



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

2015 U.S. LEXIS 1502 (2015), 719 F.3d 359 (4th Cir. 2013)

Topics Covered: Antitrust, Scope of Practice

**Outcome: Very Unfavorable**

## Issue

The issue in this case was whether a scope of practice decision of a state licensure board fell outside the federal antitrust laws under the “state action doctrine.”

## AMA Interest

The AMA believes that state medical boards should have the authority to regulate the practice of medicine.

## Case Summary

The North Carolina State Board of Dental Examiners (NCSBDE) was an agency of the State of North Carolina, charged with regulating the practice of dentistry in North Carolina. Under the North Carolina Dental Practice Act, it was unlawful to practice dentistry in North Carolina without a dental license. The Dental Practice Act further provided that a person is deemed to be practicing dentistry if that person “[r]emoves stains, accretions or deposits from the human teeth”.

Beginning in approximately 2003, non-dentists began providing teeth whitening services at mall kiosks, spas, retail stores, and salons. Subsequently, the NCSBDE issued cease and desist letters to non-dentist teeth whitening service providers and distributors of teeth whitening products and equipment. In addition, the NCSBDE sent letters to mall owners and operators urging them not to lease space to non-dentist teeth whitening providers.

The FTC enforcement staff brought an administrative action against the NCSBDE, claiming that the NCSBDE, through its issuance of the cease and desist letters, was violating Section 5 of the FTC Act, 15 USC §45. Section 5 of the FTC Act directs and empowers the FTC to prevent “unfair methods of competition.” The FTC found that, since a majority of the members of the NCSBDE were practicing dentists and not employees of the state, for purposes of the antitrust laws the NCSBDE should be deemed a private person, rather than part of a state government.

Because the State of North Carolina did not actively supervise its actions, the NCSBDE was subject to the federal antitrust laws.

The FTC issued its own cease and desist order against the NCSBDE. The FTC order prohibited the NCSBDE from directing non-dentists to cease and desist from providing teeth whitening services, unless the NCSBDE communications included language the FTC had pre-approved. The FTC did not decide whether or under what circumstances teeth whitening may constitute the practice of dentistry under the North Carolina Dental Practice Act.

The NCSBDE has appealed the FTC Order to the United States Court of Appeals for the Fourth Circuit. However, the Fourth Circuit denied the NCSBDE petition. It held that the NCSBDE cease and desist letters were unauthorized and, since a majority of the members of the NCSBDE were themselves practicing dentists and were elected by other practicing dentists, the NCSBDE should be deemed an organization of private persons. Accordingly, the state action doctrine did not apply, and NCSBDE could not restrain competition through the cease and desist letters. The Supreme Court then granted *certiorari*.

On February 25, 2015, the Supreme Court affirmed in a split decision. The Court held that state professional licensure boards controlled by active market participants are subject to suit under the federal antitrust laws unless both (i) the state has clearly articulated an intent to impact competition through activities of the licensure board and (ii) the state actively supervises the licensure board actions. The Supreme Court went on to hold that active supervision requires a review of the substance of the board's decision and not merely the procedures followed to produce it, the supervisor must have the power to veto or modify the board's decision to ensure it is in accord with state policy, and the supervisor cannot itself be an active market participant. The Court suggested that there may be additional supervisory requirements as well, but "the adequacy of supervision ... will depend on all the circumstances of a case."

### **Litigation Center Involvement**

The Litigation Center filed an *amicus* brief in the Fourth Circuit in support of the NCSBDE. The Litigation Center also filed an *amicus* brief in support of the NCSBDE petition for *certiorari*. In addition, the Litigation Center, along with several other health care organizations, filed an *amicus* brief in support of the NCSBDE on the merits in the Supreme Court.

United States Court of Appeals for the Fourth Circuit brief

United States Supreme Court brief in support of petition for *certiorari*

United States Supreme Court brief in support on the merits