NC Dental Board Case

Background and Summary of Decision
NC Dental Board Case: Background

• Starting in 2006, the NC Dental Board issued 47 cease and desist orders to non-dentists about teeth whitening, explaining criminal penalties for “practice of dentistry”.

• In 2010, the FTC charged the Dental Board with violating the FTC Act and the Sherman Act.

• The FTC prevailed before an administrative law judge, the full commission, the 4th Circuit Court of Appeals and finally the U.S. Supreme Court.
“State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies . . . Requires more than a mere façade of state involvement.” States must “accept political accountability for anticompetitive conduct they permit and control.”
NC Dental Board: Supreme Court Ruling

- Where regulatory power is delegated to active market participants, immunity requires:
  - Clear articulation
  - Active state supervision
NC Dental Board: Key Factors

- Dental Board controlled by dentists elected by “market participants”.
- Did not have explicit authority to issue “cease and desist letters.”
- Did not engage in rule-making
- Did not employ judicial process
- Court troubled by possibility that Dental Board could be motivated by economic self-interest.
Open Issues

• To which decisions does NC Dental apply?
  o Licensing/Applications?
  o Discipline?
  o Unauthorized practice?
What has been the impact on professional regulation?

Litigation and Legislation
What Has Happened Since?

- Litigation
- Proposed Legislation
- Executive Orders
- Attorney General Advisory Opinions
- Other
  - FTC Staff Guidance
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

• **Rodgers v. Louisiana State Board of Nursing**
  
  o Student challenged termination of university nursing degree program; court held Nursing Board immune under 11th Amendment

• **Rosenberg v. State of Florida**
  
  o 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**
  
  o Out of state licensee filed antitrust claims and violation of Nevada Unfair Trade Practices Act; currently pending.
Proposed Legislation

- **Iowa - HF 2426, SF 2167**
  - Provides for review of board rules on a five-year rotation by legislative services agency; attorney general will engage in active supervision of units regulating professions and will evaluate/rank units activities specified; defines “active supervision” as approval, modification, or rejection of disciplinary action, adoption/amendment to rules or policies; conducting investigations and cooperating with legislative services agency

- **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

- **Maryland – Senate Bill 1083**
  - Requires secretary of each department that has boards comprised of market participants to establish regulations for the supervision of such boards
Proposed Legislation

- **Massachusetts – HB 4188**
  o Proposed bill grants director of professional licensing boards authority to reject/rescind board decisions to extend antitrust immunity

- **Minnesota – SF 3311**
  o Establishes the Office of Supervision of Occupational Boards’ Disciplinary Actions to evaluate enforcement actions; review, approve or reject proposed enforcement of licensed or unlicensed practice

- **Nebraska - LR 546**
  o Interim study re: whether boards exposed to antitrust liability

- **New Jersey - A 1057**
  o Allows physicians right to jointly negotiate with insurance carriers and that joint negotiations qualify for state action exemption

- **New York – AB 1961**
  o Similar to New Jersey
Executive Orders

• Alabama – Executive Order #7
  o 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.
  o [Link](http://governor.alabama.gov/newsroom/2015/06/executive-order-number-7-2/)

• Oklahoma – Executive Order 2015-33
  o All disciplinary actions (not rulemaking) must first be reviewed by AG’s office before formal hearing will occur
  o [Link](https://www.sos.ok.gov/documents/executive/993.pdf)
Attorney General Opinions

- Idaho – Opinion 16-1
  - 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.
Advice Going Forward
Going Forward

- Don’t overreact.

- Conduct training. Have an attorney, knowledgeable about the case and anti-trust implications of your decisions, conduct training for Board member.

- Act in good faith and within the scope of your authority. Stay true to your core functions.

- Avoid non-relevant labels, such as age, bd. certification, integrative medicine, telemedicine, teleradiologist, etc.
Going Forward

• Don’t get baited into taking marginal, unlicensed practice of medicine cases or getting enmeshed in politically charged scope of practice disputes unless there is a clearly demonstrable public health reason to do so and significant public harm would result in the absence of intervention.

• Consider purchasing insurance for your board and members that covers antitrust litigation costs (assuming your law permits it).