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## *North Carolina Dental: A Broad Impact on Antitrust Immunity*

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### I. INTRODUCTION

In February 2015, the Supreme Court of the United States decided the second case in two years regarding state action antitrust immunity. In ruling that the North Carolina Dental Board, which is comprised of active market participants (i.e., practicing dentists), was not a state actor for the purpose of antitrust immunity, the Supreme Court has made a broad category of professional regulatory boards subject to increased antitrust scrutiny. While the decision's practical impact remains to be seen, future results will surely include closer reviews of how state regulatory boards are constituted and increased application of the antitrust laws to actions taken by such boards.

### II. CASE SUMMARY

The North Carolina Dental Practice Act (“the Act”), passed by the North Carolina legislature, established the North Carolina Dental Board (“the Board”), which was charged with regulating the “practice of dentistry.” The eight-member Board was comprised of six licensed dentists, one licensed dental hygienist, and one consumer member. The dental members were elected by dentists; the hygienist member was elected by dental hygienists. The governor appointed the consumer member. Thus, a majority of the Board consisted of dentists engaged in active practice and elected by other dentists.

The Act did not explicitly specify that providing teeth-whitening services was practicing dentistry. However, dentists complained to the Board that non-dentists were charging lower prices for whitening services, prompting the Board to take action. Deeming these services as “the practice of dentistry,” the Board issued almost fifty cease-and-desist letters to non-dentist teeth-whitening providers, warning them that they were engaged in the unlicensed practice of dentistry, which is a crime. The Board's actions had the result of impeding non-dentists from providing teeth-whitening services, which was a detriment to consumers due to reduced availability of lower-cost teeth-whitening services.

The Federal Trade Commission (“FTC”) determined that the Board's concerted action to exclude non-dentists from the market for teeth-whitening services in North Carolina violated federal antitrust laws. The Fourth Circuit heard the case and affirmed the FTC's position. The Board appealed that decision and was granted *certiorari* by the Supreme Court.

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In a 6-to-3 decision authored by Justice Kennedy, the Supreme Court affirmed the FTC and Fourth Circuit's positions that because the Board members themselves were active market participants, the Board was not a state actor, and therefore active state supervision was required to confer federal antitrust immunity on the Board's actions.

### III. DECISION IMPACT

#### *A. A Broad Category of Professional Regulatory Boards Will Be Subject to Antitrust Scrutiny*

The Court's decision provides a clear message to regulatory boards across the country—actions that would otherwise be anticompetitive cannot be shielded from federal antitrust scrutiny merely because the state has established the board that regulates the industry in which it participates. The Court did not distinguish between boards whose members are elected by their peers (other market participants) and boards whose members are selected and appointed by a state official. Thus, for purposes of antitrust immunity, the selection process was deemed irrelevant and the key determination is whether the board members are market participants. Because many licensing boards across the country are structured similarly, the decision's impact has the potential to be widespread.

In March, Commissioner Maureen Ohlhausen gave remarks about the Court's decision.<sup>2</sup> For context, Commissioner Ohlhausen is the former director of the FTC Office of Policy Planning and served on the original FTC State Action Task Force, which was created in 2001 to identify ways to narrow the application of state action immunity. In her remarks, the Commissioner described the decision as "broad" and praised the Court for going beyond mere concurrence with the Fourth Circuit. The Court could have limited its holding to state boards whose members are elected by private individuals or to state boards that act outside the scope of their authority. Instead, the Court's holding applies to all boards that are controlled by active market participants.

Open issues, raised by the dissenting opinion, remain. In particular, the dissenting opinion, authored by Justice Alito, notes practical problems the decision could create, including what it means to "control" the board. Does it simply mean that a majority of the board consists of market participants? Or can a vocal minority of market participants "control" a board? Commissioner Ohlhausen suggested that two viable options for avoiding antitrust liability for state board conduct are to (1) ensure that market participants comprise less than a majority of the board and/or (2) require that all market participants abstain from matters in which they have a financial interest. But this is merely one view. It is likely that the control issue, and other open issues, will be litigated in lower courts as states and their regulatory boards grapple with the Court's decision.

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<sup>2</sup> Remarks by Commissioner Maureen K. Ohlhausen, "Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity" (Mar. 31, 2015), available at <https://www.ftc.gov/public-statements/2015/03/reflections-supreme-courts-north-carolina-dental-decision-ftcs-campaign>.

### ***B. Sufficient State Supervision Will Vary from Case-to-Case***

The Court held that, if a state creates a board controlled by market participants, there must be a showing of active state supervision in order for antitrust immunity to attach. What qualifies as sufficient supervision will largely depend on the circumstances of the case. The Court, however, noted several prerequisites for active supervision, including that the supervising person or entity itself cannot be an active market participant. Other prerequisites include: (1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; and (2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy. Beyond these statements, the Court left open the question of what else may be necessary for active state supervision.

Given the ruling, state regulatory boards may *sua sponte* seek more state involvement in their decisions and activities to lessen any antitrust liability exposure. This state involvement could take various forms. State cabinet departments or other disinterested state officials may provide input and/or oversight over a board's substantive decisions. State legislatures may amend the relevant statutes or pass supplemental statutes to provide some form of active state supervision. The goal of such state supervision would be to ensure that boards consisting of market participants are not making anticompetitive decisions that harm consumers and the public.

## **IV. CONCLUSION**

The Court's decision confirms the need to balance competently regulating professional services with the need to prevent collusive and exclusionary conduct. Considering that professional licensing boards regulate nearly one-third of the U.S. workforce across varying occupations, states across the country are expected to respond to the decision by looking closely at both how their boards are populated and the extent of active state supervision of the conduct of such boards.