

# Antitrust

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

- ▶ Citation: 2013 U.S. App. LEXIS 11006
- ▶ Court: United States Court of Appeals for the Fourth Circuit
- ▶ State: NC North Carolina
- ▶ Disposition: Petition denied.
- ▶ Decision Date: May 31, 2013
- ▶ Profession: dentistry, dentist, teeth whitening
- ▶ Write-up: The 4<sup>th</sup> Circuit Court of Appeals affirmed the FTC administrative ruling against the North Carolina State Board of Dental Examiners and held that Board, as a self governing agency made up of practitioners elected by the licensees is a “private” entity and was not entitled to antitrust immunity. The FTC alleged that the position taken by the Board finding that teeth-whitening was within the scope of practice and, thus, limited to licensed dentists was anti-competitive. The court held that the Board was required to meet both prongs of the test for private actors to enjoy immunity from antitrust liability. The prongs include both a clearly articulated state policy *and* sufficient oversight by the state. The court noted the oversight by the state was not sufficient to justify immunity from antitrust scrutiny.

**To:** NASEMSO Board of Directors  
**Subject:** RE: Supreme Court agrees to hear case related to medical licensing boards

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**From:** Dia Gainor [<mailto:dia@nasemsso.org>]  
**Sent:** Monday, March 17, 2014 5:24 PM  
**Subject:** Supreme Court agrees to hear case related to medical licensing boards

The Supreme Court has agreed to hear a case that began with a suit filed by the Federal Trade Commission against the North Carolina State Board of Dental Examiners (NCSBDE) claiming Sherman Act and other antitrust violations for Board issuance of cease and desist orders to unlicensed vendors of tooth whitening services. Among the several claims that ultimately hit the 4<sup>th</sup> District Court was that because the Board composition includes dentists and a dental hygienist, they were colluding to exclude competition.

As is customary for Supreme Court cases, only a single question is presented. Part of the Federal Trade Commission's argument was that the composition (i.e., people in the business who stand to lose \$) and level of supervision the state regulatory agency enjoys can make them ineligible for the state exemption under antitrust laws. So the question the Supreme Court has agreed to hear arguments about is: "Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a 'private' actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants." [note, they are ultimately appointed by the Governor]. If the Supreme Court answers yes, the implications are disastrous for state boards of all types related to licensure.

Chilling quote from the NCSBDE filing with the Supreme Court:

"[T]his harm to state sovereignty is exacerbated by the serious threat posed by the decision below to the effective enforcement of the state-law regimes that have long governed regulated professions, such as dentists, doctors, lawyers, and accountants. Forcing States to reduce the level of regulatory involvement by practicing professionals deprives agencies of valuable expertise. And forcing States to increase the supervision of their own expert agencies is both intrusive and impractical."

FARB is organizing an amicus brief and inviting national associations to sign on through the contribution of \$1000 (or less) to pay a DC attorney firm to prepare and submit the brief.



**Dia Gainor, MPA**

Executive Director

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## MARK YOUR CALENDAR

October 6-10, 2014: NASEMSO Annual Meeting

Westin & Cleveland Public Auditorium, Cleveland, OH

Fall 2015: (Dates TBD) NASEMSO Annual Meeting, Louisville, KY

Fall 2016: (Dates TBD) NASEMSO Annual Meeting, Albuquerque, NM



**From:** FARB [<mailto:farb@farb.org>]

**Sent:** Monday, March 17, 2014 2:53 PM

**To:** 'Carmen Catizone'; [lfennell@arbo.org](mailto:lfennell@arbo.org); [angie@nascla.org](mailto:angie@nascla.org); 'Dale Atkinson'; 'Dalene L. Paull'; 'Debra Persinger'; Dia Gainor; 'Donna Liewer'; 'Ed Barnicott'; Ernest Schlabach; 'Maria Boyle'; 'Mary deSousa'; Mary Jo Monahan; Melanie Thompson; 'Randy Linder Bostrom Info'; 'Robyn Kendrick'; 'Shaun Conway'; 'Steve DeMers'; William Green

**Subject:** FTC Case

Good Afternoon,

The United States Supreme Court has agreed to hear the *FTC vs. NC State Board of Dental Examiners* case. As you will recall, this case implicates the state action immunity doctrine and affects issues related to all regulatory boards. As such, we believe that the opinions of FARB and its governing members will draw interest from the Supreme Court. This email is intended to ask if any FARB governing members are interested in participating in an amicus curie brief. Your interest can be pledged by agreeing to sign on to the brief and financial contribution toward the costs of preparing such a filing. Participation by all governing members will certainly bring the costs down to an affordable level.

In conjunction with Bill Hatherill and FSBPT, a negotiated \$25,000 cap to prepare an Amicus Brief has been arranged with the Washington DC office of Baker and Mackenzie. There is an April 24<sup>th</sup> due date to coincide with the filings of briefs by the dental board. It is our hope that FARB, through its governing members, will agree to sign onto the brief and contribute \$16,000 (\$1000 from each governing member). If there are governing members capable of contributing more than \$1000 this may help defray costs to those governing members unable contribute the full \$1000. It is anticipated that other like organizations, including FSBPT, will cover the remaining portions of the expenses. We believe that our support will help in creating awareness of FARB and our governing members and may attract such other groups into FARB as well.

Please reply directly to [farb@farb.org](mailto:farb@farb.org) in order for us to track the contributions from those of you that are able to do so. Thanks for your consideration in participating and contributing to this filing.

Best,

Tricia

Tricia Sullivan

Associate Executive Director

**FEDERATION OF ASSOCIATIONS OF REGULATORY BOARDS (FARB)**

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### **Mark Your Calendars!**

FARB's 22<sup>nd</sup> Annual Regulatory Law Seminar (RLS), formerly known as the ACS, will be October 3-5, 2014 at the Westin Annapolis in Annapolis, MD.

FARB's 39<sup>th</sup> Annual Forum will be January 23-25, 2015 at the Westin La Paloma in Tucson, AZ.

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