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TO: Members of the Boards of Registration within the Division of Professional Licensure
FR: —Bruce E. Hopper, Chief Legal Counsel
SU: *North Carolina State Board of Dental Examiners v. FTC*
DA: January 19, 2016

In 2015, the United States Supreme Court decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (“*NC Dental*”). This decision impacts the way that antitrust law applies to state licensing boards. A copy of this decision is attached for your review.

Briefly, the antitrust laws prohibit cartels, price fixing, and other combinations or practices that undermine competition and the free market. Prohibited practices include unlawful restraints on market participation in markets for professional services. Antitrust laws allow aggrieved persons to sue the persons or groups that impose such restraints. However, a state may lawfully choose to establish restraints on market participation, including professional licensing laws. A state may do so, for example, to protect public health, safety and welfare. When it is the state that creates the market restraints, such as through legislation, the state is immune from antitrust liability. This is called state action antitrust immunity.

In *NC Dental*, the Supreme Court considered whether state action antitrust immunity extended to protect a professional licensing board that, although created by the state, was comprised primarily of market participants.¹ The Supreme Court ruled that antitrust immunity could apply to boards consisting of active market participants only if those boards are “actively supervised” by the state.² The North Carolina Dental Board was not actively supervised and the board was therefore responsible for violating the antitrust laws. As described by the Court, active state supervision requires that the state administration has and uses the power to approve, veto or modify potentially anticompetitive board actions after determining whether those actions are consistent with state policy. Licensing boards and individual board members may be subject to antitrust liability where they cannot demonstrate that they have acted under active state supervision because state action antitrust immunity will not apply to them.

During 2015, the Office of the Attorney General convened a workgroup to consider measures to establish active state supervision of Massachusetts licensing boards when proposed board actions may have anticompetitive effects. We anticipate official steps towards this end will be announced in early 2016.

¹ In this case, the majority of members on the North Carolina State Board of Dental Examiners were dentists.

² The Court’s ruling applies to Boards “on which a controlling number of decision makers are active market participants in the occupation the board regulates....”

