

South Carolina State Board of Dentistry and the Role of Immunities in the *Parker* Doctrine

BY JEFFREY W. BRENNAN

IN *PARKER V. BROWN*, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act does not apply to sovereign acts of the states. Noting that the states are sovereign “save only as Congress may constitutionally subtract from their authority,” the Court held that Congress did not “nullify a state’s control over its officers and agents” when it enacted the Sherman Act. *Id.* at 350–51. Antitrust lawyers and courts often describe the protection from antitrust liability that attaches to state-sanctioned anticompetitive acts as “*Parker* immunity” or “state action immunity.”

A recent court of appeals decision, stemming from a Federal Trade Commission enforcement action, holds that “immunity” in this context is a misnomer, at least to the extent it is meant to imply an immunity from suit. The decision arose from a pretrial appeal to the U.S. Court of Appeals for the Fourth Circuit of an FTC interlocutory order, in which the FTC refused to dismiss a complaint based on a claim that *Parker* shielded the respondent from liability.

The court of appeals held that the pretrial denial of a *Parker* defense is not immediately appealable. In doing so, the court distinguished *Parker* claims from sovereign immunity and a small number of other asserted rights, the denial of which may be appealed before trial on the underlying merits, pursuant to the “collateral order doctrine.” The decision provides important insights into distinctions that separate *Parker* from the official immunities, and, in clarifying that *Parker* provides immunity from liability but not from suit,

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the decision also places a significant limit on defendants’ ability to avoid an antitrust trial by claiming protection under the state action doctrine.

In an administrative complaint issued in 2003, the FTC charged the South Carolina State Board of Dentistry (the Board) with an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.¹ The Board is a nine-member body, predominantly represented by dentists, that the South Carolina legislature has authorized to license and supervise the practices of dentistry and dental hygiene in the state. The FTC alleged that the Board restrained competition by adopting a regulation barring hygienists from providing various preventive dental care services to children in schools, unless the patient first had received a dentist’s pre-examination.

The Board moved to dismiss on the ground, among others, that *Parker* and its progeny immunize the challenged conduct.² The Board made two primary arguments. First, it characterized itself as sovereign. In *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984), the Supreme Court held that, consistent with *Parker*, the sovereign’s action (in that case, a state legislature’s adoption of legislation) is exempt, ipso facto, from antitrust liability. The Board asserted that it warrants an automatic exemption under this analysis.

Second, the Board argued in the alternative that, even if it is not itself sovereign, it acted pursuant to the sovereign legislature’s directive. Subordinate political subdivisions and private parties are not entitled to ipso facto protection, but instead are subjected to the test set forth in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)—that is, such parties must show that they acted pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition, and, at least with respect to purely private parties, that the state actively supervised their conduct.³ Under either *Hoover* or *Midcal*, the Board argued, it cannot be subjected to liability under Section 5 of the FTC Act.

The Commission denied the motion as to the Board’s state action claims.⁴ It held that the Board is not sovereign and thus not entitled to an automatic (ipso facto) exemption. It also held that the Board’s action actually reversed—as opposed to furthered—the legislature’s policy directive and thus that the Board’s state action claim also failed the *Midcal* test. The Board appealed the FTC’s pre-trial order to the U.S. Court of Appeals for the Fourth Circuit.

In *South Carolina State Board of Dentistry v. FTC (SCSB)*, the court of appeals dismissed the appeal for lack of jurisdiction.⁵ It ruled that the FTC’s order, like most interlocutory orders of federal district courts, cannot be appealed until after a final judgment is entered on the merits of the litigation. The Board’s right to appeal turned on whether the FTC’s decision falls within the “collateral order doctrine,” which accommodates a narrow class of rights that warrant exception to the rule of “finality.” Such rights exist in pre-trial denials of claims of qualified immunity, Eleventh Amend-

ment sovereign immunity, other official immunities, and double jeopardy. Each may be appealed as collateral orders because each articulates a constitutional or common law right to avoid “special harms” that would result from trial—a right that is permanently lost if a trial occurs before the interlocutory ruling can be reviewed on appeal.

In *SCSB*, the court of appeals held that the pre-trial denial of a *Parker* defense—even as to parties like the Board, that are not purely private but instead bear a nexus to the state itself—is not of the same character as the official immunities to which the collateral order doctrine applies. The court stated that, in *Parker*, the Supreme Court did not recognize an immunity from suit, but rather only interpreted a statute—the Sherman Act—and, upon construing the Act’s language and legislative history, concluded only that the statute does not reach state action. Accordingly, the Board could not maintain the appeal. On January 16, 2007, the Supreme Court denied the Board’s petition for a writ of certiorari regarding the Fourth Circuit’s dismissal of the appeal.⁶

Although the court in *SCSB* only ruled on whether the interlocutory denial of *Parker* protection may be immediately appealed, its decision also sheds light on two additional core issues: first, whether *Parker* is an “immunity,” either from liability or from suit; and second, how *Parker* protection relates to sovereign immunity and other doctrines that insulate actors from suit. *SCSB* is instructive for antitrust practitioners for its explication of important limits to *Parker*, particularly concerning the state action doctrine’s parallels to, and distinctions from, official immunities for state actors. For the antitrust enforcers, *SCSB* presumably is a welcome development in the case law that may eliminate some future obstacles to enforcement actions against entities that rely on *Parker* to shield their conduct from antitrust claims.

The Context: FTC Scrutiny of “Public” Restraints on Competition

SCSB is but one recent manifestation of what has long been a core component of the Commission’s competition policy and law enforcement agenda: to challenge restraints on competition by parties asserting what the agency views to be invalid claims to *Parker* protection based on flawed application of the state action doctrine. The agency’s attention on “public restraints” reaches back at least to the 1970s.⁷ It was an FTC investigation, for example, that ultimately led to *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), where the Supreme Court addressed, *inter alia*, the “clear articulation” standard in the context of a rate-setting case.

The Commission commenced *SCSB* at a time when many inside the agency had expressed concern that courts had taken the state action doctrine beyond its sound doctrinal boundaries, with the result that private actors benefited unjustifiably at consumers’ expense from patently anticompetitive practices. For example, then-Chairman Timothy J. Muris said in 2003:

Since *Parker*, . . . the scope of state action immunity from the antitrust laws has increased considerably. At times, courts have failed to consider carefully whether the anti-competitive conduct in question was envisioned by the state legislature or truly necessary to accomplish the state’s objective. Other courts have granted broad immunity to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state.⁸

Broad interpretation of the state action doctrine can mitigate the benefits of antitrust enforcement against purely private restraints on competition, by allowing public institutions unjustifiably to serve as conduits for restraints that can have the same pernicious effects on consumers. As current FTC Chairman Deborah Platt Majoras wrote, on behalf of a unanimous Commission in rejecting a party’s state action defense:

The state action doctrine and its jurisprudence are important because the doctrine enables the displacement of the federal antitrust laws. The doctrine, which is based on principles of state sovereignty, allows the states to implement legitimate policies. By enabling the displacement of the antitrust laws, however, the doctrine also can allow the implementation of programs that produce powerful anti-competitive effects, including higher prices and fewer choices for consumers.⁹

SCSB was one of nine state-action-related Commission law enforcement actions between 2003 and 2005—all part of a competition agenda that also included advocacy before legislatures and courts on the proper application of *Parker* and its progeny to current or proposed regulations affecting private rivalry.¹⁰ In addition, FTC staff published a detailed report that documented many of the lower court decisions that, in the staff’s view, gave credence to criticisms that the state action doctrine had been unduly expanded, particularly in regard to what constitutes “clear articulation” and “active supervision” under *Midcal*.¹¹ The report included “instances in which parties with a direct financial interest in the regulated field have attempted to characterize their own protectionist efforts as the will of the state,” in defense of conduct that, according to Chairman Muris, “the Supreme Court never intended to shield from antitrust enforcement.”¹²

FTC General Counsel (and now Commissioner) William E. Kovacic stated shortly after the *SCSB* complaint issued that the Commission’s overall state action agenda was both “to make sure that courts do not expand *Parker* immunity beyond its existing boundaries,” and to further “a desire to retrench various frontiers where *Parker* already has become inappropriately tolerant of public intervention to restrict competition.”¹³

Against this backdrop, the Commission issued the *SCSB* complaint, which, in FTC staff’s characterization, charges a state dentistry board “dominated by members of the industry it regulates” with eliminating competition from dental hygienists in an “egregious” manner that deprived thousands of children access to necessary preventive dental care.¹⁴ The

staff asserted that the Board not only lacked authority for its action under any clearly articulated state policy to displace competition, as *Midcal* requires, but it actually reinstated the same anticompetitive regulation that the legislature had terminated only the year before.¹⁵

Perhaps anticipating a motion to dismiss on state action grounds, when it issued the complaint the Commission retained adjudicative responsibility for the matter “[p]ending further Commission order.”¹⁶

Factual Allegations in the SCSB Complaint¹⁷

The Board’s Composition and Authority. The South Carolina legislature created the Board to license and supervise the practices of dentistry and dental hygiene. Of the Board’s nine members, seven are dentists, six of whom the state’s licensed dentists elect, one is a dental hygienist, whom the state’s licensed dental hygienists elect, and one is a member of the public, who, along with the non-elected dentist Board member, are governor appointees. The governor also approves the seven elected members. The dentist Board members also practice and, depending on office location, compete with the dentists whom they regulate.

Dental hygienists and dentists provide preventive oral health services, such as cleaning teeth, taking x-rays, providing fluoride treatments, and applying dental sealants. Over 2,200 dental hygienists are licensed to practice in South Carolina in collaboration with a supervising dentist or under the direction of the state’s public health dentist.

The Statutory Scheme for Preventive Dental Services. Beginning in 1988, South Carolina law permitted dental hygienists to provide preventive dental services in schools. This measure addressed oral health problems occurring among children due to inadequate preventive care, particularly among the 40 percent of the state’s children eligible for Medicaid. The 1988 law permitted dental hygienists to provide cleanings and sealants in schools, but only if a dentist had examined the child’s teeth within the preceding 45 days, if the dentist in writing authorized the care, parents consented, and if other conditions were met. After 1988, however, the provision of dental hygiene services in schools did not markedly increase.

In 2000, the legislature amended the law to impose fewer restrictions on dental hygienists to perform preventive dental services in schools. The amendments allowed hygienists to apply sealants, cleanings, and topical fluoride in schools under a dentist’s “general supervision,” defined to mean that a licensed dentist or the state’s public health dentist “authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed.” Other than parental consent, the amendments did not retain the other pre-2000 conditions, including the requirement that a dentist have examined the child within 45 days of receiving treatment in school from a dental hygienist. The state’s governor said that the law “removes a regulation that hindered access to dental care.”

The Board’s Allegedly Anticompetitive Response to the Amended Law. In early 2001, dental hygienists began providing cleanings, sealants, and topical fluoride in school settings. No longer required to limit their services to children who had received a dental examination within the preceding 45 days, the hygienists, by July 2001, had screened over 19,000 children and provided preventive services to over 4,000 children—three-quarters of whom were Medicaid-eligible. Due to the convenience of having these services available in schools, “[d]entists in traditional office practices risked losing patients” to the dental hygienists.

In July 2001, the Board promulgated an “emergency regulation” concerning the practice of dental hygiene in schools, re-imposing the same pre-examination requirement that the legislature had terminated in 2000 by requiring that a supervising dentist examine a patient no more than 45 days before that patient receives treatment in school from a dental hygienist. State law did not require the Board to submit the emergency regulation for approval to any other body. The new regulation’s effect was swift. During the next six months, screenings in schools fell by two-thirds relative to the preceding six months.

By operation of law, the emergency regulation was to expire in January 2002 (180 days after it was promulgated). In August 2001, the Board published a proposed permanent regulation that largely mirrored the emergency regulation. State law required that, before the proposed regulation could become final, an administrative law judge after a public hearing must report on whether the regulation would be a reasonable exercise of the Board’s authority and submit findings (which were non-binding) to the state’s General Assembly for review.

The judge concluded in February 2002 that the Board’s proposed permanent regulation contravened state policy to the extent that it re-imposed the dentist pre-examination requirement that the legislature had abolished a year earlier, and thus was unreasonable. The Board elected not to submit the proposed permanent regulation to the General Assembly, so it never took effect. After the emergency regulation lapsed, and with it the requirement for a mandatory pre-examination by a dentist, South Carolina dental hygienists resumed preventive dental care in schools, under contract with and by authorization of the state’s public health dentist. Screenings and treatments returned to the high levels that preceded the Board’s emergency regulation.

The Board’s Motion to Dismiss the Complaint

The Board moved to dismiss the complaint, on two grounds: first, that the state action doctrine shields it from liability under Section 5 of the FTC Act, and second, that the FTC’s claim is moot.

To prevail on the mootness contention, the Board was required to show that there is no reasonable expectation that the conduct could recur.¹⁸ The Board argued (i) that in 2003, the legislature again amended the relevant law, this

time by expressly referencing dental hygienists' authority to provide preventive dental care in certain public health settings without the requirement of a pre-examination by a dentist, (ii) that the "emergency regulation" giving rise to the complaint had expired, and (iii) that the Board adopted a resolution after the FTC complaint was issued, stating that pre-examinations were not required as a condition of a dental hygienist's working in a public health setting and that the Board would not seek a change to that policy.¹⁹

The Commission deferred ruling on the Board's mootness contention, and referred the matter to the administrative law judge for discovery over 90 days, as well as for findings of fact on the likelihood that the Board may engage in future unlawful conduct under the 2003 statute. As to the state action defense, the Commission denied the motion.

FTC Order on State Action Defense

In moving to dismiss, the Board argued that its status as a state agency qualifies it for an automatic, or ipso facto, exemption from antitrust liability, or, in the alternative, that it was exempt under the *Midcal* test. The Commission held that the Board is not sovereign but "a 'subordinate' state special purpose instrumentality or industry regulatory body." "Declining to treat such non-elected governmental entities as equivalent to the state itself comports fully with the policies of the state action doctrine," the FTC said, "because such entities lack the political accountability to formulate state policy."²⁰ In denying the Board an ipso facto exemption under *Parker*, the Commission relied on *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985), which provides that "[t]he circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically" by *Midcal* and its two-part test. (emphasis added).

Moving on to the *Midcal* inquiry, the Commission ruled that South Carolina did not set forth a "clearly articulated and affirmatively expressed" state policy to displace competition so as to authorize the Board to adopt the emergency regulation. South Carolina regulations provide broad general authority to the Board to regulate dentistry and dental hygiene via licensing, disciplinary rulings, and other standards—all of which displace competition to some extent. But the Commission said that "while clear articulation does not require a state entity to show 'express authorization' for every specific anticompetitive act, it does anticipate that the anticompetitive action will have a significant nexus to, or degree of 'foreseeability' stemming from, an identifiable state policy."²¹

The Commission determined that the Board's re-imposition of a pre-examination requirement by the emergency regulation was not foreseeable from South Carolina's 2000 amendments to the statute governing dental hygiene services administered in schools. "Whatever room these amendments left for regulation by the Board," the FTC said, "the one thing that is clear is that the [legislature] sought to make it

easier for dental hygienists to deliver preventive dental care services in school settings by deleting the 45-day pre[-]examination requirement."²² Accordingly, the Commission concluded that the emergency regulation was in conflict with applicable state policies, and denied *Parker* protection to the Board.

The Board's Appeal to the Fourth Circuit

The Commission decision was not a final order because the matter had not yet proceeded to trial on the merits. Nevertheless, the Board filed an appeal with the Fourth Circuit, arguing that appellate jurisdiction was proper because the FTC's refusal to dismiss the complaint "based on the immunity or exemption of the respondent" fell within a category of interlocutory rulings "typically regarded as appealable under the 'collateral order doctrine.'"²³ The Board argued, as it did before the Commission, that it (a) is "a state agency ipso facto immune from" the FTC action and, in the alternative, (b) acted properly under a broad grant of regulatory authority stemming from a clearly articulated state policy to displace competition.²⁴

The Fourth Circuit's SCSB Decision

The authority of courts of appeals under 28 U.S.C. § 1291 to review all final decisions of the district courts extends to "a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final." *Will v. Hallock*, 126 S. Ct. 952, 955 (2006) (internal quotation marks omitted). Appellate courts apply the collateral order doctrine to determine whether a particular interlocutory order fits within this "narrow class of decisions." Warranting immediate appeal are interlocutory orders that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

The Supreme Court recently reaffirmed the "stringent" parameters of the collateral order doctrine: "The requirements for collateral order appeal have been distilled down to three conditions: that an order (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 126 S. Ct. at 957 (citations and internal quotation marks omitted).

In *SCSB*, the Board claimed that the FTC order denying it protection under *Parker* met all three conditions. The court of appeals agreed with respect to the first condition, i.e., that the order "conclusively determined" that the Board's conduct was within the reach of the Federal Trade Commission Act,²⁵ but disagreed with respect to the others and, on that basis, dismissed the appeal for lack of jurisdiction.

Parker Issues Are Not "Completely Separate" from Merits Issues. To conclude that an order meets the second

condition for “collateral order” status, i.e., that it “resolves an important issue completely separate from the merits of the action,” the appellate court must determine that the order does not “involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”²⁶ The order fails under this test not merely if it raises issues identical to the merits questions, but also if it imposes only the threat of substantial duplication of judicial decision making or raises issues that are “intertwined” with the merits.²⁷

The court of appeals in *SCSB* held that the FTC’s *Parker* order failed this condition. The reason is that in all cases except those addressing whether an automatic, or ipso facto, exemption applies (an inquiry the resolution of which turns strictly on the defendant’s “sovereign” or “non-sovereign” identity), “a court must look to state law and determine if the state has a clearly articulated policy to displace competition.” That inquiry, says the court of appeals, is “enmeshed” with the complaint’s underlying charge that the defendant engaged in an anticompetitive practice, making an appeal not collateral and thus unavailable.²⁸

The court of appeals also commented that an appeal fails this condition even if the only issue is whether ipso facto *Parker* protection should apply, because the collateral order doctrine turns not on “particular injuries” in any specific case, but on the “category” of the case in which the appeal arises.²⁹ The court observed that subordinate state entities and private parties are categories of defendants that may assert a *Parker* defense, and these entities must show that their actions complied with a clearly articulated and affirmatively expressed state policy to displace competition.³⁰ Thus, because this inquiry would require the appellate court to consider issues “intertwined” with the substantive charge that the appellant’s conduct made the market less competitive, the category of the case is such that immediate appeal is unavailable.³¹

One judge on the three-judge panel disagreed with this portion of the decision, writing that “the question of whether the actor represents the state is separate and severable from the question of whether the action taken is unlawful.”³² This view recognizes that it may be possible in a given case to assess under *Midcal* whether there exists a clearly articulated and affirmatively expressed state policy to displace competition, without encountering issues that are “enmeshed” with whether the defendant’s conduct had an anticompetitive effect. This judge did not, however, address a different, but also central, question that is more likely to be intertwined with the merits of the underlying antitrust charge: whether the defendant’s actions fell within the scope of the applicable state policy.

Pre-Trial Denial of Parker Protection Is Not “Effectively Unreviewable” after Trial. Although the court of appeals could have stopped there, it also discussed whether the Board’s appeal satisfied the collateral order doctrine’s third condition—showing that an interlocutory order is

“effectively unreviewable” after trial. To satisfy this requirement, the interest under consideration must be one that would be “essentially destroyed if its vindication must be postponed until after trial is completed.”³³

In *Will*, the Supreme Court listed four types of pre-trial rulings that are “within the class” of collateral orders warranting an immediate appeal: denials of (1) absolute immunity, (2) qualified immunity, (3) Eleventh Amendment immunity, and (4) assertions of double jeopardy.³⁴ The Court in *Will* acknowledged that “[t]he examples admittedly raise the lawyer’s temptation to generalize” that *any* order denying a claimed right to prevail without trial satisfies this third condition. But, the Court added, “this generalization is too easy to be sound and, if accepted, would leave the final order requirement of § 1291 in tatters.”³⁵ The Court stated that “it is not mere avoidance of a trial, *but avoidance of a trial that would imperil a substantial public interest*, that counts,”³⁶ and pointed out that, in prior applications of the collateral order doctrine, “some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State’s dignitary interests, and mitigating the government’s advantage over the individual.”³⁷

In *SCSB*, the court of appeals determined that denying the Board’s motion to dismiss did not involve “a particular value of a higher order” because the *Parker* doctrine “did not arise from any concern about special harms that would result from trial. Instead, *Parker* speaks only about the proper interpretation of the Sherman Act.”³⁸ The Court in *Parker* assumed without deciding that “Congress could, in the exercise of its commerce power, prohibit a state” from engaging in anti-competitive practices like those at issue in that case.³⁹ The Court did not have to decide that issue, because neither in its language or history does the Sherman Act itself evidence Congressional intent to cover state action.⁴⁰

The Board made two arguments regarding this condition for meeting the collateral order doctrine. The Board first argued that *Parker* must have recognized an immunity, because the Supreme Court has sometimes referred to the state action doctrine as “*Parker* immunity.” The court of appeals disagreed, noting that no reference to “immunity” appears in *Parker*, that the Supreme Court did not use the term “immunity” in a state action case until 35 years after *Parker*, and that the Court thereafter has alternated between “immunity” and “exemption.”⁴¹ Other courts, including Judge Richard Posner, have noted that “immunity,” “exemption,” and “privilege” are often used interchangeably,⁴² but the terminology used to describe the state action doctrine did not alter the *SCSB* court’s view: “Simply put, *Parker* construed a statute. It did not identify or articulate a constitutional or common law right ‘not to be tried.’ *Parker*, therefore, recognizes a ‘defense’ qualitatively different from the immunities described in *Will*, which focus on the harms attendant to litigation itself.”⁴³

The qualitative difference between the state action “defense” and “the immunities described in *Will*,” therefore, is that those immunities articulate protection from suit, i.e., from “litigation itself.” The Supreme Court’s references to “immunity” in state action cases decided decades after *Parker* might properly be explained as describing immunity not from suit or trial, but from liability—the pre-trial denial of which is not immediately appealable because it can be vindicated following final judgment.⁴⁴

The Board’s second argument in support of its claim that the FTC decision is “effectively unreviewable” and thus collateral was that *Parker* serves the same ends as the official immunities, i.e., “the full exercise by state actors of their discretion, undeterred by the possibility of protracted antitrust litigation.”⁴⁵ The U.S. Court of Appeals for the Fifth Circuit has held that the denial of *Parker* protection is “effectively unreviewable” because the *Parker* decision and Eleventh Amendment sovereign immunity have a common justification: “to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the insistence of private parties.”⁴⁶ Similarly, the Eleventh Circuit analogized *Parker* to qualified immunity, and found that the latter derives from a purpose “to avoid needless waste of public time and money.”⁴⁷

In *SCSB*, the FTC asserted that the Fifth and Eleventh Circuits were “simply incorrect,” arguing that *Parker* limits federal antitrust law’s reach but does not stem from a need to protect state dignity, or from a desire to free state officials from the kinds of threats of litigation and damage awards that could inhibit official decision making.⁴⁸

The court of appeals agreed, starting from the premise that it is the “category” of the case, not the particulars of a specific case, that determines appealability under the collateral order doctrine. The court noted that in all denials of claims to qualified and sovereign immunity is the threat that the impending trial poses to officer initiative and to state dignity, respectively, but that the same cannot be said of all denials of *Parker* protection.⁴⁹

For example, the court of appeals reasoned, qualified and sovereign immunity is not available to municipalities and is not available to state officials in actions for declaratory or injunctive relief; in none of those situations is officer initiative or state dignity at risk.⁵⁰ The same holds true for suits by the United States against states: sovereign immunity is not an available defense. The courts have concluded, therefore, that the prospect of a trial for government officials in these circumstances does not “imperil a substantial state interest” or risk “some particular value of a high order”—the values protected in the collateral order doctrine.

In contrast, in each of the foregoing scenarios, if the cause of action is a federal antitrust claim, then the state action defense is available—to municipalities, to state officials in declaratory and injunction actions, and to states sued by the federal government. If the trial-avoidance values that are inherent in qualified and sovereign immunity do not exist in

these kinds of suits generally, so that municipalities and states can proceed to trial without threatening peril to a substantial public interest, then there is no reason to conclude that a state’s dignity or officer’s initiative would be threatened merely because a particular suit happens to allege a violation of antitrust law.⁵¹

It is possible that an antitrust case *may* intersect with an official immunity, such as in a private party’s suit for money damages from a state entity or state official for an alleged violation of the Sherman Act. In such a case, the court of appeals said, the defendant can assert qualified or sovereign immunity as well as *Parker* protection, and the defendant can assert a right to interlocutory appeal based on such immunities, irrespective of *Parker*.⁵²

The court noted that a contrary holding would entitle the Board (even assuming *arguendo* that it is a sovereign entity) to an immediate appeal, even though it cannot assert qualified or sovereign immunity from an FTC enforcement action because the FTC seeks only prospective injunctive relief and because the FTC is a federal agency. A holding that every denial of *Parker* protection is immediately appealable, solely because denials of official immunity claims involve comparable alleged harms, would mean that even private parties and cities would have the right to immediate appeal, as would state entities defending federal government or injunction claims, where no immunity applies. The court said that it “cannot countenance” such a result.

Supreme Court Petition

The Board unsuccessfully petitioned for a writ of certiorari premised on a circuit split since 1986, when the Sixth Circuit (dismissing appeal) and Eleventh Circuit (accepting appeal) reached opposite conclusions on whether an interlocutory *Parker* ruling is a collateral order.⁵³ Later cases from three other circuits (two by *dicta*) also favor immediate appeal.⁵⁴ The FTC argued that an active circuit split does not exist, characterizing the division as “stale and relatively narrow” and “one that may well be resolved by the lower courts themselves in light of this Court’s more recent [post-1986] decisions.”⁵⁵ The FTC also noted that none of the other appellate cases involved a Commission order—which “eliminat[es] possible Eleventh Amendment concerns.”⁵⁶

Conclusion

The Supreme Court has not expressly held that the pre-trial denial of *Parker* protection is outside the boundaries of the collateral order doctrine or that *Parker* and its progeny do not create the legal grounds for immunity from suit. The Court has repeatedly emphasized, however, that the class of collateral orders is narrow, and that the conditions for determining which orders fall within that class are stringent. Having denied the Board’s petition for writ of certiorari, the Court will not be addressing these points in *SCSB*—at least not unless and until a final appealable order issues and the case works its way back through the appeals process.

If the FTC finds that the Board violated Section 5 of the FTC Act, then the Board will have another opportunity, on a full administrative record, to argue these issues again on appeal. Of course, in that circumstance the Board will have lost the right to avoid trial based on its *Parker* defense.

The FTC has a substantial interest in shaping the application of antitrust law to public restraints of trade, including by reversing what it has characterized as the migration of the state action doctrine away from its core foundation. The *SCSB* decision provides an opportunity for Commission complaint counsel to litigate charges of unfair methods of competition against the Board on a full administrative record, which may help delineate how the state action doctrine should apply where the challenged conduct is that of a quasi-public entity composed almost entirely of rivals in the marketplace they regulate. Whatever the ultimate outcome, the Commission's *SCSB* proceeding is likely to boost the FTC's enforcement efforts against anticompetitive conduct fostered by state entities that invoke the state action doctrine as a defense. ■

¹ Complaint, South Carolina State Board of Dentistry, FTC Docket No. 9311 (Sept. 15, 2003), available at <http://www.ftc.gov/opa/2003/09/socodentist.htm>.

² Memorandum in Support of Motion to Dismiss, South Carolina State Board of Dentistry, FTC Docket No. 9311 (Oct. 21, 2003), available at <http://www.ftc.gov/os/adjpro/d9311/index.htm>.

³ *Id.* The Supreme Court has not addressed whether the "active supervision" requirement applies to non-sovereign state entities. The Court has determined that, to receive *Parker* protection, municipalities need not establish that the state actively supervised their anticompetitive conduct, so long as they can show that their actions stem from a clearly articulated and affirmatively expressed state policy to displace competition. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47 (1985). The Court declined to resolve whether a "state agency" must meet the active supervision requirement. *Id.* at 46 n.10. The Commission did not reach this issue in its decision.

⁴ South Carolina State Board of Dentistry, FTC Docket No. 9311 (July 30, 2004) (Commission opinion), available at <http://www.ftc.gov/opa/2004/07/sodentists.htm>. The Commission issued the ruling before assigning the matter to an administrative law judge for trial. *Id.* at 3.

⁵ 455 F.3d 436 (4th Cir. 2006).

⁶ *South Carolina State Board of Dentistry v. FTC* (U.S. Jan. 16, 2007) (No. 06-274).

⁷ See generally FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 23, 2003), available at <http://www.ftc.gov/opa/2003/09/stateaction.htm> [hereinafter FTC STATE ACTION TASK FORCE REPORT].

⁸ Remarks by Timothy J. Muris, Chairman, Federal Trade Commission, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy 6, Milton Handler Annual Antitrust Review (Dec. 10, 2002), available at <http://www.ftc.gov/opa/2002/12/handler.htm>.

⁹ Kentucky Household Goods Carriers Ass'n, Inc., FTC Docket No. 9309, slip op. (June 22, 2005), available at <http://www.ftc.gov/opa/2005/06/kentuckymovers.htm>.

¹⁰ For cases: see *id.*; Virginia Board of Funeral Directors and Embalmers, FTC File No. 041 0014 (Oct. 5, 2004), available at <http://www.ftc.gov/os/caselist/0410014/0410014.htm>; Movers Conference of Miss., Inc., FTC Docket No. D-9308 (Dec. 4, 2003), available at <http://www.ftc.gov/opa/2003/12/fyi0371.htm>; New Hampshire Motor Transport Ass'n, FTC File No. 021 0115 (Dec. 9, 2003), available at <http://www.ftc.gov/opa/2003/12/fyi0371.htm>; Alabama Trucking Ass'n, Inc., FTC Docket No. D-9307 (Dec. 9, 2003), available at <http://www.ftc.gov/opa/2003/12/fyi0371.htm>; Minnesota Transport Services Ass'n, FTC Docket No. C-4097 (Sept. 16,

2003), available at <http://www.ftc.gov/opa/2003/09/fyi0356.htm>; Iowa Movers and Warehousemen's Ass'n, FTC Docket No. C-4096 (Sept. 16, 2003), available at <http://www.ftc.gov/opa/2003/09/fyi0356.htm>; Indiana Household Movers and Warehousemen, Inc., FTC Docket No. C-4077 (April 29, 2003), available at <http://www.ftc.gov/opa/2003/04/fyi0330.htm>. For an amicus brief, see, e.g., Brief of the Federal Trade Commission as Amicus Curiae in Brentwood Academy v. Tennessee Secondary School Athletic Association, Nos. 03-5245, 03-5278 (6th Cir.) (Nov. 13, 2003), available at <http://www.ftc.gov/ogc/briefs.htm>. For advocacy letters, see generally FTC STATE ACTION TASK FORCE REPORT, *supra* note 7, at 66 et seq.

¹¹ See FTC STATE ACTION TASK FORCE REPORT, *supra* note 7.

¹² Press Release, Federal Trade Comm'n (Sept. 23, 2003), available at <http://www.ftc.gov/opa/2003/09/stateaction.htm>.

¹³ Interview with William E. Kovacic, General Counsel, Federal Trade Commission, ANTITRUST SOURCE, Jan. 2004, at 10, <http://www.abanet.org/antitrust/at-source/04/01/kovacic.pdf>.

¹⁴ Press Release, Federal Trade Comm'n, FTC Charges South Carolina Board of Dentistry (Sept. 15, 2003), available at <http://www.ftc.gov/opa/2003/09/socodentist.htm>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ All alleged facts recited in this section are from the FTC complaint, *supra* note 1.

¹⁸ See Commission opinion, *supra* note 4, at 33.

¹⁹ *Id.* at 10–11, 32.

²⁰ See Commission opinion, *supra* note 4, at 18.

²¹ *Id.* at 22 (citations omitted).

²² *Id.* at 24–25 (citations and internal quotation marks omitted).

²³ Brief of Petitioner South Carolina State Board of Dentistry, 2005 WL 3775766 (Nov. 3, 2005), at 5–6.

²⁴ *Id.* at 16–24.

²⁵ *SCSB*, 455 F.3d at 441.

²⁶ *Id.* at 441.

²⁷ *Id.*

²⁸ *Id.* at 442.

²⁹ *Id.* (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)).

³⁰ *SCSB*, 455 F.3d at 443.

³¹ *Id.*

³² *Id.* at 447. Other courts have reached similar conclusions. See *id.* at 441 and cases cited therein.

³³ *Id.* at 443 (citation and emphasis omitted).

³⁴ *Will v. Hallock*, 126 S. Ct. 952, 958 (2006).

³⁵ *Id.*

³⁶ *Id.* at 959 (emphasis added).

³⁷ *Id.*

³⁸ *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006).

³⁹ *Parker v. Brown*, 317 U.S. 341, 350 (1943).

⁴⁰ The Supreme Court's statement in *Parker* (317 U.S. at 350) that it "may assume . . . without deciding" that Congress, through the commerce clause, could have extended the Sherman Act to cover state action is not one that today's Court is likely to repeat. That is because, some five decades after deciding *Parker*, the Court held that the commerce clause does not authorize Congress to abrogate state sovereign immunity under the Eleventh Amendment, which prevents "suits by private parties against consenting States." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72–73 (1996). The case does not affect *Parker*'s core holding that the Sherman Act's construction and legislative history establish that the Act does not reach state action, but the Court, if deciding *Parker* today, might cite *Seminole Tribe* and state that Eleventh Amendment concerns would encumber any attempt to extend the Act for private damages actions. Commentators explain that the courts are likely to confront important questions concerning the inter-relationship between the *Parker* doctrine and sovereign immunity after *Seminole*

Tribe—particularly in the context of private antitrust actions brought against subordinate state entities that raise defenses under both legal frameworks. See ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 987–99 (2002); see generally Susan B. Farmer, *Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 42 VILL. L. REV. 111 (1997).

⁴¹ SCSB, 445 F.3d at 445–46.

⁴² See *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc) (“While thus a convenient shorthand, *Parker* immunity is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation”); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (Posner, J.) (“the description of a defense as an ‘immunity’ rather than a privilege or affirmative defense (and it could be all three things, of course) does not resolve the issue whether denial of the immunity is a collateral order”). Note that the Fifth Circuit, in a decision three years before *Surgical Care Ctr.*, *supra*, found that the denial of *Parker* protection is a collateral order. *Martin v. Mem. Hosp.*, 86 F.3d 1391, 1394–97 (5th Cir. 1996).

⁴³ SCSB, 445 F.3d at 444.

⁴⁴ See, e.g., *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526–27 (1988) (holding that “petitioner’s challenge to District Court’s exercise of personal jurisdiction because he is immune from civil process should be characterized as the right not to be subject to a binding judgment of the court;” such immunity “is not an immediately appealable collateral order”).

⁴⁵ SCSB, 445 F.3d at 446.

⁴⁶ *Martin v. Mem. Hosp. at Gulfport*, 86 F.3d 1391, 1395–97 (5th Cir. 1996).

⁴⁷ *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289–90 (11th Cir. 1986).

⁴⁸ See Brief of Respondent Federal Trade Commission, 2005 WL 3691202 (Dec. 27, 2005), at 19.

⁴⁹ SCSB, 445 F.3d at 446.

⁵⁰ *Id.* at 446–47. The decision notes that the Eleventh Amendment bars a person from suing a state or its agency for injunctive relief, but a plaintiff may sue a state officer in his official capacity for prospective injunctive relief to ensure compliance with federal law, and thereby effect the same result. *Id.* at 447 n.8 (citations omitted).

⁵¹ *Id.* at 447.

⁵² *Id.*

⁵³ See Petition for a Writ of Certiorari, No. 06-274, 2006 WL 2474038 at *6 (Aug. 24, 2006) (citing *Huron Valley Hosp., Inc. v. City of Potomac*, 792 F.2d 563, 567 (6th Cir. 1986)); *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289–90 (11th Cir. 1986).

⁵⁴ See *Martin v. Mem. Hosp.*, 86 F.3d 1391, 1394–97 (5th Cir. 1996); see also *We, Inc. v. City of Phila.*, 174 F.3d 322, 329 (3d Cir. 1999) (*dicta*); *Segni v. Comm’l Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (*dicta*).

⁵⁵ See Brief for the Federal Trade Commission in Opposition to Petition for a Writ of Certiorari, No. 06-274, 2006 WL 3609966 at *18 (Dec. 7, 2006). The FTC argued (*id.* at *15) that the Court’s decisions in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), and *Will v. Hallock*, 126 S. Ct. 952 (2006), emphasize that the collateral order doctrine has a limited scope and “cast significant doubt” on the existence of a meaningful circuit split.

⁵⁶ Brief for the FTC in Opposition, *supra* note 55, at *19.

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