

DECEMBER 5, 2017

TESTIMONY OF THE
OFFICE OF ATTORNEY GENERAL
HOUSE CONCURRENT RESOLUTION NO. 3026

Mr. Chairman, members of the Committee. I am Sandra DePountis, Assistant Attorney General in the State and Local Government division, appearing on behalf of the Attorney General.

The Office of Attorney General is responding to Chairman Devlin's invitation to testify about the United States Supreme Court decision in North Carolina State Board of Dental Examiners v. The Federal Trade Commission and specifically "whether the state's current policy and level of oversight of occupational and professional licensing boards satisfies the clear articulation of state policy and active supervision requirements of *North Carolina Dental*, and if not, what does the state need to do to comply with the requirements articulated in this decision."

Because cases like *North Carolina Dental* can sometimes contain nuances making them susceptible to misinterpretations and misconceptions, the Attorney General would first like to revisit an important aspect of that case. Specifically, this case ultimately stands for the proposition that when occupational and professional licensing boards ["boards"] are controlled by active market participants, the boards can only invoke state action immunity from federal antitrust liability if: (1) the challenged restraint is clearly articulated and affirmatively expressed as state policy; and (2) that policy is actively supervised by the State. Said another way, if a board is made up of members of the profession it regulates, and that board takes steps to limit competition in its profession by interpreting its scope of practice to reach areas not clearly articulated in

state law, those board members would not have state action immunity unless they are ‘actively supervised by the State.’ So the question becomes whether North Dakota provides enough active state supervision to ensure our board members are protected by state action immunity.

While this Office provided preliminary insights via email when *North Carolina Dental* was first issued, substantially more information has become available in the intervening years that allows us to provide more refined insights. Notably, it has become clearer that the vast majority of the actions and decisions by boards do not involve, invoke, or violate federal antitrust laws. For example, boards are not exposed to antitrust liability when denying licenses to applicants who fail to submit the materials required for licensure. Additionally, only “unreasonable” restraints on trade give rise to antitrust liability, and the FTC has issued guidance recognizing that a board taking disciplinary action affecting a single licensee is generally not going to be “unreasonable.” In fact, very few board decisions even touch on antitrust matters.

Because *North Carolina Dental* only relates to a very narrow set of circumstances, wholesale changes to our existing laws—which are highly effective in regulating almost all aspects of many professions—should not be undertaken without thoughtful consideration about their impact and any unintended consequences.

For example, an initial reaction after *North Carolina Dental* was a belief that just replacing a majority of board members with public members (versus active market participants) would solve the issue. A more thorough review of the case and guidance since its initial issuance has dissuaded this reaction for two main reasons. One is that the Court based its decision on the “controlling” number of board members, not majority.

Thus, even one market participant on the board could be the “controlling” number if all public members look to the active market participant for advice that guide its decision making. Second, there are benefits of having a market participant who brings expertise from the profession on the regulatory board.

It is also valuable to note that North Dakota already has several layers of active state supervision that limit a board’s ability to carry out anticompetitive efforts.

- a. Prosecutors provide active state supervision. Most boards cannot prosecute non-licensees for practicing without a license. Instead most boards must turn such matters over to the States Attorneys for prosecution.
- b. Legislators provide active state supervision. While boards can propose legislation, the legislative assembly provides active state supervision when passing laws. Furthermore, while boards can engage in rulemaking, the legislative assembly similarly has oversight of that process as well.
- c. The Governor provides active state supervision. Executive Order 2015-05 allows boards to obtain “review and written approval from the Attorney General of all actions designed to enforce or implement regulatory policies when such enforcement or implementation actions may have an anticompetitive effect upon the professional market in question.”
- d. The Attorney General provides active state supervision in several ways, including:
 - i. Issuing opinions related to a board scope of practice or other legal issues. These opinions direct the acts of government entities, until and

unless a court determines otherwise. North Dakota Century Code § 54-12-01(19).

- ii. Directing assistant attorneys general to provide boards with legal advice that cautions boards against taking any actions that may give rise to an antitrust claim. Assistant attorneys general have attended numerous trainings on the case and the Office of Attorney General is in the process of setting up training for all attorneys who advise regulatory boards so all are knowledgeable about the implications of *North Carolina Dental*.
- iii. Overseeing any litigation a board might seek to bring, and in doing so, refusing to initiate legal action that would result in unreasonable restraint on trade. North Dakota Century Code § 54-12-02.

In summation, it is important to keep in mind that many actions of the regulatory boards do not involve, invoke, or implicate antitrust issues. Furthermore, there are already several layers of active supervision that serve to keep boards from potential antitrust lawsuits and thereby preserve the state action immunity.

With that in mind, there may be circumstances that could benefit from additional layers of protection to ensure the appropriate level of supervision exists.

This Office began an exploration of options that could address the exposure North Dakota boards could face under *North Carolina Dental*. This exploration thus far has focused on two categories of persons that could bring claims of anti-competitive conduct against a board: (a) licensees and (b) non-licensees. What follows is a

discussion of some means to increase the level of active state supervision of board decision-making in these two categories.

Licensees

At present, most boards can only take disciplinary action against a licensee if (a) the licensee agrees to the discipline such as by signing a Settlement Agreement, or (b) the board and licensee obtain a hearing before an Administrative Law Judge ["ALJ"] assigned by the Office of Administrative Hearings ["OAH"]. We need not focus on option "(a)", because the licensee would be agreeing to discipline, and thus would not be able to support a claim for anti-competitive action against the board. As such, this analysis focuses on situation "(b)"—in which the boards seek to discipline licensees through a hearing at the OAH.

In that hearing process, the current law provides that at the conclusion of a hearing the ALJ issues a document that explains the ALJ's proposed findings of fact and conclusions of law—which may include proposed discipline. By law, boards can decline to follow the ALJs proposed discipline, and can issue their own findings, decisions, and discipline. See N.D.C.C. § 28-32-39. The State could increase active state supervision through the ALJ if the Century Code were modified so that instead of only allowing the ALJ to 'propose' appropriate discipline, the Century Code both (a) granted the ALJ the authority to decide what discipline is appropriate, and (b) removed the board's authority to decline to follow that decision. Increasing active state supervision by providing the ALJ with this increased authority would seem to have little, if any, fiscal impact, because

the ALJ is already conducting hearings on these matters and would simply have more authority when arriving at a conclusion.

A further, and perhaps more drastic modification of N.D.C.C. chap. 28-32, would be to require **all** professional licensing boards to go before the OAH in order to discipline a licensee. That solution would provide increased active state supervision and apply it to all North Dakota boards. Increasing active state supervision by requiring more boards to utilize the OAH process in order to discipline licensees may have a fiscal impact on that office.

Non-Licensees

The other category of persons that could bring anti-competitive claims against boards are non-licensees. As it stands at present, most—but not all—boards in North Dakota do not have jurisdiction over non-licensees. As such, if one of those boards observes activity it concludes might be the unlicensed practice in their profession, those boards refer the matter to the States Attorney, and that prosecutor decides whether to pursue the matter. No change to the Century Code is required to retain that substantial level of active state supervision for those boards.

At the same time, if the Century Code were modified so that the boards that presently do have jurisdiction over non-licensees no longer had that authority, and that instead all boards would be in the position of turning all decisions related to non-licensees over to the States Attorney, then all boards would seemingly be actively supervised. This option would have a fiscal impact on States Attorneys because more boards would be required to turn more non-

licensee matters over to those offices for prosecution. This option should be carefully considered as some boards, such as the Board of Pharmacy, may want to retain its authority over un-licensed practice in order to act quickly on matters of public health and safety.

A significant advantage to the options listed above is that each follows or expands upon laws, systems, and processes that are already fundamentally in existence in our state, as opposed to creating all-new functionality such as creating additional layers of government to provide the active supervision. And while these proposed ideas would have a fiscal impact—that impact would seemingly be less substantial than creating new systems that would be providing increased levels of bureaucratic oversight.

The Office of Attorney General looks forward to working with Legislative Management and Legislative Council to explore these ideas further and to identify any gaps that could risk the loss of state action immunity for our boards.