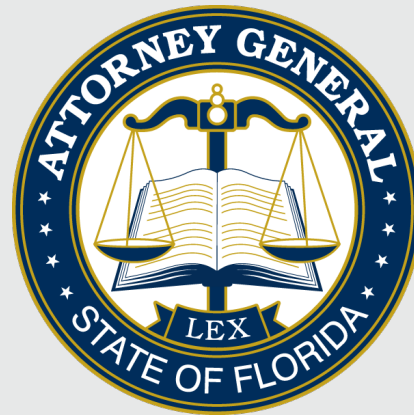


# U.S. Supreme Court Ruling in *North Carolina State Board of Dental Examiners v. FTC*

Overview, Implications, and the New Regulatory Landscape



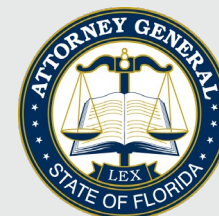
LIZABETH A. BRADY

INTERIM CO-DIRECTOR, ANTITRUST DIVISION



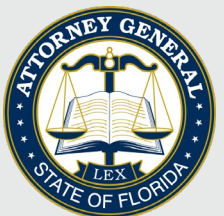
# Supreme Court's February 25<sup>th</sup>, 2015 Ruling

- If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity . . . is to be invoked.”

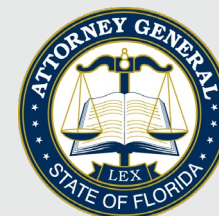


# Today's Discussion

- Antitrust Overview
- Background of the *NC Dental Board* case
- Summary of Supreme Court's 2015 ruling
- FTC Staff Guidelines
- Potential Implications for Regulatory Boards
- Pending Cases Against State Regulatory Boards

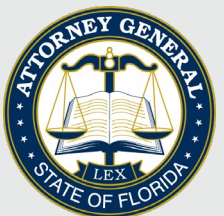


# Antitrust Overview



# Principles Behind Antitrust Law

- Law intended to promote **competition**
- Protect free competition from interference by private forces acting in their own **self interest**
- **Consumer harm**: higher prices, reduced output, lower product or service quality, decreased innovation or product improvement
- **Premise**: free and open competition results in best products and services



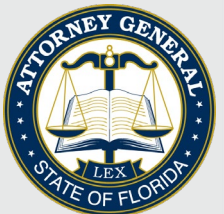
# Purpose of Antitrust Laws

- **Goal is to protect competition**
- **Not competitors**
- **Prohibits anticompetitive agreements between competitors**
  - **Agreements on price**
  - **Agreements to exclude others from the market**

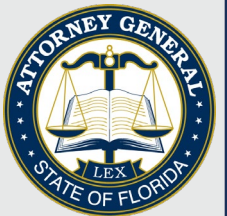


# State Action Doctrine

- Originally established by the Supreme Court as a defense to an antitrust claim in 1943 and elaborated upon in subsequent cases
- Actions by a State are not subject to the federal antitrust laws (Immune)
- Substrate government entities are also immune, so long as acting pursuant to a “clearly articulated policy to displace competition”
- Private entities may be protected if, in addition to acting pursuant to a clearly articulated state policy, they are also “actively supervised” by the state
- Florida Regulatory Boards \* Substate Entities or Private Entities?



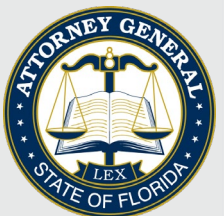
# Case Background





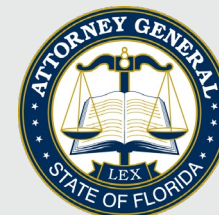
# Background Facts

- NC Board of Dentistry which is comprised of 8 members, reviewed its dental practice act; and 6 members are practicing dentists
  - Concluded act permitted only dentists to whiten teeth
  - Sent cease-and-desist letters to non-dentists and their suppliers/landlords
- Teeth whitening industry complained
- FTC opened investigation in 2008
- June 2010: FTC concluded NC Board's actions were anticompetitive and brought administrative complaint



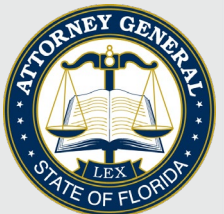
# FTC Administrative Proceeding

- FTC lawsuit alleged that NC Board violated antitrust laws
- NC Board defense: exempt from federal antitrust laws because it was a state agency and therefore protected by state-action immunity
- FTC argued NC Board is a private actor and must therefore meet highest standard to invoke state action immunity (clear articulation *and* active supervision)
- Primary reason: it is “a regulatory body that is controlled by participants in the very industry it purports to regulate” and Board members have a financial incentive to exclude competition

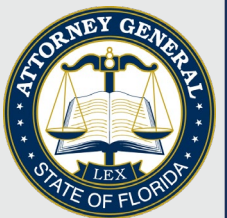


# May 2013 Fourth Circuit Ruling

- Fourth Circuit affirmed the FTC decision
- Emphasis on Board being comprised of a "**decisive coalition**" of participants in the regulated market chosen by and accountable to fellow market participants
  - Thus, private actor and active supervision required to invoke state action immunity
  - State did not oversee the cease-and-desist letters; generic oversight insufficient
- Concurring judge noted that, had Board members been appointed by Governor, it would be a state entity ... And active supervision requirement would not apply

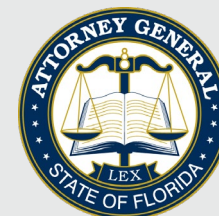


# Supreme Court Ruling



# Overview of Supreme Court Ruling

- 6 to 3 decision (Alito, Scalia and Thomas dissenting)
- **Majority's Holding:** Because a "controlling number" of the Board's decision makers are "active market participants in the occupation the Board regulates," the Board is treated as a private actor and must show active supervision by the State
  - The "active supervision" requirement was not met



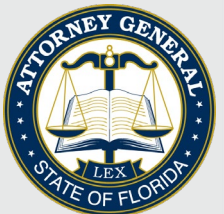
# Majority's Analysis

- **There are limits on immunity:** State action immunity exists to prevent conflict between state sovereignty and federal competition policy *but* it is not *unbounded*
- **Board is not sovereign:** State agencies are not simply by their governmental character sovereign actors for purposes of state action immunity
- The NC Board is a "**nonsovereign actor**" (an entity whose conduct does not automatically qualify as that of the sovereign state itself)



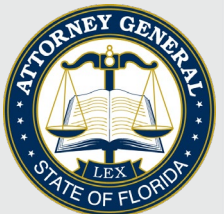
# Majority's Analysis (cont'd)

- **Active Supervision is required:** A nonsovereign actor controlled by "active market participants" enjoys immunity only if the challenged conduct is undertaken pursuant to a clearly articulated state policy and is actively supervised by the state
  - "Clearly articulated policy" prong presumed
- **State Supervision must be meaningful:** Immunity requires more than a "mere facade of state involvement"  
(states must accept political accountability)
- Limits on immunity are "most essential when the State seeks to delegate its regulatory power to active market participants"



# Majority's Analysis (cont'd)

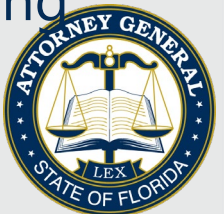
- **What's in a name:** "The need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade"
- **Likened to trade associations:** Similarities to private trade associations "are not eliminated simply because Board is given a formal designation by the State, vested with a measure of governmental power, and required to follow some procedural rules"





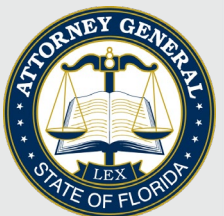
# Majority's Analysis (cont'd)

- Citizens need not be discouraged from serving
- Long tradition of professional self-regulation in US
- States may see benefits to staffing agencies with experts
- No claim for money damages: Whether Board members may be immune from money damages in some circumstances not addressed
  - State can provide for defense and indemnification
  - State can ensure immunity by adopting clear policy to displace competition and (if agency controlled by active market participants) providing active supervision



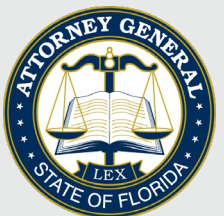
# Majority's Analysis (cont'd)

- Test is "flexible and context-dependent"
- Don't need day-to-day involvement in operations or micromanagement of every decision
- Review mechanism must provide "realistic assurance" that conduct promotes state policy, rather than merely the party's individual interests



# Constant Requirements of Active Supervision

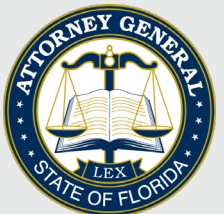
- The state supervisor who reviews the decision **MUST** have the power to reverse or modify the decision
- The “mere potential” for supervision is **NOT** an adequate substitute for actual supervision
- The State Supervisor **MUST REVIEW THE SUBSTANCE** of the decision, not just the Procedures followed to reach it
- The State Supervisor **MUST NOT** be an active market participant





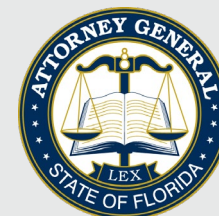
# Unanswered Questions

- What is a "controlling number"? Majority? Voting bloc? Powerful agency chair?
- Who is an "active market participant"?
- What is the scope of the market? Must market be relevant to the particular challenged conduct? Would result be different if Board members did not provide teeth whitening?
- How much participation makes person "active" in the market?



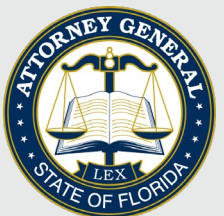
# FTC Staff Guidance

- On October 14, 2015 the FTC Staff issued staff guidelines to address two issues raised by the NC Dental Decision:
  - (1) When does a state Regulatory Board require active supervision in order to invoke the State Action Doctrine?
  - (2) What factors are relevant to determining whether the Active Supervision Requirement is satisfied?



# When is Active Supervision Required?

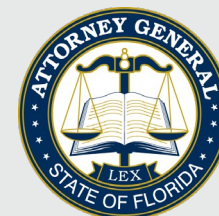
- When a controlling number of Board decision makers are active market participants in the occupation regulated



# When is Active Supervision Required?

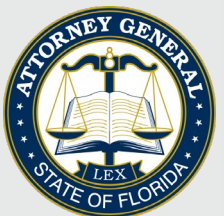
Active Market Participants Are:

- Licensed by **that** Board
- Provides **ANY** service subject to the regulatory authority of the Board
  - Includes subspecialties
  - Temporary suspension of active market participation is not sufficient



# When is Active Supervision Required?

- Method of Selection – Appointed by Governor versus Elected by the Profession: **IS NOT** determinative

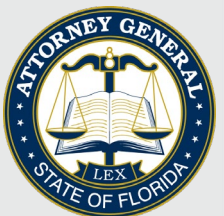




# When is Active Supervision Required?

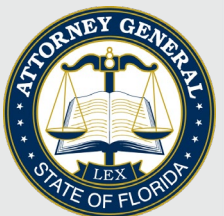
## Controlling Number of Market Participants

- Does **NOT** mean a majority
- Fact Bound Inquiry
- Voting Blocks
- Veto Power
- Deference of non-market participants



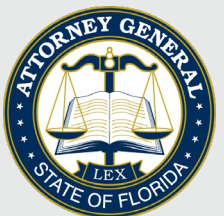
# What Constitutes Active Supervision?

In determining the adequacy of State Board Supervision, the FTC will be guided by the principles of independent judgment and political accountability



# What Constitutes Active Supervision?

- FTC factors
  - **Independently gathered or reviewed:** Board record containing relevant data, public comments, studies and other information
  - **Meaningfully evaluated:** Substantive merits of the recommended action examined in light of state legislation and policy
  - **Written Decision:** Reasons and rationale for approving, modifying or disapproving recommended action



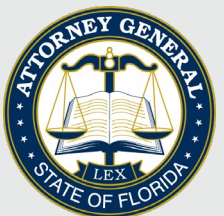
# Examples from the FTC Guidelines

- Activities **Not** Requiring Active Supervision
  - Prohibitions on regulated person from engaging in **fraudulent business practices**
  - Prohibitions on regulated person from engaging in **untruthful or deceptive advertising**
  - **Non-Discretionary** actions that implement an anticompetitive statutory regime
    - Denial of license for failure to submit required fee
    - Denial of license for failure to submit proof of education degree



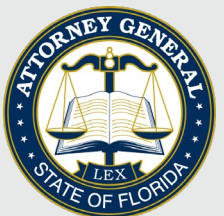
# Examples from the FTC Guidelines

- Activities **Not** Requiring Active Supervision (Cont'd)
  - Administering disciplinary process for violations of lawful and valid standards
  - **But enforcement affecting multiple persons that substantially affect competition are NOT IMMUNE and would require active supervision**



# Examples from the FTC Guidelines

- Activities that **DO NOT** Meet Active Supervision Requirement
  - Entity Supervising the Board is itself controlled by active market participants
  - State official monitors Board actions, participates in deliberations but does not have authority to disapprove

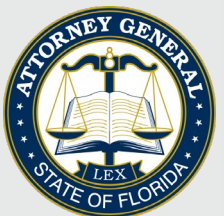
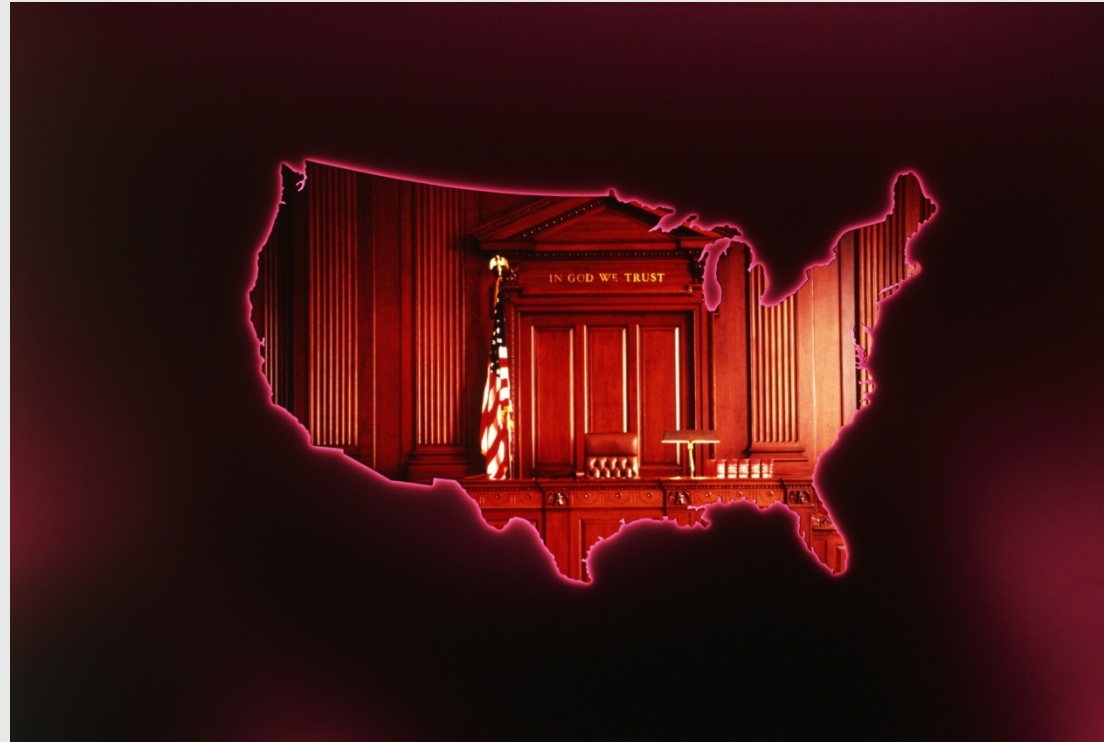


# Examples from the FTC Guidelines

- Activities that **DO NOT** Meet Active Supervision Requirement (cont'd)
  - State Attorney General or other State Official advises Board on an ongoing basis
  - Independent State Agency with veto power only engages in cursory review
  - Independent State Agency conducts a procedural review but does not substantively review Board actions



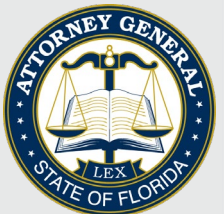
# Potential Implications





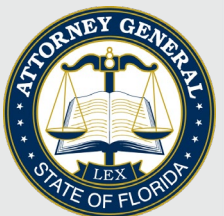
# Why Does this Matter to You?

- Practitioner members constitute a majority on ALL BOARDS.
- Are Florida Boards subject to “active supervision?”
  - Four requirements for active supervision
    - (1) Supervisor must review substance, not merely procedures
    - (2) must have power to veto and modify
    - (3) mere potential for supervision not enough; and
    - (4) supervisor can’t be active market participant.
- Lawyers are already bringing private antitrust actions against regulatory Boards in multiple jurisdictions. Its only a matter of time for Florida Boards
- Defense attorneys that appear before Florida Boards are already raising the antitrust in defense of their clients
- The Supreme Court trend is toward narrowing state action immunity. As demonstrated by the Staff Guidelines the FTC strongly disfavors state action immunity and sets a high bar for “active supervision.”



# Who Sues the Board?

- FTC
  - Will file suit for injunctive relief
- Private Plaintiffs (potential competitors)
  - Can file suit for injunctive relief
  - Has the ability to file suit for damages



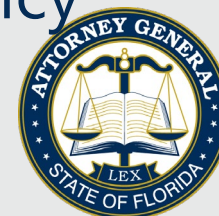
# So Now What?

- Your Board Counsel will scrutinize all Board activity including rule-making for anticompetitive actions or policies
- Avoid taking anticompetitive actions
  - Anticompetitiveness necessary consideration when rule-making
  - Avoid issuing opinions (declaratory statements) on scope of practice
  - Avoid creating grandfathering provisions unless clearly articulated in the enabling statute
- If anticompetitive actions are contemplated
  - Build a record—why is this action justified?
    - Health and safety justification
  - Clearly define the problem the action is being taken to address and document the need for action with objective supporting data



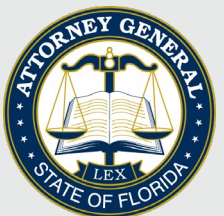
# Potential Strategies in Response to Ruling

- Develop greater state supervision over existing Boards (e.g., Governor, legislative Committee, State Court)
- Change Board membership so not “controlled” by active market participants
- Combine Boards to dilute active market participants (e.g., umbrella Boards, super Boards)
- Require legislative ratification of all rules with significant effects on competition
- Abandon the Board regulatory model for some or all professions
- Make sure that each practice act sets forth a clearly articulated policy to displace competition when appropriate.



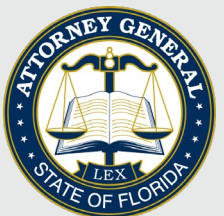
# Other Considerations

- Some activities may be more likely to draw scrutiny than others (e.g., individual disciplinary action vs. broader scope-of-practice question)
- Prepare for potential increase in private antitrust claims in response to Board actions
- FTC has been active in this area.
- DOJ has also shown in interest in this area.



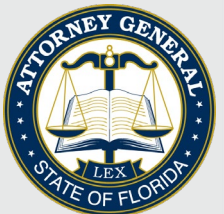
# Defense and Indemnification of Board Members

- Risk Management advises that there is no coverage of defense costs, damages or attorney fee awards in the event a Board Member is sued for Antitrust Violation
- However, if suit includes both Antitrust and other covered claims, i.e., 1983, total defense cost would be covered, but only damages for covered claims would be paid by Risk Management



# Recent Litigation Against State Regulatory Boards

- Teladoc, Inc., et al., v. Texas Medical Board, et al.; USDC WDTX Case No. 1:15-cv-343
  - Status: Case Dropped after legislation enacted
  - Teladoc sued the board to block the board's rules requiring face-to-face contact between a patient and a physician before a physician can prescribe medication.
  - Judge ruled that the active state supervisor must have the authority to amend, veto, or approve the board's actions.
- Louisiana Real Estate Appraisers Board, Federal Trade Commission Docket No. 9374 (2017)
  - Status: Settled
  - The FTC alleged the board exceeded its requirements under Dodd-Frank. The law requires appraisal management companies to compensate appraisers at a rate that is customary and reasonable for appraisal services.
  - Under the settlement, the board has agreed to stop fixing compensation rates for appraisal services in Louisiana.



# Recent Litigation Against State Regulatory Boards

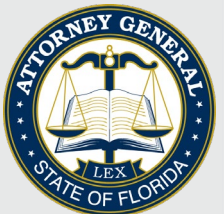
- Leeds v. Board of Dental Examiners of Alabama, et al.; USDC NDAL Case No. 2:18-cv-1679
  - Status: On Appeal
  - SmileDirectClub sued the board after the state examiners board sent a cease-and-desist letter asserting that its method of taking digital photos of prospective patients' mouths constituted an authorized practice of dentistry because no dentist was physically present.
  - Judge tossed the claims against the board, but kept the allegations against the six dentists and dental hygienist who make up the board.
- SmileDirectClub, LLC v. Battle, et al.; USDC NDGA Case No. 1:18-cv-02328
  - Status: On Appeal
  - SmileDirectClub sued the board challenging an amendment that requires a dentist to be present when SmileDirectClub's non-dentist employees take digital photos of prospective patient's teeth and gums. They argued that there is no active supervision because the board did not advise the governor on the competitive harm posed by the amendment.





# Recent Litigation Against State Regulatory Boards

- Jeffrey Sulitzer DMD v. Joseph Tippins et al.; USDC CDCA Case No. 2:19-cv-8902 (2019)
  - Status: On Appeal
  - SmileDirectClub filed a lawsuit against members of the state board alleging that they purposefully harassed the company's clinics in an effort to undermine the growing business.
  - Lower court found that the board members were immunized because they were acting in their authority.
  - SmileDirectClub has appealed the ruling to the 9<sup>th</sup> Circuit.



# Questions

