CLIENT ALERT

Supreme Court Requires "Active State Supervision" over State Regulatory Agency Comprised of Active Market Participants

Mar.03.2015

On February 25, the Supreme Court delivered a 6-3 decision clarifying that state regulatory entities do not enjoy automatic antitrust immunity when they are composed primarily of active market participants. In doing so, the Court raises the specter of greater antitrust scrutiny over actions taken by certain state regulatory and licensing bodies, such as professional regulatory boards, and possibly also government entities that themselves participate in the marketplace, such as government owned health care facilities or utilities. The case at issue, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ___ (2015) (slip opinion), addressed whether the state-action doctrine immunized activity by the North Carolina Board of Dental Examiners (the "Board"), which sent cease-and-desist letters "to nondentist teeth whitening service providers and product manufacturers." *Id.* at *3. In ruling that it did not, the Court sided with the FTC and held "that a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates" must, to invoke state-action antitrust immunity, demonstrate not only that its actions are undertaken pursuant to a clearly articulated state policy to displace competition with regulation, but also that its actions are subject to active state supervision, although the Court provided little guidance on what type of supervision would meet that requirement. *Id.* at *14.

At issue in the case was the Board's practice of sending cease-and-desist letters threatening criminal liability to nondentists who offered teeth whitening services, and accompanying products, at lower prices than dentists. The Board is an agency of North Carolina, of which six of eight members must be licensed, practicing dentists, charged with the duty to create, administer and enforce a licensing system for dentists. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services, thereby maintaining the higher prices charged by dentists for the services, constituted an anticompetitive and unfair method of competition. The Board claimed that its actions were immune from antitrust liability under the state-action doctrine set forth in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. In order to qualify for antitrust immunity under that doctrine, the challenged action generally must both: (1) follow a "clearly articulated" state policy to displace competition with regulation, and (2) be "actively supervised" by the state. *Id.* at *6.

The "clear articulation" prong was not at issue before the Supreme Court, and the Board argued that it should not have to meet the "active supervision" prong because it is a formal state agency, much like a municipality, which is excused from the active supervision requirement. The Court disagreed, holding that active supervision is a requirement for immunity for any non-sovereign entity – public or private – controlled by active market participants. Finding that the Board is similar to a private trade association vested by the State with regulatory authority, the majority held 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." *Id.* at *12-13. In this case, had the Board elected to proceed via rulemaking, its actions would have been subject to review by another state agency, but its letter-writing campaign avoided that additional oversight.

Given that the Board did not assert that its conduct was actively supervised by the State, the Court did not reach the question of what forms of state supervision would satisfy the active supervision requirement. Instead, the Court stated that the inquiry is

flexible and content-dependent, and depends on the facts and circumstances of each case. The Court did identify a few "constant requirements" of active supervision, including: (1) the supervisor must review the substance of the anticompetitive decision; (2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and (3) the state supervisor may not itself be an active market participant. *Id.* at *18.

Justice Alito contended in his dissent that, by imposing the "active state supervision" requirement on these types of state agencies, the Court has "headed into a morass" and "spawn[ed] confusion" that "will create practical problems and is likely to have far-reaching effects on the States' regulation of professions." *Id.* at **2, 11 (Alito, J., dissenting). States may be required to change the composition of regulatory boards and/or impose additional requirements to ensure that the activities of such agencies meet the active supervision requirement. The Court's holding leaves many questions unanswered, including when and how the active state supervision requirement should apply. For example, is active state supervision required in situations where the agency is itself a market participant, such as a hospital authority? Would the availability of judicial review of a licensing board's disciplinary decision satisfy the requirement, doubt being especially present if the judicial review is on an "arbitrary and capricious" standard? What is a "controlling number" and how will courts define "active market participant"? These unknowns, and many others, promise future litigation as states and their regulatory agencies controlled by active market participants seek to navigate the state-action doctrine while carrying out their public functions.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Jeane A. Thomas, CIPP/E
Partner – Washington, D.C., Brussels
Phone: +1 202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com

Ryan C. Tisch
Partner – Washington, D.C.
Phone: +1 202.624.2674
Email: rtisch@crowell.com