ANTITRUST LAW — STATE ACTION IMMUNITY — FOURTH CIRCUIT HOLDS THAT STATE'S DENTAL BOARD OF EXAMINERS MUST SHOW "ACTIVE SUPERVISION" BY STATE TO BE ENTITLED TO ANTITRUST IMMUNITY. — *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, No. 13-534, 2014 WL 801099 (U.S. Mar. 3, 2014).

In *Parker v. Brown*,[1] the Supreme Court ruled that antitrust laws do not apply to state regulation.[2] Since then, the Court has extended state action antitrust immunity under three sets of circumstances. First, conduct by the state itself — the state legislature or the state supreme court — enjoys immunity.[3] Second, under the two-prong test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[4] private parties may claim state action immunity if their actions are (1) pursuant to a "clearly articulated and affirmatively expressed"[5] state policy and (2) "'actively supervised' by the State."[6] Third, in *Town of Hallie v. City of Eau Claire*,[7] the Supreme Court held that municipalities need not show active state supervision but instead earn *Parker* immunity when, under the first *Midcal* prong, they act pursuant to a "clearly articulated" state policy to displace competition.[8] Whether state agencies should be subject to an active supervision requirement is considered an "open question."[9] Recently, in *North Carolina State Board of Dental Examiners v. FTC*,[10] the Fourth Circuit upheld a Federal Trade Commission (FTC) order directed against the North Carolina State Board of Dental Examiners for engaging in anticompetitive behavior.[11] The court ruled that the state-created Board, comprised primarily of practicing dentists elected by dentists, was subject to — and failed to pass — the *Midcal* test for private actors.[12] Though it appealed extensively to *Midcal* and *Hallie*, the Fourth Circuit failed to clarify how its focus on the Board's election fit with the Supreme Court's stated goal of preventing self-interested actors from using the cover of state agency to engage in anticompetitive conduct.

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1 317 U.S. 341 (1943).

2 *Id.* at 350–51.

3 Hoover v. Ronwin, 466 U.S. 558, 567–68 (1984).

4 445 U.S. 97 (1980).

5 *Id.* at 105 (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)) (internal quotation marks omitted).

6 *Id.* (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978) (plurality opinion)).

7 471 U.S. 34 (1985).

8 *See id.* at 46–47.

9 Hass v. Or. State Bar, 883 F.2d 1453, 1459 (9th Cir. 1989).

10 717 F.3d 359 (4th Cir. 2013), *cert. granted*, No. 13-534, 2014 WL 801099 (U.S. Mar. 3, 2014).

11 *See id.* at 374–75.

12 *See id.* at 370.

The North Carolina State Board of Dental Examiners is the state's dentistry licensing board.[13] It has eight members: six licensed dentists elected by dentists, one licensed dental hygienist elected by dental hygienists, and one consumer member appointed by the Governor.[14] The Board is empowered to sue to enjoin the unlicensed practice of dentistry.[15] In about 2003, dentists complained to the Board about nondentists providing low-cost teeth-whitening services. In response, the Board issued cease-and-desist letters to twenty-nine nondentist teeth-whitening providers, effectively ousting nondentists from the teeth-whitening market.[16] In 2010, the FTC issued an administrative complaint, alleging that the Board's enforcement measures violated section 5 of the FTC Act,[17] which prohibits "[u]nfair methods of competition."[18]

The Board moved to dismiss the FTC's complaint, arguing that it was not under the FTC's jurisdiction and that it was entitled to state action immunity.[19] An Administrative Law Judge (ALJ) denied the motion, and the FTC affirmed.[20] On the merits, the ALJ ruled that the Board had violated the FTC Act, and the FTC affirmed, enjoining the Board from continuing its actions against teeth-whitening providers.[21] The Board then petitioned for review of the final order.[22]

The Fourth Circuit denied the petition.[23] Writing for the majority, Judge Shedd[24] agreed with the FTC that the Board was a private party that must demonstrate active supervision by the state in order to qualify for *Parker* immunity.[25] The court reasoned that the Supreme Court dispensed with the active supervision requirement for municipalities in *Hallie* because a municipality presents "little or no danger

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13 *See id.* at 364.

14 *Id.*

15 *Id.*

16 *Id.* In addition, the Board sent letters to mall operators advising them to stop leasing space to nondentist teeth whiteners. *Id.*

17 15 U.S.C. §§ 41–58 (2012).

18 *Id.* § 45(a)(1); *see N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 365. The Fourth Circuit had previously determined that this provision incorporates any violation of section 1 of the Sherman Act, 15 U.S.C. § 1. *See N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 371. The FTC and the Fourth Circuit limited their review to whether the conduct violated section 1. *Id.* Though *Parker* doctrine is more often discussed in relation to the Sherman Act, the Supreme Court has applied it to cases arising under the FTC Act. *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992).

19 *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 365.

20 *See* N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 608 (2011). The Board also filed for a declaratory judgment in federal district court regarding FTC jurisdiction and state action immunity. The district court denied it as an improper attempt to appeal decisions not entitled to interlocutory review. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 768 F. Supp. 2d 818, 820, 822 (E.D.N.C. 2011).

21 *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 366.

22 *Id.*

23 *Id.* at 375.

24 Judge Shedd was joined by Judge Wynn.

25 *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370.

that it is involved in a *private* price-fixing arrangement."[26] The *Hallie* Court limited its holding to municipalities, though it speculated in a footnote that state agencies would "likely" also be exempt from that requirement.[27] The court acknowledged this "dicta in footnote 10"[28] but found it to be outweighed by other Supreme Court precedent, including a recent case in which the Court noted that "state-action immunity is disfavored."[29] The court drew on *Goldfarb v. Virginia State Bar*,[30] in which the Supreme Court concluded that the Virginia State Bar Association's minimum fee schedule was "essentially a private anticompetitive activity"[31] not "shield[ed]" from the Sherman Act[32] by the Bar's formal label as a state agency.[33] Comparing the facts of *Goldfarb* to municipal regulation, Judge Shedd argued that a state agency should be treated like a private actor if it "ha[s] the attributes of a private actor" and takes "actions to benefit its own membership."[34] The court then concluded that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" subject to the *Midcal* — not *Hallie* — test for state action immunity.[35]

Under the *Midcal* test, the court found that North Carolina did not actively supervise the Board's decisions because the cease-and-desist letters were sent without state oversight or judicial authorization.[36] Having thus denied the state action defense, the court evaluated the underlying antitrust issue. A violation of section 1 consists of "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade."[37] The court rejected the Board's argument that its "unilateral conduct" was necessarily not "concerted action" and thus outside the scope of section 1.[38] The court explained that the Board members operated separate dental practices and consequently were "separate economic actors" capable of conspiring to "deprive[] the

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[26] *Id.* at 367 (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985)).

[27] *Id.* at 367 n.4 (quoting *Hallie*, 471 U.S. at 46 n.10).

[28] *Id.* (quoting N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 625 (2011)).

[29] *Id.* at 367 (quoting FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1010 (2013)) (internal quotation mark omitted).

[30] 421 U.S. 773 (1975).

[31] *Id.* at 792.

[32] 15 U.S.C. §§ 1–7 (2012).

[33] *Goldfarb*, 421 U.S. at 791.

[34] *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 369. Though the Board cited several cases in which a state agency was not required to show active supervision, Judge Shedd concluded that those cases demonstrated only "that the particular state agency at issue was more akin to a municipality than a private actor." *Id.* at 369 n.6.

[35] *Id.* at 370.

[36] *Id.*

[37] *Id.* at 371 (quoting Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002)) (internal quotation marks omitted).

[38] *Id.*

market of an independent center of decision making."[39] The court affirmed the FTC's use of a "quick-look analysis,"[40] in which "inherently suspect"[41] behavior is deemed unlawful absent a "plausible justification."[42] Then, giving "some deference" to the FTC's view of "unfair," the court agreed that the Board's actions created an "unreasonable restraint on trade."[43] The court denied the Board's proffered justifications, including that it had acted pursuant to state law and was motivated by public health and safety concerns.[44] Accordingly, Judge Shedd concluded, the Board violated the FTC Act.

Judge Keenan concurred.[45] She wrote separately to "emphasize the narrow scope" of the court's holding regarding the active supervision requirement.[46] Judge Keenan explained that not all state agencies, even those with members who are active in the regulated market, need to show active supervision. Rather, the court's holding "turn[ed] on the fact" that the state agency was made up of market participants elected by other market participants.[47] Judge Keenan also wrote that applying the second prong of *Midcal* did not "impose an onerous burden"[48] because North Carolina remains entitled to prohibit nondentists from offering teeth-whitening services.[49]

In deciding the preliminary question of whether the Board was a "private party" subject to the *Midcal* test, the Fourth Circuit emphasized the importance of preventing financially interested actors from engaging in anticompetitive conduct under the cover of the state. However, the ultimate holding is restricted to cases in which board members are elected by market participants, and the court did not ad-

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[39] *Id.* at 372.

[40] *Id.* at 374.

[41] N.C. Bd. of Dental Exam'rs, 2011 WL 6229615, at *29 (FTC Dec. 7, 2011).

[42] *Id.* at *30. Quick look approach offers an "abbreviated" version of the Rule of Reason test that, unlike the full-blown test, does not require a "detailed market analysis." *Id.* at *17.

[43] *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 373–74. Though the FTC applied both a quick look approach and a full-blown rule of reason inquiry, the court affirmed the FTC's decision to apply a quick look analysis because the conduct — "excluding a lower-cost and popular group of competitors," *id.* at 374 (quoting *N.C. Bd. of Dental Exam'rs*, 2011 WL 6229615, at *25) (internal quotation mark omitted) — had an anticompetitive effect that "[n]o advanced degree in economics is needed to recognize," *id.* at 374 (alteration in original) (quoting *N.C. Bd. of Dental Exam'rs*, 2011 WL 6229615, at *26) (internal quotation marks omitted).

[44] *See id.* at 374 n.12. The FTC rejected the argument that the Board acted pursuant to North Carolina law because that only constitutes a defense under the *Parker* doctrine if accompanied by active supervision by the state. *N.C. State Bd. of Dental Exam'rs*, 2011 WL 6229615, at *32. Further, the FTC found that North Carolina law did not authorize the Board's cease-and-desist letters. *Id.* It also found that the Board had failed to offer substantial evidence showing a significant health risk associated with nondentist teeth-whitening options. *Id.* at *33–34.

[45] *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 376 (Keenan, J., concurring).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 377.

dress whether market participants selected by other means could qualify for the *Hallie* test. Yet precedent does not establish that political accountability can by itself remove the need to actively supervise delegations of state economic regulatory authority to private actors. And even if political accountability were sufficient to warrant *Hallie*, selection methods are not the only factor establishing political accountability. The Fourth Circuit's opinion would have benefited from clarification: whether it was applying a single-factor test at the threshold *Midcal*/*Hallie* step and, if so, how this test fits into existing rationales for state action immunity from antitrust liability.

The court's decision reflects an unwillingness to grant immunity to regulation by financially interested actors, a reluctance that arguably motivates antitrust immunity doctrine in general. The *Parker* doctrine is based on statutory interpretation; Congress could have preempted state restraints on competition under its Commerce Clause power, but instead it focused on monopolies formed by individuals and corporations and did not intend to "nullify" all state economic regulation.[50] The *Midcal* test, in turn, was created to prevent states from using the *Parker* doctrine to circumvent altogether the Sherman Act. The *Midcal* Court quoted *Parker*: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[51] Even if a state clearly expresses a policy of delegating regulatory authority to market participants, the *Midcal* rule requires active supervision to trigger immunity.[52] By restraining the extent to which state policy can take the form of delegation, Professor Einer Elhauge argues, *Midcal* reflects a normative proposition of the Sherman Act: restraints on trade should not be made by financially interested parties.[53] A few months before the Fourth Circuit decided *North Carolina State Board of Dental Examiners*, the Supreme Court explained the *Midcal*/*Hallie* distinction in similar terms, noting that municipalities have "less of an incentive to pursue their own self-interest."[54] Judge Shedd cited Elhauge's article for this proposition[55] and similarly defined "private action" in his analysis of *Goldfarb*.[56] The

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[50] Parker v. Brown, 317 U.S. 341, 351 (1943); *see also* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 500 (1987).

[51] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980) (quoting *Parker*, 317 U.S. at 351) (internal quotation mark omitted).

[52] *See* John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 731 (1986).

[53] *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 686–91, 699 (1991).

[54] FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003, 1011 (2013).

[55] *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 368 ("[F]inancially interested action is . . . 'private action' subject to antitrust review." (quoting Elhauge, *supra* note 53, at 689)).

[56] *Id.* at 369.

"key" fact in *Goldfarb* for Judge Shedd was that the Virginia Bar Association engaged in "anticompetitive practices for the benefit of its members."[57] In this way, Judge Shedd's opinion followed precedent in asking whether the decisionmakers had a financial interest. A financial interest test helps reconcile some of the apparently conflicting case law;[58] the Virginia State Bar Association is distinguishable from a municipality on this ground despite appearing similarly "public" in nature.[59]

However, in its narrow holding and emphasis on the Board's election by market participants, the Fourth Circuit raises an unresolved question: whether a state agency comprised primarily of market participants could, by virtue of its selection methods, be subject to a *Hallie* analysis rather than a *Midcal* one. The Supreme Court explained that the *Midcal* test was designed to prevent casting "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[60] The Court in *Hallie* then distinguished a municipality by finding "little or no danger that it is involved in a *private* price-fixing arrangement."[61] Both statements beg the question: the Supreme Court has never identified which characteristics of municipalities eliminate the possibility of private price-fixing such that a state agency with the same characteristics could also be deemed to lack the capacity to self-deal.[62] Other circuit courts have taken a variety of approaches to the threshold *Midcal*/*Hallie* inquiry, none of which treat selection methods as probative.[63] While not exhausting the ways in which a state agency might be subject to *Midcal*, the Fourth Circuit held that a regulatory board made up of market participants elected by other market participants necessarily will be.[64] In her concurrence, Judge Keenan observed that "[i]f the Board members here had been appointed or elected by state government officials pursuant to state statute, a much

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[57] *Id.* (quoting *Goldfarb*, 421 U.S. 773, 791 (1975)) (internal quotation mark omitted).

[58] *See* Elhauge, *supra* note 53, at 683–91 (citing case law in which decisionmaking by financially interested parties is a key factor).

[59] *See N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 369; *see also* Elhauge, *supra* note 53, at 681 (describing the indeterminacy of the private/public distinction).

[60] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980).

[61] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985).

[62] *See* Aaron S. Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. (forthcoming 2014) (manuscript at 38), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384948.

[63] For example, the Second and Fifth Circuits have taken a formalistic approach, treating state agencies as public actors if they are labeled as such by state statute. *See* Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033, 1041–42 (5th Cir. 1998) (applying the *Hallie* test to a CPA licensing board); Cine 42nd St. Theater Corp. v. Nederlander Org., 790 F.2d 1032, 1047 (2d Cir. 1986). In comparison, the Ninth Circuit has taken a more functionalist approach, looking at an entity's structure to assess whether it more closely resembles a municipality or a private actor. *See* Hass v. Or. State Bar, 883 F.2d 1453, 1460 (9th Cir. 1989).

[64] *See N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370.

stronger case would have existed" to apply *Hallie*.[65] The majority emphasized political accountability in its discussion,[66] but did not specifically agree with or reject Judge Keenan's conjecture.

Despite the ambiguity, precedent suggests that political accountability is insufficient to cure the dangers of financial self-interest such that applying the second prong of *Midcal* would be extraneous. In his 1991 article, Elhauge noted that in every case where the Court determined a state action pursuant to a statute lacked *Parker* immunity, the law gave price-setting authority to financially interested suppliers.[67] The risk of self-dealing is central.[68] Since *Midcal*, the Supreme Court has leniently applied the "clearly articulated" requirement of *Hallie*,[69] and yet rigorously applied the active supervision prong, demanding to see not "mere . . . monitoring" but that states "have and exercise power" to scrutinize individual decisions.[70] For example, in *FTC v. Ticor Title Insurance Co.*,[71] the Court found that rate setting by title companies reviewed under a "negative option regime," in which governmental inaction signified approval after a specified time period, was not active supervision because the system allowed the state to take a passive role.[72] The Court's rigorous application of the active supervision requirement shows the Court is skeptical that procedural safeguards can easily eliminate the risk of market participants pursuing their own self-interest. In many of its cases applying *Midcal*, the Supreme Court cites the *Parker* language that a state cannot declare anticompetitive

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[65] *Id.* at 376 (Keenan, J., concurring).

[66] *Id.* at 375 (majority opinion) ("Today's opinion simply reinforces the Court's admonition that federalism 'serves to assign political responsibility, not to obscure it.'" (quoting FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992))).

[67] Elhauge, *supra* note 53, at 685.

[68] Some might argue that political accountability is a crucial factor in the threshold inquiry because all public officials may have a financial interest: a state legislator, for example, could have a part-time job that creates financial incentives or, more universally, could be "captured" by industry groups or other private interests. *See* Wiley, *supra* note 52, at 725 (discussing producers' ability to obtain government benefits). However, the Supreme Court does not consider the possibility of regulatory capture to be sufficient to bar immunity. *See* Garland, *supra* note 50, at 489–94 (citing S. Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985), as an example of the Court conferring state action immunity despite evidence of capture by the trucking industry). Within the broader category of individuals with potential financial interest, market participants charged with regulating their industry have a greater opportunity to self-deal.

[69] *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 373 (1991) (holding that, under the "clearly articulated" standard, authority to suppress competition need not be explicitly granted by state law as long as it is the "'foreseeable result' of what the state authorizes" (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985) (internal quotation marks omitted))); Elhauge, *supra* note 53, at 691–93.

[70] Patrick v. Burget, 486 U.S. 94, 101 (1988); *see* Elhauge, *supra* note 53, at 693.

[71] 504 U.S. 621 (1992).

[72] *Id.* at 637–38.

actions lawful,[73] emphasizing that *Midcal* is designed to prevent state circumvention of antitrust laws. If a state cannot evade the Sherman Act by rubber-stamping prices set by market participants, it should not be able to achieve the same effect by formally creating a state arm and appointing market participants to it.

Further, even accepting that political accountability can cure the problems associated with delegation to market participants and justify the use of *Hallie* over *Midcal*, factors other than selection methods are relevant to democratic control. Judge Shedd drew on the language in *Hallie*, which describes municipalities as "exposed to public scrutiny" and "checked to some degree through the electoral process."[74] However, *Hallie* only mentioned the electoral process as one reason, "[a]mong other[s],"[75] why a municipality acts in the public interest and a private party "may be presumed to be acting primarily on his or its own behalf."[76] The *Hallie* Court also noted that municipalities are subject to "'sunshine' laws or other mandatory disclosure regulations,"[77] structural features that may facilitate exposure to public scrutiny. Other circuits have analyzed those features when classifying a state agency at the threshold step.[78] Yet Judge Shedd relied exclusively on the Board's election structure and did not note the Board's transparency requirements, its funding source, or other laws that might or might not provide a democratic check. These features may be particularly relevant when considering state licensing boards, which, when composed of members appointed by a governor, are often chosen from a list provided by the professional group,[79] a procedure hardly resembling municipal elections.

While the Fourth Circuit's narrow holding might have been an exercise in judicial minimalism, it has caused confusion about the degree to which selection methods are dispositive.[80] By failing to explain the apparent incongruence between its market participant–election holding and the Supreme Court's rationale for *Midcal* and *Hallie*, the Fourth Circuit missed an opportunity to develop the *Parker* threshold inquiry.

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[73] *See, e.g.*, *Omni*, 499 U.S. at 379; 324 Liquor Corp. v. Duffy, 479 U.S. 335, 343 (1987); *S. Motor Carriers*, 471 U.S. at 61 n.23.

[74] *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 367 (quoting *Hallie*, 471 U.S. at 45 n.9) (internal quotation marks omitted).

[75] *Hallie*, 471 U.S. at 45 n.9.

[76] *Id.* at 45.

[77] *Id.* at 45 n.9.

[78] *See, e.g.*, Hass v. Or. State Bar, 883 F.2d 1453, 1460 (9th Cir. 1989) (noting that the Oregon State Bar is subject to disclosure requirements, public meeting requirements, periodic audits, sunshine laws, and a code of ethics for public officials).

[79] Edlin & Haw, *supra* note 62, (manuscript at 36 n.218).

[80] *See* Brief for the Respondent in Opposition at 17 n.5, N.C. State Bd. of Dental Exam'rs v. FTC, No. 13-534 (U.S. Jan. 22, 2014), 2014 WL 262245.