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FTC Staff Weighs In on Oversight Standards for State Regulatory Boards

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BROOKFIELD, WISCONSIN – Last year, the U.S. Supreme Court issued a decision that could make members of state regulatory boards subject to antitrust liability. The case involved a ruling by the North Carolina Dental Board that prohibited anyone other than licensed dentists from offering teeth-whitening services in North Carolina. The FTC brought an antitrust claim against the North Carolina Dental Board, alleging that it was improperly monopolizing teeth-whitening services. The North Carolina Dental Board defended its action by maintaining that the FTC could not bring an antitrust claim against the board since it was a state agency that was exempt from antitrust claims.

The Supreme Court upheld the FTC’s claim and found that the antitrust exemption provided to state agencies did not extend to state regulatory boards that are controlled by market participants and not actively supervised by state officials. Since there was no active supervision over the Dental Board, the court held it was acting in its own private interest instead of for the public good. The court’s opinion, however, did not provide extensive guidance on what constitutes active supervision by state officials.

Late last year, the FTC Staff issued its Guidance on how a state government could actively supervise state regulatory boards. It should be noted that the FTC Staff Guidance is not controlling on federal courts that may be asked to review actions by state regulatory boards in the future. The Guidance represents only the opinion of the FTC Staff, not the FTC itself or any federal court. Nonetheless, a court would undoubtedly give some weight to the FTC Staff Guidance on the issue.

Before turning to the issue of what constitutes “active supervision,” the FTC Staff first expressed its opinion as to when a regulatory board is considered to be “controlled” by market participants. The FTC Staff opined that the method of selecting board members is not relevant to the question of whether market participants control the board. Moreover, the staff held that even if the active market participants sitting on the board are not a majority, they still may be regarded as controlling the state board if they are able to unduly shape or block decisions being made by the board. Therefore, simply because a state funeral board may have a majority of consumer members, it still could be regarded as controlled by funeral directors if it is able to block actions by the consumer members.

With regard to the primary issue as to what constitutes “ac-

tive supervision” by a state, the Supreme Court in the North Carolina Dental Board case identified the following requirements for “active supervision”:

1. The state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.
2. The state supervisor must have the power to veto or modify particular decisions to ensure they are in accord with state policy.
3. The mere potential for state supervision is not an adequate substitution for a decision by the state.
4. The state supervisor must not be an active market participant.

Taking the Supreme Court’s four factors, the FTC Staff went further and explained what steps would be required for a state to show that there is active supervision of a regulatory board decision. The FTC Staff stated in its Guidance that the following requirements would need to be shown by the state:

1. In evaluating the action taken by the regulatory board, the state supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies and reviewed documentary evidence. If those actions have already been taken by the regulatory board, then the state supervisor needs only to utilize those materials that have already been assembled.
2. The state supervisor evaluates the substantive merits of the action recommended by the regulatory agency and assesses whether that action is consistent with the laws of the state.
3. The state supervisor issues a written decision approving, modifying or disapproving the recommended action of the regulatory board and explains the reasons and rationale for that decision.

If the courts agree with the FTC Staff Guidance, states would need to take one of three measures to be able to defend anticompetitive decisions of state regulatory boards. First, the state could reconfigure regulatory agencies so they are not controlled by market participants. The problem, of course, is if a state eliminates all or a majority of market participants from a regulatory board, the agency loses the expertise it needs to properly regulate the profession or trade. It is very difficult for nonparticipants to know how to regulate the practices of physicians, engineers, architects, funeral directors, etc. For many agencies, this type of reconfiguring would jeopardize the ability of the board to adequately regulate the trade or profession.

A second measure, which a few states have taken, is to convert the regulatory board to an advisory board. For example, in California, the Cemetery and Funeral Bureau is a division of the California Department of Consumer Affairs. It has 26 state employees and is under the control of the head of the Department of Consumer Affairs. The bureau does have a 12-person Advisory Committee comprising cemeterians, funeral directors and representatives of consumer groups to assist on deathcare issues. However, the Advisory Committee has no authority over regulations or practitioners nor decisions made by the bureau.

The third option would be to create a regulatory oversight body or person who would give substantive review to any decision of a state regulatory board. As the FTC Staff Guidance provides, the review must be more than just a pro forma review of the record. Rather, according to the FTC Staff, in order for the review committee to be regarded as active supervision, it would have to either produce its own record or, if the regulatory agency has produced a record, review that record substantively and issue a written decision approving, modifying or disapproving the recommended action. The creation of such an oversight board would be an expensive and cumbersome procedure for most states.

Whether the FTC Staff Guidance will spur state legislatures to reconfigure state regulatory boards, reduce or eliminate their authority or place them under a supervisory board remains to be seen. Some could argue that the FTC Staff Guidance is just another attempt by a federal agency that has long wanted to impose its open-market economic vision on state licensing schemes. Others could maintain that some type of major revision will be necessary to keep state regulatory boards from being targets of future antitrust lawsuits. However, given that most state legislatures are dominated by conservative majorities resentful of federal intrusion into state regulatory matters, any type of significant restructuring of state regulatory boards could be a difficult sell.

MBJ

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