

The FTC is on a Roll with its Second Appellate Victory in Two Weeks

The FTC appears to be on a roll. On February 25, 2015, the U.S. Supreme Court [affirmed](#) the Fourth Circuit's upholding of the Commission's administrative ruling that the North Carolina State Board of Dental Examiners ("Board") had illegally restrained trade under the FTC Act by forcing nondentists to cease offering teeth whitening services in that state. The underlying facts were that nondentists had been offering teeth whitening services for lower prices than were licensed dentists. In response to complaints from dentists, the Board took action to exclude nondentists from the teeth whitening service market by issuing cease and desist letters. In its defense, the Board invoked state action immunity, arguing that it was immune from prosecution under federal antitrust laws because it had been acting pursuant to a clearly articulated state policy to displace competition. The FTC's ALJ ruled that even if the Board had acted pursuant to such a policy, to claim immunity, the Board must be actively supervised by the State, which it was not. The Fourth Circuit affirmed the ALJ and the Supreme Court affirmed the court of appeals.

This is the second major appellate win for the FTC this month. Earlier, the Commission won the Ninth Circuit appeal of the St. Luke's merger case from Idaho. It's also an important follow-up win to [FTC v. Phoebe Putney](#), in which the Supreme Court overruled the Eleventh Circuit on the state action immunity issue, holding that the doctrine did not prevent antitrust enforcement scrutiny of a hospital merger in Georgia.

The decision was written by Justice Anthony Kennedy on behalf of a six-member majority. Justice Samuel Alito authored a

dissent, in which Justices Antonin Scalia and Clarence Thomas joined.