

“Active Supervision” After *NC Dental*

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Introduction

- Why NC Dental is important
- Antitrust laws and state professional boards
- State action doctrine: when delegates are exempted

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Complaints About State Regulatory Boards

- “Unreasonable” licensing requirements
- “Questionable” actions defining boundaries of the profession (*NC Dental*)
- “Arbitrary” restrictions on offering innovative services

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Competitor Exclusion

- Exclusion is central to a licensing regime
- Exclusion, in antitrust, is viewed as a mechanism of potential anticompetitive harm
- Professional boards are made up of competitors

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North Carolina Dental State Board of Dental Examiners v. FTC (2015)

- Statute prohibits a person from engaging “in the practice of dentistry” except with a license issued by the state Dental Board
- Board decided that teeth whitening was exclusive to dentists; directed non-licensed persons to cease and desist
- Claim of state action defense failed because the Board was not supervised

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Sovereignty

- Key principle: states are sovereign
- A state *as sovereign* can act through its legislature or highest court
- A state *as sovereign* can have a policy to displace competition without violating federal antitrust laws
- What about acts *not* of legislature or court?

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Consistency with State Policy

- Municipality and most state employees can invoke a state action defense when their actions are consistent with a state policy to displace competition
- Private parties (professional boards) are exempt when implementing state policy if actions are:
 - Consistent with state policy to restrict competition
 - Subject to active supervision

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Recap

- States can regulate their own economies. Legislative acts and high court decisions = regulatory policy.
- Municipalities and employees are exempt if following state policy.
- Private parties are exempt if they follow clearly articulated state policy and are adequately supervised.

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Active Supervision

- *Hoover v. Ronwin* (1984)
 - Unsuccessful candidate for admission to legal practice sued members of Committee established by the Arizona Supreme Court to administer bar admissions process
 - Allegation that Committee adopted a grading formula designed to limit the number of lawyers in the state
 - Committee had discretion in administering and grading the bar exam, and in making recommendations to the Court
 - BUT, Court specified subjects to be tested, approved formula, and retained sole authority to determine admission to practice of law

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FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants

- Effort to clarify the central holding of *NC Dental*:

A state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy the active supervision requirement in order to invoke state-action immunity.

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Who is an “active market participant”?

- Includes
 - a person licensed by the board
 - a person who provides any service that is subject to the regulatory authority of the board
- Not determinative
 - temporary suspension of license
 - method of selection
 - roles in the industry

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Do active market participants “control” the board?

- In *NC Board*, 6 of 8 board members were market participants (dentists)
- Even where market participants represent a minority of board members, they may exercise control
 - examine *actual* decision-making on the board
 - examine *actual* operation of the board

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What constitutes “active supervision”?

- Inquiry is flexible and context-dependent.
- Supervisor must have the power to approve, modify, and veto.
- Supervisor must exercise independent judgment and control over the details of the regulatory scheme.
- Supervision before the regulation takes effect
- Negative option is not enough (not active)
- No rubber stamps
 - development of an adequate factual record
 - a specific assessment of how board’s action comports with substantive standards established by the state legislature
 - a written decision on the merits

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What are the required criteria of review?

- Substantive review
- A determination only that the Board has acted within its statutory discretion is insufficient
- Supervisor should ensure that decision is in accord with the State’s chosen policy, not the Board’s interests
- Legislature cannot defer to the policy preferences of the Board

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Supervision: Who and When?

- Independent official: Supervisor may not be an active market participant
- Potential supervisors:
 - Administrative agency or state official
 - Office of the Attorney General
 - Legislature
- When: Before the regulation takes effect