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BOARDS BEHAVING BADLY

How States Can Prevent Licensing Boards From Restraining Competition, Harming Consumers, and Generating Legal Liability Under *North Carolina State Board of Dental Examiners v. FTC*

After the U.S. Supreme Court's February 25 decision in *North Carolina State Board of Dental Examiners v. FTC ("Dental Examiners")*,[1] state governors and legislators can no longer afford to ignore the misbehavior of state licensing boards.

This bad behavior has been going on for decades. Licensing boards, composed of members of the very occupations they are supposed to regulate, have been adopting anticompetitive restrictions that harm consumers, stifle innovation, and yield no real public benefits. And when these restrictions inevitably are challenged in court, states have been left footing the bill to defend the boards.

In *Dental Examiners*, a dental board composed of practicing dentists sought to exclude non-dentist teeth whiteners from the market, not because the teeth whiteners posed a danger to consumers (they did not), but rather because they threatened dentists' lucrative monopoly on teeth whitening services.[2] In other cases, states have been forced to defend attempts by funeral director boards to monopolize casket sales;[3] attempts by veterinary boards to monopolize animal massage;[4] and attempts by cosmetology boards to monopolize the practice of traditional African hair braiding.[5]

Dental Examiners will magnify the cost of this misbehavior to the states. The Supreme Court, in its decision, held that North Carolina's dental board was not immune from liability under federal antitrust law.[6] As a result, future monopolistic gambits by state licensing boards will generate significant legal exposure—including, potentially, treble damages and criminal penalties.[7]

Every state must revisit its licensing laws after *Dental Examiners*. States can no longer afford to allow the anticompetitive, monopolistic behavior of their boards to go unchecked.

Dental Examiners, moreover, calls for more than a fig leaf of bureaucratic supervision. Superficial reforms will leave states open to considerable legal uncertainty, as the Supreme Court has not clearly defined the level of "active supervision" that will suffice to confer immunity from federal antitrust law. States, instead, should seek to restrict the kind of underlying anticompetitive conduct that gets boards into trouble in the first place.

IN A NUTSHELL, STATES SHOULD:

- Charge an independent "licensing ombudsman" with reviewing the actions of state licensing boards;
- Charge the licensing ombudsman with a mandate to promote economic competition;
- Make the ombudsman responsible for conducting periodic reviews to identify ways to reduce licensing burdens; and
- Eliminate licensing altogether for occupations where it is unnecessary.

States can do this by taking the following concrete steps:

- Charge a licensing ombudsman, a disinterested statewide official, with responsibility for reviewing actions taken by the boards;
- Enact a requirement that the ombudsman seek to promote competition when exercising this supervisory authority; and
- Require that same licensing ombudsman to conduct, over a period of 5 years, a rolling review of all licensing regimes and to recommend annually to state legislators changes to licensing laws that would repeal or reduce unnecessary regulatory burdens on individuals entering occupations.

Together, these reforms would get to the root of the problem at issue in *Dental Examiners* by making it more difficult for licensing boards to limit competition.

In addition to these three changes, state legislative committees should be given the additional mandate to consider in every session whether some licensing boards should be eliminated altogether. After all, the most surefire way to prevent abuse of licensing laws by licensing boards is to eliminate licensing entirely.

Both the ombudsman and the newly-empowered legislative committees should take note that many occupations—including 92 occupations listed in this report—are licensed only in some states, meaning *other* states find licensing unnecessary. In addition, states should consider eliminating boards that have few members, run a fiscal deficit that drags on the state's general budget, or oversee an occupation made safer by innovation or better consumer information.

Dental Examiners should be viewed as an opportunity to revisit an area of law in dire need of reform. Occupational licensing laws limit competition, reduce opportunities for people at the first rungs of the economic ladder, and frustrate innovation by new market entrants.[8]

Licensing laws result in the loss of 2.85 million jobs nationwide, and the cost to consumers from licensing laws has been estimated to be as high as $203 billion every year.[9]

States that seize this opportunity to clean up their licensing laws will not only reduce their legal exposure, but also will promote economic growth and employment, while eliminating unnecessary restrictions on their citizens' liberties.

I. *Dental Examiners:* A Welcome Prod to Reform

Both the facts and the holding of *Dental Examiners* should drive state legislatures to reexamine occupational licensing laws.

Dental Examiners vividly illustrates how industry insiders use licensing laws to limit competition. The dental board for North Carolina—composed almost entirely of practicing dentists—launched a series of enforcement actions against non-dentist teeth whiteners, even though teeth whitening poses no significant danger to consumers.[10] The board's economic incentive was plain: In 2006, members of the American Academy of Cosmetic Dentistry earned an average of $25,000 providing teeth whitening procedures.[11] Indeed, the record confirmed that complaints to the board about non-dentist teeth whiteners focused almost entirely on "the low prices charged by nondentists."[12]

The Court, in *Dental Examiners*, held that the board's anticompetitive conduct could give rise to significant legal exposure under federal antitrust law. The Federal Trade Commission ("FTC") sued the board in *Dental Examiners*, claiming that the board's anticompetitive conduct violated the Federal Trade Commission Act. The board responded that it was entitled to immunity as an arm of the state government.[13] But the Supreme Court rejected this claim, holding that state boards composed of market participants may be subject to antitrust liability unless states exercise "active supervision" over the board.[14]

The holding of *Dental Examiners* should cast a pall over licensing boards. States often populate their licensing boards with market participants.[15] Now, whenever a board acts to exclude competitors from the marketplace, states will need to consider the risk that either the FTC or individuals and businesses targeted by the board will sue under federal antitrust laws, potentially even seeking treble money damages.[16] Given that new legal exposure, complacency regarding boards' anticompetitive conduct is no longer a viable option.

II. "Active Supervision" Should Involve a Mandate to Prevent Anticompetitive Conduct and Adoption of a Policy to Promote Competition.

Many states will undoubtedly opt to satisfy *Dental Examiners* by introducing some form of "active supervision" of licensing boards. This should be more than a bureaucratic fig leaf. States should take this opportunity to eliminate the kind of anticompetitive conduct that gets boards into trouble in the first place.

This advice is more than just good public policy; it also will help states avoid liability under federal antitrust laws. There is no guarantee that any particular form of "active supervision" will satisfy *Dental Examiners*. Rather, the Court went out of its way to be clear that the adequacy of a state's supervisory regime "will depend on all the circumstances of a case."[17] Particularly because "state-action immunity is disfavored," states that provide only a fig leaf of supervision will constantly run the risk that their level of supervision will be judged inadequate.[18] States that act to reduce the underlying risk of anticompetitive behavior, on the other hand, will reduce the risk that boards' behavior will give rise to antitrust litigation in the first place.

States should take three concrete steps to reduce the risk of the kind of anticompetitive conduct at issue in *Dental Examiners*.

First, states should ensure that a statewide supervisory official, referred to here as a "licensing ombudsman," conducts an independent review of licensing boards' interpretation and enforcement of the licensing laws. To comport with the bare requirements for "active supervision" articulated in *Dental Examiners*, this ombudsman should at a minimum have "power to veto or modify particular decisions" and should exercise more than "mere potential for state supervision."[19] Every action taken by a board to reduce competition should have to be affirmatively approved by the licensing ombudsman.

Second, the ombudsman should be given a substantive mandate to promote competition. Without articulation of a state policy favoring competition, supervision of licensing boards will be a rudderless endeavor: The ombudsman will have authority to veto boards' enforcement decisions, but will have no guide for when to exercise that authority. By articulating a policy in favor of competition, states can help assure that supervisory authority is exercised to prevent anticompetitive behavior.

Moreover, states should articulate specific factors for the ombudsman to consider, including the effect of licensing on consumer choice, innovation, and employment in the state. By specifically listing these potential harms from licensing laws, states will help to ensure that the ombudsman bears them in mind.

Third, and finally, states should charge this ombudsman with conducting an annual review of all state licensing laws. The ombudsman should assess 20 percent of the state's licensing laws every year, thereby completing a full review of the laws every 5 years.

As with the ombudsman's day-to-day supervision of licensing boards, the law also should articulate specific factors to guide the ombudsman. The ombudsman should consider whether potential harms purportedly justifying licensing are real harms; whether some less-restrictive alternative to licensing would suffice to serve the state's regulatory interest; and whether other states impose licensing on the occupation.[20]

This process of review should be guided by a presumption in favor of repeal of licensing laws. After all, as explained below in Part III of this report, many occupations could easily be regulated by less-restrictive alternatives to licensing.

Licensing laws should only be retained when the ombudsman—not trade association advocates—shows that the cost of those laws to economic competition is outweighed by a true and present threat to public safety.

In cases where a complete repeal is not appropriate, the ombudsman should recommend to state legislators that they change licensing laws to clearly state that certain conduct falls outside the regulated occupation; for instance, a law might state that teeth whitening does *not* constitute practice of dentistry. The ombudsman may also consider reforms to promote competition by paring back boards' authority to enforce licensing laws against unlicensed individuals.

By facilitating reform by the legislature to limit boards' jurisdiction, the ombudsman can play a critical role in ensuring that licensing boards do not unnecessarily exclude competitors from the regulated market.

Model Language for State Reform Bills After *Dental Examiners*

A. Licensing Ombudsman

1. There is created a "licensing ombudsman," who shall have responsibility to oversee all licensing boards within the state.

2. Any enforcement action, rulemaking, guidance document, or other action to prevent unlicensed practice or alter the substance of licensing restrictions that is undertaken by state licensing boards shall be submitted for prior approval to the licensing ombudsman. No board can take any such action without the written approval of the licensing ombudsman.

3. The licensing ombudsman, when exercising authority to oversee state licensing boards, shall consider the effect of licensing on economic competition. Among other things, the licensing ombudsman shall consider the impact of licensing on:

a. Consumer choice and prices paid by consumers;

b. The potential for new business models; and

c. Employment opportunities available to unlicensed individuals.

4. The licensing ombudsman shall not approve an enforcement action proposed by a board unless the licensing ombudsman concludes, based on independent review conducted without deference to the licensing board, that **(a)** the board's enforcement action is authorized by state law, including the applicable licensing law; and **(b)** the cost of enforcement to economic competition is outweighed by a true and present threat to public safety.

B. Review of Licensing Laws

1. Within one year of the enactment of this legislation, and every year thereafter, the licensing ombudsman shall submit a report to the legislature proposing changes to the state's licensing laws designed to promote economic competition. The ombudsman shall review 20 percent of the state's licensing laws each year, and shall address 100 percent of the state's licensing laws over every five-year period.

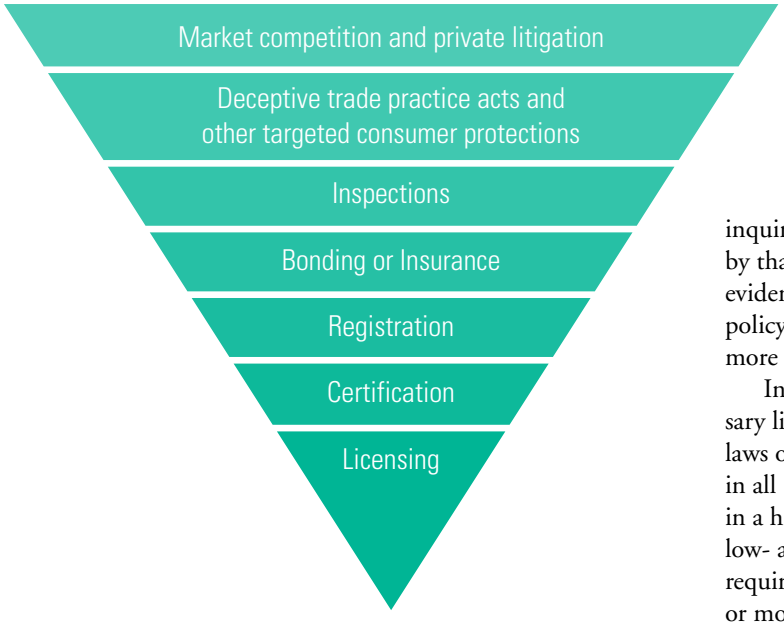
2. In preparing the report, the ombudsman shall presume that licensing laws should be repealed, and shall recommend keeping licensing laws in place only where the cost of those laws to economic competition is outweighed by a true and present threat to public safety. The ombudsman shall also consider other potential amendments to the licensing laws to promote competition, including amendments to reduce boards' jurisdiction and enforcement authority.

3. In preparing the report, the licensing ombudsman shall address, among other things:

a. Whether the potential harms purportedly justifying licensing pose a real and present danger to public safety;

b. Whether the goals of licensing can be accomplished through some less-restrictive alternative, including voluntary certification; and

c. Whether other states allow economic activity to go on without licensing, and, if so, whether the lack of licensing causes any real harm in those states.



III. The Best Response to *Dental Examiners* Is to Eliminate Unnecessary Licensing Laws.

Ultimately, the goal of states' response to *Dental Examiners* should be to eliminate unnecessary licensing laws. After all, a licensing board cannot engage in anticompetitive conduct—and cannot give rise to liability—if the board no longer exists. And, by reducing licensing burdens, states will promote free competition; create opportunities for entrepreneurship and job growth; foster innovation and new business models; and grow their economy while also securing citizens' liberties.

While the annual review process proposed in Part II is aimed at helping state legislators to eliminate unnecessary licensing laws, state legislators also should take independent responsibility to assess the need for licensing laws. Even a supposedly impartial ombudsman can be captured by regulated entities. Each state should therefore appoint a legislative committee with responsibility to review the necessity of state licensing laws.

Both the ombudsman conducting his or her annual review and state legislators interested in eliminating unnecessary licensing requirements should consider whether less-restrictive regulatory alternatives are sufficient to protect consumers or advance other state interests. Alternatives to licensing—including voluntary certification, registration, and targeted consumer-protection laws—can be conceived of as an inverted pyramid of regulatory approaches, with those at the "top" of the inverted pyramid deployed in the largest number of cases.

Starting at the top of the pyramid, state policymakers should consider whether a less restrictive form of regulation should be implemented as an alternative to licensing. Policymakers should consider each level separately and inquire if recognizable harms can be successfully addressed by that type of regulation. Only when there is credible evidence that a level fails to address real harm should the policymaker move to the next lower level and consider a more restrictive type of regulation.

In addition, states interested in eliminating unnecessary licensing requirements should look for guidance to the laws of other states. While some occupations are licensed in all (or nearly all) states, many others are licensed only in a handful—with no apparent ill effects. A study of 102 low- and middle-income occupations subject to licensing requirements found that only 15 were licensed in 40 states or more.[21] On average, the 102 occupations studied were licensed in just 22 states.[22] Where even *one* state does not regulate an occupation, other states should seriously consider whether licensing that occupation is truly necessary.

The Institute for Justice, in *License to Work*, identified 92 occupations licensed by less than 50 states.[23] Every one of these is a candidate to eliminate licensing:

Occupation	States With Licensing[24]
Preschool Teacher	49
Earth Driller	47
Athletic Trainer	46
Fisher	41
HVAC Contractor (General/Commercial)	40
Massage Therapist	39
Mobile Home Installer	39
Veterinary Technologist	37
Security Guard	37
Makeup Artist	36
Door Repair Contractor	35
Security Alarm Installer	34
Fire Alarm Installer	34
Milk Sampler	34
Child Care Worker	33
Auctioneer	33

Iron/Steel Contractor (General/Commercial)	31
Carpenter/Cabinet Maker Contractor (General/Commercial)	30
Glazier Contractor (General/Commercial)	30
Bill Collector Agency	30
Drywall Installation Contractor (General/Commercial)	30
Cement Finishing Contractor (General/Commercial)	29
Midwife	29
Insulation Contractor (General/Commercial)	29
Pipelayer Contractor	29
Terrazzo Contractor (General/Commercial)	29
Floor Sander Contractor (General/Commercial)	29
Teacher Assistant	29
Mason Contractor (General/Commercial)	29
Painting Contractor (General/Commercial)	28
Sheet Metal Contractor (General/Commercial)	28
Paving Equipment Operator Contractor	27
Animal Breeder	26
Taxidermist	26
Gaming Dealer	24
Weigher	24
Coach (School Sports)	24
Gaming Supervisor	23
Optician	22
Gaming Cage Worker	22
Travel Guide	21
Slot Key Person	21
Animal Trainer	20

Crane Operator	18
Backflow Prevention Assembly Tester	18
Animal Control Officer	17
Sign Language Interpreter	16
Cathodic Protection Tester	16
Tank Tester	14
Bartender	13
Locksmith	13
Pharmacy Technician	12
Taxi Driver/Chauffeur	12
Iron/Steel Contractor (Residential)	11
Insulation Contractor (Residential)	10
Painting Contractor (Residential)	10
Landscape Worker	10
Mason Contractor (Residential)	10
Carpenter/Cabinet Maker (Residential)	10
Cement Finishing Contractor (Residential)	9
Floor Sander Contractor (Residential)	9
Farm Labor Contractor	9
Drywall Installation Contractor (Residential)	9
Funeral Attendant	9
Glazier Contractor (Residential)	9
Travel Agent	8
Terrazzo Contractor (Residential)	8
Dental Assistant	7
Tree Trimmer	7
Upholsterer	7
Social and Human Service Assistant	7
Packager	7
Sheet Metal Contractor (Residential)	7
Title Examiner	6
HVAC Contractor (Residential)	5

Shampooer	5
Psychiatric Technician	4
Interior Designer	4
Cross-connection Survey Inspector	4
Court Clerk	4
Home Entertainment Installer	3
Dietetic Technician	3
Electrical Helper	2
Nursery Worker	2
Log Scaler	2
Psychiatric Aide	2
Still Machine Setter	2
Pipelayer Non-contractor	1
Conveyor Operator	1
Florist	1
Fire Sprinkler System Tester	1
Forest Worker	1

Even occupations licensed by substantial numbers of states may still be good candidates for reform. For instance, 39 states require a license to work as a massage therapist; 36 states require a license to work as a makeup artist; and 20 states require a license to work as an animal trainer. In each case, any risk to public safety posed by these occupations could easily be dealt with through far less onerous forms of regulation.

State-by-state tables providing a specific rundown of which of these occupations are subject to licensure can be found at www.ij.org/licensetowork. State officials can use these tables to identify licensing requirements within their states that can be targeted for elimination.

Finally, other factors that state legislators may wish to consider include whether the number of licensees covered by a board has declined, whether fees generated by licensing no longer cover the cost of enforcing the regulation, or whether innovations or better access to information have improved consumer protections.

CONCLUSION

States can view *Dental Examiners* as either a roadblock or an opportunity. States that take the first approach—and seek to do the bare minimum to satisfy *Dental Examiners*—will remain mired in litigation over the precise requirements of the Supreme Court's decision. But states that instead choose to view *Dental Examiners* as an opportunity can reduce barriers to competition and promote economic growth. Every state should seize this chance for meaningful reform.

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ENDNOTES

1 135 S. Ct. 1101 (2015).

2 *Id.* at 1108; *see also* Angela C. Erickson, *White Out: How Dental Industry Insiders Thwart Competition from Teeth-whitening Entrepreneurs* 23-24 (2013), available at http://www.ij.org/images/pdf_folder/other_pubs/white-out.pdf.

3 *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

4 *See, e.g.*, *Kelly v. Whitmore*, No. CV2014-091906 (Ariz. Super. Ct. filed Mar. 5, 2014).

5 *See, e.g.*, *Earl v. Smith,* No. 4:14-cv-358 (E.D. Ark. filed June 17, 2014).

6 *Dental Examiners*, 135 S. Ct. at 1116-17.

7 *See* 15 U.S.C. § 1 (declaring that a conspiracy in restraint of trade is a felony, punishable by fines up to $1,000,000 and imprisonment up to ten years); *id.* § 15 (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" for treble damages).

8 *See generally* Dick M. Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson, and John K. Ross, *License to Work* (2012), available at https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf.

9 *See* Morris M. Kleiner, *Reforming Occupational Licensing Policies* 6 (2015), available at http://www.hamiltonproject.org/files/downloads_and_links/reform_occupational_licensing_policies_kleiner_v4.pdf.

10 *See White Out, supra* note 2, at 23-24. A study of consumer complaints provided by 17 states concerning teeth whitening found only four health-and-safety related complaints over a period of five years, and all those complaints concerned common, reversible side effects. *Id.* at 24.

11 *Id.* at 2. Perhaps for this reason, between 2005 and 2013 over 25 state licensing boards took similar action to exclude unlicensed teeth whiteners from their states. *Id.*

12 *Dental Examiners,* 135 S. Ct. at 1108. A separate study of complaints provided by 17 states found that 96% of those complaints concerned unlicensed practice by teeth whiteners, and not consumer harm. *White Out, supra* note 2, at 23-24.

13 135 S. Ct. at 1110.

14 *Id.* In addition to "active supervision," boards seeking to claim immunity from federal antitrust law also are required to point to a "clearly articulated" state policy to displace competition. *Id.* That policy must be articulated by the state legislature or some other state sovereign. *See, e.g., FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1010-11 (2013).

15 *Dental Examiners*, 135 S. Ct. at 1117 (Alito, J., dissenting) (observing that there "is nothing new about the structure of the North Carolina Board").

16 *Id.* at 1115 (maj. op.) (reserving the question of whether board members may be sued for money damages, and stating that "States may provide for the defense and indemnification of agency members in the event of litigation").

17 *Id.* at 1116-17. The Court articulated a holistic standard, under which courts must ask "whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy.'" *Id.* at 1116. While the Court did articulate some "requirements" to find active supervision, the Court made clear that satisfying those requirements would not be sufficient to confer antitrust immunity. *Id.* at 1116-17.

18 *Id.* at 1110. In addition, even if states satisfy the requirements for active supervision, they *still* will face the risk that they will fail to meet some other requirement for immunity under the antitrust laws—including the requirement that the board operate under a "clearly articulated and affirmatively expressed" state policy to displace competition. *Phoebe Putney*, 133 S. Ct. at 1007.

19 *Dental Examiners*, 135 S. Ct. at 1116.

20 *See, e.g.*, Colo. Rev. Stat. § 24-34-104.1(4)(b)(I) & (III).

21 *License to Work, supra* note 8, at 7.

22 *Id.*

23 *Id.* at 10-11

24 Id. at 12-13 tbl.1. These figures include licensing in the District of Columbia, meaning that the maximum number of jurisdictions in which an occupation can be licensed is 51.

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