



NASBA

111TH ANNUAL MEETING

Legal Developments

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LEGAL DEVELOPMENTS

NASBA ANNUAL MEETING

OCTOBER 30, 2018

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OVERVIEW

- Recent State Board of Accountancy Cases
 - FTC Report on License Portability
 - Accounting Firms & Data Breaches
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OTHER SUBJECTS COVERED IN MANUSCRIPT

- **Other Accountancy Cases with Regulatory Implications**
- **Developments re Marijuana Enforcement Impacting Accountancy Regulation**
- **Cryptocurrency Cases**

ACCOUNTANCY BOARD CASES

- Can State Boards (and members and staff) be sued for failure to enforce?
- Can State Boards discipline CPA firms for failure to comply with peer review (including the terms of the peer review engagement)?
- What can State Boards do if a private litigant throws the kitchen sink at them in federal court?

CONLEY

- Private business dispute with CPA
- Demanded that CBA "immediately conduct a full and [thorough] investigation as to the conduct and business practices of [Defendant CPA], who is a licensed and current member of the agency and doing business as a Certified Public Accountant."
- \$3 million damages

CONLEY (POST NC DENTAL IMPLICATIONS)

- State Board not liable for damages in federal court for continuing to license an allegedly incompetent or dishonest CPA
- State agency immune under 11th Amendment
- In line with *Earles v. LA Board* (1998), *Rosa v. California* (2008), *Flattum v. Cal. Dep't of Consumer Affairs* (2012), *Cane v. Nev. State Bd. of Accountancy* (2016)
- Monitoring over 40 post NC Dental cases
- State legislative challenges and Federal legislative hope

IN RE JOHNSON

- Peer review engagement
- CPA firm received failed review
- Board rule required compliance with terms of peer review engagement
- Board also looked at the audit and found failure to comply with standards
- Failure to cooperate with inquiry
- Discipline – censure, civil penalty, and revocation until compliance with terms of engagement

IN RE JOHNSON (NC BUSINESS COURT)

- On judicial review, designated a complex business litigation case; Johnson asserted that:
- Proceeding biased & violated due process
- Expert witness testimony improperly admitted
- Board actions violated antitrust laws
- NC Business Court rejected Johnson's claims

IN RE JOHNSON (NC SUPREME COURT)

- Johnson challenged:
 - Expert witness
 - Lack of substantial evidence
 - Enforcement of private dispute
- Supreme Court ruled unanimously on the Board's side
- **Implications:**
 - How failed peer review can lead to discipline
 - Court understood public protection purpose behind enforcement of engagement contract compliance

WILTFONG V NASBA, AICPA, 3 STATE BOARDS

- Unlawful cartel to manipulate accounting market by unlawfully revoking and preventing him from obtaining a license
- Lack of effective oversight of major accounting firms, conflicts of interest, lack of due process, and failure to fairly enforce all of its rules

WILTFONG (COURT RULING)

- Even in light most favorable to plaintiff "it is impossible to determine who is allegedly conspiring with whom, when they agreed to conspire, the scope of the conspiracy, or how their conduct has affected Plaintiff specifically."
- Court dismissed on its own motion plaintiff's "meritless" claims.
- Time for appeal has expired.

FTC REPORT ON LICENSE PORTABILITY

- 2018 Report on License portability cites UAA's "substantial equivalency" standard as a good example
- Irony: In the name of competition one by-product of the legislative attacks on boards of accountancy could be the subversion of "substantial equivalency"

REGULATION OF ACCOUNTANCY IS THE MOST PRO-COMPETITIVE OF ANY PROFESSION

- CPAs only need to be licensed in the state of their principle place of business UAA §23, §3(p)
- CPAs can practice in any other jurisdiction without notice or fee. UAA §23
- CPAs are subject to substantially equivalent licensing requirements UAA §6(c)(2)
- Only titles that have the capacity or tendency to deceive are prohibited UAA §2, §14(c) - (h)
- Holders of substantially equivalent foreign credentials are allowed to provide certain services in the states §14(j)
- Nonlicensees are allowed to render many accounting services to the public §14(a)

LONG FTC SHADOW

- *US v AICPA (1972)*
- *US v Texas Board of Accountancy (1979)*
- *US v LA Board of Accountancy (1984)*
- *In re Harris, FTC v. NC State Board of CPA Examiners (1984)*
- *FTC Letter to Tennessee AG (Dec. 13, 1984) [re advertising/solicitation]*
- *In the Matter of R.I. Bd. of Accountancy, 107 F.T.C. 293 (1984); 16 C.F.R. Part 13 (Feb. 25, 1986).*
- *In the Matter of AICPA, 113 F.T.C. 698 (1990).*
- *FTC Op. (Mar. 18, 1996). The net effect on consumers of an increase in the educational requirements for CPA licensure to 150 semester hours by the Washington state legislature could be negative.*
- *Greene v. Connecticut Board (2001)*
- *Townshend v. Fisher & OK Board (2004),*
- *FTC position asserted in Copabella v. AICPA (2011),*
- *FTC and NC Dental cited in over two dozen state AG Opinions (2014-2017)*
- *Cited (unsuccessfully) in In Re Johnson and Wiltfong (2018)*

ACCOUNTING FIRMS & DATA BREACHES

- Over 50 jurisdictions have data breach notification statutes
- 33 more jurisdiction are considering revisions to strengthen data laws
- According to public records in several states, dozens of accounting firms have file mandatory notices of breaches of client data
- A few courts have opened the doors to class action suits and treble damages.
- Currently addressed via UAA Section 18 (Confidentiality)

RECENT CASES INDICATE RISKS

- *Hutton v. National Board of Examiners in Optometry, Inc.*, (4th Cir. 2018).
Class action plaintiffs had standing to pursue claims related to data breaches even though they had not incurred any fraudulent charges on credit cards opened in their names.
- *In re Facebook Biometric Information Privacy Litigation*, No. 3:15-cv-03747, 2018 U.S. Dist. LEXIS 63930 (N.D. Cal. Apr. 16, 2018). Class action plaintiffs could proceed in their lawsuit; the Illinois Biometric Information Privacy Act only required a violation of the statute—not actual injury.

California CPA firm reports data breach

The Top Cyber Risks to Accounting Firms Come from Inside the Firm

AUG 28, 2018



Hackers Breached

Firms

One of The "Big Four" Accounting

An inadequate breach response can be devastating to an accounting practice. Not only does it result in reputational harm, but can result in higher out-of-pocket expenses, including heavy fines, and more. Often times, the firm becomes a future “target” for other cybercriminals.

CPA Cyber Incidents

July 01, 2017

Recent Claims Increasing in Frequency

Risk Management for Accounting Firms



Accounting Firm Data and Security Breaches

A cyber-attack could spell disaster for your CPA firm

BUSINESS INSURANCE, PROFESSIONAL LIABILITY, PROFESSIONAL LIABILITY, , INFORMATION TECHNOLOGY

FIRM MGMT

You've Been Breached. Now What?

BY JIM BOOMER, CPA.CITP; CEO, BOOMER CONSULTING ON OCT 10, 2017

CPA Practice Advisor



Data Breach Notification Requirements Changing for CPA Firms

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THANK YOU!