Supreme Court Addresses Antitrust Liability for State Regulatory Bodies

March 19, 2015

The Supreme Court recently stripped some state regulatory agencies and boards of the ability to shield themselves from antitrust liability unless their action is actively monitored by the states. Specifically, governmental agencies and boards controlled by “active market participants” are not immune from federal antitrust liability for anticompetitive conduct unless the state has both a “clear policy” permitting the anticompetitive conduct and sufficient “active supervision” by state government. The Supreme Court’s ruling created not only the possibility of state regulatory agencies and their boards being held liable for anticompetitive conduct, but also the possibility that plaintiffs may sue individual board members for damages resulting from that conduct.

In North Carolina Dental Board v. Federal Trade Commission, the FTC sued the North Carolina Dental Board, alleging that it violated federal antitrust laws by attempting to stop non-dentist competitors from providing teeth-whitening services, which they were providing at lower prices than dentists. The FTC challenged the decision by the Board—composed of individuals who were currently practicing dentistry, or what the Court called “active market participants”—to, among other things, send out cease-and-desist letters to non-dentists noting that the practice of dentistry without a license was a crime.

In response to the FTC’s suit, the Board raised the state action immunity defense—long afforded to states to allow them to regulate, even if inconsistent with the “model of unfettered competition.” The Board argued it should be protected by the same immunity as the State of North Carolina, even though it was not actively supervised by the state, because it was a designated state agency established by virtue of a “clear policy” to displace competition. The Supreme Court disagreed, holding that a regulatory body controlled by active market participants—like the North Carolina Dental Board—must also be subject to active supervision by the state to invoke the state action immunity defense.

The Court shed some light on what active supervision requires. It is more than the “façade of state involvement.” As the Court explained, “the mere potential for state supervision is not an adequate substitute for a decision by the State.” The supervisor—someone other than “an active market participant”—must “review the substance of the anticompetitive decision, not merely the procedures followed to produce it” and “must have the power to veto or modify particular decisions to ensure they accord with state policy.”

The Court’s holding may spur antitrust litigation against professional boards comprised of industry participants and their members, particularly where individuals or classes of competitors are excluded by such boards. The composition of the board and the degree of supervision by the state will likely be key points of contention in such suits. The Court did not comment on whether board members may be personally protected against claims of money damages in some cases. But the Court did note that states can defend and indemnify board members in those cases and may further protect them from liability by ensuring that the board’s activity is subject to active supervision.

As states work to conform the operation of regulatory boards to the Court’s decision, industry participants sitting, or invited to sit, on regulatory bodies would be well-served by reviewing the robustness of state supervision of those boards’ activities, particularly those activities that may otherwise raise antitrust concerns, and by requesting indemnification.

For further information please contact Howard Iwrey at 248-203-0526 or hiwrey@dykema.com, any of the attorneys in Dykema’s Antitrust and Trade Regulation practice group, or your relationship partner.

**Attorneys**

Howard B. Iwrey
Supreme Court Addresses Antitrust Liability for State Regulatory Bodies (Cont.)

Practice Areas

Antitrust & Trade Regulation
Health Care

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2019 Dykema Gossett PLLC.