North Carolina Board of Dental Examiners vs. Federal Trade Commission

What did the U.S. Supreme Court decide?

What does this decision mean for Arkansas (and other states)?

Under this decision, do the current procedures of the General Assembly create any legal vulnerability for boards and commissions?

If so, how do we fix that?

Here is what happened.

“In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.”

The Dental Board sent out cease-and-desist letters to (for instance) mall kiosk operators, saying things like:

- If you're not a dentist, you must "cease all activity constituting the practice of dentistry."
- The unlicensed practice of dentistry is a crime.
- If you're helping others to whiten their teeth, that is the practice of dentistry.
- Mall operators should consider expelling violators from their premises.

The Federal Trade Commission sued.

- The Federal Trade Commission sued the Dental Board, arguing that when the Board excluded non-dentists from teeth-whitening services, this was unfair competition. (Or to put it another way, it was an unreasonable restraint of trade that violated antitrust law.)
- The Dental Board argued, however, that it was a government agency, and that only private bodies – not government agencies like the Dental Board – were vulnerable to antitrust ("unfair competition") liability. (Generally, government bodies cannot be liable for antitrust violations.)
- Eventually, the case was appealed to the Supreme Court.

What the Supreme Court said:

- Issue: Can a regulatory board/commission create antitrust liability for itself (and taxpayers), or is it protected from liability because it is a government body?
- Supreme Court held that: “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal* 's active supervision requirement in order to invoke state-action antitrust immunity.”
- Plain English translation:
- A board/commission with a **“controlling number”** of **practicing, regulated professionals** must **have active supervision by state government** in order to **avoid antitrust liability.**

This case has broad implications.

- This is not just a case about dentists, or teeth-whitening, or North Carolina: this extends to every board and commission in the country.

- In other words, the recipe for disaster (personal or board liability) is to have a lot of practicing professionals on a board regulating themselves, in which there is no active supervision by another body (such as the state legislature).

- What is active supervision?
- And is the Arkansas General Assembly providing it?
- Because, if not, there is a live prospect of board-member liability and taxpayer liability.

The Supreme Court on “active supervision.”

- “The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. **It suffices to note that the inquiry regarding active supervision is flexible and context-dependent.** Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide **“realistic assurance”** that a nonsovereign actor's anticompetitive conduct “promotes state policy, rather than merely the party's individual interests.” “

- “The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.”

(citations omitted)

Plain English translation:

- The Supreme Court does not give firm guidelines on what active supervision is.
- Active supervision is “flexible and context-dependent.”
- Active supervision does not require micromanagement.
- Active supervision takes place when there is “**realistic assurance**” that a regulatory agency “promotes state policy,” not private interests.
- The “few constant requirements” of active supervision:
- 1. The supervisor must review the content (not just the procedures) of the regulation.
- 2. The supervisor must be able to veto or modify the regulation.
- 3. The supervisor may not be an active market participant.
- “In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.”

Is the General Assembly providing active supervision to boards/commissions?

- Act 1258 of 2015 governs "the review and approval of administrative rules."
- It provides new review/approval procedures for the Legislative Council.
- Does Act 1258 of 2015 provide for active supervision?
- Maybe.

- Old procedure of regulatory review (before Act 1258)
- The Legislative Council **may** make **non-binding recommendations** about rules.
- New procedure of regulatory review (after Act 1258)
- The Legislative Council **shall** review and approve rules.

Act 1258 review and approval process:

Any proposed rule will be approved by the Arkansas Legislative Council under Act 1258 *unless*:

- A majority of the quorum present of the Rules/Regulations subcommittee would have to ask for a vote on whether to vote.
- In that subcommittee, there would have to be both a procedural vote on whether to vote, and then a substantive vote to disapprove the rule under consideration, in order for the rule to fail.
- A majority of the quorum present of the full Legislative Council would then have to ask for a vote on whether to vote.
- In the full committee, there would have to be both a procedural vote on whether to vote, and then a substantive vote to disapprove the rule under consideration, in order for the rule to fail.
- Four different votes are therefore required in order not to approve a rule.
- With respect to the decisions above, a rule may only be disapproved if it is inconsistent with (1) state or federal law or (2) "legislative intent."
- The committee which disapproves the rule must explain its grounds for disapproval of the rule.
- (There are also emergency rule procedures which allow for rapid approval of rules by the Executive Subcommittee.)

The above procedure makes it difficult for any proposed rule to be disapproved. It is a procedure which makes any particular rule very likely to be approved. Does this procedure qualify as **active supervision**? Maybe.

This procedure is notably different from typical passage of legislation in Arkansas, which requires **affirmative** approval at the committee and floor level. Furthermore, unlike Act 1258's procedure, if legislation is disapproved at the committee level, it never makes it to the floor. And, of course, legislators do not typically have to provide a statement explaining why they have approved or disapproved legislation.

It’s hard to predict what the Supreme Court would say about Act 1258.

Does the current approval procedure under Act 1258 protect boards and commissions from antitrust liability? I don’t know, because nobody knows exactly what passes the test of “active supervision.”

I do think the answer is uncertain, and I think that the best way to deal with uncertainty in this area is to modify the review process slightly. The goal should be to achieve a “realistic assurance” that the review and approval process has results that are consistent with state policy.

How active does "active supervision" have to be?

"Our decisions make clear that the purpose of the active supervision inquiry … is to determine whether the State has exercised **sufficient independent judgment and control** so that the details of the rates or prices have been established as **a product of deliberate state intervention**, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks **whether the State has played a substantial role in determining the specifics of the economic policy**. The question is not how well state regulation works but **whether the anticompetitive scheme is the State's own**.

FTC v. Ticor (1992)

What changes might reduce uncertainty about whether we have "active supervision" in Arkansas?

1. Have a review process with the same kind of scrutiny that we have for legislation generally. Get rid of any presumption that rules will be approved. Require affirmative votes at multiple levels for rule approval.
2. Both legislators and legislative staff should scrutinize rules for any anti-competitive aspects generally. A formal requirement that legislative staff should identify any anti-competitive aspects to the relevant committee, as part of their review, is worth considering.
3. Modify or eliminate the requirement that legislators may only disapprove of a rule if they find it inconsistent with the law or with legislative intent – and modify/eliminate the requirement that legislators have to explain themselves if they disapprove a rule.

These are the low-level changes that should be considered; these changes, in my opinion, would remove Arkansas from what I would call the "danger zone" of uncertainty about active supervision.

In any event, Arkansas has a relatively high regulatory burden.

Arkansas's economy is burdened by relatively high levels of occupational licensure. A few years ago, the Institute for Justice determined that Arkansas has the second highest set of obstacles to job entry in the entire nation; we are also the fifth most extensively licensed state in the nation. Arkansas should be a land of opportunity; instead, we are a land of licensure. Arkansas should capitalize on its opportunity to choose deregulation that encourages job creation and economic growth while preserving health and safety – our state needs to stop being a leader in locking people out of the economy who are looking for work.

A broader reform: The “Boards and Commissions Immunity Act.”

Create one or more “office(s) of regulatory review” responsible for reviewing the actions of regulatory boards, so as to ensure they advance consumer welfare. Such an office could be based in the Bureau of Legislative Research; a second office could be answerable to the governor or the attorney general.

Give the reviewing office a mandate to promote economic competition and consumer welfare. If the office rests on the authority of an executive-branch official, it could have (in effect) a veto on anti-consumer regulations.

Require the reviewing office to look back at previously established regulations, so as to cover all regulations in the state in a given time period.