

# THE STATE ACTION DOCTRINE: IMPLICATIONS FOR HEALTH POLICY

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Health Care Antitrust in the New Administration

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# Costs and access to healthcare

- Persistent problems facing healthcare system
- Competition could help alleviate problem
- But, regulations exist restraining competition, such as
  - Scope-of-practice restrictions
  - Restrictions on telehealth practice (hot topic)
  - CON (certificate-of-need) requirements
- **State action doctrine** as major hurdle to using antitrust to challenge anticompetitive restraints.

# Overview of talk

- State action pre-*NC Dental*
- *NC Dental* (2015 Sup. Ct.)
- *NC Dental's* potential impact on regulation:
  - Telehealth
  - Scope-of-practice
  - Certificate of need (probably little impact) – if time permits

# A few initial words on:

- a) scope-of-practice
- b) telehealth

Rationale for (and benefits of) regulation

Antitrust concerns

Challenge for regulators

# STATE ACTION DOCTRINE

*Pre-NC Dental:*

- where the state acts as sovereign

- where the actors are private parties

- Question left unclear?

*NC Dental*

# *Parker v. Brown* (Sup Ct 1943)

- When **state acts as sovereign**,
  - Then federal antitrust immunity
- What does “state acting as sovereign” mean?
  - Usually: state legislature passes law

# Midcal (Sup Ct 1980)

- What if state delegates regulatory authority to **private parties**?
- Exempt from antitrust only if 2-prong test is met:
  - Clear articulation of state policy;
  - Active state supervision

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[where state is municipal actor,

Only first prong has to be met for antitrust immunity]

- Open question: What if actor is state agency/board dominated by members of profession/occupation the board is supposed to regulate?

# *FTC v. NC Dental, 2015 Sup Ct*

- Relevant facts:
  - State regulatory agency established under state law to regulate practice of dentistry
  - 6 of 8 board members were licensed dentists
  - Declared teeth whitening constituted practice of dentistry
  - Sent cease-and-desist letters to low cost non-dentist providers
  - Non-dentist providers forced to exit market
  - FTC brought antitrust action against Board.
- Defense invoked state action immunity.
- Supreme Ct upholds rejection of defense, upholds liability



# *FTC v. NC Dental* (cont'd) --

## State regulatory agencies/regulatory boards

- Not the sovereign state; no automatic immunity
- “if a controlling number of decisionmakers” on the board are “active market participants” in the occupation the board regulates, then:
  - **Both** *Midcal* prongs must be met for antitrust exemption
- Also set high bar for “active state supervision”
- Rationale:
  - State action immunity is disfavored
  - Political accountability is key

# Post-*NC Dental*

**Implications for healthcare sector?**

**Potential to relax regulations that limit competition**

Implications for telehealth

# Telehealth practice

- Fast growing sector: facilitated by telecom technological advances
- Benefits: lower costs, convenience, greater access
- If used properly, quality not compromised
- Tensions between regulation & competition
  - Some regulation needed to ensure patient health & safety
  - But restrictions that unnecessarily block or severely hamper the telehealth model raise antitrust concerns.

# Example of implications of *NC Dental*:

- Texas Medical Board rules re Telehealth (***Teledoc***)
  - Prohibited video consultation
  - Required face-to-face conduct or physical exam to establish physician-patient relationship and to write any prescription
    - Exception carved out for traditional physicians covering for other traditional physicians

# *Teledoc v. Texas Medical Board, 2016* (& related FTC investigation)

- Private litigation (obtained PI), & FTC investigation
- TMB moved to dismiss ***Teledoc*** suit based on state action; loses; interlocutory appeal to 5<sup>th</sup> Cir.
  - FTC and DOJ jointly file amicus brief supporting Teledoc.
- **Very recent development: June 2017, Texas passes law overruling Texas Med. Bd**
- Evidence of trend?

# Scope-of-practice restrictions

# What are the competitive concerns?

- Some scope-of-practice rules do serve consumer protection function
- Antitrust concerns re excessive/unnecessary regulation:
  - one class of providers has competence to provide certain services but not permitted to do so;
  - Concerns enhanced when those against whom they would compete are the driving force behind restraints.
- Some examples:
  - physicians & APRNs
  - licensed dentists & dental hygienists



# Example: APRNs

- IoM and other experts' evidence re APRNs' ability and competence?
  - Overlap with PCP in diagnosis and treatment of routine ailments
- Suggests some scope-of-practice restrictions unnecessarily:
  - reduce supply of care for routine ailments
  - reduce competitive pressure on PCPs
  - keep prices high

# Example: Dental hygienists

- Evidence:
  - Dental hygienists trained and qualified to provide preventive dental services without direct supervision from dentists
  - Permitting it would result in no discernible harm to patient health and safety
- If permitted to do so:
  - increase supply
  - reduce prices
  - increase access for underserved population groups

- FTC active in competition advocacy, but also litigate when appropriate
- 2003 FTC case against SC Board of Dentistry:
  - Schools in SC entered into contracts with dental hygienists to provide preventive dental care to students at school (free to students)
  - Board passed regulation barring dental hygienists from providing preventive dental services to patients, without a prior exam by a licensed dentist.
  - FTC brought antitrust action alleging unreasonable restraint of competition.
  - Board moved to dismiss based on state action; Commission denied motion
  - Board settled
- More of these types of cases post-*NC Dental*?

# Benefits of relaxing some scope-of-practice rules

- Expand access to healthcare
- Reduce costs
- Good to scrutinize rules, particularly if influenced by group of professionals with conflicting interests

# Certificate of Need (CON)

Less likely to be affected, and why:

- Usually has clear articulation of state policy; and

- Active state supervision at every point

- Case in point: *Phoebe Putney* aftermath

# Concluding thoughts

- **Healthcare competition is compatible with quality**
- **Antitrust can play important role in enhancing competition**
- **Bonus: bipartisan support!**