[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12227

D.C. Docket No. 1:18-cv-02328

SMILEDIRECTCLUB, LLC,

Plaintiff—Appellee,

versus

TANJA D. BATTLE,
in her official capacity as Executive Director of
the Georgia Board of Dentistry,
et al.,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(July 20, 2021)

Before WILLIAM PRYOR, Chief Judge, and WILSON, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA,

BRASHER, and TJOFLAT, Circuit Judges.*

JORDAN, Circuit Judge, delivered the opinion of the Court, in which WILLIAM PRYOR, Chief Judge, and WILSON, MARTIN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, BRASHER, and TJOFLAT, Circuit Judges, joined.

JORDAN, Circuit Judge:

Sitting as a full court, we hold that interlocutory appeals may not be taken under the collateral order doctrine from the denials of so-called "state-action immunity" under *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), and its progeny. We therefore dismiss this appeal by the members of the Georgia Board of Dentistry for lack of appellate jurisdiction.

I

SmileDirectClub, LLC, offers orthodontic treatments, including teeth alignment, at steep discounts. Its business model is described in detail in the panel opinion, *see SmileDirectClub, LLC v. Battle*, 969 F.3d 1134, 1136-37 (11th Cir. 2020), and we briefly summarize it here.

Patients visit a SmileDirect location, where a technician takes a digital scan of their teeth. The scans are sent to SmileDirect's lab to create a model. They are also sent to a Georgia-licensed dentist or orthodontist, who determines whether any

* Judge Gerald Bard Tjoflat took senior status on November 19, 2019 and elected to participate in this decision pursuant to 28 U.S.C. § 46(c)(2).

oral conditions warrant further investigation or prevent the patient from being a candidate for SmileDirect's alignment treatment. If there are no issues or problems, the dentist or orthodontist creates a patient-specific plan that results in a prescription for SmileDirect's clear aligners. The patient then receives the aligners by mail from SmileDirect.

In 2018, the Georgia Board of Dentistry—a state-organized entity mostly comprised of practicing dentists—voted to amend its Rule 150-9-.02, which relates to the expanded duties of dental assistants. As explained in the panel opinion, the "practical effect of the proposed amendment w[as] . . . to require that digital scans, like the ones [performed] by SmileDirect at [its locations,] only take place when a licensed dentist is physically in the building where the scans are taking place, and to prohibit them otherwise." *Id.* at 1137. Georgia Governor Nathan Deal approved the amendment of Rule 150-9-.02 through a "Certification of Active Supervision." *See id.* (internal quotation marks omitted).

SmileDirect then sued a number of defendants, including the Board members in their individual capacities. As relevant here, SmileDirect alleged that the Board's amendment of Rule 150-9-.02 violated the Sherman Act, 15 U.S.C. § 1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or [interstate] commerce." The Board members moved to dismiss the antitrust claims against them in their individual capacities.

They argued that they were entitled to dismissal based on so-called "state action immunity" under *Parker* because they acted on behalf of Georgia in amending Rule 150-9-.02. The district court denied the motion, and the Board members filed an interlocutory appeal as permitted by our precedent. *See, e.g.*, *Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286, 1289-90 (11th Cir. 1986); *Praxair, Inc. v. Fla. Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995). The panel affirmed the district court's denial of the Board members' motion to dismiss, *see SmileDirectClub*, 969 F.3d at 1143-46, and we took the case en banc to consider whether denials of *Parker* "state action immunity" can be appealed prior to final judgment.[1]

II

Whether an interlocutory appeal can be taken from the denial of *Parker* "state action immunity" presents a question of law subject to plenary review. *See Pinson v. JPMorgan Chase Bank, N.A.*, 942 F.3d 1200, 1206 (11th Cir. 2019). The answer to that question involves consideration of two matters—the scope of the collateral

[1] The district court ruled that SmileDirect's Sherman Act claim, as pled, was "sufficient to survive a Rule 12(b)(6) motion to dismiss on *Parker* immunity grounds." D.E. 51 at 13. Like the panel, we conclude that the district court's denial of the *Parker* defense was conclusive at this stage of the litigation. *See SmileDirectClub*, 969 F.3d at 1138 n.4. The district court did not definitively reject the *Parker* defense because the facts as pled might not be the facts at summary judgment or trial. But this does not mean that the district court's Rule 12(b)(6) ruling was tentative. *Cf. Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (explaining that a motion to dismiss on qualified immunity grounds takes the defendant's conduct as alleged in the complaint, while a motion for summary judgment on qualified immunity grounds considers the evidence in the light most favorable to the plaintiff).

order doctrine and the nature of *Parker* "state action immunity"—so we begin with some background.

A

As a circuit court, we generally only have jurisdiction over appeals from "final decisions of the district courts." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting 28 U.S.C. § 1291). There are a handful of exceptions to this final-judgment rule, among them the collateral order doctrine. First recognized in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949), the doctrine allows for immediate appeals of a "small class" of non-final orders.

The collateral order doctrine is sometimes called an "exception" to the final-judgment rule, but the doctrine "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citing *Cohen*, 337 U.S. at 546). In other words, "[§ 1291] entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment, but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Id.* (internal quotation marks and citations omitted). *Accord* 19 Moore's Federal Practice § 202.07[1] (3d ed. 2021).

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