

The AHLA logo consists of the letters "AHLA" in a white, bold, sans-serif font, centered within a solid red rectangular background.

The Supreme Court's Ruling on Antitrust Immunity for State Regulatory Boards: *North Carolina State Board of Dental Examiners v. FTC* May 1, 2015 | 3:00-4:15 pm Eastern

This roundtable is sponsored by the Antitrust Practice Group and is co-sponsored by the Fraud & Abuse, Health Care Liability & Litigation; Health Information & Technology; Hospitals & Health Systems; In-House Counsel; Medical Staff, Credentialing, & Peer Review; Physician Organizations; Regulation, Accreditation, & Payment; and Teaching Hospitals & Academic Medical Centers Practice Groups.

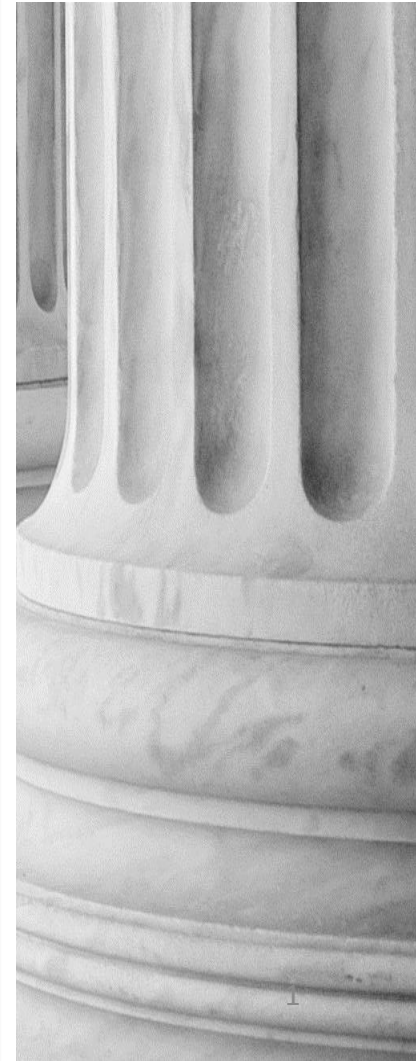
Faculty :

Hashim M. Mooppan
Jones Day, Washington, DC

Michael L. Sibarium
Pillsbury Winthrop Shaw Pittman LLP,
Washington, DC

Melissa Westman-Cherry
Federal Trade Commission, Washington, DC

*Ms. Westman-Cherry did not prepare these slides and they do not purport to reflect her views or the views of the Federal Trade Commission or any individual Commissioner.



- **BACKGROUND / OVERVIEW OF STATE ACTION DOCTRINE**
- **SUMMARY OF THE COURT'S DECISION**
- **IMPLICATIONS**

- The North Carolina Legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in the State."
 - The Board is empowered to create, administer, and enforce a licensing system for dentists, including to bring actions in the name of the State of North Carolina to enjoin persons from unlawfully practicing dentistry.
 - Of the Board's eight members, six must be licensed, practicing dentists, who are elected by other North Carolina licensed dentists.
- Starting in 2006, the Board sent official cease-and-desist letters to non-dentist teeth whitening service providers and product manufacturers in the state.
- Non-dentists left the market.

- In 2010, the Federal Trade Commission filed an administrative complaint challenging the Board's cease-and-desist letters as an anticompetitive practice and unfair method of competition under § 5 of the Federal Trade Commission Act
 - The FTC argued that the Board's actions amounted to concerted action to exclude non-dentists from the North Carolina teeth-whitening services market

- The Board moved to dismiss on the grounds that it was a state actor and therefore immune from antitrust scrutiny under Supreme Court precedents
 - *Parker v. Brown*, 317 U. S. 341 (1943) – interpreted federal antitrust laws not to apply to anticompetitive actions taken by the states in their governmental capacities as sovereign regulators

- Until *NC Dental*, Supreme Court precedent recognized three categories of actors:
 - (a) *Hoover v. Ronwin*, 466 U.S. 558 (1984) – **state sovereigns** (i.e., legislature and state supreme courts) are *ipso facto* immune
 - (b) *Hallie v. Eau Claire*, 471 U.S. 34 (1985) – **municipalities** (and "likely" other non-sovereign public entities) are immune so long as implementing a clearly articulated state policy to displace competition
 - (c) *California Retail v. Midcal*, 445 U.S. 97 (1980) – **private actors** are immune only if both implementing a clearly articulated state policy to displace competition and actively supervised by the State

- The FTC denied the Board's state-action defense
 - The FTC concluded that since the Board was controlled by market participants, it should be treated as a "public/private hybrid" and subjected to the active-supervision requirement, which it failed to satisfy
- In 2013, the Fourth Circuit affirmed

Supreme Court Decision

- Question presented to the Court: whether the FTC erred in extending the active-supervision requirement that applies to private parties to a state regulatory board simply because the board's members are also active market participants
- In a 6 to 3 ruling penned by Justice Kennedy, the Court affirmed the FTC's decision
 - “[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 held that:
 - The active supervision requirement is designed to obtain “realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.”
 - “[S]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirement was created to address.”
 - There is a “structural risk of market participants’ confusing their own interests with the State's policy goals.”
 - A board’s actual structure, and not its “formal designation,” determines whether supervision is required. The analysis turns on “the risk that active market participants will pursue private interests in restraining trade.”

Supreme Court Decision – Dissent

- Justice Alito, joined by Justices Scalia and Thomas, dissented
- Emphasized that state professional regulatory boards have long been composed of a majority of active market participants, yet the Court had never applied the active-supervision requirement to such boards, even though they have long been accused of furthering the interests of the industry rather than the public
- Called the court’s decision a “serious misunderstanding” of how state-action antitrust immunity is supposed to work
- *Parker* immunity is based on the proposition that “an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress”
- “*Parker* immunity was never conditioned on the proper use of state regulatory authority,” and the Sherman Act “is not an anticorruption or good-government statute”
- The ruling “will create practical problems and is likely to have far-reaching effects on the states’ regulation of professions”

Practical Implications: Options for States Seeking to Avoid Antitrust Liability for their Professional Regulatory Boards

1. Change the board's composition so that it is not "controlled" by market participants
2. Actively supervise those boards that are controlled by active market participants
3. Reduce exposure to substantive antitrust liability or damages

The Supreme Court’s Ruling on Antitrust Immunity for State Regulatory Boards: North Carolina State Board of Dental Examiners v. FTC © 2015 is published by the American Health Lawyers Association. All rights reserved. No part of this publication may be reproduced in any form except by prior written permission from the publisher. Printed in the United States of America.

Any views or advice offered in this publication are those of its authors and should not be construed as the position of the American Health Lawyers Association.

“This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought”—from a declaration of the American Bar Association.