

Lawyers Look for Lessons in Dental Examiners Debacle

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By Helen W. Gunnarsson

June 6 (BNA) -- When the Supreme Court made clear last year in a case involving dentistry how vulnerable members of regulatory boards can be to liability under antitrust laws, it didn't take long for bar associations to wonder whether they were about to get probed as well.

It's not out of the question, a Federal Trade Commission attorney told attendees at the 42nd ABA National Conference on Professional Responsibility, held June 2-3 in Philadelphia and presented by the ABA Center for Professional Responsibility.

FTC Assistant Director Geoffrey Green, who said he was expressing his own views, told the audience the agency favors self-regulation of professions. But he said the FTC will not hesitate to intervene in any profession's self-regulatory activities when they restrain competition, which the agency believes harms consumers.

Green cited collusion and exclusion as examples of anti-competitive activities. Collusion encompasses such actions as agreements not to advertise, he said. Exclusion includes preventing rivals from entering the market or forcing rivals to exit the market by, for example, increasing costs.

The FTC and the antitrust division of the Department of Justice share responsibility for enforcing federal antitrust laws, he added.

The Justices Speak

Lawyers have been buzzing about this topic ever since the Supreme Court declared in *N.C. State Bd. of Dental Exam'rs v. FTC*, 2015 BL 48206, 31 Law. Man. Prof. Conduct 108 (U.S. Feb. 25, 2015), that regulators are subject to suit for anti-competitive actions they take unless their positions are subject to "active state supervision" by a nonmarket participant-known as the state action doctrine.

In that case, the court said North Carolina's board that regulates dentistry wasn't immune from liability where the record didn't indicate the board members-most of whom were dentists-were carrying out state policy when they used cease and desist letters to direct nondentists to stop offering teeth whitening services in the state.

Much of the ABA program focused on whether the reasoning in *Dental Examiners* applies to those who police the practice of law-both authorized and unauthorized.

Panelist Mark W. Merritt said "The great thing about the dental board case from a regulatory perspective is it tells you everything NOT to do." He characterized the case as a "road map" for state bar authorities.

Merritt, president-elect of the North Carolina State Bar, practices antitrust law at Robinson Bradshaw & Hinson P.A. in Charlotte, N.C. He filed an amicus brief in the Supreme Court on behalf of the state bars of North Carolina, Florida and West Virginia in *Dental Examiners*.

Negative Authority

Fundamentally, Merritt told the audience, the North Carolina dental board was "not respectful" of its regulatory authority.

First, he said, the Supreme Court emphasized that the board acted outside its authority; in the majority opinion Justice Anthony Kennedy repeatedly observed that whether teeth whitening was within the definition of

practicing dentistry was unclear.

Second, Merritt said, the board acted not to address safety concerns from the public but in response to complaints from dentists themselves regarding the lower prices nondentists were charging.

Finally, he said, the board never followed rulemaking procedures in which comments expressing different points of view could have been reviewed and final rules could have been submitted to the state supreme court for approval.

"Every step of the way," panelist Alan B. Morrison said, "the dental board did things that careful regulators would not do," which "made it an easy case for the FTC."

Morrison is a professor at the George Washington University law school in Washington.

But Merritt also told the audience the justices' disapproval of the dentistry board's use of cease and desist letters "troubled" him if it were to be applied to legal regulators.

"You would think that sending a cease and desist letter would be OK" when done by a state agency statutorily tasked with the duty to prevent the unauthorized practice of law, he said.

He said in his view the opinion provides "a powerful incentive" under the antitrust laws to file suit for injunctive relief to prevent the unauthorized practice of law without first sending a warning letter.

Green said the cease and desist letters from the North Carolina board "purported to be orders, not mere threats of litigation." The court's opinion describes what types of communications are permitted and what types are prohibited, he said. A letter containing a threat of litigation is permissible, but sending a purported order to a commercial entity to cease operations, as the dentistry board did, is not, Green stated.

Us Too?

Green said a professional board with a controlling majority of active market participants must be supervised by a nonmarket participant to avoid running afoul of the antitrust laws.

But for a state bar to allow nonlawyers to make decisions about the legal profession would be a "monumental change," said moderator Wallace E. "Gene" Shipp Jr., who heads the District of Columbia's Office of Disciplinary Counsel. "We [lawyers] kinda think of ourselves as special," he quipped.

Merritt agreed such a change would be unlikely and said he did not believe a state agency performing a statutory mandate, such as a state bar regulatory agency taking action against the unauthorized practice of law, subjects itself to the antitrust laws simply because it is not supervised by a nonmarket participant.

But Green said "the bar is not unique" and its actions, like those of other self-regulated professions, are subject to antitrust scrutiny.

Opinions on Ethics Opinions

Virginia State Bar Ethics Counsel James McCauley asked from the audience whether a bar association's ethics advisory opinions might be deemed a restraint on trade.

Green said a professional association that merely issues a statement of opinion regarding what is and is not ethical and issues no sanctions for noncompliance may have a viable argument that it has not engaged in any trade restraint. But an association that also enforces its opinion "can run into trouble," he said.

For example, he told the audience, a society of professional engineers adopted a rule stating that engaging in competitive bidding was unethical. Ensuing litigation demonstrated that the association lobbied and actively policed its members' compliance with the rule, he said.

Another attendee, Mark Tuft of Cooper, White and Cooper LLP in San Francisco, said some bar associations issue ethics advisory opinions that may not be approved by any higher authority but are sometimes noted by courts and other bar groups' ethics committees, and may even be cited in comments to a state's rules of professional conduct for lawyers. "They are not rules with the force of law," Tuft said, "but they

do become part of the law of lawyering."

Green responded that noncompliance with a bar's ethics pronouncement that puts a lawyer at risk of sanctions is "a meaningful restraint." But an ethics opinion that "is just an NGO [nongovernmental organization] voicing its opinion" without enforcement or risk of sanctions is "no problem," he added.

Morrison said ethics opinions stating "that lawyers or somebody else can do something" are not restraints on competition and are safe from antitrust scrutiny. "Only when you say someone can't do something is there a potential antitrust violation. So you can tell someone you have to file a form in triplicate," he said.

Morrison also pointed out that the Dental Examiners ruling was not a bolt out of the blue for lawyer groups. The Supreme Court made clear four decades ago in *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), that bar associations are subject to liability under antitrust laws when they act without the "active state supervision" of a nonmarket participant.

And he should know: Morrison successfully argued that case before the Supreme Court on behalf of the plaintiffs.

Regulating Advertising

Lawyer advertising is the "bane" of some disciplinary counsel, Shipp said. "Is that still something the FTC is concerned about?" he asked.

Green responded that advertising is an "essential part of the competitive market" that enables consumers to learn about available services. He told the audience that the FTC has sued other professional organizations for restricting competition by restraining advertising, which the agency has found tends to lead to higher prices for consumers.

"The FTC is concerned about suppressing truthful, nondeceptive advertising," Green said.

"Lawyers can advertise," Merritt said, adding that lawyer regulation of advertising would be "far down on my list" for antitrust risk.

Morrison said he questions whether some jurisdictions' lawyer advertising rules are "too stringent," but said that as long as they have been approved by the state supreme court they fall within the state action exemption to the antitrust laws.

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Audience member Kim D. Ringler of The Ringler Law Firm in Waldwick, N.J., said many restrictions on lawyer activities and services, including advertising, have become more and more subject to question and rejection by judges and the federal government.

"It's harder and harder to say you can't advertise or offer legal forms if you're not licensed, or have an office here unless you're a member of the state bar," she said.

Merritt said his state's bar is working on updating the definition of the practice of law. Most states' definitions "were written when the Internet didn't exist," he noted.

He said the North Carolina legislature has regulated the online legal forms industry by refusing to allow forms companies who assert that their documents comply with state law to disclaim liability arising from their use. The law also requires the providers to state that users may wish to consult a lawyer for their matter, and mandates that any disputes be litigated or arbitrated in North Carolina and not another state, he said.

Merritt said legal forms also must have been reviewed by a North Carolina lawyer whose name must be kept on file.

Morrison called North Carolina's approach "sensible," though Merritt also likened regulating the legal forms industry to "trying to untie the Gordian Knot."

Learning the Lesson

Morrison said in the wake of Dental Examiners, bar associations proposing to take regulatory actions should ask themselves whether their conduct will have the effect of limiting nonlawyers in lawful actions or prohibiting lawyers from running their business more profitably, both of which would risk being found to be anti-competitive.

But Merritt said a finding of an antitrust violation is a manageable risk for bar associations and warned against "overreaction" to the dental board case. "The dental board behaved badly and paid the consequences," he said.

Green agreed, saying it was not the Supreme Court's intention to prohibit bar associations from "the vast majority of activities" they currently perform.

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