

The North Carolina State Board of Dental Examiners v. Federal Trade Commission

Summary of Amicus Curiae Brief Arguments

Overview of the Case

In June 2010, the Federal Trade Commission ("FTC") initiated a lawsuit against the North Carolina State Board of Dental Examiners ("North Carolina Board") accusing the North Carolina Board of engaging in anti-competitive conduct in violation of federal antitrust laws. The lawsuit resulted from the North Carolina State Board's decision to issue a number of cease-and-desist letters to teeth-whitening providers (and their landlords and suppliers) who were not licensed dentists, instructing them to cease the unauthorized practice of dentistry and warning them that the sale or use of teeth-whitening products by a non-dentist constituted a misdemeanor. The FTC contended that the North Carolina Board's actions violated federal antitrust laws and effectively drove non-dentist providers out of the state.

In response to the lawsuit, the North Carolina Board argued that it is exempt from the federal antitrust laws because it is an agency of the State of North Carolina and therefore entitled to the immunity provided by the "state action" doctrine. The FTC rejected this argument, and the North Carolina Board appealed to a federal appellate court, the United States Court of Appeals for the Fourth Circuit. (Appeals from FTC decisions are made directly to the relevant US Court of Appeals.)

In May 2013 the Fourth Circuit ruled in favor of the FTC, concluding that the North Carolina Board should be considered a private actor, not a state actor. The court considered three questions: (1) Is the North Carolina Board a state entity or private actor under existing federal antitrust case law; (2) If the North Carolina Board is a private actor, was it "actively supervised" by the state so that it would still be entitled to antitrust immunity; and (3) If the North Carolina Board is not immune, were its actions anti-competitive?

Ultimately, the court ruled in the FTC's favor on all three questions. The court agreed with the FTC that state agencies in which a "decisive coalition" is made up of participants in the regulated market who are "chosen by and accountable to their fellow market participants" are private actors. In its ruling, the Fourth Circuit noted that a majority of the North Carolina Board were practicing dentists elected to the Board by the licensed dentists in the state, not chosen by some state body. The concurring judge pointed out that this fact was very important in the decision.

Having been found to be a private actor, the North Carolina Board must show that it is "actively supervised" by the state in order to be immune from antitrust liability. The court concluded that there was insufficient state supervision in this case, noting that the cease-and-desist letters were sent without state oversight and without the judicial authorization required by North Carolina law. General "good government" laws requiring such things as financial disclosures by board

members constituted only "generic oversight" that was insufficient to satisfy the "active supervision" requirement, the court concluded. Finally, having ruled that the North Carolina Board was not immune from antitrust liability, the court concluded that the board's actions were anti-competitive and violated federal antitrust law.

The North Carolina Board appealed its case to the United States Supreme Court and, in early March 2014 the Supreme Court agreed to hear the case.

Purpose of the Amicus Curiae Brief

Appellate courts like the Supreme Court typically welcome the submission of *amicus curiae* (or "friend of the court") briefs by parties who are not direct participants in the litigation. One purpose of an *amicus* brief is to provide the Court with viewpoints it might not consider based solely on the arguments of the parties and, in particular, potential public policy consequences that may be broader than, and not obvious from, the case.

The goal of the *amicus* brief to be submitted by Baker & McKenzie on behalf of the regulatory entities is to make the Court aware of the *amicus* parties' concerns about the Fourth Circuit's ruling. The brief will not take a position as to whether the North Carolina Board's decision to send cease-and-desist letters was right or wrong, nor will the brief expressly endorse North Carolina's practice of allowing the licensed professionals elect licensing board members. Rather, the purpose of the brief will be to alert the Supreme Court to the potential consequences its decision may have for a wide variety of regulatory boards across the country, including the dangers of narrowing "state action" immunity in a way that jeopardizes the efficiency and effectiveness of state regulatory boards.

Summary of Points to Be Included in the Amicus Curiae Brief

The brief will begin with a description of the various parties signing the brief and explanation of the reasons for their interest in the case:

- Like the North Carolina Board, the member boards of the parties to the brief are tasked with regulating their respective professions for the good of the public and enforcing certain limitations on the practice of their profession, as authorized by their state lawmakers.

- These boards are frequently composed of professionals who work in the regulated industry. Thus, the parties to the brief face the threat of antitrust liability if the Fourth Circuit's decision is interpreted to deny antitrust immunity for boards merely because their membership includes a majority of members from the licensed profession.

- The parties to the brief are concerned with the potential slippery slope that could result from the Fourth Circuit's ruling, which has the potential to subject board members to antitrust liability and, thus, destroy the usefulness of state regulatory boards, to the detriment of the professions and, importantly, to the consuming public.

- There are many valid reasons why states may choose that licensed professionals are best equipped to regulate their own professions and enact statutes establishing regulatory boards that include members of the regulated profession. These boards rely upon a professional membership with flexible and strong enforcement powers -- the threat of liability could discourage board members from passing necessary regulations, vigorously enforcing their mandates, and properly regulating their professions.

Argument 1: It is not proper for a federal court to examine the makeup and character of state boards in order to challenge the boards' status as a state actor.

- The Fourth Circuit improperly looked behind the actions of the State of North Carolina in establishing the North Carolina Board so as to determine whether the creation of the board was "state action enough." This is contrary to existing Supreme Court precedent.

- Federal courts should give great deference to the states when determining how to create and staff their own regulatory boards.

Argument 2: The mere presence of a majority of licensed professionals on a board that regulates that profession does not make that board a "private" actor.

- State regulatory boards should be presumed to be acting in furtherance of their state-mandated mission to protect the public by regulating the profession. Regulatory boards are not organized for the benefit of business participants (as were the entities in some cases cited by the Fourth Circuit) but for the benefit of the public. The Fourth Circuit improperly applied a presumption that board members are motivated by self interest and protection of their fellow licensees.

- If the selection of board members via election by state licensees is the determining factor (as is implied by the Fourth Circuit's ruling), the Supreme Court should state so clearly and should narrowly limit the scope of its ruling to these particular factual circumstances.

Argument 3: Even if it were proper for federal courts to examine the character of state boards, they clearly are state entities.

- Even if federal courts were permitted to look behind the creation of a regulatory board to determine whether it should qualify as a state entity, such regulatory boards are clearly state entities -- they possess a variety of state attributes.

- State boards act pursuant to a public mandate and have statutory oversight by the state. Prior decisions of the federal courts have not relied upon the composition of a board to determine whether it is a state actor.

Argument 4: Private actors must demonstrate "active supervision" by the state in order to be entitled to antitrust immunity. Requiring active supervision of state boards is inconsistent with the policy goals behind the state action doctrine, which further demonstrates why state boards should be treated as state actors.

- The "state action" doctrine protects a state's right to delegate its authority.
- Requiring "active supervision" by the state negates the very benefits that delegation to a state board was intended to achieve.
- States create boards and other agencies because they are often better equipped to deal with issues requiring expertise in the profession and outside the competence of the legislature or judiciary.
- The Fourth Circuit ruling and existing case law provide little guidance regarding how much supervision is required. As a result, board members may operate under a threat of antitrust liability, which could paralyze them from carrying out their public mandates. Even if supervision were provided by the state, the risk of the supervision being legally inadequate could cripple board members from acting.
- Without state action protection, professionals may be reluctant to serve on boards, for fear of incurring liability. Those individuals who do serve may be reluctant to make difficult or controversial decisions, or pass regulations necessary to regulate their professions. (Note the significant damages available in antitrust cases, including treble damages and attorneys' fees, and the potential for follow-on private litigation after regulatory boards make tough decisions necessary to carry out their mandate).
- Requiring active supervision is also inappropriate because states have the authority to establish anticompetitive policy for the state as a whole. Licensure and regulation of professions is inherently anti-competitive -- there is no divergence between the state's authority to establish state policy and the board's delegated authority to execute that policy.

Argument 5: The Fourth Circuit's ruling does not provide a workable, objective standard for state boards to follow.

- Regulatory boards almost always include licensed professionals, for a variety of perfectly legitimate and compelling reasons.
- The Fourth Circuit's ruling leaves many unanswered questions regarding the nature and scope of regulatory boards' exposure to antitrust liability.