

*Heightened Political and Legal Scrutiny of  
Regulatory Community:  
Post NCSBDE v. FTC Case .....Now What*

FCLB Annual Meeting  
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# Speaker

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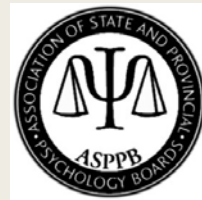
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# Agenda.....Heightened Scrutiny

- Regulation vs. Economic Growth
- Legal and Political Climate
- Separation of Trade/Industry from Regulation and Public Protection

# Perception is Reality

- Are the professions self-regulated?
- What role does the private sector play in regulation?
- What role should it play?

# Contractors association, state board join forces to build new downtown office building

(January 2017)

- <https://www.businessreport.com/article/contractors-association-state-board-join-forces-build-new-downtown-office-building> (1/3/2017; last accessed 3/27/2017)
- “Louisiana Associated General Contractors and the Louisiana State Licensing Board for Contractors are teaming up to develop a new four-story building in downtown Baton Rouge that will house offices for both entities.”
- “The state LBC is funding the building, and we are providing the property,” says LAGC CEO Ken Naquin, who estimates the budget for the building’s construction at \$6.5 million. “It’s a true public-private partnership.”

# Contractors association, state board join forces to build new downtown office building

(January 2017)

- Some comments from readers posted to the article:
  - So, a lobbying organization and a state board are joining forces to construct a four-story (small) downtown building at the public's expense. *What could go wrong with that?*
  - Has this cleared the ethics commission? *Can an entity that represents the regulated industry enter into an ongoing real estate transaction with the regulator (or the reverse it doesn't matter).* When a contractor has a potential licensing problem and seeks assistance from the Louisiana Associated General Contractors Association will the transaction be "lets just go down the hall and see what our land lord/tenant (sic) has to say, you know we are very close?"

# Legal Climate - Some Notable Cases

## ■ NC State Board of Dental Examiners v. FTC

- FTC found NC **Board not immune** from antitrust liability due to lack of active state supervision over board comprised of active market participants

## ■ Rodgers v. State of Louisiana Board of Nursing

- Student challenged termination of university nursing degree program; court held Nursing **Board immune** under 11<sup>th</sup> Amendment

## ■ NC Acupuncture Licensing Board v. NC Board of Physical Therapy Examiners

- Acupuncture Board filed suit seeking declaratory judgment that dry needling within scope of acupuncture and sought injunction against Physical Therapy Board

## ■ Henry v. NC Acupuncture Licensing Board

- Anticompetitive behavior in excluding physical therapists who perform dry needling; Injunction sought

# North Carolina State Board of Dental Examiners v. FTC

(2015)

United States Supreme Court affirmed the 4<sup>th</sup> Circuit Court of Appeals and held that the NCSBDE violated the antitrust laws by interpreting the scope of practice within the practice act to include teeth whitening. The court held that a “non-sovereign” actor whether a state agency or private group must meet the **two prong test of clearly articulated state policy AND active oversight by the state**. Based upon the fact that the NCSBDE is comprised of market participants, the court held that it was a non-sovereign entity.



# Rodgers v. Louisiana Board of Nursing (2016)

- The Court of Appeals for the 5<sup>th</sup> Circuit upheld the district court which **dismissed a nursing student's antitrust suit against the Louisiana Board of Nursing** after Board terminated a nursing school's accreditation.
- Suit was dismissed on the grounds of sovereign immunity (11<sup>th</sup> Amendment) and *Parker* immunity. Nursing student appealed.
- Court distinguished *NC Dental Board* case (where Board was not immune via *Parker* immunity).
- Court stated that the two types of immunity are distinct.
- **March 13, 2017: Rodgers filed Petition for Writ of Certiorari in U.S. Supreme Court.**

# NC Acupuncture Licensing Board v. NC Board of Physical Therapy Examiners (2016)

- Turf battle
- NC Acupuncture Board sued NC Board of Physical Therapy Examiners
- Acupuncture Board alleged dry needling exclusive within scope of acupuncture practice
- Physical Therapy Board filed motions to dismiss
- Court granted motions:
  - *Lack of subject matter jurisdiction*
  - *Lack of personal jurisdiction*
  - *Failure to exhaust administrative remedies*

# NC Acupuncture Licensing Board v. NC Board of Physical Therapy Examiners (2016)

The North Carolina Superior Court granted, for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to exhaust administrative remedies, motions to dismiss of the NC Board of Physical Therapy Board (defendant) in a complaint filed by NC Acupuncture Board seeking declaratory judgment on scope of practice related to dry needling. The Acupuncture Board argued that dry needling was exclusive to its scope of practice and sought court rulings substantiating that limit. The Board of Physical Therapy filed motions to dismiss arguing lack of personal and subject matter jurisdiction. Under a sovereign immunity analysis, the court held that “government on government” litigation rests on the rationale that courts should not interfere with government operations and policy making and that immunity is not waived unless expressly so stated. The court concluded it lacked personal jurisdiction due to immunity and granted the motion to dismiss. The court also held that the Acupuncture Board failed to exhaust its administrative remedies and, therefore, the court lacked subject matter jurisdiction. In its analysis, the court noted the statutory right under the Administrative Procedures Act to seek a declaratory ruling from the Physical Therapy Board. Finally, the court dismissed the private defendants under an anti-collateral attack analysis finding that the counts against named Physical Therapy Board members was merely an attempt to challenge an agency action through private defendants.

# Henry v. NC Acupuncture Licensing Board

(2017)

- Physical therapists received cease and desist letters from Acupuncture Board re dry needling
- Physical therapists and patients filed lawsuit against NC Acupuncture Board in federal court
- Plaintiffs alleged antitrust violations
- Significant facts alleged re relationship between Board and trade association
- Board argued that Federal Court should “stay” proceedings based upon state court case
- Court denied request

# Henry v. NC Acupuncture Licensing Board

(2017)

A U.S. District Court in North Carolina denied the defendant North Carolina Acupuncture Licensing Board's (Board) and individual board members' motion to stay the proceedings and granted in part and denied in part their motion to dismiss. The lawsuit was filed by four physical therapists, two who performed dry needling and two who wanted to perform dry needling but were hesitant to do so, due to the Board's issuance of cease and desist letters indicating that dry needling was the unauthorized practice of acupuncture. The plaintiffs also included two ballet dancers and potential clients of the physical therapists. The plaintiffs brought suit alleging antitrust claims and violations of due process. Defendants moved to stay the proceedings due to a parallel state court proceeding between the North Carolina Physical Therapy Board and the Acupuncture Board, and moved to dismiss the lawsuit for failure to state a claim. After analyzing the legal framework to determine whether a stay or abstention was appropriate, the court found that a stay was not appropriate and under the Colorado River doctrine, abstention was also not appropriate. First, the court found that the state court and the instant federal court lawsuits were not sufficiently similar to be considered parallel proceedings, as the state lawsuit did not allege antitrust claims, but instead sought a declaration that dry needling was within the practice of acupuncture. The court also found that the plaintiffs could not vindicate their rights under antitrust law in the state court proceeding and thus abstention was not proper. Additionally, the court also held that discretionary stay was not appropriate, as the defendants did not sufficiently allege hardship in proceeding with both suits simultaneously and further there would be prejudice to the plaintiffs in the continuing injury they are suffering. Finally, the court addressed the motion to dismiss, finding the antitrust claims (effect on interstate commerce, injury in fact, antitrust injury, and conspiracy) were sufficiently pled but the equal protection claims under Section 1983 should be dismissed as plaintiffs did not have a constitutional right to perform dry needling.

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# Political Climate – Legislation & Executive Orders

- Virginia HB 1566 – Creates a new agency: Division of Supervision of Regulatory Boards
- New Jersey A4273 – Requires state supervision of certain regulatory boards to provide antitrust immunity
- Mississippi HB 1425 – Requires active supervision by the Governor of certain regulatory boards to provide antitrust immunity
- Kentucky Executive Order 2016-859 (December 2016)
  - *Relating to Real Estate Commission, Real Estate Appraisers Board, Board of Auctioneers, Board of Home Inspectors and Creation of Kentucky Real Estate Authority*
- Oklahoma Executive Order 2016-39 (December 2016)
  - *Creation of Occupational Licensing Task Force*

# Political Climate – Trump Administration

- **Bannon: Trump administration is in unending battle for ‘deconstruction of the administrative state’ (2/23/2017)**
  - [https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/?utm\\_term=.6c879be8145d](https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/?utm_term=.6c879be8145d)
- **Leashes Come Off Wall Street, Gun Sellers, Polluters and More (3/5/2017)**
  - <https://www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html>
- **Trump Administration and Congress Signal New Priorities for Financial Regulation (2/13/2017)**
  - <https://corpgov.law.harvard.edu/2017/02/13/trump-administration-and-congress-signal-new-priorities-for-financial-regulation/>
- **Trump Signs Order to Enforce Regulatory Agenda (2/27/2017)**
  - <https://www.bna.com/trump-signs-order-n57982084419/>

# Key Take Home Points

- Separate regulation from trade
- Identify state and federal jurisdiction
- Understand legal concepts and consequences
- Train State Board members
- Perception is reality



# Thank you.....

- Questions and (maybe) answers