THERE'S AN ELEPHANT IN THE ROOM, BUT WHAT DOES IT LOOK LIKE?
Presentation to Public Law for the Public's Lawyers – November 12, 2015
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Introduction

You think you want whiter teeth. When you sit in a chair and someone puts the bite trays in your mouth to whiten your teeth, those trays contain either hydrogen carbamide or hydrogen peroxide. Expert witness Dr. Van Haywood[2] testified and described the health and safety concerns raised by such practices:

> *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*.[3]

The N.C. State Board of Dental Examiners (N.C. Dental Board) believed that state law mandated that this service should be done by professional trained dentists or hygienists under a dentist's supervision, after a dental examination has been conducted. After receiving complaints[4] regarding unlicensed teeth whitening services, the Board began sending Cease and Desist Orders (later, these were modified to be Cease and Desist letters) to unlicensed teeth whitening providers, asking them to comply with the state's prohibition on unlicensed "stain removal" services.

In response, the teeth whitening industry complained to and convinced the Federal Trade Commission (FTC) that the free market should decide who performs stain removal services. Moreover, since 2003, the FTC had been seeking to limit the application of the state action immunity doctrine as it

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[1] Allen, Pinnix & Nichols was counsel to the Dental Board during the investigation, hearing and appeal to the 4th Circuit. Nichols was trial counsel at the 5 week hearing before the ALJ, and appeared before the FTC and on brief at the 4th Circuit. Jones, Day handled the oral arguments, but attorneys from APN, including Nichols, was present at the oral arguments.

[2] Dr. Haywood is a licensed dentist in Georgia and teaches dentistry at the Medical College of Georgia. He is considered by most (including the FTC, who sought to hire him as their expert witness) as the preeminent authority on dental teeth whitening. He has conducted original research in esthetic and restorative dentistry, especially teeth whitening. He has written over 135 articles in dental literature on esthetic and restorative dentistry, mostly on bleaching. He testified as the expert witness for the N.C. Dental Board.

[3] Transcript of Oral Argument, *FTC v. N.C. Board of Dental Examiners*, No. 9343, pg. 2398, lines 4-11 (Mar. 9, 2011).

[4] The Supreme Court erroneously stated that all complaints had come from dentists who did teeth whitening. This is incorrect. While the Board did receive complaints from dentists, it also received them from teeth whitening clients, dental hygienists, a dentist employed by the Caldwell County Health Department, the Dental Hygiene Program Director at Catawba Valley Community College, and even a dentist employed by the State who was concerned about public health in facilities at malls. Further, the N.C. Dental Board never took any action based on the cost or price of whitening offered by non-dentists. ALL complaints were investigated based on allegations of health and safety issues. The Supreme Court was also in error when it stated on p. 3 of its opinion, "Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by non-dentists." The exact opposite is closer to the truth.

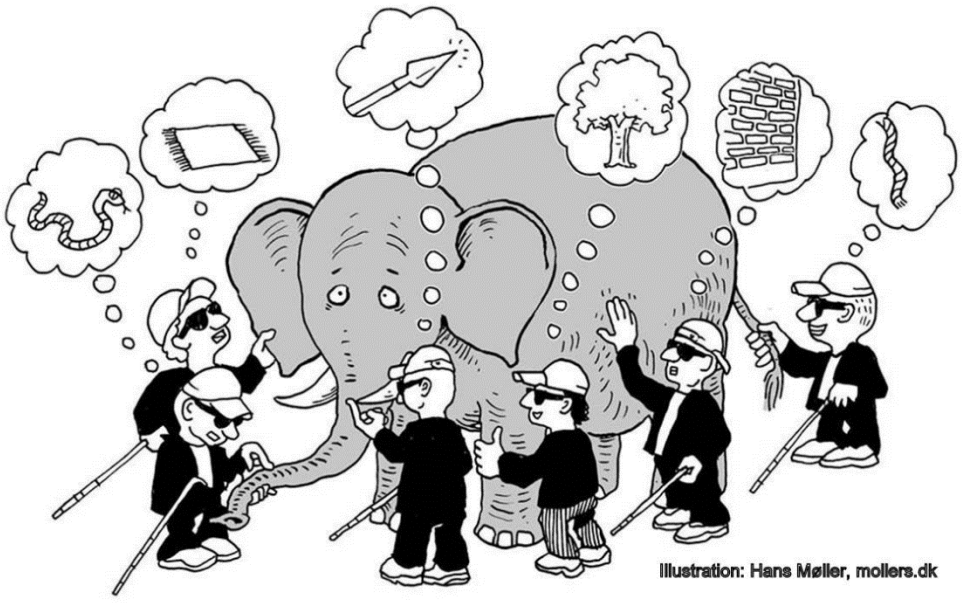
pertains to state agencies.[5] For example, in 2004, the FTC settled a case against the South Carolina Board of Dentistry arising from the lack of a South Carolina state policy in the scope of practice of dental hygienists.[6]

After repeatedly asking the N.C. Dental Board to settle, the FTC filed an administrative complaint against the Board alleging a conspiracy[7] among the dental board members, and a restraint of trade, and describing the Board as "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services."

The N.C. Dental Board and the FTC's Opposing Positions

The FTC/N.C. Dental Board case reminds me of the parable from the Indian sub-continent of the six blind men who examined an elephant. The ruler asked them, "What does an elephant look like?" Of course, each man responded based only on the part that he had examined. Similarly, one's policy position regarding the N.C. Dental Board case is based upon one's perspective. To FTC antitrust lawyers and to six out of nine U.S. Supreme Court justices, the question is, "Should the Board's actions be exempt from antitrust laws?" In contrast, attorneys who work with state agencies' attorneys see the case and ask, "Should state agencies have the autonomy they need to decide how to regulate professions?"

[5] The Commission's State Action Task Force Report is revealing of the long-term strategy of the FTC to overrule *Parker v. Brown.* It is available at: http://www.ftc.gov/os/2003/09/stateactionreport.pdf.
[6] 138 F.T.C. 229 (2004).
[7] Complaint, *In the Matter of N.C. Board of Dental Examiners*, No. D9343, pg. 1 (June 17, 2010). Although the Administrative Law Judge found that the N.C. Dental Board's actions constituted a contract, combination or conspiracy, he did not hold that the Board had engaged in collusion. Initial Decision, *In the Matter of N.C. Board of Dental Examiners*, No. D9343, pg. 122 (July 14, 2011).



Not surprisingly, news reports about the Supreme Court oral arguments reflected the political or ideological view of the reporter or editorial writer. *The New York Times* reported, "Several justices at Supreme Court arguments on Tuesday sounded troubled over efforts by a North Carolina dental board to drive unlicensed teeth-whitening services out of business."[8]

The Wall Street Journal said, "In an appeal being watched closely by medical groups, consumer advocates and small businesses, the court said it faced a difficult decision on whether to allow a federal antitrust lawsuit that alleges a North Carolina dental board took a bite out of competing businesses offering teeth-whitening services."[9]

George Will, an unabashed conservative, said that the Court had a chance "to affirm an economic right" as articulated by the Privilege and Immunities Clause of the 14th Amendment.[10]

Yet another perspective, which was argued and briefed to the FTC and the Fourth Circuit (but was not accepted as an issue by the U.S. Supreme Court) is the constitutional issue: Does the Tenth Amendment prohibit the FTC from infringing on a state's autonomy?[11] During the FTC hearing, FTC attorneys sniffed and disparaged this argument as a rehashing of "States' Rights," which was dubiously

[8] Adam Liptak, *Regulatory Case in North Carolina Appears to Trouble Supreme Court*, N.Y. Times, Oct. 14, 2014.
[9] Brent Kendall, *Supreme Court Scrutinizes Power of Licensing Boards in Teeth Whitening Case,* Wall St. Journal, Oct. 14, 2014.
[10] George F. Will, *Supreme Court Has a Chance to Bring Liberty to Teeth Whitening*, Washington Post, Oct.11, 2014.
[11] The Dental Board also filed a lawsuit in addition to the Judicial Review; it was dismissed and appealed to the Fourth Circuit, but the Court removed the case from oral argument.

used to defend the South's position prior to the Civil War, and later in opposition to civil rights legislation in the 1960's.

But recent Supreme Court cases have somewhat rehabilitated the Tenth Amendment, applying it in a number of areas: employment,[12] handgun regulation,[13] and domestic violence.[14] A review of a transcript of the Supreme Court oral arguments indicates that the policy arguments raised by the Tenth Amendment were discussed without actual reference to the constitutional provision itself. Moreover, the Reply Brief of the Dental Board and the *amicus* brief submitted by ten states raised concerns regarding encroachment on state sovereignty, but did not mention the Tenth Amendment.

Putting the FTC v. N.C. Dental Board Case in Historical Context

Putting aside the academic and constitutional debate under the Tenth Amendment, the question actually briefed and argued before the Supreme Court presented a continuum of possible outcomes. At one end, the Court could have affirmed the 1948 decision of *Parker v. Brown,*[15] where the Court first articulated the policy of state agency exemption from antitrust laws. The other end of the continuum is the position advocated by the FTC: that an occupational licensing board should either be composed of non-professional members, or all of the actions of a professional licensing board should be subject to oversight by an Executive or Legislative agency, or the Board's actions should be subject to judicial approval. According to the FTC, state occupational licensing boards unwilling to accept such oversight would face the "consequence" that their officials "will be subject to" federal oversight.

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[12] In *National League of Cities v. Usery,* 426 U.S. 833 (1976), the Supreme Court noted that the Tenth Amendment carries some constitutional protection of States' sovereignty. In this case, the Court invoked the Tenth Amendment to prevent application of the Fair Labor Standards Act to state employees. Justice William H. Rehnquist, writing for the Court, concluded:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845. *National League of Cities* overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), an earlier case in which Justice William O. Douglas, joined by Justice Potter Stewart, had dissented because "what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."

[13] In *Printz v. United States,* 521 U.S. 898 (1997), the Court invalidated the Brady Amendment and held that Congress could not require state executive officials to implement a federal scheme of firearms regulation.

[14] In *United States v. Morrison*, 529 U.S. 598 (2000), the Court invalidated an act of Congress seeking to establish a federal law regarding domestic violence.

[15] 317 U.S. 341 (1943).

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* ["*Midcal*"],[16] the Court formulated a two-part test for when an actor should be exempt: (1) the action is taken pursuant to a "clearly articulated and firmly expressed state policy" that displaces competition; and (2) "actively supervised by the State itself." Significantly, the Association in *Midcal* was not a state agency, but a nonprofit association which had been granted rate-setting authority. Since 1980, the Court has struggled to apply the *Midcal test,* but only did so in cases involving municipalities. In *Town of Hallie v. City of Eau Claire,*[17] a case which involved two municipalities, the Court said municipalities are not State agencies. In *FTC v. Phoebe Putney Health System, Inc.*,[18] a unanimous Court declined to apply the State agency exemption to a hospital run by a local government.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,[19] a Georgia corporation began erecting billboards in and around the city of Columbia, South Carolina. In response, a South Carolina corporation met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. The South Carolina corporation had been in the billboard business in Columbia since the 1940s, and controlled more than 95 percent of the relevant market in the Columbia area. The South Carolina corporation was owned by a family whose members enjoyed close relations with the city's political leaders. In 1982, the city council passed an ordinance which imposed a moratorium period on billboard construction in the city, except as specifically authorized by the council. After this ordinance was invalidated by a state court on federal and state constitutional grounds, the city council passed a new ordinance which restricted the size, location, and spacing of billboards. Two months later, the Georgia corporation filed suit in United States District Court against both the South Carolina corporation and the city. The Georgia corporation alleged that the city's billboard ordinances: (1) violated (a) Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and (b) South Carolina's unfair trade practices statute; and (2) were the result of an anticompetitive conspiracy between city officials and the South Carolina corporation which stripped both parties of any immunity from the federal antitrust laws which they otherwise might have enjoyed. A jury returned general verdicts against the city and the South Carolina corporation on both the federal and state claims. The District Court granted a Judgment Notwithstanding the Verdict; the Fourth Circuit reversed and reinstated the verdict. The U.S. Supreme Court reversed, and held that the ordinance restricting the size, location, and spacing of billboards was entitled to immunity from the federal antitrust laws, where state statutes (a) authorized the city, through the exercise of its zoning power, to regulate the size, location, and spacing of billboards, and (b) clearly articulated a state policy to authorize the city's anticompetitive conduct in connection with its regulation. The Supreme Court also held that there was no "conspiracy" exception to the rule under *Parker v. Brown*. It also concluded that the Sherman Act did not apply to anticompetitive restraints imposed by the states as an act of government, and any governmental action that qualified as state action–with the possible exception of

[16] 445 U.S. 97 (1980).
[17] 471 U.S. 34 (1985).
[18] 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013).
[19] 499 U.S. 365 (1991).

instances where the state acts not in a regulatory capacity, but as a commercial participant in a given market–was *ipso facto* exempt from the operation of the federal antitrust laws.

In the N.C. Dental Board case, the Court accepted a *certoriari* petition which squarely addressed the continued application of the state agency exemption articulated in *Parker v. Brown* and whether it was applicable to a state agency licensing board. The Tenth Amendment argument was not included in the *cert* petition.

Oral Argument and Briefs Before the Supreme Court

At the oral argument before the Supreme Court on October 14, 2014, the colloquy indicated that the Court was likely to establish a new test. 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."[20] 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 it."[21] Clearly, these two Supreme Court justices were not completely comfortable with the FTC's position.

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."[22] 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 seems almost self-evidently to be true."[23]

The FTC argued in its brief before the Supreme Court: "State boards dominated by private market participants can likewise be expected to 'foster anticompetitive practices for the benefit of [their] members.'"[24] The FTC argued that a determination of the actor's status as a state agency should be made under federal law not under state law, and that the question was the degree of State supervision.

The N.C. Dental Board countered that all occupational licensing boards had to submit reports to various State officials and were subject to the N.C. Ethics Commission, which constituted state supervision. The FTC responded that "[t]he relatively limited constraints imposed by petitioner's ethics and reporting requirements are no substitute for the active supervision required by *Midcal*."[25] It also

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[20] Transcript of Oral Argument, *N.C. State Board of Dental Examiners v. FTC*, No. 13-534, pg. 31, lines 4-8 (Oct. 14, 2014).
[21] Transcript, pg. 32, lines 13-21.
[22] Transcript, pg. 5, lines 6-11.
[23] Transcript, pg. 15, lines 7-10.
[24] FTC Brief, *N.C. State Board of Dental Examiners v. FTC*, No. 13-534, pg. 30 (July 30, 2014).
[25] FTC Brief, pg. 38.

noted that the "state ethics commission's review for financial conflicts of interest likewise 'does not include an examination of substantive Dental Board policies.'"[26]

Because of the allegedly minimal supervision applied to the N.C. Dental Board, the FTC argued that more active State supervision was required. The FTC suggested "a hybrid board of self-interest market participants," "providing . . . appropriate supervision by disinterested officials to ensure that such anticompetitive exclusion indeed reflects state policy."[27]

In its amicus brief in support of the N.C. Dental Board's petition for *certiorari*, West Virginia (joined by nine other States)[28] noted that the Fourth Circuit's decision conflicted with prior decisions by the Fifth and Ninth Circuits. "[T]hese conflicting opinions cannot be permitted to persist because their mere existence renders the States unequal sovereigns."[29] This amicus brief emphasized the issue of state sovereignty by saying "[m]oreover, concerns about state sovereignty are particularly weighty here, since the state-action antitrust exemption is grounded in federalism principles."[30] The brief then quoted key language from *Parker*: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[31] The Brief also noted that this case was the "ideal vehicle to determine whether the 'active supervision' requirement of *Midcal* applies to a state board simply because some or all of its members are also market participants."[32]

Counsel for the N.C. Dental Board and Justice Kagan had a long colloquy over 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."[33] This concern was similarly articulated by several of the *amici* briefs. For example, 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."[34]

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[26] FTC Brief, pg. 38.
[27] FTC Brief, pg. 48.
[28] Alabama, Colorado, Delaware, Florida, Kansas, Maryland, North Carolina, Ohio, and South Carolina. In a later amicus brief in support of the N.C. Dental Board following the Supreme Court's acceptance of the Board's petition for *certiorari*, West Virginia was joined by 23 other States.
[29] Brief of Amicus Curiae State of West Virginia & Nine Other States in Support of Petitioner, N.C. State Board of Dental Examiners v. FTC, pg. 5 (Nov. 27, 2013).
[30] Amicus Brief of States, pg. 7.
[31] Amicus Brief of States, pg. 7 (quoting *Parker v. Brown,* 317 U.S. 341, 350-51 (1943)).
[32] Amicus Brief of States, pg. 16.
[33] Transcript, pg. 56, lines 20-22.
[34] Brief of the N.C. State Bar, the N.C. Bd. of Law Examiners, the W.V. State Bar, the Nev. State Bar & the Florida Bar, as Amici Curiae in Support of Petitioner, *N.C. State Board of Dental Examiners v. FTC*, pg. 4 (May 30, 2014). The brief also noted 3 other "sources of impairment of the sovereign state interest" – limited resources will be diverted to defend these cases; defense of expensive antitrust litigation; and deterrence effect on those serving.

Majority Decision

On February 25, 2015, the Supreme Court issued its decision. By a vote of 6-3, the Court affirmed the Fourth Circuit's decision and the FTC's order. The closing sentence of the Court's opinion neatly summarizes its 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."[35]

Justice Kennedy, speaking for the majority, said: "A nonsovereign 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.'"[36] In issuing this statement, Justice Kennedy quoted from both *FTC v. Phoebe Putney Health System, Inc*., 568 U.S. ___, ___, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53 (2013) and *California Retail Liquor Dealers Association v. Midcal Aluminum,* 445 U.S. 97, 105 (1980).

In the wake of the Court's decision, the question for occupational licensing boards is: 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 non-sovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests."[37]

Dissent

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."[38] Justice Alito emphasized that *Parker* was based on dual sovereignty. Quoting *Parker,* he noted: "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[39]

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,

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[35] 135 S. Ct. 1101, ___, 191 L. Ed 2d 35, 55 (2015).
[36] 135 S. Ct. at ___, 191 L. Ed. 2d at 42.
[37] 135 S. Ct. at ___, 191 L. Ed. 2d at 55 (quoting *Patrick v. Burget,* 486 U.S. 94, 100-01 (1988)).
[38] Dissent, 135 S. Ct. at ___, 191 L. Ed. 2d at 55-56.
[39] Dissent, 135 S. Ct. at ___, 191 L. Ed. 2d at 57 (quoting *Parker*, 317 U.S. at 351).

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."[40]

In the final part of the dissent, Justice Alito concluded by asking a series of questions that 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?[41]

NOW WHAT? HOW WILL A STATE CONDUCT ACTIVE SUPERVISION?

Going Forward, What Does the "Active Supervision" Requirement Entail?

In its opinion (as noted above), the Court avoided a clear definition of active supervision. The majority opinion said the test was "flexible and context-dependent." State Supervision does require day-to-day involvement in the operations of an agency (or micro-management), but the review mechanism must provide a "realistic assurance" that the state agency conduct "…promotes state policy, rather than merely the party's individual interests."

My personal analysis of "active supervision" encompasses all three branches of government.

A. Active Supervision by the Judicial Branch

Clearly, judicial review of a decision, or filing a complaint for injunctive relief, or seeking criminal prosecution would all constitute "active supervision." Indeed, the FTC's Administrative Law Judge stated that in his Final Order: "*nothing in this Order prohibits the Board from*:

i. *investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;*
ii. *filing or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act pursuant to N.C. Gen. Stat. §§ 90-40, 90-40.1, or 90-233.1; or*
iii. *pursuing any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated [sic] Code;*

Provided further, that nothing in this Order prohibits the Board from Communicating to a Third Party:

i. *notice of its belief or opinion regarding whether a particular method of providing Teeth Whitening Goods or Teeth Whitening Services may violate the Dental Practice Act;*

[40] Dissent, 135 S. Ct. at ___, 191 L. Ed. 2d at 61.
[41] Dissent, 135 S. Ct. at ___, 191 L. Ed. 2d at 62.

ii. factual information regarding legislation and court proceedings concerning Teeth Whitening Goods or Teeth Whitening Services provided by Non-Dentist Providers;

iii. notice of its bona fide intention to file a court action against that Person for a suspected violation of the Dental Practice Act with regard to Teeth Whitening Goods or Teeth Whitening Services; or

iv. notice of its bona fide intention to pursue administrative remedies with regard to Teeth Whitening Goods or Teeth Whitening Services,

so long as such Communication includes, with equal prominence, the paragraph included in Appendix A to this Order."[42]

Thus, under this Order, an occupational licensing board could continue to seek injunctive relief before courts; could bring criminal complaints regarding unlicensed practice, and could complete the necessary steps to investigate and bring such actions, including, presumably, communicating the applicable laws to unlicensed individuals, and potentially seeking the cessation of illegal actions in exchange for a cessation of investigation and litigation.

B. Active Supervision by the Executive Branch

Many states have one or more umbrella agencies which were created to serve as an umbrella agency for occupational licensing boards. Since the FTC v. N.C. Dental Board decision involved a single occupational licensing board, it is an open question as to how an umbrella agency may meet the "active supervision" requirement of the Decision.

In a minority of states, including North Carolina, the occupational licensing boards are independent. Advocates supporting expanded State supervision have proposed the creation of an umbrella agency. North Carolina has currently rejected this approach.[43]

Currently, in North Carolina, there is already "active supervision" by the Executive Branch:

- the N.C. Ethics Commission, in its review of Statements of Economic Interest and its investigation and prosecution of complaints, has the ability to remove appointees;
- the N.C. State Auditor's review of occupational licensing board (OLB) audits;
- the N.C. Rules Review Commission's review of OLB rulemaking and rules; and
- Reports submitted under G.S. 93B-2 to the Secretary of State, Attorney General, and the General Assembly.

[42] Final Order, *FTC v. N.C. Board of Dental Examiners*, Docket No. 9343, pg. 4 (Dec. 2, 1011). Appendix A is attached to this manuscript.

[43] *See e.g.*, the study bill introduced by Sen. Fletcher Hartsell (R. Cabarrus), SB 361 (Mar. 24, 2015). While the Program Evaluation Division of the N.C. General Assembly rejected creation of an umbrella agency in its December, 2014 and January, 2015 reports, it is reasonable to anticipate that this recommendation may be reconsidered now or in the future, in light of this Decision.

However, all of this "state supervision" was presented to the FTC, the Fourth Circuit and Supreme Court; clearly, none considered this sufficient "active supervision."

Jones-Day Law Firm, whose partner made the oral arguments to the Supreme Court, also represents the State and Local Legal Center (SLLC).[44] In a presentation in May, 2015,[45] they suggested one of three options with regard to State Supervision:

1. Do not put a majority of market participants on an occupational licensing board;
2. Actively supervise the occupational licensing board; or
3. Forego the state immunity.

As discussed below, Governors and Attorneys General in various states are struggling with how their State should conduct "active supervision."

C. Legislative Branch

There has long been a debate about legislative oversight regarding occupational licensing boards; this is not new. Over the years, many states have created a "Sunset Commission" which considered the ongoing existence of Boards and Commissions, including occupational licensing boards; in North Carolina, a Sunset Commission was created in the 1980's, but only one OLB – the Watchmaker's Board – was eliminated.

Some legislatures have created a standing committee which has been tasked with reviewing the creation of new occupational licensing boards. North Carolina had previously created one, but it NEVER denied a request to create a new OLB.

The 2015 Adjournment Resolution stated: "Bills directly and primarily affecting the State budget, including the budget of an occupational licensing board for fiscal year 2016-2017…" In addition, the Program Evaluation Division (PED) Commission has been specifically directed to report to the short session on this matter.

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

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[44] The SLLC is a legal advocacy center with special emphasis on filing *amicus* briefs to the U.S. Supreme Court on behalf of the following state and local organizational members: National Governors Association; National Conference of State Legislatures; Council of State Governments; National League of Cities; National Association of Counties; International City/County Management Association; U.S. Conference of Mayors.

[45] **Presentation "WHAT'S NEXT AFTER NC DENTAL BOARD ... NCSL Power Point Presentation, April 1, 2015,** *slideplayer.com/slide/3995670/*

The Fourth Circuit's dissenting 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. The Supreme Court's majority opinion avoided discussion of board selection or composition, but the dissent forecast the likelihood that some perspective board members would no longer be willing to serve.

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. Further, 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."[46] Thus, it appears that the issue of board member liability will need to be addressed in future litigation, and in future legislation.

Going Forward, the FTC's Position

In a March 31, 2015, speech to The Heritage Foundation, Maureen K. Ohlhausen, a member of the FTC, commented on the N.C. Dental Board Decision but noted that the comments were her own "and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner."[47] Significantly, she noted "that decision represents the culmination of the Commission's efforts in the state action area."[48] She noted that the FTC's work on the subject began with the State Action Task Force, which formulated the goals of "reigning in antitrust exemptions and immunities."[49] Commissioner Ohlhausen observed that state boards:

1. Should be "more cognizant of, and hopefully minimizing, the competitive effects of a board's regulatory decision…";
2. "[N]eed not be controlled by active market participants";
3. 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";
4. Could be indemnified in the event that antitrust damages are imposed on individual board members; and

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[46] 135 S. Ct. at ___, 191 L. Ed. 2d at 53-54.
[47] Maureen K. Ohlhausen, FTC Commissioner, Reflections on the Supreme Court's *North Carolina Dental* Decision and the FTC's Campaign to Rein in State Action Immunity, pg. 1, note 1 (Mar. 31, 2015). *See* Appendix B attached to this manuscript.
[48] Ohlhausen Reflections, pg. 7.
[49] Ohlhausen Reflections, pg. 8.

5. Should use the injunctive procedures in court and rely on the *Noerr-Pennington* doctrine.[50]

While most of these conclusions are in line with the implications for occupational licensing boards already discussed in this paper, the mention of the *Noerr-Pennington* Doctrine raises a new question. It seems possible that, going forward, the FTC might seek to clarify the application of this Doctrine as it concerns either non-governmental entities or state agencies interacting with these entities. Specifics and further details on the FTC's position on this subject remained uncertain until October, 2015.

In October 2015, the FTC issued a Staff Guidance memorandum. It suggested that State Agencies could be:

- Advisory rather than regulatory;
- Restructured so that Boards and staff "have no financial interest in the occupation being regulated."
- 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;"
- Indemnified in the event that antitrust damages are imposed on individual board members;

In addition, the 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.

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.

Pending Litigation & State Action

Since the Supreme Court decision, nine lawsuits have been filed against licensing boards throughout the nation. See attached Appendix I, Allen, Pinnix & Nichols Summary of Litigation in the Wake of Supreme Court's N.C. Dental Board Opinion.

[50] Ohlhausen Reflections, pgs. 15-16. 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." *Id.* at pg. 17.

Two of the decisions involve North Carolina agencies – the N.C. State Bar and the N.C. Acupuncture Licensing Board. The State Bar case involved Legal Zoom and was recently settled. The other case, in the Middle District Federal Court, has been scheduled for mediation.

In addition, several Governors have addressed the issue of "state supervision."

Two state Attorneys General have issued opinions. In September, 2015, the California AG released an opinion responding to the Supreme Court decision, proposing legislative changes to address indemnification of board members and to protect against the award of treble damages in suits against boards. The Nebraska Attorney General has issued an opinion, but it is not a public record. In May, 2015, several occupational licensing boards asked the Oklahoma Attorney General to issue an opinion as to the liability of occupational licensing board members in civil and criminal actions.

Conclusion

The one thing that is certain after the N.C. Dental Board decision is that the previous manner of operation by occupational licensing boards will change. Keep your eye on the slip sheets!