

# North Carolina Board of Dental Examiners v. FTC

## Background of the Case

The North Carolina Board of Dental Examiners regulates dentists and dental hygienists. When dental hygienists began to offer teeth whitening services at retail locations several dentists submitted complaints to the Board, prompting it to order the hygienists to cease offering the procedure. The FTC noted in its brief to the Court “that the prices of these offerings undercut the prices of the services [the dentists] offered; few complainants referred to any consumer harm.”

The key question in this case for ACNM members is whether the Board engaged in anticompetitive conduct when it attempted to preclude non-dentists from offering teeth whitening services. The FTC argues that the Board’s action violated antitrust laws, specifically the Sherman Act which prohibits activities that restrict interstate commerce and competition in the marketplace. The FTC notes in its brief that “because the six dentist members [of the Board] must be active practitioners while they serve, each has a significant financial interest in the business of the profession.” In essence, the FTC contends that the actions of the Board were intended to mitigate the competitive threat posed by the dental hygienists rather than, as the Board contends, curtail activities that threatened the public’s health and well-being.

In order to gauge whether the actions of the Board violated the Sherman Act, the Court must consider whether, as a state agency, the Board is exempt from antitrust laws. The legal landscape for this analysis is murky. In its 1943 decision *Parker v. Brown*, the Court extended immunity from antitrust laws to certain types of state actions and state bodies. The Board has argued that such protections apply, but the U.S. Court of Appeals rejected this contention because the Board is composed of “market participants who are elected by other market participants,” thus categorizing the Board as a private actor outside the bounds of the *Parker* exemption unless the Board is actively supervised by the state. The Board argues that it is a state agency and as such should not be required to be supervised by another arm of the state. The Court accepted the case to resolve the question of supervision and, by extension, their decision will ultimately comment upon the boundaries of antitrust protection.

## Why Should ACNM Members Care about this Case?

The *Parker* exemption includes actions by state legislatures, which is why requirements for collaboration and supervision are not explicit antitrust violations. However, a finding in favor of the FTC would mean that actions of licensing boards are not protected and would have immediate implications for the practice of midwifery. Consider, for instance, efforts by medical boards to regulate the practice of midwifery by promulgating rules that increase the administrative burden of state-mandated collaborative or supervisory requirements, thereby arguably reducing the number of physicians willing to collaborate with midwives and limiting midwives’ ability to be active market participants. It is possible that actions like these could be considered antitrust violations if the Court decides in the FTC’s favor.



The amici briefs submitted to the Court by a host of medical associations and specialty groups recognize the implications of this case for current scope of practice battles. The American Dental Association and the American Medical Association warned, for example, that siding with the FTC would have “perverse consequences for patients and the public” because it would force boards to “subordinate their view of what is in the best interest of public health in favor of decisions that reflect the FTC’s views on federal competition policy. Indeed, the threat of antitrust liability may well cause state regulatory authorities to forbear from regulating at all in areas where the need to protect the public from unsound medical practices or unqualified medical practitioners is most critical.”

### **Further Reading**

Eric M. Fraser, Argument preview: Do state licensing boards have immunity from antitrust laws?, SCOTUSblog (Oct. 10, 2014, 1:15 PM), Available online at

<http://www.scotusblog.com/2014/10/argument-preview-do-state-licensing-boards-have-immunity-from-antitrust-laws/>

Access the briefs presented to the Court at <http://www.scotusblog.com/case-files/cases/north-carolina-board-of-dental-examiners-v-federal-trade-commission/>

Aaron Edlin and Rebecca Haw. Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? University of Pennsylvania Law Review, vol. 162 (2013-2014). Available online at

<http://www.pennlawreview.com/print/162-U-Pa-L-Rev-1093.pdf>.



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