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## State Regulatory Boards Are Open to Antitrust Liability, Says the Supreme Court

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The Supreme Court's antitrust decision this week could have significant implications for various state regulatory agencies throughout the country. The Court upheld a lower court's ruling that the North Carolina State Board of Dental Examiners (Board) illegally suppressed competition in violation of the federal antitrust laws. The Board argued that it was immune from the federal antitrust laws because it was a state entity. However, the Court rejected that argument because the Board was made up of a controlling number of practicing dentists, what the Court called "active market participants." The court reasoned that since the Board was comprised of practicing dentists, there was a risk that the Board would put the private interest of dentists above the interest of the general public. Therefore, the Board needed active state supervision in order to enjoy immunity from the federal antitrust laws.

The case stems from a ruling by the Board that only licensed dentists could offer teeth whitening services. In 2010, the Federal Trade Commission (FTC) issued an order against the Board for violating federal antitrust laws after the Board mailed cease-and-desist letters to non-dentists implying that they were breaking the law by providing teeth whitening services. The FTC claimed that the Board was attempting to maintain higher prices for licensed dentists, who also provided those services. The Board appealed the order arguing that they were a state agency acting under clearly articulated state policy and therefore exempt from antitrust liability.

The Court's opinion emphasizes the power of procedure, and it would be wise for state boards to consult with counsel on how to ensure that their procedures avoid antitrust problems. The opinion addresses all state agencies that regulate a market—engineering, education, medicine, dental, cosmetology, interior decorating, etc.—when their decisionmakers are actively involved in the market, such as practicing dentists. In order for those state agencies to have antitrust immunity, they must have "active supervision" from the state that provides realistic assurances that the board's conduct promotes state policy, rather than merely the party's individual interests.

The Court said that determining whether active state supervision exists will be highly context-specific. It identified only a few minimum requirements for active supervision. The state supervisor must have the ability to veto or modify the agency's actions, and the supervisor cannot be an active market participant. The Court did not provide a comprehensive roadmap for compliance. These minimum requirements will likely form the backbone of state legislatures' responses to the Court's decision, but some important questions were left unanswered. For instance, how many active market participants can a state board have before becoming subject to antitrust liability? How far must board members be removed from the market?

Antitrust cases are often the most expensive cases to defend. In the wake of this increase in antitrust liability, state regulatory boards should seek advice on how they can minimize the risk of suit. Some boards may choose to put in place mechanisms to facilitate active state supervision so that they will have immunity to antitrust suits. Others may choose to keep their current structure but retain counsel to help them avoid making decisions that implicate antitrust laws. The fact that they are a state agency no longer means that they are automatically immune.

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