

Consideration of Adoption of Policy Regarding Board Actions and Anti-Trust Implications

Background: The Sherman Act and federal anti-trust laws are designed to promote and protect competition. These laws, however, have not historically been applied to state actions, including actions taken by state agencies, which operate under the delegated authority of state legislatures. However, on February 25, 2015, the United States Supreme Court issued a decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. The Court's decision significantly alters the application of the Sherman Act and federal anti-trust laws and anti-trust immunity to state actions.

The North Carolina case focused on teeth whitening businesses operating in North Carolina malls. These businesses offered lower cost whitening services than traditional dental services. Many dentists in the area complained about the whitening services to the Board of Dental Examiners. In response to the complaints, the Board sent cease and desist letters to the teeth whitening businesses accusing them of practicing dentistry without a license and threatening criminal consequences. The Federal Trade Commission became involved to review the action of the Board and ultimately determined the following: (1) the Board's oversight was generic and contained no mechanism to ensure that the Board was acting per state policy rather than its own self-interest (market participants regulating the market); (2) the active supervision prong of the state action immunity doctrine (state defense against a claim of anti-competitive behavior) was not met and the Board's actions were subject to federal anti-trust laws. The matter was appealed to the Fourth Circuit and eventually to the Supreme Court. The Supreme Court affirmed the Fourth Circuit's judgment.

The Supreme Court's opinion can be generally summarized as follows:

"The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked."

The Supreme Court was not unanimous in its decision. Three of justices dissented from the majority opinion and issued a dissenting opinion.

In the wake of the North Carolina case, several states took immediate actions to demonstrate active supervision of their agencies by their state legislatures in an effort to preserve their ability to assert the state action immunity doctrine (which provides immunity from the application of the Sherman Act and other federal anti-trust laws to state actions). Some states, such as Oklahoma, implemented an extra layer of review of agency actions

by their state attorneys general. Other states considered altering the composition of their agencies so that market participants were not the ultimate decision makers in actions affecting the regulated markets. Much has been written about the North Carolina decision in the legal community over the past few years, and national legal experts continue to debate the longevity of the decision, in light of subsequent litigation in various states.

In Texas, House Bill (HB) 2950 was enacted during the 85th Legislative Session. Effective September 1, 2017, HB 2950 amended §301.059 of the Nursing Practice Act to require Board members to receive training, on an annual basis, regarding, among other topics, the types of board rules, interpretations, and enforcement actions that may implicate federal antitrust law by limiting competition or impacting prices charged by persons engaged in a profession or business the board regulates.

In response to the statute's directives and to ensure the Board's commitment to compliance with federal anti-trust law, Staff is recommending that the Board adopt the policy attached as Attachment "A".

Board Action: Move to approve the policy, attached as Attachment "A".

Policy Regarding Board Actions and Anti-Trust Implications

Purpose: The purpose of this policy is to ensure that Board actions are considered and reviewed in light of the guidance set forth in *North Carolina State Board of Dental Examiners v. Federal Trade Commission (North Carolina)* prior to the adoption and/or implementation of the action.

Background: On February 25, 2015, the United States Supreme Court issued a decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission (North Carolina)*. The Court's decision significantly alters the application of the Sherman Act and federal anti-trust laws and anti-trust immunity to state actions, including actions taken by state agencies, which operate under the delegated authority of state legislatures.

The Board recognizes that its actions, including rulemaking, interpretation(s), and enforcement actions, may implicate federal anti-trust law by limiting competition or impacting prices charged by persons engaged in a profession or business the Board regulates. The Board is further cognizant that the following actions may be particularly sensitive to anti-trust concerns and may warrant a higher level of review and consideration prior to adoption and/or implementation: (i) actions that regulate the scope of practice of licensees; (ii) actions that restrict advertising by licensees; (iii) actions that affect the price of goods or services provided by licensees; and (iv) actions that restrict licensee participation in a profession or business regulated by the Board.

It is the Board's policy, therefore, to engage in meaningful consideration and review of actions that may implicate ant-trust concerns under *North Carolina*, which may include consultation with legal counsel and/or the Office of the Attorney General, prior to adoption and/or implementation of the action.