

# Implications of *N.C. Dental Bd. v. FTC* (US Sup. Ct. 2/25/15)

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PRESENTED TO:

SENATE PROGRAM EVALUATION COMMITTEE ON MARCH 10, 2015


JOINT LEGISLATIVE PROGRAM EVALUATION OVERSIGHT COMMITTEE ON  
MARCH 16, 2015

PROFESSOR JUDITH WELCH WEGNER



# Today's Questions

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1. How is NC Dental Board structured, what powers does it have, and what did it do to draw the attention of the Federal Trade Commission?
  2. Why did the FTC sue the NC Dental Board?
  3. How did the U.S. Supreme Court rule on key questions?
  4. What are the consequences for N.C. and other states?
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# Background re Structure of NC Board of Dental Examiners

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## **NC Gen. Stat. §§ 90-22 – 90-48.3 (Article 2. Dentistry)**

- 90-22(a) Practice of dentistry declared to affect public health, safety, welfare; subject to regulation and control in public interest; act to be liberally construed
- 90-22(b) Dental Board created and is agency of the state
  - Consists of 6 licensed dentists (elected by peers), 1 hygienist (elected by peers), 1 citizen (appointed by Governor)

# Background re Authority of NC Board of Dental Examiners

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- 90-29(b)(2) Practice of dentistry includes:
  - “Removing stains, accretions or deposits from the human teeth”
- 90-30 Dental Board may license applicants to practice
- 90-40 Unlicensed practice is class 1 misdemeanor
- 90-41 Practice of dentistry by any person not duly licensed declared inimical to health, safety, welfare... may be enjoined by Attorney General, district attorney, Board of Dental Examiners, or resident
- 90-43 Board authorized to enact rules and regulations not inconsistent with statute (but subject to procedures in NC Gen. Stat. 150B)

# What did Dental Board Do to Draw Ire of FTC?

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## ○History

- **Dentists started whitening teeth** in 1990's
- In 2003 **non-dentists** (charging lower prices) began to **offer whitening services** (in shopping malls and elsewhere)
- **Dentists complained to board** citing lower prices more often than possible harm
- Starting in 2006, **Board issued 47 cease-and-desist orders to non-dentists** about whitening, explaining that criminal penalties for “practice of dentistry”
- In 2010: **FTC charged Board** with violating **FTC Act** (citing anticompetitive and unfair method of competition) & **Sherman Act**
- Subsequently FTC prevailed before administrative law judge (who found no health/safety issues) and federal Court of Appeals for Fourth Circuit

# Antitrust Basics

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## ○ Relevant Federal Statutes

- **Federal Trade Commission Act:** prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” (1914)
- **Sherman Act:** prohibits “every [unreasonable] contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” [FTC can enforce] (1890)
- Clayton Act (not at issue here): prohibits price discrimination, tying arrangements, mergers & acquisitions that would substantially lessen competition (1914, & amended)
- **Substantial penalties**

# Important Exception for “State Action”

## *Parker v. Brown* (1943)

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- **Case** involved California raisin production “proration” scheme designed to provide income stability to farmers; system was overseen by state board
- **Supreme Court carved out exception** from federal antitrust laws “to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity” (*exception is not in statutory text or legislative history*)
- Interpretation and application of ***Parker* is more complex than might appear**
  - Not the same as interpretation of 14<sup>th</sup> amendment “state action”
  - Many nuances based on policy considerations

# Applications of *Parker v. Brown* Doctrine

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- Not every state regulatory scheme will fall within *Parker* exemption
- ***California Retail Liquor Dealers Ass'n v. Midcal (1980): states & private actors***
  - California statute required wine producers and wholesalers to file fair trade contracts or price schedules with state. If failed to do so, wholesalers prohibited from selling at less than prices set by fair trade contracts or price schedules.
  - Court held that to qualify under *Parker* doctrine, **two-prong test** must be met:
    - Anticompetitive policy must be clearly articulated & affirmatively expressed by state AND
    - Actions of group authorized to implement state policy must be “actively supervised by the state”
  - On stated facts, state authorized price-setting by private parties (in effect creating a private price-fixing arrangement); state did not establish prices, review reasonableness of price schedules, regulate terms of fair trade contracts, monitor market conditions or engage in any “pointed reexamination” of the program



# Applications of *Parker v. Brown*

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- **Cases involving clarity of state policy as to competition**
  - *Columbia v. Omni Outdoor Advertising, Inc.* (1991)
    - Municipalities are not sovereigns; but are authorized by state to engage in land use regulation (which covers regulation of billboards) and it is foreseeable that in doing so they may displace competition; (and in *Hallie v. Eau Claire*: municipalities are not subject to active supervision requirement since no danger of private price-fixing)
  - *FTC v. Phoebe Putney Health System, Inc.* (2013)
    - Where state law did not clearly and affirmatively express intent to allow hospitals to make acquisitions of other health service providers that would substantially reduce competition, *Parker* doctrine did not apply

# NC Dental Board v. FTC: *Parker* or not?

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## Majority

- Dental Board is “nonsovereign actor” [new articulation] whose conduct does not automatically qualify as that of sovereign state itself
- Immunity for state agencies requires more than “mere façade of state involvement”
- Particularly so when State seeks to delegate regulatory power to “active market participants”; too much risk of blending anticompetitive motives with decisions
- Midcal governs
  - Requirement of **active supervision** designed to avoid risk and harm when private parties are engaging in anticompetitive activity
  - Rejects claim of dissenters that mere status as “state agency” is enough

# Additional Concerns: Volunteers

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- Discouraging citizens from serving on state agencies regulating their own occupation?
  - Current case does not raise issue of money damages
  - States can adopt clear policies and engage in active supervision
  - States can provide for defense and indemnification of agency volunteers

# Additional Concerns: Active Supervision?

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- **Providing active supervision**

- Does not have to involve micromanagement

- Supreme Court has found certain constant requirements

- Supervisor must review substance of anticompetitive decisions, not merely procedures

- Supervisor must have power to veto or modify particular decisions to ensure they accord with state policy

- State supervisor may not itself be active market participant

- Adequacy of supervision depends on all the circumstances

# *NC Dental Board: Dissenters*

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- Would have treated Board as “state agency” and thus within *Parker* (based on history, policy, and trappings)
- Cites uncertainties in changing composition of licensing boards
  - How many “market participants” are a “controlling number”?
  - Who is a “market participant”? And what scope defines the market?
  - This question relates to whether Board should be seen as controlled by “active market participants,” rather than whether there is sufficient state supervision.

## **JW’s Notes:**

- Per se rule on “state agencies” would not take into account concerns in *Midcal*
- During oral argument questions were asked about how to structure licensing board but majority didn’t go that way (instead focused on state supervision)

# Recommendations for NC and Others

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- **State statute on its face** seems fine in terms of statement of concern for health and safety, and expression of state policy
  - **Approach to appointing members of licensing boards** including those with relevant background is not directly displaced or prohibited
  - **Establish system of defense and indemnity for volunteer agency board members** so own assets not at risk (or perceived to be at risk) as a result of their public service
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# Recommendations...

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- Major questions relate to how to provide active supervision:
  - May be useful to consider **what kinds of activities are most likely to be “anticompetitive” (unlicensed practice v. initial licensure or discipline?)** (e.g. compare *Bates v. State Bar of Arizona*, 1977, applying *Parker* to grant immunity for state supreme court’s disciplinary rule prohibiting lawyer advertising, but striking down prohibition on 1<sup>st</sup> Amendment grounds)
  - As to **“unlicensed practice”**: **require rule-making** by Board (including standards re health, safety, welfare) and **independent review** under NC Gen. Stat. 150B (or for attorneys, by NC Supreme Court)
  - **Review authority to bring criminal or injunction actions** (AG or DA or citizen?)
  - Comports with recent study by Program Evaluation Division, presented in 12/2014, No. 2014-15) (<http://www.ncga.state.nc.us/PED/Reports/reports.html> )

# Questions?

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