



Dental Board Lacks Antitrust Immunity, High Court Hears

By Vin Gurrieri
August 7, 2014

A slew of medical and legal groups urged the U.S. Supreme Court on Wednesday to uphold a Fourth Circuit decision that the North Carolina State Board of Dental Examiners is not exempt from federal antitrust scrutiny as it consists of private practitioners with a financial interest in blocking out alternative medicine providers.

The groups — which include the American Antitrust Institute, the Pacific Legal Foundation and the Cato Institute — backed an argument by the U.S. Federal Trade Commission that the state-action immunity doctrine spawned from the high court's landmark *Parker v. Brown* decision does not protect the board from the agency's clampdown its ban on nondentists offering teeth-whitening services.

“Delegating unsupervised regulatory power to market participants who are elected by their peers multiplies the risks of self-interested behavior,” the AAI brief said. “Treating such representatives as anything but ‘private’ for purposes of the state-action exemption offends basic principles of democratic government and accountability as well as basic economic assumptions about rational behavior.”

In **a brief filed last week**, the FTC said that although the board is tasked with some regulatory power, it is made up of private dentists elected by private dentists — all people with a financial interest in the market — and is not subject to active, impartial state supervision.

The AAI's brief echoed the FTC's sentiments, saying that the agency's conclusion that state boards must satisfy the active-supervision requirement to be exempt from the antitrust laws is fully in accord legal precedent, good public policy and academic data.

Further, the AAI said that state boards dominated by market participants have an incentive to implement state policy in ways that advance their own interests, and that applying antitrust scrutiny to those boards “will not impair the public health or deter qualified professionals from serving on regulatory boards.”

A brief was also filed by alternative legal information and service providers — including

LegalZoom.com Inc., Justia and a group of prominent law professors who research and teach about access to justice and the market for legal services.

That brief argued that the Fourth Circuit was correct and that some state bar associations, as with the dental board, have used its “unsupervised power to suppress perceived competition.”

The brief noted that there is an ongoing and worsening crisis in the U.S. in which many low- and middle-income Americans can not afford to hire lawyers to address routine legal issues, a crisis caused, in large part, by over-regulation of the legal market and unnecessarily high and complex barriers to entry.

“Bar associations, similar to the dental board petitioner here, are often run by active participants in the very market they are empowered to regulate and control, without meaningful state policy direction or active oversight,” the brief said.

A similar claim was made in a brief by We All Help Patients Inc., a nonprofit coalition of alternative health care providers, who argued that if the Fourth Circuit’s decision were overturned, providers such as the dentists on North Carolina’s board could squeeze out and suppress competition from alternative medicine providers in favor of traditional providers.

WAHP said that the dentists on the North Carolina board are financially interested private parties that can’t prove they are actively supervised by the state — a requirement for state-action immunity from antitrust laws.

The PLC, a nonprofit legal foundation, and Cato, a public policy firm, said courts “should presume strongly against granting state-action immunity in antitrust cases” because state board’s have often abused licensing laws to block entrepreneurs from entering certain markets to the detriment of consumers.

Other groups that filed briefs included the American Association of Nurse Anesthetists, the Association of Dental Support Organizations and consumer advocacy group Public Citizen Inc.

Lastly, a brief was also filed by Neil Averitt, who served for nearly four decades as a member of the FTC, including as a member of its state action task force.

Averitt, who said his report provides part of the background for the present case, said no major practical or administrative problems would prevent states from actively supervising financially interested state boards if the high court were to let the Fourth Circuit’s ruling stand.

Since 2010, the FTC has accused the dental board of thwarting competition by deciding that only dentists could offer teeth-whitening services in the state. The watchdog said the board’s practices **are collusive**, arguing that a regulatory board whose members had a financial interest in its industry couldn’t exclude its competitors without

supervision by a disinterested state authority.

The board challenged the FTC's conclusions, but the Fourth Circuit **ultimately ruled** that the board's state bona fides were not strong enough to qualify for immunity without active supervision by the state.

The justices agreed to take up the board's challenge in March, setting the stage for an opinion that experts have said could have repercussions for how states regulate fields as varied as health care, education and law.

In June, several medical boards and governors' associations **filed amici curiae briefs**, saying the Fourth Circuit's decision threatens both the states' reliance on regulatory boards and the members that compose those boards, who may alter their policy decision-making if faced with antitrust liability.

The North Carolina board **filed an opening brief** in May, arguing that the agency in question in Parker did not have active supervision but was granted immunity from federal antitrust regulation anyway. The board also argued that other circuit courts have held likewise.

The board is represented in the petition by Glen D. Nager, Hashim M. Mooppan and Amanda R. Parker of Jones Day and in the lower court by Noel L. Allen and M. Jackson Nichols of Allen Pinnix & Nichols PA and Matthew W. Sawchak, Stephen D. Feldman and Dixie T. Wells of Ellis & Winters LLP.

The FTC is represented by Jonathan E. Nuechterlein, David C. Shonka, Imad D. Abyad and Mark S. Hegedus of the FTC and Donald B. Verrilli Jr., William J. Baer, Malcolm L. Stewart and Brian H. Fletcher of the U.S. Department of Justice.

AAI, PLF and Cato are each represented by in-house counsel. We All Help Patients is represented Bona Law PC. The Association of Dental Support Organizations is represented by Ropes & Gray LLP.

The case is North Carolina State Board of Dental Examiners v. Federal Trade Commission, case number 13-534, in the U.S. Supreme Court.