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Industry-run Boards Should Look over Both Shoulders

BB&K Partner Ken MacVey Analyzes in the *Daily Journal* U.S. Supreme Court Cases That Analyze Antitrust Issues for Professional Boards

By **Kendall H. MacVey**

In California and throughout the nation, there are government boards that regulate specific businesses and professions. Typically, these boards' decision-makers include members of the very business or profession the board is supposed to regulate. In California, there are state boards for attorneys (the State Bar of California), engineers, doctors, dentists, funeral directors and more. At the federal level, there are boards that regulate the production and sale of agricultural commodities by committees of industry-nominated representatives appointed by the secretary of agriculture.

The U. S. Supreme Court has taken up two cases that target industry-run government boards - one board at the state level, the other at the federal level. One shoe has already dropped. In *North Carolina Board of Dental Examiners v. Federal Trade Commission*, the court last month found that a state board with oversight over dentistry was not entitled to federal antitrust immunity when a controlling number of the board's decision-makers were dentists, and therefore, active participants in the market the board regulates.

The other shoe remains to drop. In January, the U.S. Supreme Court granted review to *Horne v. U. S. Department of Agriculture*. This case challenges agriculture marketing orders issued by the federal government that control the amount of raisins producers can sell in the open market. The 9th U.S. Circuit Court of Appeals rejected a California producer's claim that diversion of a portion of the producer's raisins for market disposition by an administrative committee of industry representatives constituted a taking under the Fifth Amendment. The Supreme Court will review that question.

By two different routes, antitrust and takings laws, the Supreme Court is closely scrutinizing the legality of actions taken by industry-run government boards. Each route has different ideological appeal to the "right" and "left" of the judicial spectrum, but represent in either case potentially heavy body blows to such

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boards.

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