

THE WALL STREET JOURNAL.

STATE LICENSING BOARDS UNDER FIRE FROM WITHIN

By Angus Loten and Sarah E. Needleman
August 27, 2014

The Supreme Court will take up an antitrust case this fall that could curb the proliferation of state licenses, a top worry for U.S. small-business owners and entrepreneurs.

At issue: Can state licensing boards staffed with business owners and professionals regulate their own markets without oversight from government employees?

The case, to be heard at the nation's highest court in mid-October, started with a dispute over teeth-whitening that erupted between the Federal Trade Commission and the North Carolina Board of Dental Examiners.

The dental board — comprised of six licensed dentists, a hygienist and one consumer member — is accused of improperly thwarting competition while the state wasn't paying attention. The board issued nearly 50 cease-and-desist letters over the past decade to beauty parlors, spas and other small businesses that offer teeth-whitening services. The letters warned that only licensed dentists can legally provide those treatments.

Such letters, as well as threatening notices to mall owners and property managers who lease space to teeth-whitening services, are "unfair methods of competition," the FTC said in a June 2010 complaint. Nondentist teeth-whitening services charge between \$100 and \$200, while licensed dentists usually charge \$300 to \$700, it said.

The agency rarely receives complaints about professional licensing from consumers, said Todd Zywicki, a law professor at George Mason University and a former director of policy planning at the FTC. It is the licensed practitioners who typically pressure state boards into cracking down on unlicensed service providers. They, in turn, complain to the FTC about being harassed by the state.

"That is how most of these licensing challenges start, with the members of the protected industry demanding that the states shut down their competitors," Mr. Zywicki said, adding at that point it becomes an antitrust issue.

An FTC spokesman declined to comment.

Experts argue that they know best how to perform a service.

North Carolina dentist Christopher Phelps, who isn't on the state's dental board, said nonlicensed teeth-whitening providers fill their syringes with over-the-counter bleaching gels instead of hydrogen or carbamide peroxide. And they use generic blue light bulbs rather than ultra-violet lights to give the impression that they are providing the same level of service, he added. "It is a show—a trick," Dr. Phelps said.

Ron Hayes, an unlicensed rival, runs mall kiosks in Virginia, Maryland and South Carolina that charge \$99 for a 20-minute teeth-whitening session. But in February he sold his kiosk in Charlotte, N.C., in part because of the state's strict licensing requirements.

"In five years we've done more than 100,000 teeth whitening jobs and never once have we put someone in the hospital," he said.

Last year Nicole Gates added teeth whitening to her mobile tanning salon service in Charlotte, N.C., in the hopes of attracting more customers. She charges \$60 for three 15-minute treatments. Since she lacks a dental license, Ms. Gates doesn't administer teeth-whitening chemicals to her customers.

Instead, she hands them a mirror and a pen filled with a 16%-hydrogen-peroxide gel and guides them in applying it.

"Her rates were a lot better than the dentist," said Wendy Hartz, who whitened her teeth with the help of Ms. Gates.

The North Carolina dental board argues it is protecting public safety.

Bobby White, a board administrator, says it gets 250 to 300 complaints annually about local teeth-whitening services, mostly from consumers.

One person whose teeth were whitened at a tanning salon claimed he later "developed extremely irritated gums, ulcers, and possible permanent nerve damage," according to the board's filings in the lawsuit.

In July 2011, Administrative Law Judge Michael Chappell ruled the dental board had violated federal antitrust law. An appeals court last year denied the board's motion to review the case, so it appealed to the Supreme Court. A decision is expected by next June.

The surge in licensing laws is partly the result of a decadeslong shift in the U.S. economy.

Nearly one in three occupations now requires some form of license, compared with just 5% in the 1950s, according to Morris Kleiner, a public policy researcher at University of Minnesota. Today nearly 23% of occupations are licensed at the state level, up from 20% in 2000.

In the past five years, at least 14 states have added licensing for yoga instructors, including Arizona, Colorado, Texas and Utah. Other newly licensed jobs: eyebrow threading, irrigation contractors and art therapists.

Most professional licensing boards are staffed with established players in those very fields.

Such boards have vested financial interests, tend to be beholden to their peers, and often prevent healthy competition, according to entrepreneurs, consumer advocates and other opponents of licensing laws.

Some entrepreneurs argue that state medical boards, whose members are nominated by private medical associations, can't be trusted to determine rules in other professions, including acupuncturists, midwives, massage therapists and chiropractors.

Similarly, state bar associations staffed by active lawyers shouldn't set rules governing online businesses that let consumers create their own legal documents, they say.

Rebecca Haw Allensworth, a law professor at Vanderbilt University who specializes in antitrust laws, said not all state licensing laws are intrinsically suspect, but in an era when

consumers publicly post complaints about businesses on Yelp and other websites there is less need for professional licensing to protect public safety.

State boards collect licensing fees, including licensing renewal payments. Those fees can be raised to help offset the cost of tax cuts.

But many licensed professionals tend to make generous donations to politicians, said Larry Salzman, an attorney at the Institute for Justice, a nonprofit law firm. "Doctors, dentists and other professional associations tend to have wealthy members with political influence," he said.

Mr. Salzman is representing an unlicensed teeth whitening business in Atlanta in a separate lawsuit against Georgia's dental board.