



# Iowa General Assembly

## 2015 Legal Updates

Legislative Services Agency – Legal Services Division

[http://www.supremecourt.gov/opinions/14pdf/13-534\\_19m2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf)

**Purpose.** *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

### STATE-ACTION ANTITRUST IMMUNITY FOR PROFESSIONAL LICENSING BOARDS

Filed by the United States Supreme Court  
February 25, 2015

North Carolina State Board of Dental Examiners v. Federal Trade Commission  
No. 13-534

[http://www.supremecourt.gov/opinions/14pdf/13-534\\_19m2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf)

**Facts and Procedure.** After receiving multiple complaints from licensed dentists, the North Carolina State Board of Dental Examiners (Board) began issuing cease-and-desist letters to nondentists who had been providing teeth whitening services and products at prices substantially lower than those charged by dentists. Under North Carolina's Dental Practice Act, the Board's primary duty is to regulate "the practice of dentistry," a term that is not specifically defined to include teeth whitening. At the time of the case, 8 of the 10 dentists on the Board earned substantial fees from teeth-whitening services.

The Federal Trade Commission (FTC) filed an administrative complaint against the Board alleging that the Board's actions in preventing nondentists from engaging in the practice of teeth whitening constituted an anticompetitive and unfair method of competition in violation of the Federal Trade Commission Act. The Board moved to dismiss the complaint, claiming that, as an agency of the state, it was immune from liability because it was taking state action. An administrative law judge (ALJ) denied the motion and the ruling was sustained by the FTC. The FTC stated that the Board must be "actively supervised" by the state to claim such immunity, which it was not. After a hearing on the merits of the complaint, an ALJ determined the Board had unreasonably restrained trade in violation of the antitrust law. The ruling was sustained by the FTC and affirmed by the Fourth Circuit Court of Appeals. The United States Supreme Court (Court) granted certiorari.

**Issue.** Whether state professional licensing boards are entitled to state-action immunity under federal antitrust law?

**Holding.** The Court held that a state board can only invoke state-action antitrust immunity if it is subject to "active supervision" by the state. That requirement was not met here because a majority of the Board's members are "active market participants" in the occupation the Board regulates.

**Analysis.** The Court has previously provided states immunity from antitrust laws because doing otherwise would likely be an undue burden on each state's power to regulate. Antitrust immunity generally covers nonstate actors, such as boards controlled by active market participants, if the state clearly articulates the anticompetitive policy and actively supervises the policy. This case focuses on the second prong of that test: whether North Carolina actively supervised the policy adopted by the Board. The Court stated that even though the Board is a state agency, "When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest." Thus, North Carolina's state supervision of the Board's action was insufficient because the Board members had an interest in protecting themselves and fellow dentists.

Boards whose members are not "active market participants" may not need to meet the standards set forth in this case. In addition, the Court identified four requirements of active state supervision: the supervisor must review the substance of each anticompetitive policy; the supervisor must have authority to modify or override the policy; the supervisor's supervision may not be "mere potential;" and the supervisor may not be an active market participant.

**Dissent.** Three Justices joined in the dissent. The dissent noted that self-regulation for professions such as dentistry predated federal antitrust laws, and that a state’s designation of a board as a state agency should be sufficient for immunity to reach that agency’s actions. The dissent argued that the Court should not attempt to determine whether an agency is sufficiently independent from the market or industry it regulates.

**Impact on Iowa.** The type of “self-regulation” at issue here is common in Iowa. However, the makeup of various professional licensing boards vary broadly. The Iowa Department of Public Health’s (DPH) Bureau of Professional Licensure regulates 39 professions through 19 professional licensing boards. It is unclear whether DPH oversight would be considered “active supervision” independent of a particular board sufficient to satisfy the Court’s standard in this case. Additionally, rulemaking by licensing boards in Iowa is subject to review by the Administrative Rules Review Committee, a committee of 10 legislators that may object to a rule or vote to delay the implementation of a rule so the full legislature may review the issue.

*LSA Monitor: Tim Reilly, Legal Services, (515) 725-7354.*