

STATE-ACTION ANTITRUST IMMUNITY  
IN THE WAKE OF  
*NORTH CAROLINA STATE BOARD OF DENTAL  
EXAMINERS V. FEDERAL TRADE COMMISSION:*  
WHAT DOES IT MEAN FOR STATE BARS  
AND BAR EXAMINERS?

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In its February 2015 decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*<sup>2</sup> (“N.C. Board”), the United States Supreme Court held that state licensing boards controlled by market participants—including boards duly established by state legislatures—do not enjoy automatic immunity from antitrust laws. Instead, the boards and their members will enjoy such immunity only if their actions (1) are taken pursuant to clearly articulated state policy and (2) are “actively supervised” by the state.

The N.C. Board decision may have broad institutional impacts. As the dissent argued, the decision could “create practical problems and is likely to have far-reaching effects on the States’ regulation of professions.”<sup>3</sup> Boards controlled by “active market participants”—for example, practicing dentists serving on a dental board—must now ensure that the state provides sufficient “active supervision” of their regulatory decisions to avoid liability under the Sherman Act for acts that are found to be anti-competitive. State bars, in disciplining attorneys and policing the unauthorized practice of law, and boards of bar examiners—many of which are controlled by practicing attorneys—now may be more vulnerable to antitrust claims. They, and the states

that created them, will need to evaluate steps necessary to reclaim antitrust immunity while preserving the integrity and effectiveness of these entities.

The Supreme Court provided a few guideposts for determining whether “active supervision” is present: (1) the individual or entity within the state government that provides the requisite “active supervision” must review the substance of the allegedly anticompetitive decision, (2) the supervisor must have power to veto or modify that decision, and (3) the supervision cannot be provided by an active market participant. A fuller picture of what the supervision requirement will mean for state bars and boards of bar examiners that have heretofore assumed that their actions were subject to state-action antitrust immunity or other immunities must await the further development of case law and Federal Trade Commission (FTC) rulings.

The Supreme Court did not have occasion in *N.C. Board* to address the issue of judicial immunity from antitrust claims, which is a separate immunity that may be available to state bars and boards of law examiners (as discussed below).

## STATE-ACTION ANTITRUST IMMUNITY IN A NUTSHELL

The Sherman Act<sup>4</sup> was enacted in 1890, when Congress's power to regulate commerce was more restricted than it is today. At the time, states enjoyed plenary regulatory authority over the professions. But the Supreme Court expanded its interpretation of Congress's power to regulate commerce in later decades and opened the door to greater federal oversight of potentially anticompetitive state regulations.<sup>5</sup>

It was against this backdrop that the Supreme Court decided *Parker v. Brown* ("*Parker*") in 1943.<sup>6</sup> In *Parker*, a raisin producer argued that a California agricultural price support program, administered through the Agricultural Prorate Advisory Commission, violated the Sherman Act.<sup>7</sup> The Court rejected the claim. It did so because it perceived serious federalism concerns with a reading that would apply Sherman Act scrutiny to every instance in which the policies and values of a state, expressed through its regulations, had anticompetitive effects.<sup>8</sup> Thus, the Court employed the canon of constitutional avoidance to create "state-action immunity" under the Sherman Act where states act in their sovereign capacities.<sup>9</sup>

The Supreme Court clarified the scope of the "state-action immunity" exception in the years following *Parker*. Because *Parker* relied on principles of federalism to carve out the exception in the first place, the Court was predictably disinclined to allow non-state entities to invoke the "state-action immunity" exception without some meaningful connection to the state itself. In *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>10</sup> the Court permitted a municipality to invoke the "state-action immunity" exception only if (1) the "restriction of competition is an authorized implementation of state policy" and

(2) "suppression of competition is the 'foreseeable result' of what the statute authorizes."<sup>11</sup> Likewise, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* ("*Midcal*"), the Court held that a private actor invoking the "state-action immunity" defense must show that the anticompetitive restraint (1) is "clearly articulated and affirmatively expressed as state policy" and (2) is "actively supervised by the State."<sup>12</sup>

The Supreme Court then went decades without revisiting "state-action immunity."

## THE FTC'S EFFORTS TO ROLL BACK STATE-ACTION IMMUNITY

In 2001–02, the chairman of the FTC convened a State Action Task Force to study the courts' application of state-action immunity and "identify opportunities to direct the development of that case law in a manner that promotes competition and enhances consumer welfare."<sup>13</sup> The Task Force concluded that lower courts had applied the state-action doctrine "in a manner that could potentially endanger national competition goals."<sup>14</sup> The Task Force therefore recommended a robust campaign to enforce each of the *Midcal* requirements. For example, the Task Force recommended enforcing the "active supervision" requirement through application of the following analysis:

- (a) a finding of active supervision must be based on a determination that the state official's decision was rendered after consideration of the relevant factors; (b) the absence of an adequate factual record precludes a finding of active supervision; and (c) the use of specific procedural measures—such as notice to the public, opportunity for comment, and a written decision—is significant, though not necessarily conclusive, evidence of active supervision.<sup>15</sup>

Thus, the Task Force focused on ensuring that the existence of state supervision would be a substantive, factually supported determination, and not merely a procedural formality. The Task Force further recommended that any quasi-governmental entity be subject to the antitrust laws if (a) it is composed, in whole or in part, of market participants, or (b) there is an “appreciable risk” that the anticompetitive conduct is a result of a deviation from the state policy.<sup>16</sup>

The FTC also began a targeted litigation strategy to rein in what it believed to be particularly excessive anticompetitive conduct. For example, the FTC targeted moving company associations that engaged in “rate setting.”

The FTC also challenged a state-created hospital authority’s purchase of one of two hospitals in a county, and a lease of the hospital to a nonprofit management corporation formed by the authority in *Federal Trade Commission v. Phoebe Putney Health System, Inc.* (“*Putney Health*”). The district court dismissed on “state-action immunity” grounds and the Eleventh Circuit affirmed. The Supreme Court unanimously reversed, concluding that the Eleventh Circuit applied *Midcal*’s “clear articulation” requirement too loosely.<sup>17</sup> The Court held that the “clear articulation” requirement necessitated some showing that the state “affirmatively contemplated” the possibility that its law was authorizing anticompetitive actions.<sup>18</sup>

## THE N.C. BOARD DECISION

Two years after *Putney Health*, the Supreme Court again turned its attention to state-action immunity—this time addressing the “active supervision” prong of *Midcal*.

## Background

The North Carolina Board of Dental Examiners (“Board”) was established as an “agency of the State for the regulation of the practice of dentistry[.]”<sup>19</sup> The Board is composed of eight members—six licensed dentists engaged in the active practice of dentistry, one licensed and practicing dental hygienist, and a “consumer” appointed by the governor.<sup>20</sup> The Board is authorized to promulgate rules and regulations to enforce its mandate, subject to approval by the North Carolina Rules Review Commission,<sup>21</sup> and may file suit to enjoin the unlawful practice of dentistry.<sup>22</sup>

Dentists were the original providers of teeth-whitening services in North Carolina.<sup>23</sup> However, non-dentists soon entered the market, offering the services at reduced prices. Responding to complaints from licensed dentists, the Board “[went] forth to do battle” with the non-dentists.<sup>24</sup> Rather than issue a formal rule, the Board issued at least 47 cease-and-desist letters on its official letterhead to non-dentist teeth-whitening service providers and product manufacturers.<sup>25</sup> Many of these letters directed the recipient to cease “all activity constituting the practice of dentistry,” warning that the unlicensed practice of dentistry is a crime and expressly stating, or strongly implying, that teeth whitening constitutes “the practice of dentistry” (even though North Carolina’s Dental Practice Act does not specify that teeth whitening constitutes “the practice of dentistry”).<sup>26</sup> In addition, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth-whitening services.<sup>27</sup> The Board also sent letters to mall operators, stating that kiosk teeth whiteners were illegal and advising the malls to consider expelling violators. Eventually, non-dentists ceased offering teeth-whitening services in North Carolina.<sup>28</sup>

The Board's actions attracted the attention of an energized FTC. The FTC filed an administrative complaint in 2010 and prevailed at all levels of administrative review—notwithstanding the Board's invocation of state-action immunity. The Fourth Circuit affirmed.<sup>29</sup>

### The Supreme Court's Opinion

The Supreme Court agreed to hear the case and also ruled in the FTC's favor. The Court did not contest that the Board was a state agency (having been so designated by a state statute), and it assumed—as the parties had—that the Board's actions were taken pursuant to a “clearly articulated and affirmatively expressed” state policy.<sup>30</sup> However, noting that the touchstone of *Parker* state-action immunity is whether the entity is exercising the state's sovereign power by implementing its policies, the Court concluded that active market participants “controlled” the Board, thereby barring the assumption that the Board was implementing North Carolina's policy.<sup>31</sup> Thus, it was necessary for the Board to show that its anticompetitive actions had been “actively supervised” by the state to invoke state-action immunity.

According to the Court, “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.”<sup>32</sup> In other words, “not every act of a state agency is that of the State as sovereign.”<sup>33</sup> The Court concluded that the Board had not received “active supervision” of its efforts to extinguish the non-dentist provision of teeth-whitening services.<sup>34</sup> As a result, state-action immunity did not apply.<sup>35</sup>

The Board had argued that the “active supervision” requirement did not apply at all, because the Board was a state agency. As a result, the

Supreme Court's decision did not address any particular supervisory regime. However, the Court did note that “the inquiry regarding active supervision is flexible and context-dependent,” and that active supervision “need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision.”<sup>36</sup> The pertinent question will be whether the state's review mechanisms provide “‘realistic assurance’ that a nonsovereign actor's anticompetitive conduct ‘promotes state policy, rather than merely the party's individual interests.’”<sup>37</sup> The Court went on to explain that “[t]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it,” “the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy,” the “‘mere potential for state supervision is not an adequate substitute for a decision by the State,’” and “the state supervisor may not itself be an active market participant.”<sup>38</sup>

### The Dissenting Opinion

Justice Alito, joined by Justices Scalia and Thomas, dissented, arguing that the Court's decision reflected a misunderstanding of *Parker*.<sup>39</sup> The dissent's reasoning can be condensed to a syllogism: (1) the Sherman Act does not apply to state agencies under *Parker*; (2) the Board is a state agency; (3) therefore, the Sherman Act does not apply to the Board.<sup>40</sup> Contrary to the majority's conception of the Board as a nonsovereign entity, the dissent accepted as dispositive the “agency label” that North Carolina had given the Board by statute.<sup>41</sup>

In the dissent's view, *Parker* was intended to immunize the precise kind of government regulation of professions that was at issue here.<sup>42</sup> Moreover, the dissent believed its more bright-line test was preferable because it would avoid the “morass” and

“confusion” resulting from “[d]etermining whether a state agency is structured in a way that militates against regulatory capture[.]”<sup>43</sup>

The dissent identified numerous “practical problems” caused by the Court’s decision that could “have far-reaching effects on the States’ regulation of professions.”<sup>44</sup> First, the decision could undermine the purpose of licensing boards by incentivizing states to select nonprofessionals to staff the boards. This would “compromise the State’s interest in sensibly regulating a technical profession in which lay people have little expertise.”<sup>45</sup> The dissent also noted the uncertainties that would now be placed on states regarding *how* to comply. What, the dissent queried, constitutes a “controlling number” of board members?<sup>46</sup> Who is an “active market participant”? What if the board member ceases active practice while on the board, but returns to practice after completing his or her term? And what is the relevant “market” in which board members may not be “active participants”?<sup>47</sup>

## HOW THE DECISION MAY IMPACT STATE BARS AND BAR EXAMINERS

State bar organizations are some of the oldest and most well-established professional licensing boards in the nation.<sup>48</sup> Regulation of the legal profession occurs in three broad contexts: first, regulations regarding who can practice and how one gets admitted; second, regulations regarding the conduct of attorneys once licensed; and third, regulations relating to the unauthorized practice of law. The regulatory responsibilities are handled by different entities in some jurisdictions (e.g., by a board of bar examiners, or a state bar organization and its enforcement committees or officers),<sup>49</sup> while a single entity has responsibility for all three types of regulation in other jurisdictions. Antitrust lawsuits may challenge

any of these kinds of regulatory actions. Might the Supreme Court’s decision regarding dental examiners limit state-action immunity for state bars and bar examiners when these actions are alleged to be anticompetitive?

### Are State Bars and Boards of Bar Examiners Different from Boards of Dental Examiners?

#### *State Supreme Court Authority*

One important feature of state bars and boards of bar examiners in every state is that they are commonly charged with enforcing rules established by their respective state Supreme Courts. For example, all boards of bar examiners apply bar admission rules approved by their respective state Supreme Courts.<sup>50</sup> State bars may enforce ethical rules that have been approved by a state Supreme Court or a state legislature. The *N.C. Board* opinion itself saw no distinction between the “decision[s] of a state supreme court, acting legislatively rather than judicially,” and state legislation.<sup>51</sup> The former, like the latter, “*ipso facto* are exempt from the operation of the antitrust laws” because they are an undoubted exercise of state sovereign authority.<sup>52</sup> But while this fact might help establish the existence of a “state policy” that a state bar *could* be enforcing, it does not answer the central questions that arose in *N.C. Board*: (1) whether the control of practicing lawyers of a state bar or board of bar examiners implicates the structural concerns identified in *N.C. Board*, and (2) if so, whether the respective state Supreme Courts “actively supervise” the conduct that is alleged to be anticompetitive.

As Justice Alito noted in his dissent in *N.C. Board*, it is unclear what constitutes “control” of a board by practicing professionals.<sup>53</sup> In that case, private practitioners constituted a majority, but not all, of the board, and the challenged actions were undertaken only by the practicing dentist members.<sup>54</sup>

State bar organizations may, in some instances, have more decision-makers and a more complex committee structure than the N.C. dental board. This factor will have to await further development of the case law and FTC decisions.

A further question is whether the involvement of a state's Supreme Court will constitute active supervision of a state bar or board of bar examiners "controlled" by active participants in the market.

In *Goldfarb v. Virginia State Bar*<sup>55</sup> ("Goldfarb"), for example, which the Court discussed in *N.C. Board*, the Court denied *Parker* immunity to the Virginia State Bar. The Bar—composed of practicing attorneys—had established a minimum fee schedule for legal services relating to residential real estate transactions, and petitioners alleged that the minimum fee schedule and its enforcement mechanism constituted price-fixing in violation of the Sherman Act.<sup>56</sup> The Court acknowledged that the State Bar was "a state agency by law" but nonetheless denied state-action immunity because the Virginia Supreme Court had not *mandated* imposition of the fee schedule—that is, the fee schedule was not an implementation of clearly articulated state policy *requiring* (rather than just prompting or enabling) such anticompetitive action.<sup>57</sup>

By contrast, the U.S. Supreme Court has upheld actions by a state bar when exercising the authority or policy of the states' high courts. In *Bates v. State Bar of Arizona*, licensed attorneys and members of the Arizona State Bar who had been charged in a complaint filed by the Bar with violating the state Supreme Court's restrictions on attorney advertising, which the Bar enforced, claimed that the rule restricting attorney advertising violated the Sherman Act by limiting competition. The U.S. Supreme Court held that the restriction on advertising was not subject to attack under the Sherman Act because the rule

reflected an activity of the state acting as sovereign, but struck down the advertising restrictions on First Amendment grounds.<sup>58</sup> In *Hoover v. Ronwin*, a challenge was brought to the Arizona State Bar's admissions function.<sup>59</sup> The state Supreme Court delegated its plenary authority over admissions to a Committee on Examinations and Admissions. The Committee was required to submit its grading formula and recommendations for admission to the Supreme Court, which made the final decision to grant or deny admission.<sup>60</sup> A candidate who had been denied admission and whose petition for review had been denied by the Court alleged that the State Bar, members of the Committee, and others had conspired to restrain trade in violation of the Sherman Act by setting the grading scale on the examination with the goal of reducing the numbers of competing attorneys in the state. The U.S. Supreme Court found that the delegation of plenary authority by the Court to the Committee and the procedure for Committee recommendation to the Court was sufficient to constitute implementation of a "clearly articulated state policy" by the state.<sup>61</sup> In both *Bates* and *Hoover*, the Court found state action.<sup>62</sup> However, in neither case did the U.S. Supreme Court find it necessary to determine whether there was "active supervision," because the conduct at issue was undertaken by the state Supreme Court itself.<sup>63</sup>

It seems unlikely that *N.C. Board* would change the relevant analysis when a state bar or board of bar examiners undertakes an action that is affirmatively directed by a state Supreme Court (as in *Bates* and *Hoover*). But where, as in *Goldfarb*, an action is not clearly mandated by the state Supreme Court, the issue of whether the state bar or bar examiner entity is "actively supervised" may now be at issue in determining whether there is antitrust immunity. For example, a state bar's exercise of its discretion in pursuing an allegation of the unauthorized practice

of law may not be affirmatively directed by the state Supreme Court. State bars and bar examiners may want to review the types of actions that fall outside the scope of state Supreme Court mandates.

### ***Judicial Immunity of Members***

Another way in which state bars and boards of bar examiners are different from dental boards is that their members are sometimes entitled to judicial immunity. In *Forrester v. White*,<sup>64</sup> the Supreme Court identified “an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform,” and held immunity to be “justified and defined by the functions it protects and serves, not by the person to whom it attaches.”<sup>65</sup> Consistent with this recognition, the rules of at least some state Supreme Courts expressly extend judicial-related immunities to activities of bar examiners.<sup>66</sup>

State bar examiners and state bar employees have been characterized as performing a judicial function for which immunity was appropriately extended in various court cases, both in Sherman Act antitrust litigation and in other contexts.<sup>67</sup> The reasoning in these cases has sometimes resembled the rationale for the “adequate supervision” requirement under *Parker*. For example, in *Sparks v. Character and Fitness Committee of Kentucky*,<sup>68</sup> an unsuccessful applicant to the Kentucky state bar sued, *inter alia*, the Kentucky Committee on Character and Fitness and Kentucky’s Board of Law Examiners, both of which were created by a direct order of the Kentucky Supreme Court. Relying in part on *Hoover*, the Sixth Circuit held that both the Committee and the Board, in determining whether to admit an individual to the bar, were entitled to judicial immunity because they acted under the “direct supervision” of the Kentucky Supreme Court.<sup>69</sup> According to the Court, “[t]he act of consid-

ering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform those duties on behalf of the judiciary are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same act.”<sup>70</sup>

However, in other areas involving the administration of the legal profession, immunities may be less settled,<sup>71</sup> and the impact of *N.C. Board* potentially greater. In their amicus brief in *N.C. Board*, the North Carolina State Bar and Board of Law Examiners (and other signatories to the brief) expressed their concern that “[t]reating a state agency as a ‘private actor’ would not only potentially deprive state agencies and their officials of state[-]action immunity, but would also cast doubt on the availability of other immunities, such as immunity under the Eleventh Amendment,” and that “[a] clear benefit of the state[-]action doctrine is to avoid sending antitrust litigation, complex as it is, into the thicket of other official immunity doctrines.”<sup>72</sup> That may have been a concern, but nothing in *N.C. Board*’s holding specifically suggests the nullification of preexisting judicial or legislative immunities that state bar employees or bar examiners may possess. The existence of such immunities in the wake of *N.C. Board* may be tested by antitrust plaintiffs’ lawyers. As a practical matter, judicial or legislative immunities may not have been asserted, or even explored, in prior antitrust cases because of the likelihood of *Parker* immunity. Now, they may be raised and addressed more often.<sup>73</sup>

### **Practical Issues**

#### ***What Is Sufficient “Active Supervision”?***

*N.C. Board* has unsettled long-standing expectations among state bars, which, prior to the decision, could justifiably believe that they were protected

by state-action immunity when implementing and enforcing board policies, even when those policies were not the direct product of express legislative or state Supreme Court action. For example, in *Hass v. Oregon State Bar*,<sup>74</sup> plaintiffs challenged a resolution of the Oregon State Bar requiring all active Oregon-based attorneys to purchase primary malpractice insurance from the Bar. The provision was not imposed directly by either the Oregon legislature or the Oregon Supreme Court acting in a legislative capacity, but was promulgated by the Bar, “which is merely an instrumentality of the state judiciary.”<sup>75</sup> Noting that the Bar’s records were open for inspection and audit, and that the Bar was subject to notice and ethics rules like other state and municipal agencies, the Ninth Circuit concluded that the Bar should be treated as “a public body, akin to a municipality for the purposes of the state[-]action exemption,” even though it was controlled by a 15-member board of governors, 12 of whom were lawyers elected by the other lawyers in the state.<sup>76</sup> The Ninth Circuit found this fact to be irrelevant to whether the Bar was a state agency, a status that “depends on whether it is an instrumentality of the government of the state, not on whether it is supervised by one department of government rather than another.”<sup>77</sup> That view now appears untenable after *N.C. Board*.

But what degree of active supervision is necessary to satisfy the “active supervision” requirement? While not “deciding the question,” *N.C. Board* offered three essential features: (1) the supervisor must review the substance of the anticompetitive decision, (2) the supervisor must have power to veto or modify the decision, and (3) the supervision cannot be provided by another active market participant.

These broad guidelines are helpful, but questions persist. To what extent must the supervising

entity review the decision? State Supreme Courts all have an active role in promulgating the rules for admission to the bar.<sup>78</sup> If the state Supreme Court is tasked with providing active supervision, does every member of the Court need to review a state bar’s admission decision? Or can the justices divide the workload? How extensive must the review be? Must an “opinion” be written? Moreover, could a state Supreme Court justice be considered an “active market participant”? Many states elect their Supreme Court justices, or appoint them for terms. Prior to taking the bench, those lawyers maintain successful law practices. After serving as judges, many return to active law practice.<sup>79</sup> Arguably, such judges remain market participants and therefore cannot “supervise” the regulation of their own profession.

The uncertainty of the “active supervision” requirement could also create conflicts between, on the one hand, the ability of outside parties (like the FTC) to *know* that “active supervision” is occurring and, on the other, significant federalism concerns. For example, if state Supreme Courts are tasked with providing the necessary “active supervision,” will their operations be subject to second-guessing by the FTC and the federal courts as to whether—in any given case—adequate supervision was provided? This result seems contrary to the objective of *Parker*, namely to preserve state independence from federal intrusion.

FTC Commissioner Maureen Ohlhausen (once a member of the State Action Task Force referenced above) recently stated her belief that state-action antitrust immunity, after *N.C. Board*, does not create any “terribly onerous” requirements for boards to meet to avoid liability.<sup>80</sup> She suggested that state boards have “several viable options for avoiding both antitrust liability for, and excessive oversight



of, their conduct.”<sup>81</sup> And she noted that “if a board is not engaging in conduct that is a violation of the antitrust laws, it need not even address the issue of active supervision.”<sup>82</sup> To states and boards across the nation, however, that may be cold comfort, akin to the infamous suggestion about incursion on Fourth Amendment liberties: if you’ve got nothing to hide, there’s nothing to worry about. Where states and board members had enjoyed some flexibility in regulating professions as they saw fit, even by means of policies that the FTC might have deemed to be anticompetitive, they now may be subject to the second-guessing of federal antitrust regulators and risk exposure to private lawsuits, if not protected by other immunities.

### *The Threat of Damages and Attendant Recruitment Difficulties*

A prevailing plaintiff under the Sherman Act may recover treble damages.<sup>83</sup> The Court did not address the availability of damages in *N.C. Board* because the FTC sought only injunctive relief. As a result, as the Court noted, the Court had no occasion to address whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. The Court referenced *Goldfarb*, which had reserved the issue of whether a state bar is protected from such damages claims by Eleventh Amendment sovereign immunity,<sup>84</sup> and the issue of whether a state agency is subject to a suit for damages in federal court appears to remain open.

The Court also briefly noted that states could—as they do in other contexts—opt to indemnify and/or defend commission members found to have violated the Sherman Act.<sup>85</sup> This is true as a theoretical matter, but it is unclear whether state legislatures will put such protections in place if they are not already present.

In *N.C. Board*, the petitioners and several amici strenuously argued that the risk of exposure of board members to antitrust damages would have the effect of decreasing the pool of willing board participants. That concern did not appear to weigh heavily in the Supreme Court’s final reasoning, and the extent to which the concern was warranted remains to be seen.

In this regard, the analytical matrix for state bars and boards of bar examiners may differ from that of dental boards because, as discussed above, they have frequently been held to be protected by other immunities. If judicial, legislative, or sovereign immunities are available to backstop damages claims, state bars and boards of bar examiners may not have the same exposure to antitrust claims as other boards. Where such other immunities do not apply, state legislatures may decide to defend and indemnify board members (although their willingness and ability to do so is an open question in this period of budgetary pressures). But however one evaluates the extent of the heightened risk of antitrust exposure for state bars and bar examiners, that increased risk may render it more difficult to recruit highly qualified individuals to participate on the boards of a state bar or on boards of bar examiners. Most bar examiners volunteer their services, and the threat of antitrust damages claims may cause some to question whether the sacrifice is worthwhile.

### *Deterring Effective and Necessary Regulation*

As noted, regulation of the legal profession occurs in three broad contexts: first, there are regulations regarding who can practice and how one gets admitted; second, there are regulations regarding the conduct of attorneys once licensed; and third, there are regulatory actions relating to the unauthorized practice of law. The regulatory responsibilities are handled by different entities in some jurisdictions,

while a single entity has responsibility in other jurisdictions. Historically, there have been antitrust lawsuits filed in all three contexts. The potential exposure to antitrust suits could therefore present a challenge to state bars and boards of bar examiners as they attempt to conscientiously carry out their regulatory mandates. According to surveys by the American Bar Association, 31 states and the District of Columbia described the enforcement of their rules against the unauthorized practice of law as “active.”<sup>86</sup> In at least 15 of these jurisdictions, the bar plays a role in enforcement.<sup>87</sup> And of the 28 jurisdictions that responded to the question of whether they had received complaints regarding nonlawyer providers of legal services, 25 stated that they had received such complaints.<sup>88</sup> Because it is uncertain how, when, or whether states will seek to shield board members from antitrust liability, *N.C. Board* might deter robust regulation by these state bars, which may be wary of taking controversial stances or making the tough calls necessary to carry out their regulatory functions.

States can begin to address these concerns by ensuring that adequate mechanisms are in place to satisfy the “active supervision” requirement. But as discussed, the extent of the necessary supervision is unclear and may come at a cost to the effectiveness and efficiency that state bars—and other similar regulatory agencies—previously enjoyed. Now, every decision involving potentially anticompetitive conduct may theoretically need to pass through an additional layer of bureaucracy, consuming an unknown amount of time. In addition to reducing the efficiency of state bars, this additional layer of bureaucracy could serve as another deterrent to professionals who might not be receptive to being second-guessed by non-expert bureaucrats. State bars fearful of damages suits—and unsure of what “active supervision” entails—might decide to exchange the prac-

tice of issuing cease-and-desist letters for the less cost-effective and less conciliatory tactic of filing a lawsuit against any party engaged in what is believed to be the unauthorized practice of law, because doing so would immediately raise the substantive issue, rather than awaiting FTC action.<sup>89</sup> Boards of law examiners may be wary of making some difficult decisions on admissions or testing policies. Otherwise, these entities, already handling thousands of grievances and disciplinary matters, may add to their litigation workload, compelling additional expenditure of state funds.

For example, LegalZoom, a provider of do-it-yourself legal services, has been the subject of enforcement efforts by the North Carolina State Bar (and other state bars) for the “unauthorized practice of law.” In 2008, the North Carolina State Bar sent a letter to cease and desist. In 2010, the State Bar refused to register LegalZoom’s prepaid legal services plans. In response, LegalZoom sued the North Carolina State Bar, asserting, among other things, claims for purported monopolization.<sup>90</sup> While its claims for commercial disparagement were dismissed on sovereign immunity grounds, the North Carolina state court held that the monopoly claim was not barred by sovereign immunity.<sup>91</sup> After *N.C. Board*, states may need to decide whether to address the activities of LegalZoom or other similar service providers.<sup>92</sup> As a second example, state bars could face antitrust challenges in their efforts to enforce rules prohibiting law firms from accepting investment from nonattorneys or allowing nonlawyer partners.

State bar examiners may also face exposure to antitrust suits as a result of the requirement in the vast majority of jurisdictions that persons graduate from law school before they may be admitted to the bar. Only a handful of states allow alternative

routes for obtaining a legal education. The state bars that do not provide such alternative routes could find themselves the subject of an antitrust suit for denying individuals who have not graduated from law school the opportunity to take the bar exam and be admitted to practice in that state.<sup>93</sup> Indeed, this was the type of challenge made in *Hoover*.<sup>94</sup> But in *Hoover* the Court found state immunity because the state Supreme Court *did* review each individual for admission.<sup>95</sup>

If “active supervision” is provided—as *N.C. Board* requires—as to every decision denying a non-graduate admittance to the bar, the volume of such requests could burden the effective operations of state bar examiners and state Supreme Courts, while adding further costs. State bars could face the same dilemma with respect to rules regulating nonlawyers. The jurisdictions are roughly evenly split as to allowing nonlawyer practice in any capacity.<sup>96</sup> As with rules requiring a law school education to qualify for bar admittance, challenges could be made by parties seeking to fill “paralegal” positions or other similar roles in states where such conduct is not permitted.

This is just a sampling of the issues that could arise following *N.C. Board*. Likely there are already conversations happening within the states about the need to modify the structure of state regulatory boards, or to put in place additional supervisory practices. In many instances, those changes will require legislative, executive, or judicial fixes that, until the law develops, necessarily remain untested.

## CONCLUSION

The *N.C. Board* decision opens the actions of state bar examiners and state bar associations, previously thought immune under the state-action doctrine, to potential antitrust liability. Adjusting to this new

environment will be a challenge to the relevant state entities as they determine which mechanisms to establish to reclaim the protection of state-action immunity. It may also prompt state bar examiners and bar associations to consider more closely the extent to which their actions are protected by other immunities, and by indemnification commitments from their state legislatures. ■

## NOTES

1. The authors thank Benjamin Hayes, an associate at Norton Rose Fulbright US LLP, for his assistance in preparing this article.
2. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015).
3. *Id.* at 1122 (Alito, J., dissenting).
4. 15 U.S.C. § 1 *et seq.*
5. *See Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743, n.2 (1976) (“[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power.”). *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Commerce Clause reaches even local activity that “exerts a substantial economic effect on interstate commerce”).
6. *Parker v. Brown*, 317 U.S. 341 (1943).
7. *Id.* at 346–47.
8. *Id.* at 350–51.
9. *Id.* at 350–52.
10. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).
11. *Id.* at 370, 373. *Cf. Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45, 47 (1985) (“Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.”).
12. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In 1992, the Court affirmed that *Midcal*’s limits on delegation must ensure that “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).
13. *See* Federal Trade Commission, FTC Chairman Muris Outlines Agency’s Positive Agenda (Dec. 10, 2002), available at <https://www.ftc.gov/news-events/press-releases/2002/12/ftc-chairman-muris-outlines-agencys-positive-agenda> (accessed Apr. 22, 2015).
14. *See* Federal Trade Commission, Office of Policy Planning, Report of the State Action Task Force, at 1 (Sept. 2003) available at [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/report-state-action-task-force/stateactionreport.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf) (accessed Apr. 22, 2015).
15. *Id.* at 3.

16. *Id.*
17. *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1012 (2013).
18. *Id.* at 1011.
19. N.C. Gen. Stat. Ann. § 90–22 (2013).
20. *Id.* § 90–22.
21. *Id.* § 90–48.
22. *Id.* § 90–40.1.
23. *N.C. Board*, 135 S. Ct. at 1108.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *See* 717 F.3d 359, 370 (4th Cir. 2013).
30. *N.C. Board*, 135 S. Ct. at 1110–11.
31. *Id.* at 1114.
32. *Id.*
33. *See City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978).
34. *N.C. Board*, 135 S. Ct. at 1116–17.
35. *Id.* at 1117.
36. *Id.* at 1116.
37. *Id.*
38. *Id.* at 1116–17.
39. *Id.* at 1117 (Alito, J., dissenting).
40. *Id.* at 1118.
41. *Id.* at 1120.
42. *Id.* at 1117.
43. *Id.* at 1118.
44. *Id.* at 1122.
45. *Id.*
46. *Id.* at 1123.
47. *Id.*
48. According to an amicus brief filed by Public Citizen, as of 2006, licensing boards regulated some 800 professions. Public Citizen Inc. Brief of *Amicus Curiae* in Support of Respondent, *North Carolina Board of Dental Examiners v. Federal Trade Commission* (August 2014), available at <http://www.citizen.org/documents/North-Carolina-Board-Dental-Examiners-v-FTC-Amicus.pdf> (accessed May 6, 2015).
49. This is the case in North Carolina, for example, and the North Carolina Board of Law Examiners and the North Carolina State Bar joined in filing an amicus brief in support of the state Board of Dental Examiners in *N.C. Board*. *See* n.72 *infra*.
50. *See* NATIONAL CONFERENCE OF BAR EXAMINERS AND AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2015 (National Conference of Bar Examiners and American Bar Association 2015), Chart 1, available at <http://www.ncbex.org/pubs/bar-admissions-guide/2015/index.html#p=12> (accessed Apr. 8, 2015).
51. *N.C. Board*, 135 S. Ct. at 1110 (quoting *Hoover*, 466 U.S. at 567–68).
52. *Id.*
53. *Id.* at 1123 (Alito, J., dissenting).
54. *Id.* at 1108.
55. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).
56. *Id.* at 775–76.
57. *Id.* at 789–93.
58. *Bates*, 433 U.S. at 353, 356.
59. 466 U.S. 558, 567–82 (1984).
60. *Id.* at 572–73.
61. *Id.*
62. *See Bates*, 433 U.S. at 360, 362; *Hoover*, 466 U.S. at 572–73.
63. *See Bates*, 433 U.S. at 360; *Hoover*, 466 U.S. at 570.
64. *Forrester v. White*, 484 U.S. 219 (1988).
65. *Id.* at 227 (emphasis omitted).
66. *See, e.g.*, Rule 108, Wyoming Supreme Court Rules and Procedures Governing Admission to the Practice of Law (“Immunity. For any conduct or occurrence in the course of or arising out of performance of any official duties in connection with these rules, the Board [of Law Examiners], its Executive Secretary, its counsel, the [Character and Fitness] Committee, its counsel and all employees, personnel and agents through whom the Board and/or Committee functions shall retain common law immunity applicable and enjoy any immunity granted to the fullest extent provided by law, including such judicial and prosecutorial immunities as the Court would enjoy if performing the same functions.”).
67. *See also Lawrence v. Welch*, 531 F.3d 364 (6th Cir. 2008) (holding that members of the Michigan State Bar’s Character and Fitness Committee performed a “judicial or quasi-judicial function” and enjoyed absolute immunity from a damages claim under 42 U.S.C. § 1983 “in conducting the character and fitness examination which is integral to the process of determining whether an applicant is fit to practice law”); *Stoddard v. Carlin*, 799 F. Supp. 2d 57 (D.D.C. 2011) (holding, in a lawsuit brought by an individual whose bar application was rejected on character and fitness grounds, that the D.C. Court of Appeals and the three judges named as defendants were entitled to absolute judicial immunity, and that the Committee on Admissions and its chairman and general counsel were entitled to quasi-judicial absolute immunity); *Julien v. Comm. of Bar Exam’rs for Practice of Law*, 923 F. Supp. 707, 714–15 (D.V.I. 1996) (holding that board of law examiners and its members had judicial immunity to antitrust suit to the extent they were determining whether an applicant was qualified for admission, and noting that “courts have consistently held that admission to a jurisdiction’s bar is a peculiarly judicial function”); *Levanti v. Tippen*, 585 F. Supp. 499, 504–05 (S.D. Cal. 1984) (finding judicial immunity to apply to some acts of bar examiners, and legislative immunity to apply to others); *Khanna v. State Bar of Cal.*, 505 F. Supp. 2d 633, 640 (N.D. Cal. 2007), *aff’d*, 308 F. App’x 176 (9th Cir. 2009) (applying judicial immunity to shield state bar employees from § 1983 damages); *see also Feliciano v. Tribunal Supremo De Puerto Rico*, 78 F. Supp. 2d 4, 12–13 (D.P.R. 1999) (same).
68. *Sparks v. Character and Fitness Committee of Kentucky*, 859 F.2d 428 (6th Cir. 1988).
69. *Id.* at 431.
70. *Id.* (quoting *Sparks v. Character & Fitness Comm.*, 818 F.2d 541, 544–45 (6th Cir. 1987), *vacated pursuant to Forrester v.*

- White*, 484 U.S. 219 (1988)). See generally K. A. Wopat, *Judicial Immunity in Bar Admissions*, 4 J. CIVIL RIGHTS & ECON. DEV. 332 (1989).
71. See, e.g., *DiBlasio v. Novello*, 344 F.3d 292, 300-02 (2d Cir. 2003) (denying judicial and prosecutorial immunity for the “summary suspension” of a license where state official found to have “blend[ed] the roles of investigator, prosecutor, and judge”); *Mitchell v. Fishbein*, 377 F.3d 157, 172–74 (2d Cir. 2004) (“screening committee” of lawyers seeking to be on panel to provide legal services to the poor was not entitled to immunity, due to absence of “any separation of its investigative and decisionmaking functions”). But see *Simons v. Bellinger*, 643 F.2d 774, 778–85 (D.C. Cir. 1980) (committee on unauthorized practice of law was entitled to absolute immunity, even when engaging in “investigative” functions).
  72. Brief of the North Carolina State Bar et al., as *Amici Curiae* in Support of Petitioner at 8 n.3, *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (May 30, 2014), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-534\\_pet\\_amcu\\_ncsb-et-al.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-534_pet_amcu_ncsb-et-al.authcheckdam.pdf) (accessed May 6, 2015).
  73. An additional defense may also be available to bar examiners with respect to some of their activities, when sued in federal court: the *Rooker-Feldman* doctrine. “At its most basic, the *Rooker-Feldman* doctrine, named after the two cases from which it sprung, is the principle that lower federal courts do not have jurisdiction to review state court judgments.” Note, *The Rooker-Feldman Doctrine: What Does It Mean to Be Inextricably Intertwined?*, 56 DUKE L.J. 643 (2006). One of those cases, *District of Columbia v. Feldman*, 460 U.S. 462 (1983), involved constitutional challenges to a state court’s refusal to waive its requirement that all bar applicants be graduates of ABA-approved law schools. The Supreme Court held that the district court lacked subject-matter jurisdiction over Mr. Feldman’s claims: “If the constitutional claims presented to a United States district court are inextricably intertwined with the state court’s denial in a judicial proceeding of a particular plaintiff’s application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.” *Id.* at 483–84 n.16. For illustrative cases applying the *Rooker-Feldman* doctrine in dismissing challenges to bar admission decisions, see, e.g., *Brown v. Bowman*, 668 F.3d 437 (6th Cir. 2012); *Kastner v. Texas Bd. of Law Examiners*, 408 F. App’x 777 (5th Cir. 2010); *Craig v. State Bar of Cal.*, 141 F.3d 1353 (9th Cir. 1998); cf. *Wilson v. Dows*, 390 F. App’x 174 (3d Cir. 2010) (holding that *Rooker-Feldman* doctrine did not deprive district court of jurisdiction over claims brought by applicant denied admission on character and fitness grounds, but nevertheless dismissing the claims based on *Younger* abstention grounds). For a case applying the *Rooker-Feldman* doctrine to dismiss antitrust claims (among other claims), see, e.g., *Pawlak v. Nix*, 1996 U.S. Dist. LEXIS 14523 (E.D. Pa. 1996). Note, however, that the *Rooker-Feldman* doctrine likely would not prevent a federal court antitrust challenge to a rule of general application. See, e.g., *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005).
  74. *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989).
  75. *Id.* at 1456.
  76. *Id.* at 1460 & n.3.
  77. *Id.* at 1461.
  78. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2015, *supra*, Chart 1, available at <http://www.ncbex.org/pubs/bar-admissions-guide/2015/index.html#p=12> (accessed Apr. 8, 2015).
  79. See, e.g., Hunton & Williams, John Charles Thomas, available at [http://www.hunton.com/John\\_Charles\\_Thomas/](http://www.hunton.com/John_Charles_Thomas/) (accessed Apr. 9, 2015) (biography of John Charles Thomas, former Virginia Supreme Court Justice).
  80. Law360, Melissa Lipman, FTC Commission Says High Court Win Won’t Burden State Boards, available at [http://www.law360.com/competition/articles/637830?nl\\_pk=7e14b025-f58f-4bb9-8a59-453627eb57ee&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=competition](http://www.law360.com/competition/articles/637830?nl_pk=7e14b025-f58f-4bb9-8a59-453627eb57ee&utm_source=newsletter&utm_medium=email&utm_campaign=competition) (accessed Apr. 9, 2015).
  81. *Id.*
  82. *Id.*
  83. 15 U.S.C. § 15.
  84. *N.C. Board*, 135 S. Ct. at 1115 (citing *Goldfarb*, 421 U.S. at 792 n.22).
  85. *Id.*
  86. American Bar Association Standing Committee on Client Protection, 2012 Survey of Unlicensed Practice of Law Committees, Chart II, available at <http://www.directclaw.com/clientprotectionsurveyupl.pdf> (accessed Apr. 9, 2015).
  87. *Id.* Chart I, II.
  88. *Id.* Chart III.
  89. See Brief of the North Carolina State Bar et al., *supra*, at 11–20.
  90. Complaint for Declaratory and Injunctive Relief, *LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11-CVS-15111, ¶¶ 63–66 (Super. Ct., Wake Cnty., N.C., Sept. 30, 2011).
  91. *LegalZoom.com, Inc. v. North Carolina State Bar*, 2014 NCBC 9, 2014 WL 1213242, at \*16 (¶¶ 75, 77) (Mar. 24, 2014).
  92. LegalZoom filed an amicus brief on the winning side in *N.C. Board*, arguing that the North Carolina State Bar was acting toward LegalZoom in a manner that indicated a lack of a clearly articulated policy and lack of adequate supervision. See Brief for LegalZoom.com, Inc. as *Amicus Curiae* Supporting Respondent at 19–20, *N.C. Bd. of Dental Exam’rs v. Federal Trade Comm’n*, 135 S. Ct. 1101 (2015). The amicus brief of the North Carolina State Bar (joined by several other states) argued that a decision in favor of the FTC would “entice the State Bar’s opponents in similar controversies” to assert Sherman Act claims, “making it more costly and difficult for the State Bar to protect the public from harm.” See Brief of North Carolina State Bar, *supra*, at 15–16.
  93. See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2015, *supra*, Charts 1, 3.
  94. *Hoover*, 466 U.S. at 572–73.
  95. *Id.*
  96. See ABA Standing Committee on Client Protection, 2012 Survey, *supra*, Chart II.



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