

## FTC Issues Guidance Regarding Antitrust Scrutiny of State Medical Boards

In light of a recent Supreme Court decision, state medical boards are concerned that their ability to regulate the medical profession has been greatly hindered through the application of federal antitrust laws to state medical board actions.<sup>1</sup> In the 2015 decision *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the Supreme Court held that medical boards are subject to antitrust scrutiny unless a board satisfies two requirements: (1) the board must establish that the challenged restraint coincides with state policy; and, (2) that the board is “actively supervised” by the state.<sup>2</sup> Various trade organizations, such as the *American Medical Association* (AMA), have expressed concerns that the application of federal antitrust law to state medical boards will have a chilling effect on service on such boards, which may ultimately discourage boards from adequately regulating the medical field.<sup>3</sup> Following the Supreme Court decision, state officials looked to the *Federal Trade Commission* (FTC) for advice on how to create and staff medical regulatory boards that receive immunity from antitrust scrutiny.<sup>4</sup> In response to these requests, on October 14, 2015, the FTC provided guidelines for how state agencies may comply and move forward in regulating their fields in the wake of the decision.<sup>5</sup> This Health Capital Topics article will discuss the guidelines the FTC provided surrounding the Supreme Court decision, what it means to be an active market participant and what active state supervision means, the consequences that befall state medical boards if they do or do not fall within these definitions, and the concerns the decision raised with organizations.

The FTC guidance stems from recent regulatory scrutiny surrounding alleged anti-competitive behavior by a dental board in North Carolina. The FTC brought the action against the *North Carolina State Board of Dental Examiners* (Board) for participating in anticompetitive conduct when they sent cease-and-desist letters to nondentists offering whitening services.<sup>6</sup> The Supreme Court feared that the active market participants on a medical regulatory board would be motivated by their own personal interests.<sup>7</sup> In response, the Board argued that they received protection from antitrust scrutiny under the doctrine of state-action antitrust immunity.<sup>8</sup> The Board based its assertion of immunity on their classification as “an agency of the State for the regulation of the practice of dentistry.”<sup>9</sup> While many States’ laws may violate antitrust laws, the

Supreme Court interpreted immunity for States acting within their sovereign capacity.<sup>10</sup> It is through this immunity that the Board argued that various antitrust laws, including the Sherman Act, did not apply to the regulation of nondentists providing teeth whitening services.<sup>11</sup>

The Supreme Court was unconvinced by the Board’s argument, holding for the FTC because the Board failed to satisfy the two requirements: (1) regulatory board restraints coincide with state policy; and, (2) active supervision of the regulatory board by the state.<sup>12</sup> In regard to the first requirement of coinciding with state policy, the Supreme Court held that the *North Carolina Dental Practice Act*, which declared dentistry a matter of public concern, did not explicitly state whether teeth whitening is included in dentistry.<sup>13</sup> The purpose of the board was to regulate the dental profession; however, if the board was permitted to regulate a practice that is not included within the *Dental Practice Act* to be dentistry, the board would have overstepped its bounds of regulation.<sup>14</sup> In regard to the second requirement of active supervision by the state, the Supreme Court stated that medical boards cannot possess immunity from antitrust laws simply by authorizing their violations or declaring their action as lawful; rather, an external regulatory body consisting of non-market participants must supervise the board.<sup>15</sup> In short, the Board’s status as an agency of the State is not sufficient, on its own, to protect it from antitrust law.<sup>16</sup>

To address the rising concerns from state medical boards and respond to requests for advice, the FTC released guidelines that may clarify confusion surrounding the recent *North Carolina State Board of Dental Examiners* decision.<sup>17</sup> The FTC guidance focuses primarily on the second requirement of active State supervision,<sup>18</sup> specifically focusing on two issues: (1) when is active supervision required to invoke state action defense; and, (2) what facts are relevant in determining whether the active supervision requirement is satisfied.<sup>19</sup>

The crux of a court’s decision will be based on whether the members of state regulatory boards can be classified as active market participants and whether states are actively supervising the board to ensure the state policies are at the forefront of the board’s decisions.<sup>20</sup> States whose medical boards consist of active market participants must show that they are being actively

supervised by the state.<sup>21</sup> If a State is unable to show that it actively supervises the state medical board, then the federal antitrust laws apply, and they are unable to enjoy the state-action immunity.<sup>22</sup> However, if a State is able to make this showing and the board's regulations are aligned with state policy, then the state medical board is able to enjoy this state-action immunity.<sup>23</sup> The underlying principle in requiring active supervision by the states is to provide reassurance that the board's decisions promote state policy and not their own personal interests.<sup>24</sup>

The FTC considers a member to be an active market participant in the occupation they regulate if: (1) they are licensed by the board; or (2) if they provide services subject to regulation by the board.<sup>25</sup> The methods used to select board members do not determine whether they are active market participants.<sup>26</sup> Also, the board must consist of a controlling number of active market participants for antitrust laws to be applied, which may be less than a majority of the board.<sup>27</sup> The FTC states that the inquiry into whether there is a controlling number is fact intensive and will be decided on a case-by-case basis, with the FTC considering the structure of the board, rules governing the exercise of the board's authority, and whether active market participant board members have veto power.<sup>28</sup>

The Supreme Court decision provides limited guidance on what it means to be "*actively supervised*" by the state. The Supreme Court stated that to be "*actively supervised*," the state must review the decisions of the state medical board, retain the power to veto such decisions, and the supervisor cannot be an active market participant.<sup>29</sup> However, the FTC also weighed in on the topic and provided additional comment as to what it means to be actively supervised by the state. The FTC stated that it will consider how thorough a supervisor's investigation is into the matter, including: whether the state supervisor: (1) obtained all of the relevant facts; (2) collected data and evidence; and, (3) received public comment.<sup>30</sup> The active supervision must also precede the implementation of any allegedly anticompetitive restraint.<sup>31</sup> The FTC guidance provides examples of instances where the "*active supervision*" is not satisfied, including when: (1) the entity responsible for supervising falls under the control of the regulatory board; (2) the supervising entity lacks authority to disapprove of anticompetitive acts; and, (3) the board supervisor actually serving as a member on the board.<sup>32</sup>

In addition, medical associations such as the AMA voiced concerns about the implications of the decision, arguing that the "*state action exemption*" should be used to protect the work of the state medical boards.<sup>33</sup> Bobby White, chief operations officer of the Board, stated that as a result of the decision, state medical boards will have to adapt the way they operate and how they are structured, which may disrupt the quality of professional regulation.<sup>34</sup> In response to these concerns, the Supreme Court stated that their decision should not have a chilling effect on service on state medical boards or the regulation they provide, affirming its belief that those

called upon to serve on state medical boards will not be deterred because they are esteemed by their colleagues and typically "*devot[e] time, energy, and talent to enhancing the dignity*" of their profession.<sup>35</sup>

The FTC guidance comes with numerous caveats.<sup>36</sup> First, regulatory boards should be empowered to restrict competition by state legislature only to protect against a credible risk of harm.<sup>37</sup> Second, states are not required to provide active supervision to regulatory boards if they feel like they should be subjected to antitrust oversight.<sup>38</sup> Finally, the FTC noted that technical deviation from the FTC guidance does not automatically deem the state action immunity doctrine inapplicable, or that a violation of antitrust laws has occurred.<sup>39</sup>

While these guidelines may be strict and difficult to fulfill, the FTC has provided other suggestions to help a board comply with the new antitrust environment.<sup>40</sup> The FTC stated that a state, in creating these regulatory boards, could avoid federal antitrust laws entirely by allowing these boards to play an advisory role instead of a regulatory role, or by entrusting the regulation to members who have no personal financial interest in the field to serve as a board member.<sup>41</sup> Additionally, states may consider altering the way in which medical board members are selected in an effort to avoid antitrust scrutiny, including state appointment of members.<sup>42</sup>

While the Supreme Court decision pertained to dentistry, the decision may affect a variety of professional fields regulated at the state level.<sup>43</sup> The decision addresses the danger of allowing professional occupations to self-regulate while possessing the authority of the state, which may increase prices and decrease consumer choice.<sup>44</sup> After the *North Carolina State Board of Dental Examiners*, states may implement or revise regulations to further protect consumers over the market participant.<sup>45</sup> While the Supreme Court left many questions unanswered through its ruling in *North Carolina State Board of Dental Examiners*, the FTC has shed some light on how state medical boards may approach this issue in the future.<sup>46</sup> Like other federal regulatory guidance, the document provides insight into how the FTC may scrutinize state medical boards and what factors will be utilized by the FTC in determining whether to contest state medical board actions.<sup>47</sup>

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5 *Ibid.*

6 "North Carolina State Board of Dental Examiners v. Federal Trade Commission" p. 6.

7 *Ibid.*, p. 8.

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- 8 *Ibid.*, p. 6.  
9 *Ibid.*, p. 6 (dissent).  
10 *Ibid.*, p. 6-7.  
11 *Ibid.*, p. 6.  
12 *Ibid.*, p. 9.  
13 *Ibid.*, p. 6.  
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15 *Ibid.*, p. 13-14.  
16 *Ibid.*, p. 10-13.  
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20 “North Carolina State Board of Dental Examiners v. Federal  
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21 *Ibid.*  
22 *Ibid.*  
23 *Ibid.*  
24 Colorado Medical Society, September 1, 2015.  
25 FTC, October 2015, p. 7.  
26 *Ibid.*  
27 *Ibid.*, p. 8.
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- 28 *Ibid.*  
29 “North Carolina State Board of Dental Examiners v. Federal  
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30 Schenker, October 14, 2015.  
31 FTC, October 2015, p. 10.  
32 *Ibid.*, p. 13.  
33 “Federal Trade Commission (FTC) State Engagement”  
American Medical Association, 2015, [http://www.ama-assn.org/ama/pub/advocacy/state-advocacy-arc/state-advocacy-campaigns/ftc-engagement.page?](http://www.ama-assn.org/ama/pub/advocacy/state-advocacy-arc/state-advocacy-campaigns/ftc-engagement.page) (Accessed 10/15/15).  
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