

Review of North Carolina Board of Dental Examiners v. FTC **574 U.S. 494 (2015)**

Joint Legislative Administrative Procedure Oversight Committee

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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.



What is state-action immunity?

- Concept was first expressed in *Parker v. Brown*, 317 U.S. 341 (1943).
- Units of state and municipal government are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that had foreseeable anticompetitive effects when enacted.

Factual History

Structure and Authority of the NC Dental Board

- 8 total members (G.S. 90-22)
 - 6 dentists (elected by peers)
 - 1 dental hygienist (elected by peers)
 - 1 consumer (appointed by Governor)
- Principal duty is to create, administer, and enforce a licensing system for dentists. (G.S. 90-29 through 90-41)

Factual History

Background

- **1990s** – Dentists started whitening teeth.
- **2003** – Non-dentists offered services at lower prices. Dentists complained to the Board, mostly about the low prices. The Board opened an investigation. The hygienist and consumer member did not participate.
- **2006** – Board sent at least 47 cease-and-desist letters to non-dentist teeth whiteners.
- **2007** - Persuaded the Cosmetic Arts Board to warn cosmetologists not to offer teeth whitening services and sent letters to mall operators advising that they consider expelling non-dentist teeth whiteners.



Procedural History

- **2010** – FTC filed a complaint against the Board for violation of antitrust laws. An ALJ concluded that the Board had unreasonably restrained trade in violation of antitrust law. FTC ordered the Board to stop sending cease-and-desist letters. The Board appealed.
- **2013** – Fourth Circuit Court of Appeals affirmed the FTC in all respects.
- **2014** – Supreme Court granted cert.
- **2015** – Supreme Court affirmed Fourth Circuit (6-3).

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 had not adopted a rule over teeth whiteners that would have been reviewable by the Rules Review Commission.

Holding

- The Court found that the Board, in this case, 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 only applies if:
 - The challenged restraint is 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 it was not actively supervised by the State.

Holding

- What is active supervision?
 - The supervisor must review the substance of the anticompetitive 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.”**

Legislative Response

- **2016** – APO formed a Dental Board Case Subcommittee and recommended legislation in response to the decision.

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015**

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BILL DRAFT 2015-SBz-21 [v.10] (03/02)

**(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
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Short Title: Amend Occupational Licensing Boards Statutes. (Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO RESPOND TO THE HOLDING IN NORTH CAROLINA STATE BOARD OF
3 DENTAL EXAMINERS V. FEDERAL TRADE COMMISSION, AS RECOMMENDED
4 BY THE JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT
5 COMMITTEE.
6 The General Assembly of North Carolina enacts:

Summary of APO-Recommended Legislation

- **G.S. 93B-5:** Add training in federal law, antitrust law, and state action immunity to the list of topics on which all board members of an occupational licensing board must receive biennial training.
- **G.S. 93B-17:** Require occupational licensing boards to adopt rules for the receipt and resolution of complaints, for taking disciplinary or enforcement actions against its licensees, and for taking enforcement actions against persons not licensed by the board.

Summary of APO-Recommended Legislation

- **G.S. 93B-18:** Clarify occupational licensing boards' authority to investigate unlicensed activity and to notify unlicensed persons of possible violations of laws and rules. This section would also provide standardized language for notifying unlicensed persons and entities of possible violations of the law.
- **G.S. 93B-19:** Provide the venue for an injunctive relief sought by an occupational licensing board is the superior court of the county where the defendant resides or in the county where the occupational licensing board has its principal place of business

Summary of APO-Recommended Legislation

- **G.S. 93B-20:** Authorize an occupational licensing board to appear in its own name in actions for injunctive relief, and authorizes the superior court to grant injunctions, restraining orders, or take other appropriate action even if criminal prosecution has been instituted. No board could issue such orders independently of the superior court unless specifically authorized to do so by law.
- **G.S. 93B-21:** Require each occupational licensing board to implement a complaint process, with the requirements specified, and implement that process no later than January 1 of the year following enactment.

Summary of APO-Recommended Legislation

- Overall effect is to provide **more State oversight** over occupational licensing boards.
- Special attention given to actions taken by occupational licensing boards that have the potential for anticompetitive impacts.

Introduced Legislation

- **S783 (2016)** – Referred to Senate Rules and did not receive a hearing.
- **H1007 (2016)** – Passed the House. Referred to Senate Finance but did not receive a hearing.
- **S464 (2017)** – Referred to Senate Rules and did not receive a hearing.
- **S735 (2017)** – *Dental Board* provisions recommended by APO added by the House. Senate did not concur.