstitial decisions to be made by disinterested persons. Or, at least, if they’re not made by disinterested persons, we don’t feel confident that they truly reflect the policy choices of the state Legislature itself,” Stewart said.

A ruling for the government could reverberate widely, said Dionne Lomax of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, who is following the case.

“If the Supreme Court elects to impose ‘active supervision’ on private regulatory bodies, the decision could have broad implications on the structure and authority of state professional review boards,” she said. “It could conceivably impact everything from the composition of such boards,

how the state oversees and regulates such boards, and the costs of the state to oversee the board's activities."

The North Carolina board has drawn amicus support from 23 states, the American Medical Association, the American Dental Association and others. The government's amici include antitrust scholars, Public Citizen and the libertarian Cato Institute and Pacific Legal Foundation.