

The North Carolina State Board of Dental Examiners v. Federal Trade Commission



Background

In June 2010, the Federal Trade Commission (FTC) filed a [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 then issued dozens of 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 by stifling market competition under Section 1 of the Sherman Act and constituted unfair competition under the Federal Trade Commission Act. The FTC complained that the Dental Board's actions deprived consumers of the important benefits of competition and provider choice. The Dental Board argued that, because it is a state regulatory agency, it was exempt from FTC scrutiny under the theory of state action immunity. The Commission found that the Dental Board was not exempt from FTC review and state action immunity did not apply because the action taken by the Dental Board was not actively supervised by the State. At trial, the administrative law judge found the Dental Board liable for violating the FTC Act. The full Commission affirmed.

The Dental Board appealed to the 4th Circuit Court of Appeals, which upheld the Commission's decision, and the Dental Board appealed to the United States Supreme Court.

ANA's Position

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, speaking with a singular voice, 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 Nursing Organizations agreed that, despite the concerns of National Council of State Boards of Nursing (NCSBN) and others, accountability of professionals serving on licensing boards would not significantly discourage participation. The Nursing Organizations also argued that active supervision by the state would be appropriate to ensure that any restraint of trade by a medical or other licensing board is pursuant to the clearly articulated policy of the state, rather than in the board's self-interest.

The NCSBN joined the Federation of State Medical Boards and others to file an [amicus brief](#) with the Supreme Court in support of the

Dental Board. NCSBN advocated in favor of granting immunity to the Dental Board because of a concern that licensed professionals will not participate on professional boards if they could be liable for board action. ANA spoke with NCSBN before the Nursing Organizations' amicus brief was filed to explain ANA's position and provide assurance that ANA was not against nurses serving on licensing boards. ANA assured NCSBN that ANA strongly believes in professions' self-regulation and that nurses are vital to the work of boards of nursing.

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 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.

While the Supreme Court's decision only applies where the board is controlled by active market participants, the Court did not define "Active Market Participants." It is safe to assume that licensed individuals sitting on licensing boards who are also practicing the profession they regulate are "active market participants."

ANA analysis

This Supreme Court ruling is likely to 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. "Meaningful state supervision" that SNAs have a hand in crafting could provide another mechanism for addressing ongoing scope of practice concerns. On the other hand, some states may move in the direction of creating "super boards" that would regulate multiple professions undermining the principles related to professional self-regulation. ANA will be actively monitoring state responses and also stand ready to help SNAs as they engage in dialogue with state officials.

Consumer groups are concerned that nearly all states have boards that are composed of market participants and are not adequately supervised by states. Recently 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. [One example from the letter](#) states:

Either the composition of the board receiving such delegation must be changed (e.g., with the addition of a supermajority of non-conflicted "public members") or all actions of a board dominated by active market participants must be subject to a state supervision mechanism that "provide[s] 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests."

What's next for states?

- States should begin to examine their licensing boards to determine whether their boards are at risk of liability under this Supreme Court ruling (e.g., does a majority of board members practice in the profession?).
- States with boards comprised of a majority of members practicing in the profession will have to look at their supervisory structures to determine if they are consistent with the guidance provided by the Court and, if not, develop a mechanism for active state supervision. There are many models with varying benefits and drawbacks.
- States should 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.
- 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.
- 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 <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>

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