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High Court Shakes Up State Bars

A ruling could subject them to antitrust claims.

BY MARCIA COYLE

A U.S. Supreme Court decision is forcing state bars to re-examine their operations to avoid potentially huge antitrust liability. At the same time, three public interest-consumer organizations are pressing the nation's 50 state attorneys general to enforce the high court's ruling.

The justices' Feb. 25 decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* held that the doctrine of state-action immunity did not shield the board from Sherman Act antitrust regulation. The doctrine extends

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Court Wants Tighter Supervision of Licensing Boards, State Bars Included

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immunity to bodies acting in their sovereign capacity.

"Active market participants cannot be allowed to regulate their own markets free from antitrust accountability," Justice Anthony Kennedy wrote for a 6-3 court. "When a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. If a state wants to rely on active market participants as regulators, it must provide active supervision."

The North Carolina dental board's members included six dentists, one dental hygienist and one consumer who enforce a licensing system for dentists. After the board issued numerous cease-and-desist letters to nondentist teeth-whitening service providers, the Federal Trade Commission filed an administrative complaint accusing the board of anti-competitive behavior in excluding nondentists from the market for teeth-whitening services.

The high court ruling was not limited to the dental board and teeth whitening, in the view of antitrust experts including Robert Fellmeth, a former prosecutor and director of the University of San Diego School of Law's Center for Public Interest Law. The center, along with Consumer's Union and the Citizen Advocacy Center, sent a letter to state attorneys general asking for information about their compliance with the decision.

"This was a cosmic case where the Supreme Court said any agency controlled by active participants in the trade regulated does not have sovereign protection," Fellmeth said. "They are in same position as a cartel of truckers, insurance agents and other horizontal competitors meeting and deciding what to do. And, by the way, lawyers are included here."

The vast majority of occupational licensing boards and commissions nationwide, including state bars, now comprise majorities—even supermajorities—of licensed professionals "in the very economic tribal grouping with an economic interest in restraints of trade benefiting them," the groups wrote in their letter.

The groups recognize that many members of these regulatory boards and commissions believe they are acting in the public interest, they wrote. However, the dominance by professionals and lack of active supervision by a state higher authority have led to cozy relationships that do not serve the public interest. They used state bars as an example.

"State bars controlled by attorneys rarely discipline for excessive billing or intellectual dishonesty," they wrote. "Few require any demonstration whatever of competence in the actual practice area of law relied upon by clients. Few require malpractice insurance, or in any way ameliorate the harm from attor-



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ney incompetence. The point is, each of the many agencies within your state is empowered to carve out momentous exceptions from federal antitrust law, and those decisions in particular require a level of independence from the implicit focus of current practitioners.

STATE BARS AMICUS BRIEF

State bars raised concerns about the high court case in an amicus brief filed before the decision. They warned that "by denying these state regulators state action immunity unless they show active supervision by other parts of state government, the decision impairs the ability of state regulators to enforce state laws

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enacted to protect the public."

Countering these concerns were LegalZoom.com, Justia and other alternative providers, who charged that the crisis in access to legal services "is caused in large part, by over-regulation of the legal market and unnecessarily high and complex barriers to entry."

Some state bars are still studying the decision and its implications. "We don't know yet," said Francine Walker, spokeswoman for The Florida Bar. "We're still trying to determine whether it's going to require any changes."

Mark Merritt, vice president of the North Carolina State Bar and an antitrust partner in Charlotte's Robinson, Bradshaw & Hinson, said one important difference between the bar and the dental board is that the former falls under the supervision of the North Carolina Supreme Court.

"Certainly, the decision probably will lead to state supreme courts having stronger relationships with their state bars and oversight to see whether they

are acting consistent with their statutory authority or the authority granted by their state supreme court," Merritt said.

The decision is unlikely to affect the bar's disciplinary process for lawyers or issuance of ethical guidance, he said.

"The area we see as being affected is the unauthorized practice of law, where we have statutory authority to enjoin people practicing law without a license," he said. "I could see people in that area claiming

what they do isn't subject to the regulatory authority of the state bar and that the bar is acting anti-competitively."

His bar is working with the state Legislature, he said, to have the state attorney general review any actions the state bar believes could raise competitive concerns.

In their decision, the justices held there must be "active supervision" to invoke state action immunity. To meet that requirement, the court said, "The supervisor must review the substance of the anti-competitive 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, and the mere potential for state supervision is not an adequate substitute for a decision by the state." Further, the state supervisor may not itself be an active market participant.

Under earlier law, state-action immunity was a "relatively efficient way" to defend against an antitrust claim, Merritt said. "Even for people who are state actors, it's not as clean a defense anymore, and it's a defense that could be expensive to bring before a court. The reality is this is going to play out over time."

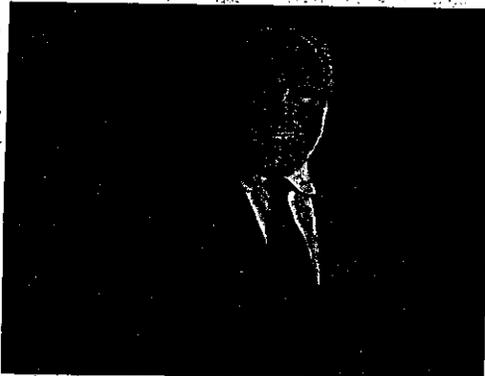
But not too much time, said San Diego's Fellmeth, who wants state attorneys general to move quickly on licensing-board changes. They need to tell board members they may be liable for a felony offense and treble damages, he said.

"Three to four years from now, a few of my friends will file antitrust actions against individual board members and there will be a \$10 million or \$20 million judgment," he said. "And then others will do it. I have friends in that community, and they are already salivating at the prospect."

"If I'm an attorney general, I want to say with pride, 'I saw this coming and we created some way of addressing it.' Bither get rid of a majority of the trade members or create some oversight that passes muster."

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What do Men Want, Anyway?

BY VIVIA CHEN

Exactly how evolved is today's red-blooded American male? Surprisingly evolved in some respects. In other ways, though, they're a tangle of insecurity.

Here are some main findings of The Shriver Report on the 21st century male, based on a survey of more than 800 men conducted by Hart Research in April:

- Almost two-thirds of men are "very comfortable" with a partner/spouse who works.
- 51 percent are "very comfortable" with a spouse or partner who earns more.
- Almost half (49 percent) are "very comfortable" reporting to a female boss.
- 64 percent of men are "comfortable" with having a woman as U.S. president.

But here are some things that men are still hung up about:

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• Four in nine say it's harder to be a man today than it was for his father. "In fact, 30 percent of American men agree that women taking on greater responsibility outside the home has had a negative effect on the confidence of American men."

• Only 44 percent are "very comfortable" with taking 12 weeks of paternity leave.

• Only 24 percent are "very comfortable" with being a stay-at-home dad.

The bottom line is that men are now more accepting of women in the workplace, but far less keen on switching places with women and assuming the role of Mr. Mom.

In any case, the report gets really interesting when men are asked about the qualities they value in their wives versus their daughters. By a whopping 66 percent, they want their daughters to be independent—although only 34 percent want that same trait in their wives. I can only assume that men want what's best for their daughters as they navigate life's challenges; as for themselves, men prefer wives who are less independent and presumably less troublesome.

What's heartening is that men, by a wide margin, want both their wives and daughters to be intelligent (72 percent value smart wives; 81 percent smart daughters). Being attractive ranks far lower (45 percent value attractiveness in their wives; only 11 percent in their daughters.) Frankly, this was a revelation, and a nice rebuke to the value we usually place on female pulchritude.

Another surprise: Very few men are looking for women to play Suzy Homemaker. A scant 14 percent value the trait of homemaker in their mates, while a paltry 5 percent want their daughters to play that role.

The upshot: Men are no longer that uptight about working women/spouses/mothers/colleagues. I don't know if they love it, but they seem to be getting use to it. And if more men start valuing what they want for their daughters—independence and strength—in all women, we might make some progress.

Vivia Chen is chief blogger for The Careerist. Updates appear daily at thecareerist.typepad.com. She can be contacted at vchen@abn.com.