

STATE OF FLORIDA

PAM BONDI
ATTORNEY GENERAL

December 9, 2015

The Honorable Andy Gardiner
President of the Senate
Room 409, The Capitol
Tallahassee, FL 32399-1100

The Honorable Steven Crisafulli
Speaker of the House
Room 420, The Capitol
Tallahassee, FL 32399-1300

Re: Impact U.S. Supreme Court's Decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission

Gentlemen:

In February, the U.S. Supreme Court issued a ruling in North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015), which held that State licensing boards controlled by market participants active in the market being regulated by those boards are not immune from federal antitrust liability unless they are acting pursuant to a clearly articulated state policy to displace competition and are subject to active state supervision. Because many of Florida's hundreds of boards and commissions are controlled by participants in the markets that the boards themselves regulate, it is important to advise you of the potential impact of the Supreme Court's decision regarding these boards and commissions and the potential antitrust liability they may now face as a result of the decision.

In the North Carolina case, the State Board of Dental Examiners was composed of eight members, six of whom were actively practicing dentists. When non-dentists began offering teeth whitening services at substantially lower prices than licensed dentists, the Board sent almost 50 cease-and-desist letters to the non-dentist teeth whitening services, ordering them to stop the practice, warning them that the unlicensed practice of dentistry is a crime, and stating or implying that teeth whitening constitutes the practice of dentistry without issuing any formal rulemaking on the question. As a result, non-dentists ceased offering teeth whitening services in North Carolina. The Federal Trade Commission (FTC) filed an administrative complaint against the Board and found that the cease-and-desist letters violated the Sherman Act because they were anticompetitive and unfair, and unjustified by any public safety concern.

The Board argued that it was immune from antitrust liability because it was an agency of the State, but the Supreme Court rejected that claim. The Court ruled that, while States are generally immune from antitrust liability, if a state agency is controlled by active market participants it is only immune for actions when acting in its sovereign capacity and those actions are "clearly articulated and affirmatively expressed as state policy" and adherence to that policy is "actively supervised by the State." Such supervision is required to obviate "the risk that active market participants will pursue private interests in restraining trade," so the supervision "requires more than a mere facade of state involvement to ensure the States accept political accountability for anticompetitive conduct they permit and control."

Because the Board in North Carolina was controlled by active market participants and not actively supervised by another state actor, the Supreme Court upheld the FTC's prosecution of the Board under the Sherman Act when it determined that teeth whitening was the practice of dentistry and issued cease and desist letters to non-dentists who were providing teeth whitening services.

The State of Florida has hundreds of boards and commissions, and many of them, like North Carolina's Board of Dental Examiners, are controlled by active market participants and not actively supervised by another state actor. If the actions of these boards and commissions are not also subject to active state supervision, they now face potential antitrust liability for any actions they take that may unreasonably burden competition as a result of the Supreme Court's decision.

This was the case in North Carolina: although the Supreme Court recognized the Board at issue was subject to North Carolina's Administrative Procedure Act and its formal rules were reviewable by an independent Rules Review Commission, the challenged Board non-rule-making actions (cease-and-desist letters) were not subject to any state supervision and so were not shielded by state action immunity. The decision does not take a position as to whether the result may have been different had the Board followed the formal administrative review processes available to it.

The Supreme Court's decision, while noting the risks of anticompetitive behavior by state regulatory boards and commissions, does provide some limited guidance as to what constitutes sufficient "active supervision" to assist boards and commissions controlled by active market participants in ensuring antitrust immunity. For example, the decision states that while what constitutes "active supervision" is "flexible and context dependent," it "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision," but it must "provide realistic assurance that [the] anticompetitive conduct promotes state policy." At a minimum, the supervisor "must review the substance of the anticompetitive decision, not merely the procedures followed to produce it," "must have the power to veto or modify particular decisions to ensure they accord with state policy," and must "not itself be an active market

participant." The "mere potential for state supervision is not an adequate substitute for a decision by the State." Additional guidance on this issue was offered by Federal Trade Commission staff on October 14. I enclose a copy of "FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants" for your information.

The North Carolina Dental decision has clearly raised the liability risk for professional boards controlled by market participants and, it is important that the Legislature be aware of that increased risk so that it may take whatever action it deems necessary. One intermediate step while considering more permanent solutions is already being taken, with many state board advisors, such as those in my Office, reminding the boards and commissions they advise that they should not engage in potential anticompetitive behavior, economic protectionism, or other actions that further the private interests of one group by inhibiting the competition provided by another group unless adequately justified by a compelling public need, like the health and safety of constituents. Obviously, this is just a temporary solution and a more permanent solution may be deemed necessary.

After careful consideration--assuming that it remains the practice in Florida to have professional boards controlled by market participants as a functional part of state government--it appears that there are a number of options that could be undertaken to reduce the liability risk to the State caused by the North Carolina Dental decision, and the most consistent and comprehensive means of implementing those options is through legislation. Should the Legislature undertake this challenge, I urge careful consideration of every reasonable option.

One option, of course, is to do nothing; however, taking this course will not afford the affected boards and commissions reasonable antitrust immunity. As the recently released Federal Trade Commission Staff Guidelines on this issue acknowledges, a state legislature need not provide for active supervision of its regulatory boards, but such inaction will expose those boards to potential antitrust liability.

If the Legislature does wish to consider statutory changes in response to the Court's decision in North Carolina Dental, a review of the decision in conjunction with the FTC Staff Guidelines suggests there are at least three options available that would either obviate the need for or establish the active state supervision required. My Office takes no position on any of these options and simply submits them to you for your consideration. States across the country are considering these same options in light of the Supreme Court's decision. The FTC staff guidelines and hypotheticals therein may also suggest other options to you.

One option is to amend existing enabling legislation for each board or commission to reduce the number of active participants or increase the number of public members or state officials on each board or commission. This would create a board where active market participants are not a majority and would reduce, but not eliminate entirely, the potential for antitrust liability. The FTC Staff Guidelines make it clear that simply reducing the number of market participants to less than a majority is not in itself sufficient to ensure antitrust immunity but, rather, requires a "fact-based inquiry." For example, according to the Guidelines, if board members who are active market participants have veto power over the board's regulatory decisions, then, regardless of their numbers, state action immunity would not be available.

Another option is to enact legislation establishing a new executive agency tasked with actively supervising all boards and commissions whose members are active market participants. The agency would be responsible for reviewing all potentially anticompetitive actions to ensure that they comport with clearly articulated legislative policy. I am aware of at least one state considering this option. To meet the requirements of North Carolina Dental, the new agency would be required to proactively review all substantive board and commission decision-making to ensure that any potentially anticompetitive actions promote clearly articulated state policy, and, if such actions are not in accordance with the Legislature's Intent, the agency must have the power to veto or modify the boards' and commissions' actions. Under the Supreme Court's decision, the agency's review must not be a mere possibility—it must be substantive and actually performed—and the head of the agency must not be an active market participant in the market of the regulator's action being reviewed. As a matter of sound public policy, the agency should also seek to ensure the boards and commissions promote, rather than inhibit, market competition and consumer choice when possible.

North Carolina Dental also suggests that the new agency should be wholly independent of the boards and commissions to ensure that the boards and commissions remain publicly accountable for their conduct through active substantive supervision by the agency. The FTC Staff Guidelines suggest further that such an agency would need to substantively evaluate the board's decisions prior to implementation of the anticompetitive restraint in order to fully comply with the active supervision requirement. Such an evaluation, according to the Guidelines, should include consideration of written submissions from sources other than the board, public hearings and a written decision.

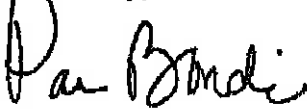
A third option is to amend an existing statute, such as Florida Statute §120.545, to include legislative or administrative review of all proposed rules to determine whether they would unreasonably restrict competition or the availability of professional services in a significant portion of the state. To be meaningful, the review process mandated by the amended statute would need to ensure that the reviewer was not an active market participant in the profession at issue but had some expertise in the area to be reviewed.

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The reviewer would also need to have the power to veto or modify any proposed rule or portion thereof determined to unreasonably restrict competition prior to its implementation. If such an option were selected, the legislative or administrative reviewer would be the state actor tasked with active supervision of board actions.

It is important that this issue be addressed by the Legislature as expeditiously as possible. My Office stands ready to answer any questions or concerns about these issues you may have and to assist the Legislature in assessing the options available to it in light of the Supreme Court decision.

Sincerely,

A handwritten signature in black ink that reads "Pam Bondi". The signature is written in a cursive, flowing style.

Pam Bondi
Attorney General

cc: Governor Rick Scott