

February 27, 2015

TO: Deans of United States Dental Schools
Directors of Advanced Dental Education Programs
Directors of Allied Dental Education Programs
ADEA Board of Directors
ADEA Legislative Advocacy Committee

FROM: Rick Valachovic, D.M.D., M.P.H., ADEA President and CEO
Yvonne Knight, J.D., ADEA Senior Vice President for Advocacy
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RE: North Carolina State Board of Dental Examiners v. Federal Trade Commission

On February 25, 2015, the Supreme Court of the United States (Court) published its [decision](#) in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.¹ The issue before the Court was whether the North Carolina State Board of Dental Examiners (Board) violated federal antitrust laws by issuing cease-and-desist letters to individuals without licenses who provided teeth whitening services in North Carolina.

Background

Beginning in the 1990s, dentists began providing teeth whitening services in North Carolina. Around 2003, non-dentists also began offering the services, often at a reduced price.² The Board became aware that persons not licensed to practice dentistry were providing teeth whitening services through complaints from licensed dentists. The Board investigated the complaints and issued more than 40 cease-and-desist letters to non-dentists who were providing teeth whitening services. The Board's cease-and-desist letters was brought to the attention of the Federal Trade Commission (FTC).

The FTC initiated administrative proceedings against the Board alleging its actions violated federal antitrust laws. Specifically, the FTC asserted that the Board's actions to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an anti-competitive and unfair method of competition under federal antitrust laws. At the conclusion of the administrative proceeding, the FTC ordered the Board to stop sending cease-and-desist letters to individuals offering teeth whitening services in the State.

The Board sought review of the FTC's order in the United States Court of Appeals for the Fourth Circuit (Fourth Circuit). The Board argued that: (1) the Board was exempt from federal antitrust laws under the

¹ Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Alito filed a dissenting opinion, in which Justices Scalia and Thomas joined.

² According to court documents, the North Carolina's Dental Practice Act ([Act](#)) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists. The Act does not expressly include teeth whitening within the definition of "the practice of dentistry."

“state action doctrine”³; (2) the Board did not engage in unlawful concerted action; and (3) the Board’s action did not unlawfully restrain trade.

The Fourth Circuit [rejected](#) all of the Board’s arguments and affirmed the FTC’s order. The Fourth Circuit found that the Board was a state agency elected by the very market participants, [dentists], that it sought to regulate because in North Carolina, the legislature delegated regulation of dentists to a dental board. Therefore, by state law, practicing dentists fill a majority of the seats on the Board. In this instance, the Board tried to exclude non-dentists from the market for teeth whitening services after the Board received complaints about the low prices and the fact that non-dentists were providing these services. Since the Board’s actions were not supervised by state officials from North Carolina only members of the dental board itself, it negated the defense of “state action immunity.” The Board appealed the FTC’s decision to the U.S. Supreme Court.

Supreme Court’s Decision

The Supreme Court in a six-to-three opinion, written by Justice Anthony Kennedy, sided with the Fourth Circuit, holding that the Board is not immune from antitrust laws. The opinion explains that even though the Board is an agency of the state, its actions must be supervised by the state in order to enjoy antitrust immunity. The Court stated that the “formal designation given by the State” does not itself create immunity. Furthermore, “when a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.”

The Court concluded that the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to non-dentist teeth whiten[ing providers].” Therefore, if there is no active supervision by the state, the Board has no immunity from antitrust laws.

Conclusion

What initially began as a conflict over whether individuals not licensed to practice dentistry should be offering teeth whitening services, resulted in a federal antitrust case raising the issue of whether members of a profession serving on a state licensing board of that profession may actively regulate unlicensed individuals without conflicting with federal antitrust laws.

The Court’s decision could have far-reaching impact. The decision will make governors and state legislatures, who compose state agencies, boards, and commissions, rethink the structure of these entities, especially if the entity is to have overarching regulatory power on services, and activities under their purview. Also, in light of the Court’s ruling, now states must provide active supervision so that these bodies do not run afoul of antitrust laws.

Please check with your legal counsel to determine how this decision might affect your institution or programs. If we can be of further assistance on this matter, please direct your inquiries to Yvonne Knight, J.D., Senior Vice President for Advocacy and Governmental Relations, at knighty@adea.org.

³ State action doctrine refers to a principle of antitrust law that state mandated or directed restraints are exempted from antitrust liability. For the doctrine to apply, the state must act as a sovereign, rather than as a “participant in a private agreement or combination by others for restraint of trade.” The standard was set in the case *Parker v. Brown*, 317 U.S. 341 (U.S. 1943).