

CALIFORNIA SENATE OFFICE OF RESEARCH

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Federal Update

U.S. SUPREME COURT RULING MAY IMPACT MEMBERSHIP OF CALIFORNIA'S REGULATORY BOARDS

A recent U.S. Supreme Court ruling (*North Carolina State Board of Dental Examiners v. Federal Trade Commission*) may make it necessary to reconfigure the membership of the Department of Consumer Affairs regulatory boards. In the case, the North Carolina Board of Dental Examiners regulates the practice of dentistry as outlined by the North Carolina Dental Practice Act. The act does not specify whether teeth-whitening is the "practice of dentistry." However, the board, composed of a controlling number of licensed dentists, took the independent position that a dental license is required to perform teeth-whitening procedures. As a consequence of this position, the board issued 47 cease and desist orders to businesses offering teeth-whitening services. In response, the Federal Trade Commission (FTC) filed an administrative complaint alleging that the board's action constituted an anticompetitive and unfair method of competition under the FTC Act. The administrative law judge ruled in favor of the FTC, and the case eventually was heard in the U. S. Supreme Court in October 2014.

The court held that the dental board was protecting the profession, not the public, and thus implicitly declared that professional regulatory boards "controlled by active market participants" without sufficient state oversight and review could be held liable for anticompetitive decisions.

IMPACT ON BOARD MEMBERSHIP UNDER REVIEW

This is significant to California because most of California's health care regulatory boards are made up of a majority of "active market participants" (a.k.a. license holders), and as a result of this case, it is unclear whether the California's current oversight of these boards is sufficient. Therefore, it may be necessary to change the structure of

California's boards. The potential impact of these restructured boards could lead to a reduction in professional representation in policy-making and disciplinary decisions.

However, there are questions as to what extent the ruling applies to California's health care regulatory boards. The Senate Business, Professions and Economic Development Committee is reviewing implications of the decision to determine what, if any, legislative action might be necessary to ensure the state's regulatory boards and their members are exempt from antitrust liability for the boards' decision-making.

The court's decision in the *North Carolina State Board of Dental Examiners v. Federal Trade Commission* can be found on the Supreme Court's Web site at:

http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf

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Written by Taryn A. Smith. The California Senate Office of Research is a nonpartisan office charged with serving the research needs of the California State Senate and assisting Senate members and committees with the development of effective public policy. The office was established by the Senate Rules Committee in 1969. For more information, please visit <http://sor.senate.ca.gov> or call (916) 651-1500.
