

NC Dental Leaves State Boards With Little To Smile About

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The recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* could subject hundreds and perhaps thousands of state regulatory boards to federal antitrust liability for conduct once thought immune as state action, and so creates the possibility that individual board members may be subject to treble damage awards.

The case began when the North Carolina dental board sent cease-and-desist letters to nondentists who offered teeth-whitening services at prices less than dentists, asserting that they were engaging in the unlicensed practice of dentistry. The FTC charged that board members' concerted action to exclude nondentists from the teeth-whitening market was an anti-competitive and unfair method of competition in violation of §5 of the Federal Trade Commission Act and Section 1 of the Sherman Act. The board moved to dismiss, asserting that as a state board it was immune from antitrust liability under the state action doctrine. An administrative law judge, the FTC and the U.S. Court of Appeals for the Fourth Circuit disagreed, and found the board had improperly restrained trade.



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The U.S. Supreme Court, in a 6-3 decision written by Justice Anthony Kennedy and issued on Feb. 25, 2015, held that because a controlling number of the board members were dentists engaged in the very occupation the board regulates, the board could invoke state action antitrust immunity only if the board was subject to active supervision by the State, and here that requirement was not met. That ruling, while it could spur competition and lower prices, could have sweeping consequences for regulatory boards, as indicated in amicus briefs submitted to the court.

All 50 states regulate the practice of dentistry and medicine through a state licensing agency whose members include practicing dentists and physicians, respectively. Dental and medical boards are just the tip of the iceberg. California, for example, is dependent upon 25 regulatory boards responsible for "licensing and oversight of various professions." Numerous states have boards that include practitioners and regulate professionals and workers as diverse as osteopathic physicians, nurses, pharmacists, physical therapists and occupational therapists, not to mention veterinarians, funeral home directors, accountants, barbers and real estate appraisers. Many states provide lawyer discipline through boards whose members include lawyers.

As the lower courts apply the Supreme Court's holding to diverse facts patterns several factors will determine the breadth of the case's impact, and also what states and boards may do, if anything, to qualify for a state action defense. Those factors include:

Composition of the Board

The North Carolina State Board of Dental Examiners has eight members, including six active, licensed dentists, elected by other North Carolina dentists. The seventh member is a dental hygienist, elected by hygienists, and the final member is a "consumer appointed by the Governor." The majority limited its holding to circumstances where "a controlling number of the Board's decisionmakers are active market participants in the occupation the board regulates." Slip op. at 14.

The dissent, written by Justice Samuel Alito and joined by Justices Antonin Scalia and Clarence Thomas, questioned whether controlling means majority, or something less than that. They also questioned whether an orthodontist or periodontist who did not provide teeth-whitening services were active market participants. Another unknown is the importance of whether board members are appointed or elected. See *The North Carolina State Board of Dental Examiners v. FTC*, Case No. 12-1172 (4th Cir. 2014) (noting board members "are chosen by and accountable to their fellow market participants"). The Supreme Court, however, did not address the importance of that distinction.

Active Supervision

The majority opinion described what constitutes "active supervision" in slightly different terms at different points in its opinion and those differences could have a substantial impact in determining whether a board may invoke state action immunity. Compare slip op. at 9 (state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy") with slip op. at 10 ("requiring the State to review and approve interstitial policies made by the entity claiming immunity") with slip op. at 18 ("supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy"). Which of those tests applies will impact both which boards, as currently configured, can meet the active supervision requirement, and the contours of any needed legislative fix.

Form of Board Action

One of the underlying issues in the case is whether teeth-whitening services constitute the practice of dentistry. The North Carolina board concluded it did, and sent 47 cease-and-desist letters. Under North Carolina law, the board has the authority to issue rules governing the practice of dentistry under the state's Administrative Procedures Act, provided those rules are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. Slip op. at 2. The court noted that the "Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official." The court's analysis might well have been different if the board had first promulgated a rule, clarifying that teeth whitening, which the FTC found was a "safe cosmetic procedure," slip op. at 4, constitutes the practice of dentistry before taking any enforcement action. Whether a board will be entitled to state action antitrust immunity if it acts through rulemaking authority will likely depend on the degree of state supervision of the board's rulemaking activities.

A separate but related issue is whether board members not entitled to state action immunity are potentially liable for treble damages. Noting that the FTC had not sought monetary relief, the court said this matter “does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances enjoy immunity from damages liability.” Slip op. at 16 (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 n. 22) (1975) (reserving issue of whether state bar was protected by the Eleventh Amendment)). The court further noted that “States may provide for the defense and indemnification of agency members in the event of litigation.” Slip op. at 16. Boards that do not offer such protections might wish to do so, even if that requires legislative action, to assuage concerns of current and prospective board members.

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