

## **MEMORANDUM**

November 14, 2015

**TO:** Senator Fletcher Hartsell

**FROM:** Karen Cochrane-Brown, NCGA Staff Attorney

**RE:** Implications of *NC Dental Board v. FTC*

You requested that I outline the implications of the recent Dental Board decision and possible options that could be considered by the Joint Legislative Administrative Procedure Oversight Committee (APO) to address those implications. The following is a review of the case and its implications as well as some thoughts on possible solutions.

### **Summary of the Case**

In 2006, largely in response to complaints from dentists, the North Carolina Dental Board began a campaign to stop what it believed was the unauthorized practice of dentistry by non-dentist teeth whiteners. The Board sent at least 47 cease and desist letters to teeth whiteners, sent letters to mall operators advising them to stop leasing space to teeth whiteners, and told the N.C. Cosmetic Arts Board to warn cosmetologists not to offer the service. In 2010, the Federal Trade Commission filed a complaint against the Dental Board for antitrust law violations and after a hearing, ordered the Board to stop its activities against teeth whiteners. The Board appealed. The Court of Appeals, Fourth Circuit affirmed the FTC in all respects. The Supreme Court granted certiorari.

On February 25, 2015, the U.S. Supreme Court held that the actions of the North Carolina Dental Board in restraining non-dentist teeth whiteners were not protected from antitrust regulation under the doctrine of state action immunity. This doctrine was defined by the court to respect the principle of federalism in antitrust cases.<sup>1</sup> The court conferred immunity on the anti-competitive conduct of states when acting in their sovereign capacity. The court found that, in this case, the Dental Board was not acting as a State agency but was instead a "non-sovereign actor" controlled by market participants. The court further noted that in order to be applicable to non-sovereign actors, state action immunity requires:

- The challenged restraint must be clearly articulated and affirmatively expressed as State policy; AND

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<sup>1</sup> *Parker v. Brown*, 317 U.S. 341 (1943)

- The policy must be actively supervised by the State.<sup>2</sup>

In applying this test, the court acknowledged that the Board's statutory authority could be broadly read to include a policy to prevent the unauthorized practice of dentistry, thereby satisfying the first prong. However, there was no evidence and the Board did not claim that the State had actively supervised the Board in the implementation of this policy.

In denying the Board state action immunity, the court noted that the Board did not use any of the available State procedures that would have allowed the State to approve its actions, such as adopting rules or seeking injunctive relief from the courts. The court also specifically noted that the statute does not authorize the Board to take actions against non-dentists other than seeking injunctive relief. The court expressed the concern that given the actions taken by the Board, it was not even clear that the State was aware of the Board's actions, not to mention endorsing them.

The court concluded that if a State wants to rely on active market participants as regulators, it must provide active supervision in order to invoke state action immunity. The court did not specifically state what constitutes active supervision, but noted that it must have the following characteristics:

- The supervisor must review the substance of the anti-competitive action.
- The supervisor must have the power to veto or modify the action.
- The mere potential for state supervision is not enough.
- The supervisor may not be an active market participant.

### **Implications for North Carolina Occupational Licensing Boards**

The decision in the Dental Board case has potential implications for all of North Carolina's approximately 55 independent occupational licensing boards. Most of the boards are composed primarily of active market participants and currently, there is no provision requiring that many of the actions of these boards be supervised by any politically accountable state actor. This means that the boards may be subject to suits for violation of antitrust laws and in some cases may be found liable.

However, there are a number of situations in which the case would appear to have little or no impact. First, with regard to state occupational licensing and regulation that is not controlled by active market participants, such as the Insurance Commissioner, the Commissioner of Banks, or

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<sup>2</sup> This test was enunciated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The case involved a trade association which was authorized to set standards for the wine industry.

the State Board of Education, there would appear to be no need for additional supervision. In each of these cases, the regulator is not a market participant and is either an elected official or directly accountable to an elected official. Therefore, there is no incentive to be anti-competitive and it is clearer that any action taken is that of the state.

Next, from a cursory review of the statutes, it appears that most if not all of the independent occupational licensing boards are authorized to apply either directly or indirectly to the courts for injunctive relief when the board believes that the public health or safety is imperiled by the unauthorized practice of the profession or occupation. Since the judicial branch of government ultimately makes the decision as to whether the board's concern has merit, it would not appear that there is a need for additional supervision of the board's action in seeking an injunction.

Finally, with regard to the rulemaking actions of licensing boards, it appears that there may be adequate state supervision. Under Article 2A of Chapter 150B of the General Statutes, the process for rulemaking provides that an administrative rule adopted by a state agency cannot become effective until it has been approved by the Rules Review Commission (RRC).<sup>3</sup> The RRC is an independent agency, the members of which are appointed by the legislature. In addition, the RRC does not regulate any profession or occupation. The RRC can disapprove a rule if it finds that the agency has not been delegated authority for the rule by the General Assembly. Although this is not a review of the board's action based on antitrust principles, the determination that the board has clear statutory authority for the action could be characterized as a substantive review. Until the courts provide further clarification, we cannot be sure; however, this would appear to be the kind of supervision the court envisioned in the Dental Board case.

All other actions taken by licensing boards, including some decisions related to licensure and discipline, are potentially subject to challenge if the actions promote anti-competitive goals. Without additional state supervision, these boards might not get the benefit of state action immunity.

### **Possible Options to Respond to the Dental Board Decision**

#### **A. Other States' Responses**

Like North Carolina, many states are considering how to respond to the Dental Board decision. In Oklahoma, Governor Mary Fallin requested guidance from the Attorney General and issued an Executive Order to address the issue. The Order directs that "any state board on which, a majority of its members are participants in the same market that the board regulates" must

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<sup>3</sup> The rules adopted by the State Bar are not subject to review by the RRC. The State Bar is subject to supervision by the Supreme Court.

submit all proposed licensure or prohibition actions to the Attorney General for review and written analysis.<sup>4</sup> The Governor noted that the Office of the Attorney General is best suited to assume these duties because it has authority to review and enforce the antitrust statutes and also because it provides legal advice to most boards and agencies.

In California, the Attorney General was asked the following question by a member of the Senate:

"What constitutes 'active state supervision' of a state licensing board for purposes of the state action immunity doctrine in antitrust actions, and what measures might be taken to guard against antitrust liability for board members?"

The Attorney General responded in a comprehensive analysis by describing the characteristics of active state supervision as outlined by the Supreme Court and by detailing several measures that might be taken to guard against antitrust liability including changing the composition of boards, adding lines of supervision by state officials, and providing board members with legal indemnification and antitrust training.<sup>5</sup>

## **B. FTC Guidance**

Recently, in response to requests for clarification from state officials, the Bureau of Competition of the Federal Trade Commission issued guidance regarding factors it would use to evaluate the adequacy of active state supervision over boards regulating occupations. The factors include whether the state supervisor:

- Has, to the extent not already performed by the regulatory board:
  - Collected relevant facts and data;
  - Conducted public hearings and studies;
  - Invited public comments; and
  - Reviewed market conditions and documentary evidence.
- Evaluated the substance of the recommended action and whether the action complies with state standards.
- Issued a written decision approving, modifying or rejecting the proposed action, including a rationale for the decision.<sup>6</sup>

The FTC staff also noted that active supervision is only necessary if a regulatory board seeks the protection of state action immunity in response to a claim of antitrust violation. Alternatively, a

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<sup>4</sup> Oklahoma Executive Order 2015-33

<sup>5</sup> 98 Ops. Cal. Atty. Gen 12 (No. 15-402; Sept. 10, 2015); available at <https://oag.ca.gov/system/files/opinions/pdfs/15-402.pdf>.

<sup>6</sup> *FTC Staff Issues Guidelines on State Regulatory Board Supervision*, PRACTICAL LAW LEGAL UPDATE (WLN Resource ID: w-000-6784; Oct. 14, 2015); available at <http://us.practicallaw.com/w-000-6784>.

state could choose to rely on other antitrust defenses and/or to provide indemnification to board members.

### **C. North Carolina Response**

In North Carolina, there has been concern about the autonomy of licensing boards for a number of years. In 2009, the legislature added oversight of occupational licensing boards to the statutory duties of the Joint Legislative Administrative Procedure Oversight Committee (APO), and in 2012, APO recommended that the Joint Legislative Program Evaluation Oversight Committee (PED) study the structure and operation of independent licensing boards. This study was completed and a report was issued in early 2015. In addition, just this past session, the Regulatory Reform Act of 2015 included a provision directing APO to review the report and make appropriate recommendations to the 2016 Regular Session of the General Assembly.<sup>7</sup>

Based on the foregoing, APO could consider making the following recommendations:

1. One of the major recommendations of the PED report was that the General Assembly establish an Occupational Licensing Commission, within the Department of Commerce, to improve the effectiveness of occupational licensing boards and assist with resolving disputes between boards. Most of the Commission's duties would relate to monitoring and coordinating administrative functions of the boards to provide greater transparency and accountability and to improve the overall effectiveness of the activities and processes performed by the boards. However, in light of the Dental Board decision, the role of this Commission could be expanded to provide the substantive review of potentially anti-competitive actions taken by occupational licensing boards.
2. The General Assembly could follow the example set by Oklahoma and delegate review of licensing board actions to the Attorney General. Currently, the Consumer Protection Division of the Department of Justice is responsible for state antitrust claims. Assigning supervision of licensing boards to the statewide elected official who already has responsibility for prosecuting claims of unfair trade practices would likely be seen by the courts as adequate state supervision. Alternatively, the Governor's office could also be assigned this duty.
3. Another option would be to modify the composition of the boards. Currently, most boards in North Carolina are controlled by a clear majority of active market participants. The General Assembly could amend the laws to include a majority of public members while still maintaining the expertise provided by members of the occupation. However, the Supreme Court referred to a "controlling number" not a majority of board members.

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<sup>7</sup> S.L. 2015-286, Sec. 1.7

It is unclear whether just changing the ratio of public to professional members would resolve the immunity problem.

4. Under current law, occupational licensing boards are deemed state agencies for purposes of the Tort Claims Act and board members are covered to the same extent as other state officers and employees. In addition, boards are authorized to purchase commercial insurance to cover all risks or potential liability, including liability under the Tort Claims Act.<sup>8</sup> This protection should help to reassure current or future board members. However, there may be ways to strengthen the indemnification of board members who face liability for antitrust violations.
5. Finally, the General Assembly could require that occupational licensing board members receive specific training in antitrust concepts and the importance of establishing a sound basis for any anti-competitive actions they may take. This could be added to the training members are currently required to receive under G.S. 93B-5.

### **Conclusion**

The NC Dental Board v. FTC decision has broad implications for state regulation and licensing of occupations. As the legislative committee charged with oversight of occupational licensing, APO should take the lead in making recommendations to address this issue.

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<sup>8</sup> G.S. 93B-16