



NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS V. FEDERAL TRADE COMMISSION

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STATE ACTION IMMUNITY DOCTRINE

This doctrine originated in 1943 with *Parker v. Brown*, 317 U.S. 341. It provides that when states act in their sovereign capacity, their otherwise anticompetitive conduct is immune from scrutiny under federal antitrust law. The doctrine also applies to private actors if (1) their anticompetitive activity occurs pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and (2) the state actively supervises that policy.

In *North Carolina Dental*, the Court held that the state's dental board was not entitled to this immunity when it acted to deter non-dentists from offering teeth whitening services, as the board was a nonsovereign entity controlled by active market participants and did not receive active supervision by the state.

ISSUE

This report briefly summarizes the U.S. Supreme Court's decision in [*North Carolina State Board of Dental Examiners v. Federal Trade Commission*](#), 135 S.Ct. 1101 (2015), and its implications for Connecticut. How do Connecticut's boards function in comparison to the North Carolina board? Are there states with boards that function differently enough to not be affected by the decision?

The Office of Legislative Research is not authorized to provide legal opinions and this report should not be considered as one.

SUMMARY

In this case, the Federal Trade Commission (FTC) filed an administrative complaint charging the North Carolina State Board of Dental Examiners with violating federal antitrust law. The board had issued cease-and-desist letters to non-dentist teeth whitening providers and product manufacturers and took other actions intended to deter non-dentists from offering teeth whitening services. While North Carolina law vests in the board the authority to regulate dentistry, the law does not address whether teeth whitening constitutes the practice of dentistry.



The FTC alleged that the board's actions constituted an anticompetitive and unfair method of competition in violation of federal antitrust law. The board moved to dismiss on the grounds of state action immunity (see sidebar).

The case eventually reached the U.S. Supreme Court. A majority of the Court held that the board was not entitled to state action immunity. The board was controlled by active market participants (six of the eight board members were dentists), and the state did not actively supervise the board when it interpreted the dental practice act as addressing teeth whitening and took action to deter non-dentists from offering such services.

In rejecting the board's argument that entities designated by a state as an agency are exempt from the active supervision requirement, the Court noted that "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." The Court identified certain required factors for active supervision but noted that the overall inquiry on the adequacy of supervision will depend on context. In October 2015, FTC staff issued a [guidance document](#) on the active supervision requirement.

It appears that the decision may impact certain professional regulatory boards in most, if not all, states. Many professional licensing boards are controlled by active market participants, and those boards are not always subject to the type of supervision described in the case. The National Governors Association, National Conference of State Legislatures, and Council of State Governments together submitted an amicus curiae [brief](#) to the Court in support of the North Carolina Dental Board. The brief noted that every state uses boards and commissions to perform a variety of functions and many states "use boards and commissions to implement public policy."

Similar to the North Carolina Dental Board, many of Connecticut's professional licensing boards include active market participants as a majority of membership. In 2015, Connecticut enacted legislation addressing the case, by increasing the Department of Public Health's (DPH) oversight over the department's professional licensing boards and commissions ([PA 15-5, June Special Session](#), § 493). This session, a governor's bill ([SB 15](#)) would further address the case in the context of boards or commissions within the Department of Consumer Protection (DCP).

NORTH CAROLINA DENTAL DECISION

Active Supervision Requirement

In *North Carolina Dental*, the Court held that the state's dental board was not entitled to state action immunity from federal antitrust law, because the board was a nonsovereign entity controlled by active market participants and did not receive active supervision by the state. The Court wrote that "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern."

The Court noted that "the inquiry regarding active supervision is flexible and context-dependent," while reviewing "a few constant requirements of active supervision" established in prior cases:

The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the "mere potential for state supervision is not an adequate substitute for a decision by the State." Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case (135 S.Ct. at 1116-1117) (internal citations omitted).

In October 2015, FTC staff issued a [guidance document](#) describing when active supervision is required. For example, the document states that "[a]ctive market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision."

The document also describes factors relevant in determining whether the active supervision requirement has been met. These include whether the supervisor has (1) obtained the information necessary to properly evaluate the board's proposed action; (2) evaluated the substantive merits of the proposed action and assessed whether it aligns with standards established by state law; and (3) issued a written decision approving, modifying, or disapproving the action and explaining the rationale for that decision.

North Carolina Dental Board Composition and Actions

North Carolina's dental board is charged with regulating dentistry in the state. Specifically, the law states that the board is "the agency of the State for the regulation of the practice of dentistry." The board consists of six dentists, one dental hygienist, and one consumer. The board may promulgate regulations governing dental practice in the state consistent with the state dental practice act and subject to the approval of the state Rules Review Commission (N.C. Gen. Stat. Ann. § [90-22](#), [90-48](#)). The act does not specify that teeth whitening falls within the practice of dentistry.

In describing the board's activities to deter non-dentists from teeth whitening, the Court noted the lack of oversight by the state:

After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. . . . there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists (135 S.Ct at 1116).

Connecticut Comparison

Like the North Carolina Dental Board, many of Connecticut's licensing boards consist primarily of active market participants. In most cases, these boards are not authorized to promulgate regulations; there are some exceptions (e.g., the Board of Accountancy, [CGS § 20-280](#)).

Table 1 provides examples of board composition for five licensing boards or commissions under Connecticut law, three within DPH and two within DCP.

Table 1: Examples of Professional Licensing Boards or Commissions in Connecticut

Board	Composition
Dental Commission (CGS § 20-103a)	<ul style="list-style-type: none"> • Six dentists • Three public members
Medical Examining Board (CGS § 20-8a)	<ul style="list-style-type: none"> • 13 physicians • One physician assistant • Seven public members
Board of Examiners for Optometrists (CGS § 20-128a)	<ul style="list-style-type: none"> • Four optometrists • Three public members
Real Estate Commission (CGS § 20-311a)	<ul style="list-style-type: none"> • Three real estate brokers • Two real estate salespersons • Three public members
Architectural Licensing Board (CGS § 20-289)	<ul style="list-style-type: none"> • Three architects • Two public members

Connecticut Legislation

As summarized below, the legislature enacted a law in 2015 increasing DPH’s supervision of its boards and commissions and is considering a bill this session to increase DCP’s supervision.

2015 Legislation. Last year, the legislature enacted changes to the oversight of DPH boards and commissions, presumably in response to the *North Carolina Dental* decision ([PA 15-5, June Special Session](#), § 493).

Under the act, DPH’s boards and commissions must notify the department when they (1) receive complaints or (2) either receive petitions or initiate proceedings for declaratory rulings under the Uniform Administrative Procedure Act (UAPA). The DPH commissioner or his designee, within 15 days after receiving any such notice, may notify the board or commission that the (1) decision it renders in the matter will be a proposed decision and (2) commissioner or designee will render the final decision. In making the proposed final decision, the board or commission must comply with the UAPA’s requirements for proposed final decisions.

Under the act, the commissioner or his designee may approve, modify, or reject the proposed decision, or remand it for further review or to gather additional evidence. Within 30 days after a board or commission issues a proposed decision, any party to the matter may file a written exception. The act specifies that the commissioner’s or designee’s decision (rather than the board’s or commission’s) is final under the UAPA, subject to an aggrieved person’s right to file (1) a petition for reconsideration with DPH or (2) an appeal with the Superior Court.

2016 Bill. This session, the Government Administration and Elections Committee is considering a governor's bill intended to further address the *North Carolina Dental* decision ([SB 15](#), An Act Adopting the Requirements of *North Carolina State Board of Dental Examiners v. Federal Trade Commission* and Making Minor Revisions to Boards and Commissions Statutes). The bill is scheduled for a public hearing on February 22.

The bill (§ 2) provides that any exercise of statutory functions by a board or commission within DCP is a proposed decision, subject to the DCP commissioner's approval, rejection, or modification. Under current law, these boards and commissions exercise their statutory functions independently of the commissioner.

The bill requires boards or commissions within DCP to transmit any proposed decisions within their statutory authority to the DCP commissioner. The commissioner then has 30 days to notify the board or commission that the commissioner or his designee will render the final decision. The bill allows the commissioner or designee to approve, modify, or reject the proposed decision, or remand it for further review or to gather additional evidence. The bill specifies that the commissioner's or designee's decision is final under the UAPA for purposes of reconsideration or appeal to the Superior Court.

Under the bill, if the commissioner or his designee fails to act on the matter within 30 days, the proposed decision is considered approved by the commissioner and is deemed the final decision of the board or commission for purposes of appeal.

ADDITIONAL READING

Gringer, David. *Antitrust Treatment of State Licensing Boards in the Wake of North Carolina State Board of Dental Examiners vs F.T.C.*, available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/antitrust-treatment-of-state-licensing-boards.pdf.

National Conference of State Legislatures. *Active Supervision After NC Dental*, Webinar, January 21, 2016, available at <http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/active-supervision-after-nc-dental.aspx>.

National Law Review, *Supreme Court Clarifies "Active Supervision" Prong of Antitrust's State Action Exemption*, February 26, 2015, available at <http://www.natlawreview.com/article/supreme-court-clarifies-active-supervision-prong-antitrust-s-state-action-exemption>.

Soronen, Lisa and Elizabeth Woods, State and Local Legal Center, *NC Dental: What Did the Supreme Court Say and What Can States Do?*, September 2015, available at

<http://static1.1.sqspcdn.com/static/f/624306/26552206/1442864215407/SLLC+NC+Dental+Board.pdf?token=WVQM%2FK4rEWquAxF4AXLEp53fwvM%3D>.

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