

## Antitrust Immunity and Boards, Commissions, & Committees

Prepared by the Office of Legislative Research and General Counsel  
for the Business and Labor Interim Committee  
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## North Carolina State Board of Dental Examiners v. Federal Trade Commission

- Basic Facts about the Board:
  - 8 member board
    - 6 licensed dentists elected by dentists
    - 1 licensed hygienists elected by hygienists
    - 1 consumer appointed by the governor
  - Principal duty is to create, administer, and enforce licensing system for dentists
  - May make rules governing the practice of dentistry if not inconsistent with the Act and if approved by the Rules Review Commission
  - Subject to various state laws such as administrative procedures, public records, and open meetings

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- Basic Facts about Dispute:
  - In the 1990's, dentists began whitening teeth
  - By 2003, nondentists began whitening teeth
  - Dentists began to complain, which resulted in a Board investigation
  - The Board issued at least 47 cease and desist letters and took other action that was not subject to oversight by a politically accountable official
  - In 2010, FTC filed an administrative complaint charging the Board with violating federal law arguing that the Board's actions constituted an anticompetitive and unfair method of competition

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- Basic Elements of Analysis:
  - Federal antitrust law is a central safeguard for free market structure
  - States need not adhere in all contexts to a model of unfettered competition -- *Parker* interpreted the antitrust laws to confer immunity on anticompetitive conduct by states when acting in a sovereign capacity
  - A nonsovereign actor controlled by active market participants is only immune if:
    - Restraint is one clearly articulated and affirmatively expressed as state policy
    - The policy is "actively supervised" by the state
  - Court refutes argument that persons would not serve on boards

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- Basic Elements of State Supervision:
  - Need not be day-to-day involvement
  - Realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy v. risk that market participants will pursue private interests
  - Supervisor must review the substance of anticompetitive decision not merely process
  - Mere potential for state supervision is not substitute for decision by the state
  - Supervisor must have power to veto or modify decisions to ensure accord with state policy
  - Supervisor may not itself be an active market participant
  - Adequacy of supervision depends on all the circumstances of the case

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- What are the implications for Utah?

