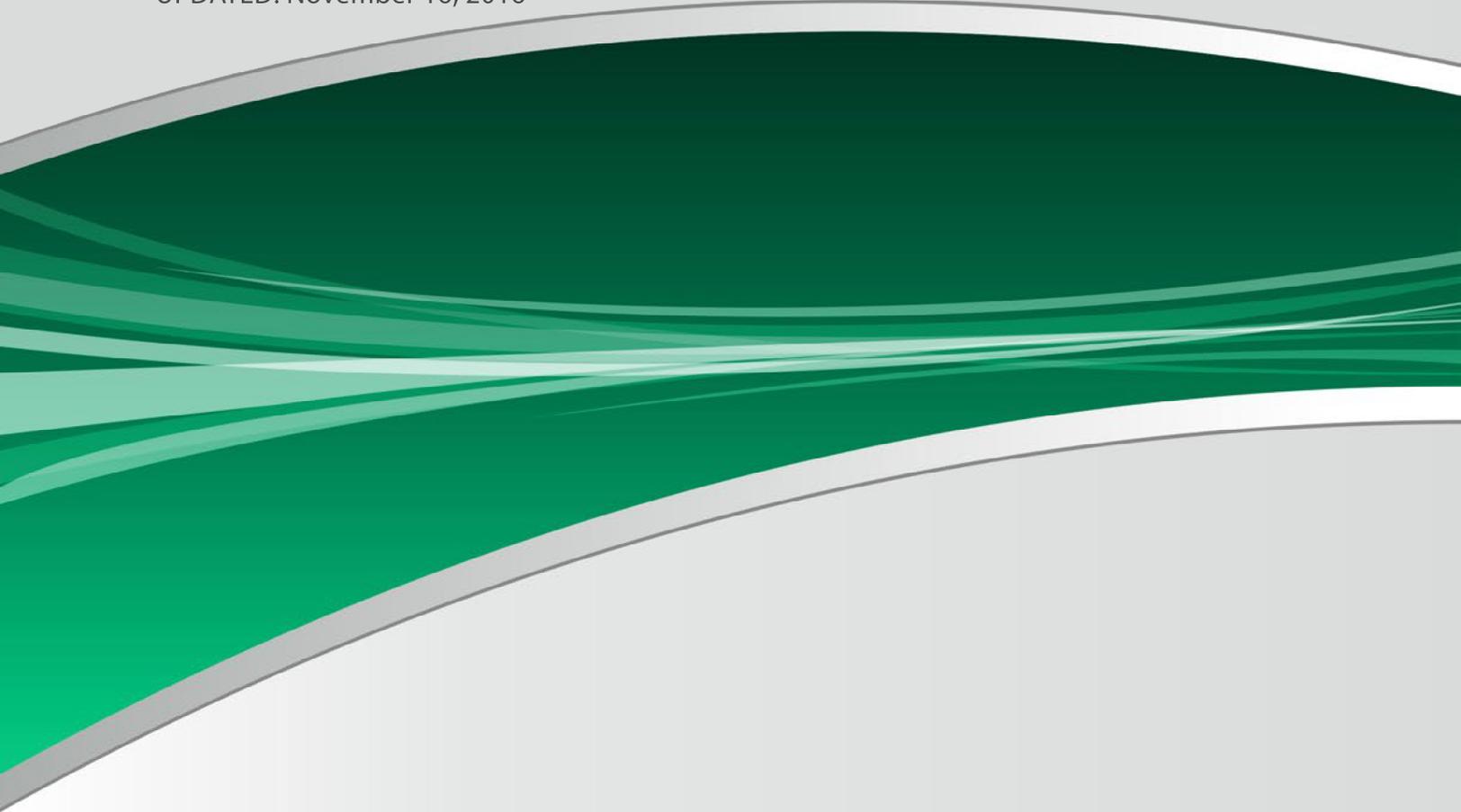


# **NORTH CAROLINA DENTAL CASE DECISION**

## **IMPLICATIONS AND CONSIDERATIONS FOR STATE BOARDS OF ACCOUNTANCY**

ISSUED: November 23, 2015

UPDATED: November 16, 2016



**NASBA**

NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY  
150 FOURTH AVENUE NORTH, SUITE 700  
NASHVILLE, TN 37219-2417

**The U.S. Supreme Court’s Decision in  
*North Carolina State Board of Dental Examiners v. Federal Trade Commission*  
and Implications for State Boards of Accountancy**

---

**Table of Contents**

Executive Summary .....	2
Overview .....	3
State Regulation of CPAs Is Uniquely Procompetitive .....	3
State Action Background .....	4
What Did the Supreme Court Hold? .....	5
FTC Releases Its Staff Guidance .....	6
What Is Active State Supervision? .....	8
What Activities Should Be Subject to Active State Supervision? .....	12
Does a Board’s Member Selection Process Affect the Active Supervision Requirement? .....	15
A Path Forward.....	15
Indemnification, Insurance, & Defense .....	16
State Statutory Immunity .....	16
Education & Training .....	17
Conclusion .....	17

## Executive Summary<sup>1</sup>

For more than 70 years, state boards of accountancy have been presumed to be immune from federal antitrust laws as long as their otherwise anticompetitive actions were clearly authorized by state statutes. However, the Supreme Court's 2015 holding in *N.C. State Board of Dental Examiners v. Federal Trade Commission* ("*NC Dental Board*")<sup>2</sup> now requires that licensee-controlled state boards also be "actively supervised" by a neutral state entity in order to enjoy state action immunity from federal antitrust law.

The Supreme Court's decision has left state regulators with questions concerning the extent of the decision's application to boards of accountancy. For example, the Court did not detail how many licensee board members would constitute a controlling interest on the board or whether their particular area of practice would be a factor, leading to speculation as to whether traditional state oversight of boards of accountancy, along with the potential for court review of enforcement actions, would be sufficient supervision to ensure antitrust immunity.

As a result, some states' executive branches and legislatures are reacting to the *NC Dental Board* decision with an abundance of caution, proposing bills and enacting executive orders to create new supervision mechanisms. Further reactions, including changes to board composition and internal board enforcement and rulemaking procedures, have been proposed in some states. It is imperative that states and state boards not permit knee-jerk reactions but rather undertake a risk-management evaluation of their internal processes and procedures in light of the increased scrutiny and uncertainty.

Questions on state board antitrust exposure can be addressed by applying useful interpretive guidance drawn from several sources. This includes existing court precedent, the Federal Trade Commission's ("FTC") Order against the North Carolina State Board of Dental Examiners ("Dental Board"), FTC staff guidance released in October 2015, and decisions in a number of pending and future court cases on the subject. By drawing on these sources, this paper concludes that state boards of accountancy are already largely functioning in compliance with antitrust law requirements. Thus, while the Supreme Court's decision has given rise to some significant interpretive questions, it does not appear that dramatic changes to the structures, functions, or operations of accountancy boards are necessary. However, antitrust training and immunity, indemnification, defense, and insurance purchase provisions should be evaluated in light of antitrust risks.

---

<sup>1</sup> This document has been prepared by NASBA in conjunction with Allen & Pinnix, P.A., NASBA's outside legal counsel, for the use of NASBA's members, the state boards of accountancy. State boards and others should rely upon their own legal counsel's interpretations of the legal issues discussed herein. The opinions and statements contained in this document are not necessarily those of NASBA or any state board.

<sup>2</sup> 135 S. Ct. 1101 (2015).

## Overview

The following provides an overview of the procompetitive aspects of accountancy regulation, the history of state licensing board immunity, the effects of the Supreme Court's decision in *NC Dental Board*, and implications for state boards of accountancy going forward. This paper is intended to be an evergreen document that may be updated as future litigation and state and federal guidance provide greater clarity on this topic.

## State Regulation of CPAs Is Uniquely Procompetitive

Procompetitive benefits and efficiencies are key factors when undertaking an antitrust analysis and could weigh heavily in favor of state boards when evaluating the antitrust implications of actions that might otherwise be considered anticompetitive. The 55 state boards of accountancy around the nation have worked diligently with the National Association of State Boards of Accountancy ("NASBA") to reduce barriers to trade in accountancy services. Beginning in 1997, the state boards, NASBA, and the American Institute of Certified Public Accountants ("AICPA") embarked upon a national legislative effort to remove impediments to interstate practice, ease restrictions on firm ownership, lift anticompetitive limits on fee arrangements, and permit the use of trade names. Concurrently, NASBA and the AICPA developed and promoted these changes through the Uniform Accountancy Act ("UAA"), an evergreen model law developed to provide a comprehensive, uniform approach to regulation of the accounting profession. As stated in the "Introductory Comments" to the UAA 7th Edition: "these changes achieve the goals of enhancing public protection, facilitating consumer choice, and supporting the efficient operation of the capital markets." In the past two decades, these procompetitive changes have been adopted in almost all U.S. jurisdictions; they serve as a model for states and professional licensing generally for so long as boards operate within their statutory authorization.

As a result of these efforts, the regulation of accountancy among the states is uniquely efficient and procompetitive. For example, under the UAA, as implemented by state laws:

- CPAs only need to be licensed in the state of their principal place of business. UAA §§ 3(p), 23.
- CPAs can practice in another 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. UAA § 14(j).
- Nonlicensees are allowed to render many accounting services to the public. UAA § 14(a).

## State Action Background

The Supreme Court first established its state action antitrust immunity doctrine in 1943 in *Parker v. Brown*.<sup>3</sup> At issue in *Parker* was the legality of a California state program, implemented pursuant to state law, to monitor the sale of, and set prices for, raisin production. This case interpreted decades-old federal antitrust law, concluding that Congress had not used its Commerce Clause power to preempt state restraints on competition. Thus, the Court concluded that federal antitrust law “makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”<sup>4</sup> In the decades that followed *Parker*, courts determined that the “state” included at least the state legislature and the state supreme court and, as such, these bodies were entitled to automatic immunity. Presumably, as the third branch of state government, governors could have been deemed automatically immune from federal antitrust law under *Parker* as well. However, few court decisions considered the question of how *Parker* might apply to state agencies or private parties implementing state law.

In 1980, the Supreme Court elaborated on the state action doctrine in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*,<sup>5</sup> in order to limit abuse of the antitrust law exception by private parties. *Midcal* established two requirements for private parties seeking to invoke state action immunity—clear articulation and active state supervision. Then, in 1985, the Supreme Court held in *Town of Hallie v. City of Eau Claire* that municipalities (themselves sub-state entities) need only demonstrate clear articulation and not active supervision because “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement.”<sup>6</sup>

In recent decades, other federal court cases have dealt with the application of *Parker* with regard to state agencies, including licensing boards. The focus of these cases was generally the clear articulation prong and whether the state agencies had acted pursuant to their statutory authorization, or in the case of a state bar, pursuant to the mandate imposed on them by the state supreme court. Courts, including the Supreme Court, tended to conclude that state agencies were not required to show active supervision in order to enjoy immunity, so long as they acted pursuant to state law.<sup>7</sup>

In *NC Dental Board*, the clear articulation prong was assumed by the Supreme Court to be met and not at issue. However, it is important to understand how State Boards can and must meet this standard. Under the clear articulation standard, a

---

<sup>3</sup> 317 U.S. 341 (1943).

<sup>4</sup> *Id.* at 351.

<sup>5</sup> 445 U.S. 97, 105 (1980).

<sup>6</sup> 471 U.S. 34, 47 (1985).

<sup>7</sup> In *Hallie*, the Supreme Court opined in a footnote that “[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.” *Id.* at 46 n.10.

proposed board action should be supported by a state statute authorizing the proposed action. As the Supreme Court recently stated: “to pass the clear articulation test, a state legislature need not expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects.”<sup>8</sup> Instead, the displacement of competition should be “the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.”<sup>9</sup>

### What Did the Supreme Court Hold?

In *NC Dental Board*, the Supreme Court held that state agencies controlled by active market participants in the industry they regulate must demonstrate both clear articulation and active state supervision in order to invoke state action immunity. The Supreme Court affirmed the U.S. Court of Appeals for the Fourth Circuit, which denied the Dental Board’s petition for review of the FTC’s Order.

The *NC Dental Board* case stemmed from the Dental Board’s practice of sending cease and desist letters to unlicensed teeth whitening service providers and warning letters to property management companies. Some of these letters ordered the recipients to cease and desist from the unauthorized practice of dentistry. While the Dental Board has statutory authority to sue individuals for unauthorized practice in court or to refer matters to other officials for criminal prosecution, it does not have express statutory authority to send cease and desist letters or orders. The letters had the effect of limiting the provision of teeth whitening services within North Carolina. In 2008, the FTC opened an investigation and subsequently brought an administrative complaint against the Dental Board in 2010.

Ultimately, the FTC determined that the Dental Board must demonstrate active supervision because the board was controlled by market participants and such supervision was lacking with regards to the issuance of the cease and desist letters. On the merits (beyond state action immunity), the FTC found that the Dental Board had restrained trade in violation of the federal antitrust laws. The FTC ordered the Board to not send cease and desist letters or other communications that stated non-dentists may not offer teeth whitening services and products. It is important to note that the issue of public protection and evidence of harm was not before the Supreme

---

<sup>8</sup> *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1011 (2013) (internal citations and quotations omitted). In *Phoebe* (a quintessential clear articulation case), the Court was faced with the issue of “whether a Georgia law that creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, clearly articulates and affirmatively expresses a state policy to permit acquisitions that substantially lessen competition.” *Id.* at 1007. The Court held that “[b]ecause Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, . . . the clear-articulation test is not satisfied and state-action immunity does not apply.” *Id.* In contrast, state accountancy acts contain extensive mandates for state boards to act anticompetitively but the boards must ensure their conduct is pursuant to and within such mandates.

<sup>9</sup> *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. at 1112.

Court although the Dental Board had introduced evidence before the FTC of individuals being physically harmed by unlicensed teeth whitening service providers.

### FTC Releases Its Staff Guidance

In October 2015, the FTC’s Bureau of Competition released its “FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants.”<sup>10</sup> This document sets forth FTC staff’s views on the active supervision requirement as it applies to state regulatory boards in the wake of the *NC Dental Board* case. Significantly, the Staff Guidance is not binding on the FTC, and FTC staff has reserved the right to modify, rescind, or revoke the guidance.

The Staff Guidance sets out to respond to two questions: “First, when does a state regulatory board require active supervision in order to invoke the state action defense? Second, what factors are relevant to determining whether the active supervision requirement is satisfied?”<sup>11</sup> Before explaining the answers to those two questions, the guidance sets forth some important caveats for state legislators to consider: Federal antitrust law does not require that a state legislature provide for active supervision of any state regulatory board.<sup>12</sup> Moreover, “[t]his document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.”<sup>13</sup> These caveats acknowledge the fact that it is a state’s prerogative as to whether or not to shield its regulatory boards from antitrust oversight and that there is no one-size-fits-all approach when it comes to state action immunity and any potential antitrust liability.

Beyond state action immunity, the Staff Guidance addresses some general points regarding board actions and the applicability of antitrust law:

1. Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.  
...
2. The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability.  
...
3. In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the “sham exception.”<sup>14</sup>

---

<sup>10</sup> Available at [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf) (hereinafter “Staff Guidance” or “FTC Staff Guidance”).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 6.

The Staff Guidance continues by addressing two of the key issues that remain unresolved by the Supreme Court and will continue to be at issue in the lower courts. First, it sets forth who will be considered an active market participant: “[a] member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.”<sup>15</sup> This broad view appears to encompass retiree or inactive licensee board members, board members who practice exclusively in a different specialty than one at issue before the board, and board members whose work is limited to academia.

Second, the Staff Guidance leaves open the question of what constitutes a controlling number of licensee board members: “[w]hether a particular restraint has been imposed by a ‘controlling number of decisionmakers [who] are active market participants’ is a fact-bound inquiry that must be made on a case-by-case basis.”<sup>16</sup> That said, FTC staff does provide the following factors that will be considered in such an analysis:

The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board’s authority.

Whether the board members who are active market participants have veto power over the board’s regulatory decisions.

...

The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.<sup>17</sup>

The Staff Guidance provides some insights as to what constitutes active supervision and what factors are relevant to determining whether the active supervision requirement has been satisfied. These insights will not be repeated in detail here, but, in essence, they make clear that the FTC staff is looking for the active supervisor to review the substance of a proposed board action prior to the

---

<sup>15</sup> *Id.* at 7.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.*

implementation of such action. Moreover, the reviewer should gather all necessary information to make an informed decision as to whether to approve, modify, or veto the proposed action. Then, the reviewer should issue a written decision as to the outcome of the review in order to demonstrate the meaningful review that occurred and to serve an evidentiary function. Finally, the Staff Guidance sets forth examples of what does and does not constitute active supervision in the rulemaking and disciplinary setting.

The information contained in the Staff Guidance is one important source that state boards and state legislators should consider when evaluating potential responses to the *NC Dental Board* case. While the guidance raises further questions, it does give readers some of the parameters that FTC staff will employ when evaluating the potentially anticompetitive conduct of state boards. Additionally, missing details will likely be provided in the coming months and years by pending and future court cases challenging licensing board immunity.

### What Is Active State Supervision?

Active supervision requires “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”<sup>18</sup> The Supreme Court further elaborated on the active supervision requirement in *NC Dental Board*:

*Midcal’s* supervision rule “stems from the recognition that [w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.” . . . Concern about the private incentives of active market participants animates *Midcal’s* supervision mandate, which demands “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”<sup>19</sup>

In order to effectuate the active supervision requirement, the Supreme Court has declined to offer a bright-line test or checklist. Instead, each case will be evaluated on the conduct at issue and the measures taken to ensure independent state oversight. Nonetheless, the Court did offer guidance on the role of the state supervisor:

[T]he supervisor must review the substance of the anticompetitive decision; . . . the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; . . . and the “mere potential for state supervision is not an adequate substitute for a decision by the State.”<sup>20</sup>

---

<sup>18</sup> *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

<sup>19</sup> 135 S. Ct. at 1112 (internal citations omitted).

<sup>20</sup> 135 S. Ct. at 1107 (internal citation omitted).

This guidance was considered by the federal district court in *Teladoc, Inc. v. Texas Medical Board*,<sup>21</sup> where the board members’ motion to dismiss the antitrust claim was denied because they could not show active state supervision of their rulemaking. Briefly, the lawsuit was brought against the board and its members in their individual and official capacities by a national telemedicine provider. The board had adopted two rule amendments requiring an established, face-to-face relationship between a physician and his or her patient before that physician can provide telemedicine services. If there was no established, face-to-face relationship, the rules require a physician, nurse practitioner, or physician assistant to be physically present with the patient for the telemedicine consultation. The court granted Teladoc’s motion for a preliminary injunction and enjoined the medical board “from taking any action to implement, enact, and enforce” the rule amendments.

The board members brought a motion to dismiss following the filing of a joint stipulation dismissing the board and its fourteen members in their individual capacities. The members argued that there was active state supervision of their actions because they were subject to judicial review by the Texas courts and State Office of Administrative Hearings. The court did not agree, holding the members had not provided any examples of judicial review that had rejected the validity of a rule because it was not “in accord with state policy.”<sup>22</sup> Further, the judicial review on which the members relied “merely permits a court to determine a rule is invalid. It does not, therefore, meet the Supreme Court’s mandate that ‘the supervisor must have the power to veto or *modify* particular decisions to ensure they accord with state policy.’”<sup>23</sup>

Other examples of active state supervision in regard to rulemaking put forward by the board members failed to satisfy the court. It held that the sections of Texas’ version of the Administrative Procedures Act cited by the members did not meet the Supreme Court’s requirement that the “supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.”<sup>24</sup> As to the members’ argument that the Texas Legislature had sufficient oversight to constitute active supervision via the “sunset review” process, the court rejected this argument because the Sunset Commission did not have the power to veto or modify any rule adopted by the Board.<sup>25</sup> The court also rejected the argument that the board members were actively supervised because their disciplinary actions were subject to

---

<sup>21</sup> No. 1:15-cv-00343-RP, 2015 U.S. Dist. LEXIS 166754 (W.D. Tex. Dec. 14, 2015). The board members filed a notice of appeal with the Fifth Circuit, but due to procedural and jurisdictional issues, the district court denied the board’s motion for certification of the interlocutory appeal. *Teladoc*, No. 1:15-CV-343-RP, 2016 U.S. Dist. LEXIS 107443 (W.D. Tex. Aug. 15, 2016). The board voluntarily dismissed its appeal in the Fifth Circuit, and a joint motion to stay was filed with the district court to facilitate discussions between the parties.

<sup>22</sup> *Id.* at \*23.

<sup>23</sup> *Id.* (quoting *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1116).

<sup>24</sup> *Id.* at \*24 (quoting *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1116).

<sup>25</sup> *Id.* at \*27.

judicial review. The scope of the review available under the applicable section of the Texas Government Code, noted the court, was limited and failed to provide the reviewing court with a method for determining whether the members' actions were "in accord with state policy."<sup>26</sup>

*Teladoc* illustrates the difficulties that states will potentially face in interpreting and complying with the active state supervision guidance set out in *NC Dental Board*. As states continue to respond to the opinion, each state will have to review its own entities and procedures to determine the best course of action for its agencies. This review will require a balancing of regulatory efficiency and public protection with the need for antitrust supervision and the risks that flow from potential liability.

Some models for supervision already exist or are being developed.<sup>27</sup> With regard to rulemaking, the rules of many state boards are already subject to review by an executive or legislative branch commission charged with rules review oversight. Whether or not a state's rules review mechanism is sufficient will likely depend upon whether there is a substantive review of the promulgating entity's statutory authority to propose such a rule and whether the disinterested reviewer has the power to modify or veto the proposed rule.

With regard to state board actions outside of rulemaking, including enforcement activities, there are many potential responses that states can consider. The first and most likely response may be to make no changes beyond ensuring that state boards operate within and pursuant to their statutory mandates for all actions. Doing so will generally limit the antitrust risks for state boards and allow states to continue their public protection mission in the most regulatorily efficient manner, without the additional layers of bureaucracy.

In several states, active supervision review entities have been proposed and/or implemented, with the anticipated role of vetting potentially anticompetitive decisions by state boards. These entities range from designated parties within the Attorney General's office to standalone agencies or similar entities empowered to approve, modify, or veto proposed board actions.<sup>28</sup> There are many questions as to

---

<sup>26</sup> *Id.* at \*26.

<sup>27</sup> For example, Massachusetts' governor issued an executive order "to ensure proper review of the regulation of professional licensing by independent boards." Mass. Exec. Order No. 567 (Mar. 28, 2016), <http://www.mass.gov/governor/legislationexecorder/execorders/executive-order-no-567.html>. The executive order instructs the director of professional licensure and commissioner of public health to review "any act, rule, regulation, or policy" proposed by the state's independent licensing boards that may potentially reduce competition in the relevant market and disapprove those that may have an anti-competitive effect. If disapproved, an act, rule, regulation, or policy "shall not be published, implemented, facilitated, or advanced by any employee or agent of the Commonwealth."

<sup>28</sup> Oklahoma's Attorney General is now responsible for reviewing non-rulemaking activities of boards where the majority of members are active participants in the market regulated by the board. Okla. Exec. Order No. 2015-33 (July 17, 2015), <https://www.sos.ok.gov/documents/executive/993.pdf>. The executive order was followed by guidance issued by the state's attorney general, which directed boards

the extent of the role these review entities will play in overseeing board activities, whether they should be funded by licensees or general funds, whether their decisions will be subject to time limits, and whether there will be avenues for appeal. It is also important to note that the FTC has emphasized that any such independent review agency must review the substance of the proposed board action and not merely serve as a rubber stamp.<sup>29</sup>

A minority of state boards operate under umbrella agencies that oversee and in some instances carry out much of the work of state boards. So long as the umbrella agency has the authority to review and either modify or veto a proposed board action, such a structure is not likely to require further active supervision changes.

Another potential response could be the dilution of the membership of market participants on state boards to the point where licensees make up less than a controlling interest. This response would lessen the role of licensees and increase the role of public members on state boards so that board actions may not require active state supervision in the first place. However, such changes pose practical and regulatory concerns. Significant questions will arise for states considering this option because, according to the *NC Dental Board* dissent, “it is not clear what sorts of changes are needed to satisfy the test that the Court now adopts.”<sup>30</sup> Indeed, without further court guidance, it is unclear who may be considered an “active market participant” and what is a “controlling interest.” The FTC has weighed in with its Staff Guidance, adopting a broad stroke for both concepts.

FTC staff states that an individual “will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.”<sup>31</sup> Furthermore, the inquiry as to whether a board is “controlled” by active market participants “is a fact-bound inquiry that must be made on a case-by-case basis.”<sup>32</sup> The FTC Staff Guidance sets forth the following factors that it will consider in the inquiry regarding the existence of a controlling interest: “The structure of the

---

subject to the order to seek approval for any action that could be considered anti-competitive, including licensee disciplinary action. Letter from E. Scott Pruitt, Okla. Att’y Gen., to Boards & Commissions (Aug. 17, 2015), available at <http://s3.amazonaws.com/content.newsok.com/documents/FINAL%20Letter%20to%20Agencies%2008212015.pdf?embeddedLinkType=document>.

<sup>29</sup> Per the examples found on page 13 of the FTC’s Staff Guidance, the following scenarios do not constitute active supervision:

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency.
- The independent state agency perfunctorily approves the recommendations of the regulatory board. . . .
- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board.

<sup>30</sup> 135 S. Ct. at 1123 (Alito, J., dissenting).

<sup>31</sup> FTC Staff Guidance at 7.

<sup>32</sup> *Id.* at 8.

regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board’s authority. Whether the board members who are active market participants have veto power over the board’s regulatory decisions.”<sup>33</sup> Thus, any licensee of a state board may be considered an active market participant, and the controlling interest analysis does not necessarily turn on majority licensee status alone.

In addition to the open structural questions regarding board composition, states considering the dilution of licensee board members could also jeopardize the technical expertise and cost-saving benefits that flow from staffing boards of accountancy with licensees. Large and small boards rely on their members’ experience, and often highly specific and advanced knowledge, to handle enforcement matters, standards adoption and interpretation, and evaluation of harm or potential harm to the public.

Undoubtedly, there are other possible responses beyond those referenced above. Any potential response must be evaluated in light of the FTC’s and the Supreme Court’s focus on certain board activities requiring supervision—not all activities undertaken by state boards. As a practical matter, any response should also be subject to an evaluation of costs and benefits to boards’ public protection missions.

### What Activities Should Be Subject to Active State Supervision?

Not all state board activities require active supervision because most board activities are not the focus of antitrust enforcement and potential liability. As the FTC stated in its brief before the Supreme Court: “[e]ven where the prerequisites for an exemption are absent, finding lack of state action immunity does not prove the violation.”<sup>34</sup> Further, “the great majority of practices found non-immune are undoubtedly not antitrust violations to begin with.”<sup>35</sup> As a result, the focus of active supervision has been on state board actions where immunity would actually be of legal significance. This includes potentially unauthorized actions that seek to restrain competition by excluding unlicensed competitors who engage in activities that may or may not be prohibited by a particular practice act.

Thus, active state supervision is generally not needed for routine operations, such as most licensure decisions, license renewals, and most licensee discipline. Rather, supervision should focus on state board conduct that could be deemed an unreasonable restraint on trade under federal antitrust laws. This conclusion is supported by the Supreme Court’s decision, which laid out the scope of the Court’s antitrust concerns:

---

<sup>33</sup> *Id.*

<sup>34</sup> Brief for the Respondent at 56, *N.C. State Bd. of Dental Examiners v. FTC*, No. 13-534 (U.S. July 30, 2014) (internal citation and quotes omitted).

<sup>35</sup> *Id.* (internal citation omitted).

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.<sup>36</sup>

As previously noted, the FTC's Order details the actions that the Dental Board may and may not take pursuant to federal antitrust law. The FTC's Order allows the Dental Board to continue to legally engage in conduct that is within its statutory prerogative. For example, under the terms of the FTC's Order, the Dental Board may continue to take the following actions without any new supervision requirement:

- (i) investigate a Non-Dentist Provider for suspected violations of the Dental Practice Act;
- (ii) file, or cause to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act ....; or
- (iii) pursue any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code....<sup>37</sup>

Consistent with (ii) above, the initiation of a lawsuit generally will not require active supervision as it would not constitute an antitrust violation in the first place. This position is consistent with the FTC Staff Guidance which states that "the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the 'sham exception.'"<sup>38</sup>

Under the FTC's Order, the Dental Board is also generally permitted to continue communicating with third parties regarding the content of its authorizing statute and the limits that the Dental Practice Act places on unauthorized practice, without active state supervision. The Dental Board may also continue with licensee enforcement, unchanged, pursuant to state law. The practical effect of the Order is thus limited to addressing actions taken against unlicensed teeth whitening service providers without statutory authorization.

It appears that the Supreme Court and the FTC are focusing their attention on a pattern of unilateral board actions to restrain competition without oversight from an independent state body. The FTC is not necessarily concerned with Dental Board enforcement actions against a single competitor.<sup>39</sup> This focus is supported by the premise that federal antitrust laws are directed at injuries to competition, not injuries to individual competitors or potential competitors. Indeed, the FTC Staff

---

<sup>36</sup> 135 S. Ct. at 1116 (emphasis added) (internal quotes omitted).

<sup>37</sup> Final Order at 4, *In re N.C. Bd. of Dental Examiners*, Docket No. 9343 (F.T.C. Dec. 7, 2011).

<sup>38</sup> FTC Staff Guidance at 6.

<sup>39</sup> "[T]he Board had decided teeth whitening constitutes 'the practice of dentistry' and sought to prohibit those who competed against dentists from participating in the teeth whitening market. . . . [T]here is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists." 135 S. Ct. at 1116.

Guidance notes “that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition.”<sup>40</sup> It goes on to state, however, that “[a] pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.”<sup>41</sup>

This distinction was recently illustrated in the U.S. District Court for the Eastern District of Virginia case of *Petri v. Virginia Board of Medicine*.<sup>42</sup> Petrie, a chiropractor licensee of the Medical Board, was disciplined by the board and, in response, she sued the board alleging an antitrust violation. The court rejected Petrie’s claim not on state action immunity grounds but under a full antitrust analysis of whether her situation was the type of claim that is meant to be addressed by antitrust law. Petrie argued that her “individual injury constitutes harm to the overall competition.”<sup>43</sup> The court held that:

[T]he law is clear that “the elimination of a single competitor, standing alone, does not prove the anticompetitive effect necessary to establish antitrust injury.” . . . Petri has shown no evidence that pricing in the market was altered or that other chiropractors failed to join, or left, the market as a result of the Board’s actions. Without such a showing, Plaintiff has failed to show the necessary anticompetitive effects of a Sherman Act violation.<sup>44</sup>

The district court’s decision was affirmed by the U.S. Court of Appeals for the Fourth Circuit, which noted that Petrie was unable to point to any specific evidence that the Board’s order against her had a broader anticompetitive effect on any other Virginia chiropractor.<sup>45</sup> Her efforts to show such a broad effect were labelled by the court as “mere speculation.”<sup>46</sup> The court did not address whether the Board had engaged in an anti-competitive contract, combination or conspiracy or whether Petrie sustained an economic injury that was sufficient to confer standing for her to sue for a Sherman Act violation. At this writing, a petition for certiorari is pending with the U.S. Supreme Court.

Therefore, from the FTC’s Order, the Supreme Court’s decision, and the developing body of federal antitrust law on this subject, it is likely that the active supervision requirement need not extend broadly to issues such as individual licensure decisions (as opposed to broad policy decisions and actions that could restrict market entry), examination, peer review, continuing education, renewals, or most licensee discipline. Instead, it appears that the Supreme Court’s intent is to

---

<sup>40</sup> FTC Staff Guidance at 12.

<sup>41</sup> *Id.*

<sup>42</sup> No. 1:13-cv-01486, 2014 U.S. Dist. LEXIS 166228 (E.D. Va. Dec. 1, 2014). The plaintiff’s last name is misspelled in the caption of the district court opinion.

<sup>43</sup> *Id.* at \*7.

<sup>44</sup> *Id.* at \*7-\*8 (internal citations omitted).

<sup>45</sup> No. 15-1007, 2016 U.S. App. LEXIS 8931 (4th Cir. May 16, 2016).

<sup>46</sup> *Id.* at \*9.

ensure that enforcement actions against unlicensed persons and policy positions taken by state regulatory boards that may affect all licensees or make it more difficult for non-licensees to enter the regulated market are in accord with state policy.

## Does a Board's Member Selection Process Affect the Active Supervision Requirement?

The Supreme Court did not view the Dental Board's member selection process as an applicable factor in its analysis of whether active supervision applies. The FTC Staff Guidance expressly rejects selection method as a determining factor on the active market participant analysis (though it does not address selection method as a factor in whether active supervision should be or is present): "The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates."<sup>47</sup>

However, it is conceivable that a board's member selection process might be a factor in determining the amount or degree of state supervision required in a particular case. In the Dental Board's case, dentist board members were elected by North Carolina's dentists.<sup>48</sup> This practice is unusual among licensing boards, and is not used by any U.S. boards of accountancy, which instead generally rely on executive branch appointments. While the Court's decision did not address the Dental Board's unusual selection practice, a concurring judge's opinion in the Fourth Circuit Court of Appeals' decision highlighted the Dental Board's selection methods as a key factor in her conclusion that a violation of federal antitrust law occurred.<sup>49</sup>

## A Path Forward

More than a year and a half has passed since the *NC Dental Board* decision and we have witnessed a myriad of reactions, from legislation to executive action to lawsuits. Active supervision regimes have been proposed and, in some cases, adopted by state legislatures and executive branches. Some states have amended their board member appointment and removal processes and authority. At least one state legislature has unsuccessfully proposed a plan to change the composition of their regulatory boards in an effort to dilute the licensee representation on the boards. All of these responses have one thing in common: they are all attempts to comply with

---

<sup>47</sup> FTC Staff Guidance at 7.

<sup>48</sup> The Dental Board's membership also includes a dental hygienist, who is elected by the state's dental hygienists, and a consumer member who is appointed by the governor.

<sup>49</sup> "In this context, it is useful to state what our opinion does not hold. We do not hold that a state agency must always satisfy the active supervision prong of the standard set forth in *Midcal* to qualify for antitrust immunity under the state action doctrine. Nor do we hold that a state agency comprised, in whole or in part, of members participating in the market regulated by that state agency is a private actor subject to *Midcal's* active supervision prong. Instead, our holding that the Board is a private actor for purposes of the state action doctrine turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market." *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 376 (4th Cir. 2013) (Keenan, J., concurring).

and respond to the Supreme Court's decision. However, none of these responses guarantee immunity, and each comes with certain nuances and risks (as have been discussed above). Regardless of whether states opt for any of the above-described responses to the decision, states should evaluate the opportunity to implement or strengthen immunity, indemnification, defense, insurance, and education/training requirements in their statutory schemes.

### Indemnification, Insurance, & Defense

Private antitrust lawsuits against state boards, their staffs, and their members have proliferated in the months following the *NC Dental Board* decision. Antitrust liability carries significant risks, including potential treble damages and attorneys' fees. The Supreme Court noted that "States may provide for the defense and indemnification of agency members in the event of litigation."<sup>50</sup> The issue of board member and board staff indemnification and defense is one that many states will grapple with in this case's wake. Many states already provide for board member and board staff indemnification statutorily, and changes to these practices will not be required unless states wish to expressly provide for the defense of these individuals. Other states may wish to amend their statutes so that they expressly provide for the indemnification and defense of state board members and their staffs. Some state boards may be permitted to, and may opt to, carry insurance that helps to defend against and offset any potential antitrust liability. In the event that a state board carries insurance, either through a state coverage system or through a commercial policy, it is important to evaluate whether such coverage includes antitrust damages and defense costs.

### State Statutory Immunity

An issue that often accompanies indemnification is whether states should provide for statutorily-imposed immunity for board members and board staff. It is important to note that such immunity, standing alone, may not be wholly effective in immunizing board members and staff from some federal suits, including antitrust suits. However, many states already provide for such immunity from civil liability for board members and board staff because it is the right thing to do from a policy perspective. No profession, especially accountancy, should be faced with the diminution of its regulatory scheme because board members may be deterred from serving for fear of personal liability. This immunity may help to ease the fears of those who are serving or may consider serving on state boards in the future. More importantly, such immunity may become part of a court's analysis for certain immunities under federal law beyond the state action doctrine.

---

<sup>50</sup> 135 S. Ct. at 1106.

Both statutory immunity and indemnification are already provided for under many states' statutes, and these issues are addressed in Section 4(g)(2) of the Uniform Accountancy Act, which provides:

The board, its members, and its agents shall be immune from personal liability for actions taken in good faith in the discharge of the board's responsibilities, and the State shall hold the board, its members, and its agents harmless from all costs, damages, and attorneys' fees arising from claims and suits against them with respect to matters to which such immunity applies.

This provision could be strengthened to further expressly provide for the defense of board members and board agents. State boards and other stakeholders should review their jurisdictions' applicable provisions and see what could be appended or improved under their specific circumstances.

### Education & Training

Regardless of how states opt to respond to the *NC Dental Board* opinion, their response can and should be bolstered with initial and ongoing antitrust training for state board members, board staff, and board counsel. Such training should include an overview of antitrust law, various defenses and immunities that may be implicated in the face of an antitrust claim, a review of antitrust litigation against state boards, and other important aspects of navigating the intersection of antitrust and state licensing. These training requirements were recently prescribed in West Virginia by House Bill 271 (signed by the governor in March 2016), which requires mandatory training in federal antitrust law and state action immunity for all West Virginia Board of Accountancy members and the Board's representatives from the Attorney General's office. The bill also provided for indemnification to its board members and staff. Training such as that mandated in West Virginia is an important and reasonable response to the *NC Dental Board* fallout because it can provide a baseline of understanding and practical advice for state regulators to carry out their roles while being equipped to address potential antitrust concerns.

### Conclusion

In light of the outcome of the *NC Dental Board* case, there are a number of considerations for states and their boards of accountancy. The current lack of certainty regarding the effect of federal antitrust law and the potential threat of increased private litigation on this subject reveals the need for a cautious and measured approach.

Regardless of how state governments react to this case, boards of accountancy should ensure that enforcement actions against non-licensees are taken with explicit, specific statutory support or clear court precedent. Similarly, rulemaking implicating unlicensed practice or rulemaking with the effect of increasing requirements imposed for licensure or renewal must be undertaken pursuant to clearly-articulated state

law. Most boards of accountancy already operate in an environment and with procedures that do not give rise to significant antitrust exposure. Therefore, it is essential that state governments seeking to alter board of accountancy structures or practices understand the nuances of state action immunity, the Supreme Court's holding, and the FTC's intentions. Otherwise, a state may respond to the *NC Dental Board* case in a manner that unnecessarily hampers regulatory efficiency, increases costs, and threatens public protection.

In addition, states should evaluate the need to make statutory changes to effectively address immunity, indemnification, defense, and insurance requirements for state board members and board agents. Finally, states should also consider having education and training made available for boards, board staff, and board counsel that will cover antitrust law and related immunities and defenses. This training will help states and their regulatory boards ensure that they can properly spot and address potential antitrust risks.