

## RESOURCES

# United States Supreme Court Rules That State Licensing Boards May Not Be Immune to Federal Anti-Trust Lawsuits

In a decision that likely will have far-reaching effects on occupational and other licensing boards and agencies nationwide, the United States Supreme Court recently ruled that actions taken by the North Carolina State Board of Dental Examiners (“the Board”) are subject to Federal anti-trust statutes. In the case of *FTC v. NC State Board of Dental Examiners*, decided on February 25, 2015, the United States Supreme Court upheld the Federal Trade Commission’s anti-trust lawsuit against the Board, arising out of the Board’s attempts to regulate the practice of tooth whitening by nondentists in North Carolina. Specifically, the Court held that because the Board was controlled by licensed dentists and since the Board’s actions were not actively supervised by the State of North Carolina, the Board could not invoke the doctrine of state-action immunity to defend against the FTC’s allegations that the Board had violated federal anti-trust laws, specifically the Sherman Act.

The Board is a State agency created by statute to regulate the practice of dentistry, including the licensure of dentists and dental hygienists as well as disciplining licensees who engage in unprofessional conduct. By statute, the majority of the Board members are practicing dentists who are elected statewide by the licensed dentists in this state. The case arose as a result of the Board’s unilateral and unsupervised attempts to force nondentist tooth whitening service providers out of North Carolina, claiming that tooth whitening by such nondentists constituted the illegal practice of dentistry without a license.

The FTC filed suit against the Board, alleging that the Board’s action to exclude nondentists from the market for tooth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Sherman Act. The Board, relying on what it saw as well-settled case law, contended that as a state agency it was immune from anti-trust lawsuits. The FTC prevailed at both the trial and appellate court levels. The U.S. Supreme Court, in a 6-3 decision, sided with the FTC. Construing earlier court decisions, the Supreme Court ruled that because the Board was controlled by actively practicing dentists and since its actions were not “actively supervised” by the state, the Board was not immune to being sued for violating the Sherman Act.

The Supreme Court’s ruling could have unintended and far-reaching effects on all occupational and licensing agencies across the nation. In essence, the actions of any licensing board that is controlled by the licensees it regulates (as is the case with virtually all professional and occupational licensing boards) may be subject to anti-trust lawsuits unless such board’s actions are actively supervised by the state itself. This means that the actions taken by any licensing board that is not actively supervised by the state are subject to anti-trust scrutiny if those actions have the tendency to, for example, drive competitors out of the market. How this ruling will impact disciplinary actions commenced by a licensing board against a licensee remains to be determined. However, since discipline such as suspension or revocation of an occupational license is frequently issued by licensing boards and does, by its very nature, reduce competition, challenges to such discipline on anti-trust grounds may occur.

Since, in the instant case, the FTC was not seeking a monetary judgment against either the Board or its members, the Court side-stepped the issue of whether, and under what circumstances, a licensing board or its members might be held liable for money damages in an anti-trust lawsuit.

The Supreme Court opinion can be found [here](#).

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