



C. Scott Litch

Chief Operating Officer and General Counsel

Litch's Law Log

Supreme Court Rules Against North Carolina's Dental Board

You have probably read about this case in a previous column, the AAPD CEO's annual report, or the *ADA News*. There is also background on the AAPD website http://www.aapd.org/aapd_joins_supreme_court_brief_in_support_of_north_carolina_dental_board_vs_ftc/?pg=2.

The AAPD joined Amicus Curiae (friend of the court) briefs before both the Fourth Circuit Court of Appeals and the U.S. Supreme Court in the case of *North Carolina State Board of Dental Examiners v. the Federal Trade Commission (FTC)*.

On Feb. 25, 2015, the U.S. Supreme Court ruled that a North Carolina dental board doesn't have antitrust protections to limit the actions of dentists from whitening teeth because the board is not actively supervised by the state. Justice Anthony Kennedy wrote the 6-3 opinion for the court. Justices Antonin Scalia, Clarence Thomas and Sam Alito dissented. The case arose when the FTC challenged the decision by the North Carolina board to limit teeth-whitening services in the state to dentists. They deemed the dental board's actions suppression of competition. That ruling was upheld by the U.S. Circuit Court of Appeals. The Supreme Court subsequently granted the board's request for review of the Circuit's decision.

They argued the board should not be immune because North Carolina did not actively supervise the board's actions. The board argued that, as a state agency, it does not need to be actively supervised by the state. Concerned about the negative impact that the lower court's ruling could have on the ability of professional boards to regulate their respective professions, ADA, AAPD, the AMA, and 15 other associations filed a friend-of-the-court brief supporting the state board's position.

The Court's majority opinion said that since the board is controlled mostly by dentists and not actively supervised by the state, it doesn't have antitrust immunity. Therefore, it cannot make decisions as drastic as telling non-dentist tooth whiteners that they cannot practice.

To satisfy the requirement of active supervision, the court observed that state officials must possess and exercise power to review the particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. The "mere potential for state supervision is not an adequate substitute for a decision by the State." Daily involvement by the state in an agency's operations is not required to satisfy the second requirement. It is only important that the state's involvement provide a "realistic assurance" that the anticompetitive conduct of an actor such as the board "promotes state policy, rather than merely the party's individual interests." The court accordingly identified three requirements of active supervision:

- The state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.
- The state supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.
- The state supervisor may not itself be an active market participant.

The ADA believes the decision constitutes a radical departure from the court's established law, and throws into question the regulatory, licensing, and disciplinary authority of thousands of professional boards across the country.

ADA General Counsel Craig Busey was kind enough to provide the following commentary on the case and its implications:

"The ADA is extremely disappointed with the Court's decision.

It is noteworthy that North Carolina board was acting under its authority to prohibit the unlicensed practice of dentistry and relied on the state's Dental Practice Act, which includes "removing stains and accretions from the teeth," in its definition of dental practice. That would appear to be an active assertion of the state's authority to regulate the unauthorized practice of dentistry for public safety.

The amicus argued that that the members of the North Carolina board, as a state agency established by state legislation and pursuing the responsibilities assigned to it by state statute, were immune from federal antitrust law liability under the State Action Doctrine as enunciated by the Supreme Court in its 1943 landmark decision, *Parker v. Brown*, 317 U.S. 341. In that case, the State of California had established an agricultural regulatory body consisting of market participants. **The court held that conduct by a state with anticompetitive effects may serve public health and safety concerns that override the interests served by imposition of the federal antitrust laws and that it is the state that should be able to make that decision for itself.** Who the members of the body were or how they were chosen did not concern the court. The members' exemption from enforcement of the antitrust laws existed by virtue of the fact that they were serving on a state agency created by the sovereign state of California.

The ADA believes that the well-established, 70-year-old precedent announced in *Parker* should have been applied in the North Carolina case, where the board is unquestionably a state agency created by the sovereign state of North Carolina. In the ADA's view, the court's analysis need not have gone any further than this.

Unfortunately, the Court effectively disregarded the teachings of *Parker v. Brown* and imposes on a bona fide state agency a rule that in the past it only applied to non-state bodies. The court held “active supervision by the state” is required in order to shield the board and its members from federal antitrust liability.

The court’s decision leaves professional boards across the country in a quandary, with no explanation as to what level of active supervision is necessary to invoke immunity for each board. In addition, boards are likely to be extremely reluctant to take actions that may subject them to legal exposure, and individual members may be justifiably concerned about possible liability.”

I am also fearful this decision will cause state boards to be extra cautious about enforcing existing regulations where there is any

likelihood of a legal action. This would include regulations governing specialty advertising, namely that a general dentist is not allowed to hold herself out as a specialist.

Alito made the following logical point in his dissenting opinion:

“Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State’s interest in sensibly regulating a technical profession in which lay people have little expertise.”

Well said! Unfortunately, we now we face an era of “state supervisors”—who are not dentists—hovering over the decisions made by state dental boards.

For further information, contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169, ext. 29, or slitch@aapd.org.

Legislative and Regulatory Update

Unless otherwise noted, for further information on any of these issues, please contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169 or slitch@aapd.org.

FEDERAL NEWS

AAPD 2015 Legislative and Regulatory Priorities

These priorities, as developed by the Council on Government Affairs and approved by the board of trustees, are available on the AAPD website at http://www.aapd.org/assets/1/7/2015_Legislative_Priorities_for_website.pdf.

Top priorities continue to be Title VII pediatric dentistry funding (see below), amendments to the Affordable Care Act (including extension of the CHIP program), and Medicaid dental reforms (including reform of RAC audits).

Dental Associations Spell Out Fiscal Year 2016 Oral Health Funding Priorities for Congress

On Feb. 9, 2015, the AAPD, along with the American Dental Association, American Dental Education Association, and the American Association for Dental Research, communicated FY 2016 oral health funding priorities to the chairs and ranking minority members of the Senate and House Appropriations Committee’s Subcommittee on Labor, Health and Human Services, Education related agencies. This request includes the AAPD’s top funding priority, \$10 million for pediatric dentistry training under Title VII of the Public Health Service Act (Section 748). The letter also requests report language encouraging the Health Resources and Services Administration (HRSA) to initiate a new grant cycle for dental faculty loan repayment. Copies of the letters are available on the AAPD website at http://www.aapd.org/assets/1/7/FY2016_Dental_Request_Letters.pdf.