

FEDERATION OF CHIROPRACTIC LICENSING BOARDS

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North Carolina State Board of Dental Examiners v. FTC – The Fallout

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Agenda

- ***North Carolina State Board of Dental Examiners v. FTC***
 - ✦ ***Antitrust laws***
 - ✦ ***Background/Facts of case***
 - ✦ ***Overview of United States Supreme Court opinion***
 - ✦ ***Effect on regulatory boards***
 - ✦ ***Strategies?***

Antitrust Laws

- Laws intended to promote ***competition***
- Protect free competition from interference by private forces acting in their own ***self interest***
- ***Consumer harm:*** higher prices, reduced output, lower product or service quality, decreased innovation or product improvement
- ***Premise:*** free and open competition results in best products and services

Antitrust Laws

- **Federal Trade Commission Act:** prohibits “unfair methods of competition” and “unfair or deceptive acts or practices”
- **Sherman Act:** prohibits
 - ✦ (1) agreements in restraint of trade and
 - ✦ (2) actions to **unlawfully** obtain, extend, maintain a **monopoly**
- **Clayton Act:** prohibits price discrimination, tying arrangements, mergers/acquisitions that would substantially lessen competition
- Violations can create **criminal** and **civil** liability (treble damages, attorneys’ fees)

Federal Trade Commission

- United States federal government agency established in 1914
- Principal mission: promotion of consumer protection and elimination/prevention of anti- competitive business practices
- Five commissioners, nominated by President and confirmed by Senate
- Enforces antitrust laws, reviews proposed mergers, investigates business practices

Anti-Trust Laws & State Action Doctrine

- Originally established by the Supreme Court in 1943 and elaborated upon in subsequent cases
- Actions by a State are not subject to the federal antitrust laws
- Sub-state government entities also immune, so long as acting pursuant to a “clearly articulated policy to displace competition”
- Private entities may be protected if, in addition, they are “actively supervised” by the state

Background/Facts of Case

- **NC Board reviewed its dental practice act**
 - ✦ Concluded act permitted only dentists to whiten teeth
 - ✦ Sent cease-and-desist letters to non- dentists and their suppliers/landlords
- **Teeth whitening industry complained**
- **FTC opened investigation in 2008**
- **June 2010: FTC concluded NC Board's actions were anticompetitive and brought administrative complaint**

FTC Administrative Proceedings

- FTC lawsuit alleged that NC Board violated antitrust laws that prohibit “unfair competition”
- NC Board argued it was exempt from federal antitrust laws because authorized by the state and protected by **state- action immunity**
- FTC argued NC Board is a **private actor** and must therefore meet highest standard (clear articulation **and** active supervision)
 - ✦ FTC argued “**a regulatory body that is controlled by participants in the very industry it purports to regulate**”

4th Circuit Ruling

- Fourth Circuit supported FTC position
- Emphasis on Board being comprised of a “**decisive coalition**” of participants in the regulated market chosen by and accountable to fellow market participants
 - Thus, private actor and active supervision required
 - State did not oversee the cease-and-desist letters;
 - Generic oversight insufficient
- Concurring judge noted that, had Board members been appointed by Governor, it would be a state entity . . . and active supervision requirement would not apply

Appeal to United States Supreme Court

- March 2014: US Supreme Court agreed to hear the case
- Nineteen *amicus curiae* briefs filed
- For example, FCLB via FARB and 14 other regulatory and professional organizations submitted a brief in support of antitrust immunity for state boards
- Oral argument held October 14, 2014

Amicus Arguments

- (1) State regulatory boards like the NC Dental Board are clearly state entities
- (2) Fourth Circuit's ruling imperils states' ability to delegate their authority to expert regulatory boards
- (3) Requiring "active supervision" of state boards would negate agencies' efficiency benefits
- (4) Fourth Circuit's test improperly looks behind state action to inquire into the private motives of state boards members.
 - Fourth Circuit improperly presumed that state regulatory boards do not act in the public interest
- (5) Threat of antitrust liability could paralyze boards, deter participation, and chill decision making

U.S. Supreme Court Majority

- 6 to 3 decision (Alito, Scalia and Thomas dissenting)
- **Majority's Conclusion:** Because a “controlling number” of the Board’s decision makers are “active market participants in the occupation the Board regulates,” the Board is treated as a private actor and must show active supervision by the State
- The “active supervision” requirement was not met here

U.S. Supreme Court Majority

- **There are limits on immunity:** State-action immunity exists to prevent conflict between state sovereignty and federal competition policy *but* it is not unbounded
- **Board is not sovereign:** State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity
 - The NC Board is a “**nonsovereign actor**” (an entity whose conduct does not automatically qualify as that of the sovereign state itself)

U.S. Supreme Court Majority

- **Active Supervision is required:** A nonsovereign actor controlled by “active market participants” enjoys immunity only if the challenged conduct is actively supervised by the state
 - ✦ “Clearly articulated policy” prong presumed here
- **State Supervision must be meaningful:** Immunity requires more than a “mere façade of state involvement” (states must accept accountability)
 - “The need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade”

U.S. Supreme Court Majority

- Court noted in distinguishing this case from previous jurisprudence....
 - NC Board is not like the municipality in *Hallie* because it was an “electorally accountable municipality with general regulatory powers and **not private price-fixing agenda**”
 - “. . . was more like prototypical state agencies, **not specialized boards dominated by active market participants**”

U.S. Supreme Court Majority

- **Likened to trade associations!!!!!!!**
 - Similarities to private trade associations “are not eliminated simply because Board is given a formal designation by the State, vested with a measure of governmental power, and required to follow some procedural rules”

U.S. Supreme Court Majority

- **Citizens need not be discouraged from serving**
 - Long tradition of professional self-regulation in US
 - States may see benefits to staffing agencies with experts
 - No claim for money damages here, so need not address whether board members may be immune from money damages in some circumstances
 - State can provide for defense and indemnification
 - State can ensure immunity by adopting clear policy to displace competition and (if agency controlled by active market participants) providing active supervision

U.S. Supreme Court Majority

- **How much state supervision is required?**
 - Test is “flexible and context-dependent”
 - Don’t need day-to-day involvement in operations or micromanagement of every decision
 - Review mechanism must provide “realistic assurance” that conduct “promotes state policy, rather than merely the party’s individual interests”
- **Four requirements:**
 - ✦ (1) supervisor must review substance, not merely procedures;
 - ✦ (2) must have power to veto/modify;
 - ✦ (3) mere potential for supervision not enough; and
 - ✦ (4) supervisor can’t be active market participant

U.S. Supreme Court Dissent

- **Dissent:** The majority seriously misunderstands the doctrine of state-action immunity. Board is a state entity. Period.
- It is a state agency “and that is the end of the matter”
- Created by state legislature to serve a prescribed regulatory purpose and to do so using the State’s power in cooperation with other arms of state government
- Majority “takes the unprecedented step of holding that [immunity] does not apply . . . because the Board is not structured in a way that merits a good-government seal of approval”

U.S. Supreme Court Dissent

- “North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and safety.”
- Board is not a private trade association
- Board is a state agency; would not exist if the State had not created it
- Board membership is irrelevant; what matters is that it is part of the NC government

U.S. Supreme Court Dissent

- Majority disregards Board's status as a "full-fledged state agency" and treats the Board "less favorably than a municipality"
- "... until today . . . immunity was never conditioned on the proper use of state regulatory authority."
- Obvious advantages to staffing medical and dental boards with practitioners
- Staffing boards with CPAs would lessen risk but "would also compromise State's interest in sensibly regulating a technical profession in which lay people have little expertise"
- States may now have to change composition of boards, "but it is **not clear what sort of changes are needed to satisfy the test** that the Court now adopts."

U.S. Supreme Court Dissent

- **Unanswered questions.....**
 - What is a “controlling number”? Majority? Voting bloc? Obstructionist minority? Powerful agency chair?
 - Who is an “active market participant”?
 - What is the scope of the market? Must market be relevant to the particular challenged conduct? Would result be different if Board members did not provide teeth whitening?
 - How much participation makes person “active” in the market?
 - Why stop at structure of the board when evaluating “board capture”?

Relevance to Regulatory Boards

- Broader issue of “state action” is relevant to all regulatory boards
- Many boards include practitioner members
- Amount of interface with the state may vary
- Second recent Supreme Court ruling narrowing state-action defense; *FTC strongly disfavors state action defense and seeks a high bar for “active supervision”*

What Has Happened Since?

- Litigation
- Proposed Legislation
- Executive Orders
- Attorney General Advisory Opinions
- Other
 - FTC Staff Guidance
 - https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

Litigation

- **Axcess Medical v. Mississippi State Board of Medical Licensure**
 - Challenge to rules limiting non-licensees from owning clinics; dismissed
- **Coestervms.com, Inc. v. Virginia Real Estate Appraiser Board**
 - Applicant challenged denial of licensure due to past conduct; plaintiff voluntarily dismissed
- **Colindres v. Battle (Georgia Board of Dentistry)**
 - Non-licensee claims antitrust violations, constitutional claims; motion to dismiss pending

Litigation, *cont'd*

- **Henry v. North Carolina Acupuncture Licensing Board**
 - Anticompetitive behavior in excluding physical therapists who perform dry needling
 - Injunction sought; motion to dismiss filed
- **LegalZoom.com, Inc. v. North Carolina State Bar**
 - Challenge to rules restricting legal plans by non-licensee; consent judgment entered

Litigation, *cont'd*

- **Petri v. Virginia Board of Medicine**
 - Discipline of licensee for unauthorized practice; Board won at district court; oral argument before Fourth Circuit in March 2016.
- **Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado**
 - Antitrust violations (chiropractors); antitrust claims dismissed, defendants immune and suit dismissed.
- **Robb v. Connecticut Board of Veterinary Medicine**
 - Threatened discipline of licensee; licensee claimed antitrust violations; motion to dismiss granted (disciplinary proceeding can move forward).

And yet more litigation....

- **Rodgers v. Louisiana State Board of Nursing**
 - Student challenged termination of university nursing degree program; court held Nursing Board immune under 11th Amendment
- **Rosenberg v. State of Florida**
 - Suspended licensee (lawyer) challenged Grievance Committee and Florida Bar action as anticompetitive; Court dismissed action because FL Bar was a sovereign entity
- **Strategic Pharmaceuticals Solutions, Inc. v. Nevada State Board of Pharmacy**
 - Out of state licensee filed antitrust claims and violation of Nevada Unfair Trade Practices Act; currently pending.

And yet more litigation....

- **Teladoc v. Texas Medical Board**
 - Non-licensee challenged rule restricting telemedicine practice and requiring “face to face or in-person evaluation.” Injunction granted and Board motion to dismiss denied. On appeal before 5th Circuit.
- **Wallen v. St. Louis Metropolitan Taxicab Comm’n**
 - Uber drivers and customers challenged Commission, members, and cab companies. Injunction sought and motions to dismiss filed; referred to mediation to be done by January 2017.
- **WSPTN Corp v. Tennessee Department of Health, Council for Hearing Instrument Specialists**
 - Employers and licensee-employees claims monopoly and restraint of trade in hearing aid market by Board and members. Injunction sought, motion to dismiss pending.

Proposed Legislation

- **Arizona – House Bill 2613**

- Pending legislation to deregulate certain professions (athletic trainers, geologists, landscape architects); committee hearing February 2016

- **Virginia – House Bill 1388**

- Gives agency director authority to determine whether board decisions may have potential adverse impact on competition and if so, whether such action consistent with clearly articulated state policy

Proposed Legislation

- **Wyoming – Senate Bill 55**

- Board shall not take action if not explicitly authorized by statute and if not explicitly authorized, Board shall seek guidance from Office of Attorney General. Bill also provides for joint interim legislative committee to provide further recommendations

- **California – Senate Bill 1195**

- Authorizes the director, upon own initiative or upon request of consumer or licensee, to review a decision or other action (except as specified) to determine whether it restrains trade and to approve, disapprove, or modify decision as specified.

- **North Carolina – Draft Legislation-February 2016**

Executive Orders

- **Alabama – Executive Order #7**
 - Established Alabama Office for Regulatory Oversight of Boards and Commissions; voluntary program for boards to comply with existing law that requires active state supervision as a condition of state action immunity.
- **Oklahoma – Executive Order 2015-33**
 - All disciplinary actions (not rulemaking) must first be reviewed by AG's office before formal hearing will occur

Executive Orders

- **Massachusetts – Executive Order 567**
 - Instructs the director of professional licensure and commissioner of public health to review and approve any act, rule, regulation or policy proposed by a board that may have an anti-competitive effect.
 - Lists boards that are covered and types of actions (scope of practice, advertising restrictions, price regulations, etc.)
 - <http://www.mass.gov/governor/legislationexecorder/execorders/executive-order-no-567.html>

Executive Orders

- **Delaware – Executive Order 60**
- Creates a Committee to conduct a comprehensive analysis of the composition, State oversight and licensing requirements of all commissions, boards and agencies regulated by the Division of Professional Regulation.
- Committee will issue a report by October 14, 2016, to include:
 - Recommendations for legislative or regulatory action that will remove any unnecessary or overly burdensome requirements;
 - An examination of the relative burdens of licensing and certification requirements of regulated professions compared to neighboring states;
 - Recommendations whether current system could or should be replaced by an alternative methodology; and
 - Recommendations regarding the process by which regulation is added to a new profession or the requirements for existing regulated professions are increased.
- <http://governor.delaware.gov/orders/EO060.pdf>

Attorney General Opinions

- **California - Opinion No. 15-402**
 - Focuses on question of what is active state supervision and what can boards do to meet the requirement
 - Has good language regarding indemnification of board members
 - https://oag.ca.gov/system/files/opinions/pdfs/15-402_0.pdf?

Attorney General Opinions

- **Nebraska – Advisory Letter to Board of Accountancy**
 - Action of boards re: an individual license “when undertaken in accordance with statutes and/or promulgated rules, is unlikely to present an antitrust question....”

Attorney General Opinions

- **Idaho – Opinion 16.01**

- Increase public membership on boards. *This alternative must strike an appropriate balance between need for subject matter expertise and board controlling market access.*
- Assign an independent state official the authority to approve, reject or modify market participant-controlled board decisions
- Evaluate necessity of boards and commissions.

Other

- Ohio *Columbia Dispatch News* article
- Senator Seitz plans to draft legislation to redesign occupational licensure and regulation framework.
- Three potential solutions:
 - Reconfigure boards so not controlled by professionals (this option is disfavored)
 - Create “mega-boards” to consolidate regulation of related fields
 - Empower a single state actor, such as an AG or Lt. Gov., to review and issue board decisions

Anything Else?

- Anyone have any updates on any of these initiatives?
- Anything else you are aware of?
- Please send any information on updates or new developments on this topic in your jurisdiction to FARB (farb@farb.org)

What's Next?

- Don't Overreact
- Most day to day operations and decisions do not implicate antitrust concerns
 - **FTC Staff Guidance and Supreme Court opinion reinforce that**
 - **Antitrust laws protect *competition* not *competitors* so, generally speaking, an individual licensee unhappy about discipline imposed, standing alone, will not have a sufficient antitrust injury to allege.**
 - **Watch scope of practice and unlicensed practice issues regarding groups/categories of individuals; advertising restrictions; restrictions on bidding or price regulations**
 - **Overlapping scopes okay; focus on qualified, minimum competence to practice**

What's Next?

- Act in good faith and within the scope of your authority (practice act and rules)
- Shift your perspective:
 - Put on your regulatory/public protection hat, take off your profession hat
 - Arguably, all board members are public members – some just have special expertise

What's Next?

- Does the proposed decision or action trigger antitrust concerns?
- If not, follow ordinary course of business.
- If so, what happens next?
 - Rulemaking – notice and comment
 - Advisory opinion from the Attorney General (esp. important if Board has private counsel)
 - Seek a declaratory judgment from the courts
 - Seek statutory change via legislation
- These above actions likely provide sufficient oversight and active supervision

Now What?

- Consult with AG....private sector attorney
- Don't forget first prong: **clearly articulated state policy to displace competition**
 - ✦ How clear is your enabling statute?
- Remember four requirements for active supervision:
(1) supervisor must review substance, not merely procedures; (2) must have power to veto/modify; (3) mere potential for supervision not enough; and (4) supervisor can't be active market participant

Potential consequences/strategies

- Develop greater state supervision over existing board (e.g., “State Supervision Czar,” legislative committee, state court)
- Change board membership so not controlled by active market participants; argue for state entity status (e.g., more public members; remove practitioner majority)
- Combine boards to dilute market participants (e.g., umbrella boards)
- Seek state endorsement of decisions with significant effects on competition
- Abandon boards for certain professions
- Make no changes

Strategies

- Evaluate/establish/understand state program for defense and indemnification of board members
- What activities are undertaken? (e.g., individual action (application denial, discipline, etc) vs. broader scope-of-practice question)
- Prepare for potential increase in private antitrust claims in response to board actions
- FTC may be encouraged; complaints brought to FTC's attention may get receptive audience
- Note: Method of board member selection not an express factor in Supreme Court's decision

Q & A

- **Many thanks.....**