



IMPLICATIONS OF NC DENTAL BOARD v. FTC

**JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT
COMMITTEE**

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Specific Issue Before the Court

Whether the NC Dental Board's actions in restraining non-dentist teeth whiteners were protected from antitrust regulation under the doctrine of state-action immunity.



Background of the case



- *Structure and Statutory Authority of the Dental Board*
 - *8 members; 6 dentists (elected by peers), 1 dental hygienist (elected by peers), 1 consumer (appointed by Governor) G.S. 90-22*
 - *Principal duty to create, administer, and enforce a licensing system for dentists. (Article 2, Chap. 90)*

Background of the case

Factual History.

- *1990's – dentists started whitening teeth.*
- *2003 – non-dentists offered service at lower prices.*
- *Dentists complained – mostly about lower prices.*
- *Board investigated – neither hygienist nor consumer participated.*
- *2006 – Board sent at least 47 cease and desist letters to non-dentist teeth whiteners.*
- *Board told Cosmetic Arts Board to warn cosmetologists not to offer service.*
- *Board sent letters to mall operators advising them to stop leasing space to teeth whiteners.*



Background of the case

- Procedural History
 - *2010 – FTC filed complaint against Board for violation of antitrust laws.*
 - *ALJ held hearing, concluded Board unreasonably restrained trade in violation of antitrust law.*
 - *FTC ordered Board to stop sending cease and desist letters.*
 - *Board appealed; Court of Appeals, Fourth Circuit, affirmed the FTC in all respects.*
 - *Sup. Ct. granted certiorari, affirmed Ct. of Appeals.*

The Court's Holding

- The court held that the Board was not entitled to state action immunity in this case.
- ***“While North Carolina prohibits the unauthorized practice of dentistry, the Dental Practice Act is silent on whether that broad prohibition covers teeth whiteners.”***
- The court noted that the Board's concern over teeth whiteners had not resulted in a rule which would have been reviewable by the independent Rules Review Commission.

The Court's Holding

- The court found that, in this case, the Dental Board was a “**nonsovereign actor**” controlled by market participants.
- A nonsovereign actor may not invoke state-action immunity unless its restraining actions are the exercise of the State’s sovereign power.
- **State-action immunity for nonsovereign actors requires:**
 - ❖ **The challenged restraint must be clearly articulated and affirmatively expressed as State policy; AND**
 - ❖ **The policy must be actively supervised by the State.**
- The Dental Board did not get state-action immunity in this case because the State did not actively supervise it.

The Court's Holding

The Dental Board argued that entities designated as State agencies are not required to be actively supervised by the State in order to receive state-action immunity.

- ***“Immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.”***

The Court disagreed.

- ***“Immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in the market, and on what terms, the need for supervision is manifest.”***

The Court's Holding

- What is active supervision?
 - The supervisor must review the substance of the anti-competitive action.
 - The supervisor must have the power to veto or modify the action.
 - The mere potential for state supervision is not enough.
 - The supervisor may not be an active market participant.

“If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under Parker is to be invoked.”

What the Court did not say

- The Court did not say that the Dental Board was not a state agency for any purpose.
- The Court did not say that the State may not include active market participants on occupational licensing boards or other state agencies.
- The Court did not say that the Dental Board would be subject to antitrust violations in performing its clear statutory duties of issuing licenses and disciplining licensees.
- The Court did not say that the Dental Board is powerless to take any actions against non-dentists.
- The Court did not say what specifically constitutes active state supervision.

Implications for NC Licensing Boards

- Most of NC's independent occupational licensing boards are composed of active market participants and there is currently no requirement that they be supervised.
- As a result of the decision, these boards can be sued for antitrust violations and in some cases may be found liable.
- *Situations in which the case does not apply:*
 - When licensing and regulation is done by a State agency not controlled by active market participants.
 - When the licensing board seeks judicial relief.
 - When the licensing board engages in rulemaking.

Possible Options to Respond to the Decision

- Other States' Responses
 - Oklahoma – Executive Order directing boards to submit actions to the Attorney General for review.
 - California – In response to request from legislator, the Attorney General detailed several measures to guard against antitrust liability, including:
 - Changing composition of boards.
 - Adding lines of supervision by state officials.
 - Providing indemnification and antitrust training for board members.

Possible Options to Respond to the Decision

- In evaluating adequacy of active state supervision, the FTC will consider whether the state supervisor:
 - Has, to the extent not already done by the board:
 - Collected relevant facts and data;
 - Conducted public hearings and studies;
 - Invited public comments; and
 - Reviewed market conditions and documentary evidence.

Possible Options to Respond to the Decision (cont.)

- Evaluated the substance of the recommended action and whether the action complies with state standards.
- Issued a written decision approving, modifying or rejecting the proposed action, including a rationale for the decision.
- The FTC noted that active supervision is only necessary if the board seeks state action immunity.

Possible NC Response

- APO could consider making any of the following recommendations:
 - Establish the Occupational Licensing Commission as recommended by PED and authorize it to review anti-competitive actions taken by licensing boards.
 - Delegate review of licensing board actions to the Attorney General or the Governor's office.

Possible NC Response (cont.)

- Modify the composition of the boards by reducing the number of active market participants.
- Strengthen the indemnification of board members who face liability for antitrust violations.
- Require board members to receive specific training in antitrust concepts and the importance of a sound basis for anti-competitive actions.

Conclusion

- The NC Dental Board v. FTC decision has broad implications for state regulation and licensing of occupations.
- APO should consider making recommendations to address this issue.