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***North Carolina State Board of Dental
Examiners v. Federal Trade Commission,
135 S. Ct. 1101 (2015)***

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Agenda

***North Carolina State Board of Dental Examiners
v. FTC***

- Antitrust laws
- Background/Facts of case
- *Overview of United States Supreme Court opinion*
- Relevance to state boards
- Summary

Antitrust Laws

- Laws intended to promote *competition*
- Protect free competition from **interference by private forces acting in their own *self interest***
- **Consumer harm:** higher prices, reduced output, lower product or service quality, decreased innovation or product improvement
- **Premise:** free and open competition results in best products and services

Antitrust Laws

- **Federal Trade Commission Act** prohibits “unfair methods of competition” and “unfair or deceptive acts or practices”
- **Sherman Anti-Trust Act** prohibits:
 - agreements in restraint of trade and
 - actions to *unlawfully* obtain, extend, maintain a *monopoly*
- **Clayton Act** prohibits price discrimination, tying arrangements, and mergers or acquisitions that would substantially lessen competition
- Violations can create criminal and civil liability (treble damages, attorneys’ fees)

Federal Trade Commission

- United States federal government agency established in 1914
- Principal mission: promotion of consumer protection and elimination and prevention of anti-competitive business practices
- Five commissioners, nominated by President and confirmed by Senate
- Enforces antitrust laws, reviews proposed mergers, investigates business practices

Antitrust Laws...

State Action Doctrine

- Originally established by the Supreme Court in 1943 and elaborated upon in subsequent cases
- Actions by a state are not subject to the federal antitrust laws
- Sub-state government entities also immune, so long as acting pursuant to a “clearly articulated policy to displace competition”
- Private entities may be protected if, in addition, they are “actively supervised” by the state

Background - Facts of Case

- North Carolina Board of Dental Examiners reviewed its dental practice act
- Concluded the Act permitted only dentists to whiten teeth
- Sent cease-and-desist letters to non-dentists who were whitening teeth and suppliers of the products
- Teeth whitening industry complained
- FTC opened investigation in 2008
- June 2010 - FTC concluded Dental Board's actions were anticompetitive and brought administrative complaint

4th Circuit Ruling

- Fourth Circuit supported FTC position
- Emphasis on Board being comprised of a "decisive coalition" of participants in the regulated market chosen by and accountable to fellow market participants
- Thus, private actor and active supervision required
- State did not oversee the cease-and-desist letters;
- Generic oversight insufficient
- Concurring judge noted that, had Board members been appointed by Governor, it would be a state entity . . . and active supervision requirement would not apply

Appeal to United States Supreme Court

- March 2014: US Supreme Court agreed to hear the case
- Nineteen *amicus curiae* briefs filed
- Included 15 regulatory and professional organizations submitted a brief in support of antitrust immunity for state boards
- Oral argument held October 14, 2014

Amicus Arguments

- State regulatory boards like the NC Dental Board are clearly state entities
- Fourth Circuit's ruling imperils states' ability to delegate their authority to expert regulatory boards
- Requiring "active supervision" of state boards would negate agencies' efficiency benefits
- Fourth Circuit's test improperly looks behind state action to inquire into the private motives of state boards members.
- Fourth Circuit improperly presumed that state regulatory boards do not act in the public interest
- Threat of antitrust liability could paralyze boards, deter participation, and chill decision making

United States Supreme Court

- 6 - 3 decision (Alito, Scalia and Thomas dissenting)
- Majority's Conclusion:
Because a “controlling number” of the Board’s decision makers 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 “active supervision” requirement was not met here

Majority:

- **There are limits on immunity:** State-action immunity exists to prevent conflict between state sovereignty and federal competition policy *but* it is not unbounded
- **Board is not sovereign:** State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity
 - The North Carolina Board is a “nonsovereign actor” - an entity whose conduct does not automatically qualify as that of the sovereign state itself

Majority:

- **Active Supervision is required:** A nonsovereign actor controlled by “active market participants” enjoys immunity only if the challenged conduct is actively supervised by the state
 - “Clearly articulated policy” prong presumed here
- **State Supervision must be meaningful:** Immunity requires more than a “mere facade of state involvement” - states must accept accountability
 - “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”

Majority:

Citizens need not be discouraged from serving:

- Long tradition of professional self-regulation in US
- States may see benefits to staffing agencies with experts
- No claim for money damages here, so Court did not address whether board members may be immune from money damages in some circumstances
- State can provide for defense and indemnification
- State can ensure immunity by adopting clear policy to displace competition and, if agency controlled by active market participants, providing active supervision

Majority:

- **How much state supervision is required?**
 - Test is “flexible and context-dependent”
 - Don’t need day-to-day involvement in operations or micromanagement of every decision
 - Review mechanism must provide “realistic assurance” that conduct “promotes state policy, rather than merely the party’s individual interests”
- **Four requirements:**
 - Supervisor must review substance, not merely procedures;
 - Must have power to veto or modify;
 - Mere potential for supervision not enough; and
 - Supervisor can’t be active market participant

Relevance to Regulatory Boards

- Broader issue of “state action” is relevant to all regulatory boards
- Many boards include practitioner members
- Amount of interface with the state may vary
- Second recent Supreme Court ruling narrowing state-action defense
- FTC strongly disfavors state action defense and seeks a high bar for “active supervision”

Summary

- **First Prong:** Clearly articulated state policy to displace competition
- **Second Prong:** Four requirements for “active supervision”
 - *Supervisor must review substance, not merely procedures;*
 - *Must have power to veto or modify;*
 - *Mere potential for supervision not enough; and*
 - *Supervisor can't be active market participant*
- **Note:** Method of board member selection not an express factor in Supreme Court's decision