WHO’S MINDING THE STORE?

What Happens When the U.S. Supreme Court Accidentally Puts State Agencies Out of Business

State Bar of California
Business Law Section

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PRESENTER:
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This Program Offers One Hour of MCLE Participatory Credit
INTRODUCTION

- California passed the Medical Practice Act in 1876, designed to regulate the state’s medical industry.

- By 1930, California had ten state boards under the Department of Vocational and Professional Standards, including accountants, architects, barbers, cosmetologists, dentists, embalmers, optometrists, pharmacists, physicians and veterinarians.

- In 1970, California renamed this agency the Department of Consumer Affairs (DCA).
DCA BOARDS AND BUREAUS

- Accountancy
- Acupuncture
- Arbitration
- Automotive Repair
- Barbering and Cosmetology
- Behavioral Sciences
- Athletic Commission
- Cemetery and Funeral
- Chiropractic Examiners
- Contractors
- Court Reporters
- Dental Hygiene
- Dental Board
- Electronic and Appliance Repair
- Guide Dogs
- Medical Board
- Naturopathic Medicine
- Occupational Therapy
- Optometry
- Osteopathic Medical Board
DCA BOARDS AND BUREAUS CONTINUED

- Pharmacy Board
- Physical Therapy Board
- Physician Assistant Board
- Podiatric Medicine Board
- Professional Fiduciaries
- Psychology Board
- Real Estate Board
- Registered Nursing Board
- Respiratory Care Board

- Speech-Language Pathology and Audiology and Hearing Aid Dispensers
- Structural Pest Control
- Telephone Medical Advice
- Veterinary Medical Board
- Vocational Nursing / Psychiatric Technicians
MEANWHILE, IN NORTH CAROLINA. . . .
DENTAL BLEACHING

- Dental bleaching or tooth whitening is the use of carbamide peroxide, which reacts with water to form hydrogen peroxide.

- The peroxide oxidizing agent penetrates the porosities in the rod-like crystal structure of enamel and breaks down stain deposits on dentin.

THE PARTICIPANTS

United States Federal Trade Commission

- **FTC’s Mission**: To prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.

- **FTC’s Vision**: To promote a U.S. economy characterized by vigorous competition among producers and enhancing consumer access to accurate information, yielding high-quality products at low prices and encouraging efficiency, innovation, and consumer choice.
THE PARTICIPANTS CONTINUED

North Carolina State Board of Dental Examiners

- **Board’s Purpose**: To ensure that members of the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry and dental hygiene in the state of North Carolina.

- **Board Members**: Of the eight members, six are dentists, one is a registered dental hygienist, and one is a consumer.
TAR HEEL STATE

The origin of the term “Tar Heel” comes from the small distilleries and sawmills in North Carolina that produced sizeable amounts of pitch, tar, turpentine, and rosin for other British colonies prior to the American Revolution.
THE PARTICIPANTS CONTINUED

United States Supreme Court

- Consists of the Chief Justice and eight Associate Justices.

- The President of the United States has the power to nominate Justices, and the Senate provides advice and consent for all appointments.

- “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” (U.S. Const., Art. III § 2)
THE SUPREME COURT

Justice Clarence Thomas is the only current Justice of the U.S. Supreme Court born in the South (Pin Point, Georgia), although Justice Antonin Scalia was a professor at the University of Virginia School of Law between 1967 and 1974.
NORTH CAROLINA DENTISTS

- 1990s – North Carolina dentists start to whiten teeth.
- Ten years later, non dentists in North Carolina follow suit.
- In 2006, the North Carolina State Board of Dental Examiners issue more than 47 cease-and-desist letters to non dentists who whiten teeth.
- In 2007, the North Carolina Board of Cosmetic Art Examiners issue similar warnings.
- Soon after non dentists stop offering teeth whitening services.
THE STATUTORY FRAMEWORK

- Sherman Act, § 1 (15 U.S.C. § 1) prohibits “every contract, combination . . . or conspiracy in restraint of trade.”


- Clayton Act, § 7 (15 U.S.C. § 18) prohibits mergers and acquisitions where the effect may be “substantially to lessen competition” or “to tend to create a monopoly.”

MEANWHILE, IN CALIFORNIA. . . .
CORPORATE PRACTICE OF MEDICINE

- Corporations and other artificial legal entities shall have no professional rights, privileges, or powers (Cal. Bus. & Prof. Code § 2400)).

- The professional practice of the applicant or applicants is wholly owned and entirely controlled by the applicant or applicants (Cal. Bus. & Prof. Code § 2415(b)(2)).

- Prohibition also applies to chiropractic medicine (§ 1050), dentistry (§ 1625) and optometry (§ 3000), among other professions.
CORPORATE PRACTICE OF MEDICINE CONTINUED

- California has a “long-standing public policy against permitting lay persons to practice any of the medical arts or to exercise control over decisions made by healing arts practitioners.” (California Ass’n of Dispensing Opticians v. Pearle Vision Center, Inc., 143 Cal. App. 3d 419 (1983)).

- A physician may not “lend” his or her professional license to a corporation without risk of disciplinary action or even license revocation. (Steinsmith v. Medical Board, 85 Cal. App. 4th 458 (2000)).
CORPORATE PRACTICE OF MEDICINE CONTINUED

- California’s prohibition includes direct medical care as well as administrative services that directly influence clinical delivery. (*Painless Parker v. Board of Dental Examiners*, 216 Cal. 285 (1932)).

- Statutory exemptions provide for establishing hospital clinics (Cal. Health & Safety Code § 1206(d)) and outpatient settings operated by a nonprofit hospital (Cal. Health & Safety Code § 1206(l)).
CORPORATE PRACTICE OF MEDICINE CONTINUED

At its core, this prohibition on the corporate practice of medicine is “designed to protect the public from possible abuses stemming from the commercial exploitation of the practice of medicine.”

(County of Los Angeles v. Ford, 121 Cal. App. 2d 407 (1953)).
MEDICAL BOARD OF CALIFORNIA ("MBC")

- Regulates the practice of medicine through California’s police power.
- Disciplines medical practitioners for unprofessional conduct by restricting, suspending or revoking the physician’s license to practice medicine.
- Investigates complaints from the public, from other licensees, and from health care facilities.
“The Board’s investigators have the status of peace officers [citation], and possess a wide range of investigative powers. In addition to interviewing and taking statements from witnesses, the Board’s investigators are authorized to exercise delegated powers [citation] to ‘Inspect books and records’ and to ‘Issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry [or] investigation . . . in any part of the state.’”

MEANWHILE, ACROSS THE NATION. . . .
APPOROACH BY OTHER STATES

- **Arizona**: “A professional corporation does not somehow magically transfer the licenses of the individuals who own it to the corporate body as a whole.” (*Midtown Medical Group, Inc. v. State Farm Mut. Auto. Ins. Co.*)

- **Colorado**: No prohibition for the corporate practice of certain mental health professions.
APPRAOCH BY OTHER STATES CONTINUED

- North Dakota: Conflict between case law and statute.

- Virginia: Corporate entities that have obtained a certificate of authority and employ or contract with individuals licensed by a health regulatory board are not prohibited from practicing medicine directly or as a manager.

- Nevada: Attorney General opinion often disregarded.
ANTITRUST AND HEALTH CARE
A VIEW FROM THE PAST

“Over the years, health care service has been treated pretty much as a ‘natural monopoly.’ It has been assumed that a community could support only so many hospitals; that providers just naturally control supply and demand. . . . Isn't it just possible, some are asking, that turning competition loose, at least in some sections, may not only lower the costs of health care but improve its quality?”

1996 FTC AND U.S. DOJ ANTITRUST POLICY

- Mergers and acquisitions
- Hospital joint ventures involving technology or specialized clinical care
- Non-Fee-related information provided to purchasers of health care services
- Provider participation in exchange of price and cost information
- Joint purchasing arrangements
- Multiprovider networks
RECENT COURT DECISIONS

- **Promedica Health System, Inc. v. Federal Trade Comm’n, 749 F.3d 559 (6th Cir. 2014)** (upholding the decision by the FTC to block a hospital merger in Ohio), *cert. denied ___ S. Ct. ____* (May 4, 2015).

- **Federal Trade Comm’n v. Phoebe Putney Health System, Inc., 133 S. Ct. 1003 (2013)** (holding that immunity did not apply for local governmental entity when FTC challenged its acquisition of a second hospital).
SAINT ALPHONSONSUS V. ST. LUKE’S

- 778 F.3d 775 (9th Cir. 2015).
- 2012 merger of St. Luke’s Health Systems and Saltzer Medical Group violated the Clayton Act and state law.
- “[H]uge market share” of the post merger entity “creates a substantial risk of anticompetitive price increases” in the applicable market.
- Divestiture ordered, ignoring argument that post-merger efficiencies were more important. “Extraordinary efficiencies” may be required to offset potential risk.
A WORD FROM THE FTC

“The success of health care reform in the United States depends on the proper functioning of our market-based health care system. Antitrust laws play a crucial role in ensuring that consumers benefit.”

THE SUPREME COURT DECISION
OVERVIEW OF SUPREME COURT’S RULING

➢ 6-3 decision

➢ Agreed with Fourth Circuit and FTC

➢ Violation of Sherman Act

➢ No immunity

➢ Ominous Dissenting Opinion
ALLEGATIONS BY FTC

- Dental Board’s concerted action to exclude non dentists from the market for teeth whitening services violated antitrust laws.

- Dental Board argued it had immunity from prosecution as “its members were invested by North Carolina with the power of the State, and as a result, the Board’s actions were cloaked with” immunity under *Parker v. Brown*, 317 U.S. 341 (1943).
SUPREME COURT AGREES WITH FTC

Nonsoversign boards such as the Dental Board enjoy immunity under *Parker* only after satisfying two conditions:

- The “challenged restraint . . . [must be] clearly articulated and affirmatively expressed as state policy” and
- The State actively supervises the policy in question.
SUPREME COURT AGREES WITH FTC CONTINUED

- North Carolina may prohibit the unauthorized practice of dentistry, but it did not articulate through legislation a similar prohibition on teeth whitening.

- There was not proper oversight of the Dental Board, which was comprised of six members who are licensed dentists, one licensed and practicing dental hygienist, and one “consumer” appointed by the governor.
APPLICATION OF PRIOR SUPREME COURT RULING

“[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own.”
THREE JUSTICES DISAGREE AND WARN

“North Carolina’s Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State’s power in cooperation with other arms of state government.”

The dissenting opinion also issued a warning to other professions about the implications of the North Carolina State Board of Dental Examiners decision, in particular that “it will create practical problems and is likely to have far-reaching effects on the State’s regulation of professions.”
THE FUTURE OF THE MBC
CHALLENGES TO THE MBC

- Ability to effectively maintain regulatory oversight questioned.

- Budgetary concerns have always been a source of contention.

- The Supreme Court’s focus on “whether anti-competitive conduct engaged by [nonsovereign actors] should be deemed state action and thus shielded from antitrust laws” overshadows the conduct of any such state regulatory professional board, whether or not its conduct is “efficient, well-functioning, or wise.”
QUESTIONS UNRESOLVED BY THE JUSTICES

- Will the FTC replace the MBC as the only remaining line of defense to protect the public interest?

- Will the public’s interest depend upon interpretation by the FTC of the laws of competition without regard for California’s prohibition on the corporate practice of medicine?

- What is the impact on the traditional notions of federalism espoused throughout the Affordable Care Act?
LESSONS TO CONSIDER

- The CMB may adopt, amend, or repeal in accordance with the provisions of the Administrative Procedure Act, those regulations as may be necessary to enable it to carry into effect laws relating to the practice of medicine.

- While traditional notions of federalism encourage states to independently craft their allocation of balance, the ways in which each state opts to mold its particular helping of power often speak volumes.
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Craig is an attorney and health care consultant, specializing in issues pertaining to modern American health care and the ways it should be managed in its current climate of reform.

Craig’s law practice focuses on health care mergers and acquisitions, regulatory compliance and counseling for providers. Craig is also an adjunct professor of law at Pepperdine University School of Law, where he teaches courses on Hospital Law and the Affordable Care Act.

Between 2002 and 2011, Craig was the Chief Executive Officer of Coast Plaza Hospital in Norwalk, California. Craig is also a Fellow Designate with the American College of Healthcare Executives and Chair of the State Bar of California, Business Law Section, Health Law Committee.

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Thank You

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