

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

NC Dental Board: Supreme Court Ruling

- “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?
 - Licensing/Applications?
 - Discipline?
 - 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
 - [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active supervision of state boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active%20supervision%20of%20state%20boards.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

- **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.

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**
 - Proposed bill grants director of professional licensing boards authority to reject/rescind board decisions to extend antitrust immunity
- **Minnesota – SF 3311**
 - 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**
 - Interim study re: whether boards exposed to antitrust liability
- **New Jersey - A 1057**
 - Allows physicians right to jointly negotiate with insurance carriers and that joint negotiations qualify for state action exemption
- **New York – AB 1961**
 - Similar to New Jersey

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.
 - <http://governor.alabama.gov/newsroom/2015/06/executive-order-number-7-2/>
- **Oklahoma – Executive Order 2015-33**
 - All disciplinary actions (not rulemaking) must first be reviewed by AG's office before formal hearing will occur
 - <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.
- <http://www.ag.idaho.gov/publications/op-guide-cert/2016/Opinion16-1.pdf>

Advice Going Forward



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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).