Supreme Court Ruling in North Carolina Board of Dental Examiners v. Federal Trade Commission

Implications for State Regulation of PA Practice
“The U.S. Supreme Court issued a 6-3 ruling on Feb. 25, 2015, in N.C. State Board of Dental Examiners v. Federal Trade Commission (FTC) that immunity from Sherman Act antitrust laws does not automatically apply to state boards consisting of a controlling number of active market participants who are not actively supervised by the State.”

AAPA Medical Watch, Feb. 26, 2015

“Breaking: Supreme Court Issues Ruling Against NC Board of Dental Examiners”
Antitrust Immunity Not a Given for State Licensing Boards

Supreme Court’s Decision May Have Implications for PAs

BY STEPHANIE RADIX, JD

The U.S. Supreme Court issued a 6-3 ruling on Feb. 25, 2015, in N.C. State Board of Dental Examiners v. Federal Trade Commission (FTC) that immunity from Sherman Act antitrust laws does not automatically apply to state boards consisting of a controlling number of active market participants who are not actively supervised by the state.

Established by state law to regulate the practice of dentistry, the North Carolina Board of Dental Examiners (board) is composed of six practicing dentists—who are all active market participants—one consumer and one dental hygienist. In the 1990s, dentists in the state, including members of the board, began offering teeth whitening services, which were very lucrative.

A decade later, non-dentists also began to offer the services at much lower prices, which resulted in complaints from dentists. Although the state’s Dental Practice Act does not specify that teeth whitening is the practice of dentistry, such an absence did not stop the board from issuing nearly 50 cease-and-desist letters to non-dentist teeth-whitening service providers. These letters cautioned that the unlicensed practice of dentistry was a crime and insinuated that by providing teeth whitening services the non-dentists were committing a crime and should immediately stop offering the service.

In 2010, the FTC brought an administrative complaint alleging that the board’s endeavors to preclude non-dentists from the teeth-whitening services market constituted unfair and anticompetitive acts in violation of the Sherman Act. An administrative law judge (ALJ) determined that the board’s actions were a violation of the Sherman Act and ordered the board to halt further communications to non-dentists regarding the discontinuation of teeth-whitening services.

The ALJ also required the board to notify recipients of the letters of their right to seek declaratory rulings in state court. The board appealed these findings to the 4th U.S. Circuit Court of Appeals, which affirmed the FTC’s ruling.
Facts of the Case

- In the 1990s, dentists in North Carolina, including members of the North Carolina Board of Dental Examiners, began offering teeth whitening services, which were very lucrative.

- A decade later, non-dentists also began to offer the services at much lower prices, which resulted in complaints from dentists.

- The state’s Dental Practice Act does not specify that teeth whitening is the practice of dentistry.
Facts of the Case

• Established by state law to regulate the practice of dentistry, the North Carolina Board of Dental Examiners (board) is composed of six practicing dentists—who are all active market participants—one consumer and one dental hygienist. The board’s dentist members are elected by the dental society.

• Starting in 2003 the board issued nearly 50 cease-and-desist letters to non-dentist teeth-whitening service providers stating that teeth whitening is the practice of dentistry.

• These letters cautioned that the unlicensed practice of dentistry was a crime and insinuated that by providing teeth whitening services the non-dentists were committing a crime and should immediately stop offering the service.
Facts of the Case

• In 2010 the FTC brought an administrative complaint against the board over its practice of telling non-dentists that offering teeth whitening services would land them in trouble because they were not licensed to do such work.

• In the FTC’s view, the Board’s action was a clear violation of the Sherman Antitrust Act

• An administrative law judge determined that the board’s actions were a violation of the Sherman Act and ordered the board to halt further communications to non-dentists regarding the discontinuation of teeth-whitening services.
The Sherman Anti-Trust Act of 1890

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."

Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable.

For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws.

On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.

FTC Website: The Anti-Trust Laws
Facts of the Case

• The board appealed these findings to the 4th U.S. Circuit Court of Appeals which affirmed the FTC’s ruling

• The board appealed to the Supreme Court
The Supreme Court of the United Status (SCOTUS) Ruling

- SCOTUS sided with the FTC and rejected the board’s defense of state action immunity
- State licensing boards composed of market participants do not enjoy automatic immunity from antitrust laws
- Even though the dental board is an agency of the state, it still must be supervised by the state to enjoy antitrust immunity.

SCOTUS Blog February 25, 2015
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 specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina. The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board’s motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained

“Limits 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.”

Opinion of the Court, page 8
The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, 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.”

Opinion of the Court, pages 4-5
AAPA Staff Met with FTC Attorneys on March 19, 2015

Tara Koslov, Deputy Director
Office of Policy Planning (OPP)

Patricia Schultheiss, Attorney Advisor
Office of Policy Planning

Michael Bloom, Assistant Director
Office of Policy and Coordination
Bureau of Competition

Ellen Connelly, Attorney
Health Care Division
Bureau of Competition

Imad Abyad, Attorney
Office of General Counsel

David Schmidt, Assistant Director
Bureau of Economics

Michael Powe, Ann Davis and Stephanie Radix
Information from AAPA – FTC meeting

• Understanding the complete impact of the SCOTUS decision will take some time.

• The fact that the decision did not rest on the fact that the NC Dental Board was elected by the dental society strengthens the reach of the decision.

• What constitutes enough “active supervision” will require additional interpretation.
• FTC has a good understanding of the value of PAs in the healthcare system, and PA role and practice

• The FTC is very interested in anti-competitive behavior in health care

• This interest goes beyond the SCOTUS ruling: “If an interpretation is within the discretion of an agency or group, but the conduct was anti-competitive, FTC is interested.”
What is beyond the reach of the Sherman Act?

“Anything a state legislature does is ipso facto exempt from anti-trust.”

Imad Abyad, Attorney
FTC Office of General Counsel
In Follow-Up

• FTC asked AAPA to review *Policy Perspectives – Competition and the Regulation of Advance Practice Nurses* to see if content applies to regulation of PA practice

• Staff assessment is that it does apply – communicated to FTC
• All parts of the paper that refer to unnecessary limitations imposed by rigid collaboration or supervision requirements are just as applicable to PAs as to APRNs.

• The report’s finding that, “APRNs’ scope of practice varies widely for reasons that are related not to their ability, education or training, or safety concerns, but to the political decisions of the state in which they work,” is completely applicable to PA regulation.

• The description of availability of providers being limited by unnecessarily strict state requirements directly relates to PA practice.

• The final points made in the paper are directly applicable to PAs, including the descriptions of how overly strict supervision or collaboration requirements stifle innovation and restrict access.

• AAPA has requested that FTC prepare a similar paper about PA practice and its regulation and continues follow-up with FTC.
SCOTUS Decision is Getting Wide Attention

High Court Strikes Down Anticompetitive Regulation In North Carolina Dental Case

Forbes
March 6, 2015
“Mr. Marcus reported that DCA's legal department is currently reviewing a Supreme Court decision on a case against the North Carolina State Board of Dental Examiners (NCBDE) by the Federal Trade Commission. The court decided that the NCBDE cannot be permitted to regulate their own markets for anti-trust accountability. DCA legal office is currently reviewing this decision and its potential impact on DCA Boards and Bureaus.”

California PA Board Minutes May 4, 2015
“The risk of not being granted state action immunity is real and should be taken seriously. When assessing risk the first step is to consider the nature of the activity at issue. Is the action anti-competitive? Does it restrict competition? If so, are the majority of decision-makers on the board active market participants?”

Office of the Iowa Attorney General responding to the Center for Public Interest Law
What are the implications for state regulation of PA practice?

- State agencies that regulate PA practice must abide by the findings in the SCOTUS opinion or risk action by the FTC

- Guidance supplied by the FTC in their policy document on APRNs can be utilized by state chapters to impact regulation of the profession
What has the SCOTUS ruling and subsequent FTC meetings given us?

- A more level playing field
- New tools
- Some answers
- Additional questions

AAPA is eager to work with its constituent organizations to utilize these new tools to remove practice barriers
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Your state advocacy go-to resource team!