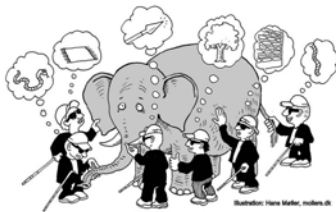


N.C. Dental Board v. FTC

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BLIND MEN EXAMINE AN ELEPHANT



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You Think You Want Whiter Teeth?

• Your Dentist?



• Spa or Mall?



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How Are My Teeth Whitened?

Both use trays, but:

- ❖ Dentists use hydrogen peroxide at 25-40 percent.
- ❖ Others use hydrogen peroxide at 6-15 percent, or hydrogen carbamide (which breaks down to 3% hydrogen peroxide)



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What Does the Expert Say?

*"My conclusions are that **bleaching has some risk to the public safety and needs a proper dental exam prior to initiation** due to the unknowns of what bleaching does in terms of masking pathology, also that there are concerns about the **quality of products** and pH issues and acid levels, and there's concern about what things like **dental lights do in terms of bleaching.**" (Emphasis added)*

Dr. Van Haywood, DDS

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Factual History

- In 2003, Board received complaints about non-dentist providers of teeth whitening services.
- From 2003-2009, the Board conducted investigations of spas and kiosks in malls.
- From 2005 – 2009, the Board sent 47 Cease & Desist letters to unlicensed persons or businesses.

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Factual History

- Sometime in 2008, the FTC initiated an investigation of the State Board.
- From 2008 – 2010, the FTC interviewed 17 Board members & staff members (some twice) and requested thousands of pages.
- On June 17, 2010, the Commission filed an administrative Complaint alleging that State Board had conspired to restrain trade by enforcing a state statute, N.C. Gen. Stat. § 90-29(b)(2).

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Factual History

In addition, the administrative Complaint alleged that:

- The Board had engaged in conduct that would have the effect of restraining competition by preventing and deterring non-dentists from providing teeth whitening services in North Carolina.
- That issuance of the C & D letters was without authority.

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PRIOR SCOTUS PRECEDENT

Parker v. Brown (1949):

Nothing in the language or history of the Sherman Act “suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”

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PRIOR SCOTUS PRECEDENT

FTC denied Dental Board's motion to dismiss based on *Parker*. It noted: "*the Commission has many times exercised jurisdiction over state boards as 'persons' under the FTC Act. See, e.g., Va. Bd. Of Funeral Dirs. & Embalmers, 138 F.T.C. 645 (2004); S.C. State Bd., 138 F.T.C. 229; Mass. Bd. Of Registration in Optomet1y, 110 F.T.C. 549 (1989). ... The Board in this matter is not the sovereign.*"

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FTC ORDER DENYING MOTION TO DISMISS

"The questions before us now are whether the Board must meet both of *Midcal's* requirements to qualify for state action protection, and, if so, whether the Board has met them as a matter of law. We conclude that the Board must meet both prongs of the *Midcal* test and that it has failed to show sufficient state supervision."

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Factual History

- The FTC ALJ conducted a 5 week trial and issued a 130 page Initial Decision on July 14, 2011.
- He ordered the Board to Cease and Desist from issuing Cease & Desist letters, but allowed the Board to file court actions against a non-dentist provider for alleged violation of the Dental Practice Act.

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Factual History - 4th Circuit

The Board appealed to the Fourth Circuit which affirmed the FTC in a 3-0 decision, with a concurring opinion. The Court held that:

- The Board was a private actor and not a state agency.
- The State did not “actively supervise” the Board.

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Factual History – 4th Circuit

- The Board, because it was made up of licensees, had the capacity to conspire.
- The FTC’s findings of anti-competitive behavior were supported by substantial evidence.
- The pattern of sending C & D letters was concerted action.

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Factual History – SCOTUS

On Oct. 14, 2014, SCOTUS heard oral arguments and considered 17 amicus briefs.

The questions at the oral argument indicated that the Court was likely to establish a new test.

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Factual History – SCOTUS

During the oral argument, Justice Breyer asked the salient question, “...*what the State says is: We would like this group of brain surgeons to decide who can practice brain surgery in this State. I don’t want a group of bureaucrats deciding that. I would like brain surgeons to decide that.*”

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Factual History – SCOTUS

When the Deputy Solicitor General described the role of the Rules Review Commission as an independent “body of disinterested State actors who could pass on the validity of rules,” Justice Scalia responded, “*Really, really? ...I don’t want that. I want a neurologist to decide that.*”

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Factual History – SCOTUS

BUT, other Court members expressed support for the FTC position. Justice Ginsburg asked, “*Why should there be an antitrust exemption for conduct that is not authorized by state law? The objection here was that this board was issuing a whole bunch of cease and desist orders. They had no authority to do that. No authority at all.*”

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Factual History – SCOTUS

Justice Kagan said that the question is:
"Is this party, this board of all dentists, is there a danger that it's acting to further its own interests rather than the governmental interests of the State? And that seem almost self-evidently to be true."

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Factual History – SCOTUS

Counsel for the Dental Board and Justice Kagan had a long colloquy about state supervision. Counsel noted that: *"There is a grave risk that if you require too much supervision as a condition of anti-trust [sic] immunity, no one will serve on these boards."*

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Factual History – SCOTUS

This concern was articulated by several of the amicus briefs. The N.C. State Bar, in its amicus brief, said: *"Lawyers will be reluctant to serve as bar councilors for fear of being sued – and of being held individually liable – in treble damage antitrust actions."*

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SCOTUS DECISION

- * On February 25, 2015, the Supreme Court issued its decision.
- * By a vote of 6-3, the Court affirmed the Fourth Circuit and the FTC.
- * The closing sentence of the opinion neatly summarizes the Court's Decision.
- * *"If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under Parker is to be invoked."*

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SCOTUS DECISION

Justice Kennedy, speaking for the majority, said: "A non-sovereign actor controlled by active market participants – such as the Board – enjoys *Parker* immunity only if it satisfies two requirements:

- 'the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,'
- and . . . 'the policy . . . [is] actively supervised by the State.'

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What is State Supervision?

- * Of course, the question becomes, what is "active supervision?"
- * Justice Kennedy left that matter open.
- * He stated, "Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather the question is whether the State's review mechanisms provide "realistic assurance" that the nonsovereign's actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests."

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Dissenting Opinion

- * In his dissent, Justice Alito, joined by Justices Scalia and Thomas, indicated he would have upheld *Parker*.
- * *"Today, however, the Court takes the unprecedented step of holding that Parker does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interest of the State's dentists. There is nothing new about the structure of the North Carolina Board."*

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Dissenting Opinion

The dissent also criticized the new test under *Midcal* and the fact that municipalities

"benefit from a more lenient standard for state-action immunity than private entities. Yet, under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervise its actions."

Dissent, 135 S. Ct. at ___, 191 L. Ed. 2d at 61.

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Dissenting Opinion

In the final part of the dissent, Justice Alito, by asking questions, forecast the uncertainty of the future application of the Decision.

- "What is a 'controlling number'?"
- Is it a majority? And if so, why does the Court eschew that term?
- Who is an 'active market participant'?
- What is the scope of the market in which a member may not participate while serving on the board?
- Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency?"

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WHAT HAPPENED TO THE TENTH AMENDMENT?

"State sovereignty is not just an end in itself: Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012)

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WHAT HAPPENED TO THE TENTH AMENDMENT?

Recent Supreme Court cases have somewhat rehabilitated the Tenth Amendment, applying it in a number of areas to invalidate Congressional enactments:

- ❖ Employment laws;
- ❖ handgun regulation; and
- ❖ domestic violence.

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What is State Supervision?

My view of State Supervision is to consider all 3 branches of government.

- ❖ Judicial Branch
- ❖ Executive Branch
- ❖ Legislative Branch

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What is State Supervision by Executive Branch?

- ❖ Governor's Appointment Power;
- ❖ N.C. Ethics Commission, in its review of Statements of Economic Interest and its investigation and prosecution of complaints; also, it has the ability to remove appointees;
- ❖ N.C. State Auditor's review of occupational licensing board (OLB) audits; and
- ❖ N.C. Rules Review Commission's review of OLB rulemaking and rules.

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What is State Supervision by Judicial Branch?

- ❖ Injunctive Relief for unlicensed practice;
- ❖ Criminal prosecution;
- ❖ Imposition of Civil Penalties, e.g. *N.C. Board of Barber Examiners v. Kindsgrab*
- ❖ Judicial Review of Declaratory Ruling, e.g. Alabama

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What is State Supervision by Judicial Branch?

Most OLB statutes include a provision authorizing the Board to file a lawsuit and seek injunctive relief for unlicensed practice.

E.g., The N.C. Board of Architecture is empowered "... to institute ... suit in the Wake County superior court for a permanent injunction to restrain defendant from allegedly practicing architecture in violation of the provisions of G.S. 83-1(3) and 83-12." *North Carolina Board of Architecture v. C. A. Lee*, 264 N.C. 602, 142 S.E.2d 643 (1965).

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What is State Supervision by Judicial Branch?

Most OLB statutes also include a provision authorizing the Board to ask a District Attorney to prosecute a criminal action for unlicensed practice. E.g., N.C.G.S. 83A-16(a). "Any individual or corporation not registered under this Chapter, who shall wrongfully use the title "Architect" or represent himself or herself to the public as an architect, or practice architecture as herein defined, or seek to avoid the provisions of this Chapter by the use of any other designation than "Architect": (i) **shall be guilty of a Class 2 misdemeanor;**

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What is State Supervision by Judicial Branch?

BUT, some Boards have a felony provision.

E.g., N.C. Board of Medicine, N.C.Gen.Stat. 90-18(a) provides: "Any person so practicing without being duly licensed and registered in this State and who is falsely representing himself or herself in a manner as being licensed or registered under this Article or any Article of this Chapter shall be guilty of a Class I felony.

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What is State Supervision by Judicial Branch?

Imposition of Civil Penalties, e.g. Kindsgrab v. N.C. Board of Barber Examiners, N.C. Court of Appeals, NO. COA13-1321 (7 October 2014), PDR to NC Supreme Court denied on March 5, 2015.

"... in this case we hold that the imposition of civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering."

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Dilemmas for State Supervision by Legislative Branch?

- ❖ Oversight of independent-minded licensing boards with varying functions?
 - Litigation?
 - Rule-making?
 - Other responsibilities?
- ❖ Organizational structure for oversight?
- ❖ Legal counsel for independent-minded licensing boards & associated costs?
- ❖ Defining scope of practice for overlapping professions/licensure?

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What are Options for State Supervision by Legislative Branch?

- ❖ Umbrella structure for oversight?
 - Licensure Commission proposed by APO last January?
 - New Cabinet agency?
- ❖ Standing Legislative Committees
- ❖ APO will report to 2016 short session

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Going Forward, How Will Occupational Licensing Board Members Be Selected?

- * The Fourth Circuit's concurring judge based her opinion on the subject of immunity on the fact that the N.C. Board members were elected by the state's dentists, rather than selected by the Executive Branch.
- * But, the oral argument before the Supreme Court seemed to minimize that issue.

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Going Forward, How Will Occupational Licensing Board Members Be Selected?

- * The Supreme Court's majority opinion avoided discussion of board selection or composition.
- * But the dissent forecast the likelihood that some prospective board members would no longer be willing to serve.

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Going Forward, Will Occupational Licensing Board Members Be Liable?

- * As noted previously, many of the amicus briefs before the Supreme Court raised the specter of occupational licensing board appointees declining to serve because of their concern about their personal liability.

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Going Forward, Will Occupational Licensing Board Members Be Liable?

- * Justice Kennedy, speaking for the majority, said: "But this case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. . . . And, of course, **the States may provide for the defense and indemnification of agency members in the event of litigation.**" (Emphasis added)

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Going Forward, Will Occupational Licensing Board Members Be Liable?

This is no longer an academic discussion.

- ❖ On April 24, 2015, a medical clinic, a doctor and the clinic owner sued the MS. Board of Medical Licensure because it forced him to see the clinic since he was not a physician.
- ❖ The complaint uses/follows the FTC's administrative complaint issued against the NC Dental Board. In fact, the plaintiffs' complaint accidentally includes this heading: **ANTICOMPETITIVE EFFECTS OF THE DENTAL BOARD'S ACTIONS**

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Going Forward, Will Occupational Licensing Board Members Be Liable?

- ❖ Since the Supreme Court decision, nine other lawsuits have been filed against licensing boards throughout the nation.
- ❖ Two Governors have addressed the issue of "state supervision."
- ❖ Two state Attorneys General (California and Nebraska) have issued opinions.

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Going Forward, Will Occupational Licensing Board Members Be Liable?

Two of the lawsuits are in North Carolina.

- ❖ LegalZoom.com, Inc. v. N.C. State Bar, No. 1:15-CV-439 (M.D.N.C. June 3, 2015).
- ❖ Henry v. N.C. Carolina Acupuncture Licensing Board, No. 1:15-cv-00831-WO-LPA (M.D.N.C. Oct. 7, 2015).

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Going Forward, Will Occupational Licensing Board Members Be Liable?

The unauthorized practice of law dispute between LegalZoom and the North Carolina State Bar took a new turn in June 2015 when LegalZoom brought federal antitrust claims against the Bar in the Middle District of North Carolina. Complaint, LegalZoom.com, Inc. v. N.C. State Bar, No. 1:15-CV-439 (M.D.N.C. June 3, 2015). LegalZoom sought **\$10.5 million** from the State Bar over the issue of unauthorized practice of law.

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Going Forward, Will Occupational Licensing Board Members Be Liable?

LegalZoom and the North Carolina State Bar recently settled this case & Judge Gale approved on 10.22.2015.

One provision requires both parties to work to pass HB 436; it also has an unusual provision about the Court's jurisdiction if the bill does and does not pass.

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Going Forward, Will Occupational Licensing Board Members Be Liable?

The agreement also permits LegalZoom to continue operating in North Carolina. However, for a period of two years or until legislation clarifying the definition of the "practice of law" is enacted, its blank templates must be reviewed by North Carolina lawyers and it must inform customers that blank templates are not a substitute for an attorney's advice.

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Going Forward, Will Occupational Licensing Board Members Be Liable?

- * Does the OLB have public liability insurance that will pay the cost of defense?
- * Will the insurance policy also pay damages?
- * Probably, any coverage will exclude treble damages.

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Going Forward, the FTC's Position

- >Could be actively supervised by the following methods: legislative committees, umbrella state agencies, rules review commissions, or other disinterested state officials in the event that the State prefers that a board is "controlled by market participants;"
- >Could be indemnified in the event that antitrust damages are imposed on individual board members;

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Going Forward, the FTC's Position

- * Should use the injunctive procedures in court and rely on the *Noerr-Pennington* doctrine.
- * She later discussed the need for States to "take a step back to reconsider the composition and oversight of their regulatory boards ... to see if they are on balance helping or harming consumers."

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Going Forward, the FTC's Position

In October, 2015, FTC issued a Staff Guidance Statement. It notes:

- * Boards could be advisory;
- * Board or staff should "have no financial interest in the occupation being regulated."

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Going Forward, the FTC's Position

Regarding "state supervision," FTC noted:

State regulatory board must satisfy the clear articulation prong:

- ❖ Is OLB member active market participant?
- ❖ Is constraint by "controlling number of decision-makers"?
- ❖ Supervisor must have authority to veto or modify OLB decision.

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Going Forward, the FTC's Position

FTC noted the following examples do not violate antitrust laws:

- ❖ Reasonable restraints on competition e.g. regulating untruthful or deceptive advertising
- ❖ Ministerial (i.e. non-discretionary) acts such as license issuance

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Going Forward, what can OLB do?

- * Should use the injunctive procedures in court and rely on the *Noerr-Pennington* doctrine for unlicensed practice.
- * Appendix to ALJ (see manuscript) indicates that Boards could send letters if they notify recipient that they have a right to contest the injunction in court.

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Questions?



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