

STATE SUPERVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS - BACKGROUND MEMORANDUM

The Legislative Management assigned to the Administrative Rules Committee a study directed by 2017 House Concurrent Resolution No. 3026 ([Appendix A](#)). The resolution provides for a study of the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity. According to the testimony in support of this resolution, the request for the study is in response to the 2015 United States Supreme Court decision, *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015). In *North Carolina Dental*, the Supreme Court held when a controlling number of a state's occupational or professional licensing board members are market participants, the board must be "actively supervised" to be immune from antitrust law.

BACKGROUND

Licensing boards are a creation of state law. The laws governing licensed occupations and professions often provide for regulation and oversight of the licensees through the appointment, often by the Governor, of members of the occupation or profession to licensing boards. The board is responsible for ensuring the licensees maintain high standards of professionalism and quality of care to safeguard public health and safety. Licensing boards adopt administrative rules, discipline licensees, and respond to consumer complaints. Most licensing boards have the statutory authority to sanction licensees for unprofessional or unlawful conduct, by way of reprimand or suspension or revocation of a license.

When a majority of the members of any state licensing board are competitors of the individuals regulated by the board, board decisions and policies that restrain trade may raise antitrust issues. Licensing board members often are either unaware of the applicability of the antitrust laws to their board or are inadequately educated to recognize the type of actions that may expose the board to antitrust risk. Even if board members believe that competition restraining policies are necessary to ensure high professional standards, quality services, or quality patient care, a court may find the policies do not justify the restraint of trade.

Antitrust Laws and the State Action Doctrine

Antitrust laws exist to ensure a competitive marketplace. The Sherman Antitrust Act of 1890 [15 U.S.C. §§ 1-7] is a federal law that attempts to maintain free and orderly markets by prohibiting monopolies and other efforts in restraint of trade. When businesses, commonly referred to by the courts as "market participants," engage in prohibited anticompetitive behavior, the businesses expose themselves to liability under federal antitrust law. The Sherman Act does not expressly distinguish state agencies from private parties when it comes to restraining trade; however, since 1943 certain forms of state action have been immune from the antitrust laws as the result of case law.

State-action immunity is a doctrine created by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). This doctrine exempts from prosecution under the antitrust laws certain activities the state has decided to regulate rather than allow the marketplace to discipline itself. The rationale behind the *Parker* immunity is that in enacting the Sherman Act, Congress did not intend to restrain state behavior. The state action doctrine provides immunity to states, state actors, and private actors from liability for violations of federal antitrust laws if the actor's anticompetitive actions are actions of the state.

For the doctrine to apply, the United States Supreme Court has extended its state action doctrine of antitrust immunity to cover three sets of circumstances:

1. **State conduct.** Actions taken by the state's lawmakers or state supreme court, which result in anticompetitive effects, enjoy immunity from federal antitrust laws.
2. **Private parties acting under the active supervision of the state.** Under the two-prong test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), private parties may claim state-action immunity if the parties' actions are: (a) pursuant to a clearly articulated and affirmatively expressed state policy; and (b) actively supervised by the state.
3. **Municipalities acting pursuant to a clearly articulated state policy.** The United States Supreme Court has held municipalities need not show active state supervision as a prerequisite to securing the protections of the state action doctrine.

The case law in the area of antitrust laws and application of the state-action immunity doctrine, which has been evolving since 1943, led to the question raised in *North Carolina Board of Dental Examiners v. Federal Trade Commission*: If the state agency in question is a professional licensing board comprised of private industry members, must another state actor supervise the agency for it to be immune from the antitrust laws?

NORTH CAROLINA BOARD OF DENTAL EXAMINERS V. FEDERAL TRADE COMMISSION

The North Carolina Dental Practice Act (N.C. Gen. Stat. §§ 90-22-90-48.3) grants the North Carolina Board of Dental Examiners (board) broad authority to regulate the practice of dentistry. The board consists of eight members, including six members who must be licensed, actively practicing dentists, one member who must be a licensed, actively practicing dental hygienist, and the final member who must be a nondentist consumer. Licensed dentists in North Carolina elect the six dentist members and licensed hygienists elect the hygienist member of the board. The Governor appoints a resident of North Carolina to serve as the consumer member of the board. The board's primary function is to create, administer, and enforce a licensing system for practicing dentists. If the board suspects an individual of engaging in the unlicensed practice of dentistry, the board may bring an action to enjoin the individual from continuing the unlawful practice.

In the 1990s dentists in North Carolina began offering teeth whitening services. Around 2003 many nondentists entered the teeth whitening market, offering whitening services at considerably lower prices than dentists who offered the same service. Practicing dentists complained to the board about the nondentist providers offering whitening services. The board investigated the provision of teeth whitening services by nondentists and indicated its intent to stop the nondentist providers.

At the conclusion of the board's investigations, the board issued 47 cease and desist letters, on official board letterhead, to the nondentist teeth whitening providers. These letters requested the providers cease and desist "all activity constituting the practice of dentistry." The letters indicated providing teeth whitening products and services by nondentists is a misdemeanor under North Carolina law. The board also contacted the North Carolina Board of Cosmetic Art Examiners and requested that board warn cosmetologists to refrain from providing teeth whitening services. The result of the board's efforts was to end the provision of teeth whitening services by nondentists and to cause manufacturers and distributors of teeth whitening products for nondentist providers to leave North Carolina or to decide not to do business in North Carolina.

On June 17, 2010, the Federal Trade Commission (FTC) issued an administrative complaint against the board for violating the Federal Trade Commission Act [15 U.S.C. § 45]. The board moved to dismiss the complaint, arguing as an agency of the state, the board's actions were that of the state itself and, consequently, the board was exempt from federal antitrust liability under the state action doctrine. An administrative law judge denied the board's motion to dismiss and FTC affirmed the administrative law judge's decision. Finding that the board's actions to exclude nondentist providers from the teeth whitening market were not actively supervised by the state, FTC declined to extend immunity to the board under the state action doctrine.

The board filed a federal declaratory action in the United States District Court for the Eastern District of North Carolina to enjoin the FTC's administrative proceeding. The district court dismissed the board's declaratory action, reasoning it lacked subject matter jurisdiction to render a judgment. After the federal district court dismissed the board's declaratory action, an administrative law judge held a trial on the merits. The administrative law judge found that the board violated the Federal Trade Commission Act through its anticompetitive actions to exclude nondentist practitioners from the teeth whitening market. On appeal, FTC affirmed the administrative law judge's findings on the same grounds.

The board appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359 (4th Cir. 2013), upheld the FTC's conclusion that the board was a "private actor" because the board consisted primarily of market participants. According to the Fourth Circuit, to invoke state-action immunity as a private actor, the board could take anticompetitive actions to benefit its own membership; however, the board first must satisfy both the "clear articulation" and "active supervision" requirements of *Midcal*. The Fourth Circuit further concluded the board's anticompetitive actions did not have the sufficient supervision to meet the active state supervision prong of the *Midcal* test. The Fourth Circuit determined the board could not invoke state-action immunity protection from antitrust laws. The United States Supreme Court granted certiorari to decide whether, to invoke state-action immunity, the board's anticompetitive actions should be subject to the active supervision requirement.

On February 25, 2015, the United States Supreme Court affirmed the Fourth Circuit's decision in a 6-3 decision. The Supreme Court rejected the board's arguments and held "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity." The majority also found because a controlling number of the board's decisionmakers are active market participants in the occupation the board regulates, the board is treated as a private actor and must show active supervision by the state. The Court concluded the board did not meet the active supervision requirement.

The Court also reaffirmed the active supervision requirement is "flexible and context-dependent." The Court did not address what procedures would be sufficient to show active supervision. The Court, however, indicated the four basic requirements for active supervision are:

1. The review must be substantive, not merely procedural;
2. The supervisor must have the power to veto or modify the particular decisions;
3. The mere potential for review is not enough; it must actually occur; and
4. The supervisor may not be an active market participant.

STATES' RESPONSE TO THE *NORTH CAROLINA DENTAL DECISION*

According to a report ([Appendix B](#)) of the National Conference of State Legislatures (NCSL), since the 2015 decision, numerous lawsuits have been filed against licensing boards. Among the most common complaints against boards have been difficult entry requirements, arbitrary restrictions on offering innovative services, and unclear definitions of the scope of a given occupation or profession. Most claims have been settled or dismissed due to the lack of a credible antitrust claim.

To assist state governors, legislatures, and licensing boards, FTC issued a 13-page guidance paper ([Appendix C](#)). The paper advises states to avoid federal antitrust laws by creating regulatory boards that are advisory only or by staffing those boards with members who do not have a financial interest in the occupation or profession being regulated.

According to NCSL, the primary question states have been working to address the 2015 ruling in *North Carolina Dental* is who should do the supervising. The report indicated the states are handling the supervision of licensing boards through executive orders, legislative proposals, and opinions issued by the states' attorneys general.

For example, the:

- Connecticut General Assembly passed a law in 2016 that makes any exercise of statutory functions, including licensing, subject to the approval of the state's Department of Consumer Protection.
- Indiana has established a committee to reform the way appeals of decisions of licensing boards are handled with the goal of moving away from traditional single administrative law judge models toward of panel of judges who hear appeals from boards and agencies.
- Governors in Alabama and Massachusetts issued executive orders establishing regulatory oversight boards to review, modify, or veto the actions of boards and commissions.
- Arkansas Legislature passed a bill in 2015 requiring all board rules and regulations be approved by a subcommittee of the Legislative Council. Previously the subcommittee's authority was a simple review of proposed board actions.

To address states' concerns and questions regarding the impact of and solutions to the Supreme Court decision, the State and Local Legal Center in Washington, D.C. has provided information ([Appendix D](#)) that identifies three options for states to consider to be in compliance with *North Carolina Dental*:

- Do not put a controlling number of active market participants on boards;
- Actively supervise boards on which market participants make up a controlling number of members; or
- Forgo state-action immunity by not actively supervising boards and keeping a controlling number of market participants on boards.

Attached as [Appendix E](#) is a document prepared by NCSL summarizing legislation enacted by states in response to *North Carolina Dental*.

NORTH DAKOTA PROFESSIONAL LICENSING BOARDS

North Dakota law provides for the licensure of certain occupations and professions. The primary method of licensing individuals engaged in occupations and professions is by statutory licensing boards; however, some are licensed by state agencies.

Most statutes regulating occupational and professional licensing boards are contained in North Dakota Century Code Title 43, and most of the occupations and professions licensed and regulated in Title 43 are health care and counseling related. Other professions licensed under Title 43 include abstractors, accountants, architects, social workers, trade professions (such as electricians and plumbers), and certain service industry workers (such as barbers and cosmetologists). Professions regulated by licensing boards contained in other titles including teachers (Title 15) and attorneys (Title 27).

The membership of the occupational and professional licensing boards varies from board to board. The Governor appoints most members of licensing boards in North Dakota. Requirements for board membership among the many regulated occupations and professions include criteria such as age, residency, education, licensure in that regulated profession or occupation, and membership in a particular professional organization.

SUGGESTED STUDY APPROACH

In its study of the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity, the committee may want to approach the study as follows:

- Receive information from the Attorney General's office regarding the *North Carolina Board of Dental Examiners v. Federal Trade Commission* case and its impact on North Dakota;
- Receive information from the National Conference of State Legislatures and the Council of State Governments regarding the case and what other states have done to address antitrust concerns;
- Review the structure and authority of the state's occupational and professional licensing boards; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:5