

North Carolina State Board of Dental Examiners v. FTC: Next Steps for State Action & For Nurses

Background

In June 2010, the Federal Trade Commission (FTC) filed an [administrative complaint](#) against the North Carolina Board of Dental Examiners (Dental Board) alleging that the Dental Board, through the dentists who were board members, was preventing non-dentists from providing teeth whitening services by defining the practice of dentistry to include teeth whitening. The Dental Board issued letters to non-dentists accusing them of practicing dentistry without a license and demanding that they cease and desist from providing teeth whitening services. The Dental Board was comprised of six licensed dentists, one licensed dental hygienist and one consumer member.

The FTC complaint alleged that the Dental Board's actions were an unlawful restraint of trade under Section 1 of the Sherman Act and constituted unfair competition under the Federal Trade Commission Act. The FTC asserted that the Dental Board's actions deprived consumers of the important benefits of competition and provider choice. The Dental Board argued that as a state regulatory agency, it was exempt from FTC scrutiny under the theory of state action immunity. The Commission's [opinion](#) and [final order](#) found that the Dental Board was not exempt from FTC review and state action immunity did not apply because the actions taken by the Dental Board were not actively supervised by the State. The administrative law judge found the Dental Board liable for violating the FTC Act, and the full Commission affirmed that finding.

The Dental Board appealed to the 4th Circuit Court of Appeals (which upheld the Commission's decision) and then to the United States Supreme Court. The American Nurses Association (ANA) joined with the American Association of Nurse Anesthetists, American College of Nurse Midwives, American Academy of Nurse Practitioners and National Association of Clinical Nurse Specialists (Nursing Organizations) to file a friend of the court or [amicus brief](#) in support of the FTC's position. The [Citizen Advocacy Center](#) also joined the brief. ANA and the other Nursing Organizations urged the Supreme Court to find that licensing boards are not immune from liability if they unlawfully restrain the practice of other licensed professionals.

The Supreme Court's Decision

On February 25, 2015, the [U.S. Supreme Court](#) affirmed the 4th Circuit's decision and the position of the [FTC](#) by stating that "a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates" is not exempt from scrutiny or immune from liability unless the board is actively supervised by the state. The Supreme Court said that more than "a mere façade of state involvement" is required.

The Supreme Court did not prescribe a particular mechanism of review of this issue but provided the following guidance: (1) the substance of the anticompetitive decision must be reviewed (not just the procedures for making the decision); (2) the state must be able to veto or modify anticompetitive decisions to ensure that they are consistent with state policy; (3) the “mere potential for state supervision is not an adequate substitute for a decision by the State”; and (4) the state supervisor may not be an active market participant.

States will need to grapple with two issues that were not addressed by the Supreme Court: what constitutes “active market participants” and what constitutes “active supervision by the state.”

Discussion

This Supreme Court ruling will have a significant impact on state regulatory boards. It is important that state nurses associations engage with state decision makers to influence the direction that states take in response to this decision. Depending on how it is implemented, “meaningful state supervision” could provide a mechanism for addressing ongoing scope of practice concerns. On the other hand, some states may opt to create “super boards” to regulate multiple professions – an approach that may undermine professional self-regulation.

Consumer groups are concerned that nearly all states have boards that are composed of market participants and are not adequately supervised by states. Three consumer groups ([Consumers Union](#), the [Center for Public Interest Law](#), and the [Citizen Advocacy Center](#)) sent a [joint letter](#) to all 50 state attorneys general, alerting them that the states must change the way they conduct professional licensing.

Several important resources are available to help states evaluate and address these issues. In October 2015, FTC issued [Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants](#). The guidance responds to requests from state officials for advice regarding antitrust compliance for state boards responsible for regulating occupations. The guidance addresses when a state regulatory board requires active supervision in order to invoke the state action defense. It also describes factors to determine whether the active supervision requirement has been satisfied. In November 2015, the [Citizen Advocacy Center](#) issued a document entitled [Addressing the Supreme Court’s North Carolina Decision: Options for States](#). The document suggests two different approaches to secure antitrust immunity for regulatory boards: ensure that “active market participants” are no longer a controlling number on the board; or ensure that regulatory board actions are subject to “active state supervision.” The paper describes [eight different options](#) that states might utilize in response to the Supreme Court’s decision:

1. Public member Majority
2. Multi-party Board Membership
3. Umbrella Board with Policy Oversight
4. Independent Review Board to Oversee Rulemaking
5. Majority Public Review Body for Scope of Practice Actions
6. Make Boards Advisory Only
7. Expand the Powers of Sunrise / Sunset Review
8. Give Attorneys General Additional Oversight Powers

What's next for states?

- States are beginning to examine their licensing boards to determine whether their boards are at risk of liability under this Supreme Court ruling. Examples include an [Opinion](#) by the California Attorney General, and [Executive Order](#) by the Governor of Oklahoma, a [Research Report](#) from the Connecticut General Assembly, Office of Legislative Research, and numerous legislative bills.
- States with boards comprised with a majority of members practicing in the profession will need to review their supervisory structures to determine if they are consistent with the guidance provided by the Court and make changes if necessary.
- States may also consider whether to provide for the defense and indemnification of boards and board members.

What Can SNAs Do?

- Each state has a unique mechanism and structure for regulating professional boards. It is essential that you talk with your board of nursing about this ruling and the impact in your state. We urge all constituent and state nursing associations (C/SNAs) to closely monitor developments within your state. Activity may be taking place in the legislative branch, the Governor's office, or in the office of Attorney General.
- Talk with your legislators, [Attorney General](#) and other state officials involved in these regulatory matters to ensure that your state has or adopts supervisory structures and processes that are consistent with the guidance provided by the Supreme Court. ANA stands ready to assist C/SNAs as they engage in dialogue with state officials.
- Encourage nurses to continue to serve on boards of nursing.

Resources

Advocacy groups to state AGs: Warn board members they now potentially face personal liability.
Retrieved <http://www.professionallicensingreport.org/advocacy-groups-to-state-ags-warn-board-members-they-now-potentially-face-personal-liability/>

Brief for the Respondent, The North Carolina State Board of Dental Examiners v. Federal Trade Commission (no. 13-534). Retrieved from <https://www.ftc.gov/system/files/documents/cases/140730dentalexaminersbrief.pdf>

Brief of The American Association of Nurse Anesthetists, et al. as Amici Curiae Supporting Respondent, The North Carolina State Board of Dental Examiners v. Federal Trade Commission (no.13-534). Retrieved from http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-534_resp_amcu_aana-et.al.authcheckdam.pdf

Brief of The American Dental Association, et al. as Amici Curiae Supporting Petitioner, The North Carolina State Board of Dental Examiners v. Federal Trade Commission (no.13-534). Retrieved from

http://www.ada.org/~media/ADA/Member%20Center/Files/legal_amicus-brief-for-nc-dental-board-case.ashx

FTC concludes North Carolina Dental Board illegally stifled competition by stopping non-dentists from providing teeth whitening services. Retrieved from <https://www.ftc.gov/news-events/press-releases/2011/12/ftc-concludes-north-carolina-dental-board-illegally-stifled>

The North Carolina State Board of Dental Examiners v. FTC [Open letter of Inquiry and request for documents]. Retrieved from <http://www.professionallicensingreport.org/wp-content/uploads/2015/05/5-4-15-Letter-to-Kamala-Harris-re-NC-Dental-Board.pdf>

The North Carolina State Board of Dental Examiners v. Federal Trade Commission (Slip opinion). Retrieved from http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

Who's my AG? Retrieved from <http://www.naag.org/naag/attorneys-general/whos-my-ag.php>