THE STATE CENTER

THE CENTER FOR STATE ENFORCEMENT OF ANTITRUST AND CONSUMER PROTECTION LAWS, INC.

360 FURMAN STREET #1026
BROOKLYN, NY 11201
(631) 324 - 0436

WWW.STATECENTERINC.ORG

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Re: Primer for State Regulatory Board Supervisors and Counsel

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015), the Supreme Court held that decisions of state regulatory boards controlled by active market participants are subject to the antitrust laws absent active state supervision. Without understanding how antitrust law applies to the important work they do, state boards may unwittingly expose themselves, their individual members and state governments to substantial antitrust liability.

The application of antitrust principles, which often requires the weighing and balancing of pro- and anti-competitive effects, to the wide range of actions taken by the many state boards responsible for regulating professional and commercial conduct throughout the United States can be a daunting task. It is critical, however, that state boards make these decisions wisely - not merely to protect against antitrust liability - but to assure that consumers benefit from their actions.

The State Center has commissioned this primer as an aid to state boards to help assure that their decisions comply with *North Carolina Dental*. While intended principally for state board supervisors and their counsel, board members themselves may also benefit from reading the primer. Although discussion of legal and economic concepts is necessarily unavoidable, the primer eschews technical jargon to the extent possible and provides many concrete examples.

The primer's author, Abraham L. Wickelgren, is perhaps uniquely qualified to have undertaken this important assignment. He is the Bernard J. Ward Professor in Law at the Law School of the University of Texas at Austin and is co-editor of the American Law and Economics Review. Professor Wickelgren holds both a J.D. from Harvard Law School and a Ph.D. in economics from Harvard University.

The primer is intended to enhance understanding and provide guidance. It is not intended to, nor does it, constitute legal advice. On the contrary, state boards are encouraged to consult their attorneys and outside counsel to assure that their decisions comply with antitrust and other applicable laws.

Sincerely yours,

Stephen D. Houck
Executive Director, State Center

Responding to the North Carolina Dental Decision: A Primer for State Regulatory Board Counsel and Board Supervisors

Abraham L. Wickelgren

Abraham L. Wickelgren
University of Texas School of Law
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Responding to the North Carolina Dental Decision:
A Primer for State Regulatory Board Counsel and Board Supervisors

Abraham L. Wickelgren[1,2]

Executive Summary

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[3], the Supreme Court held that the decisions of state regulatory boards controlled by active market participants do not enjoy immunity from the antitrust laws unless they are actively supervised by the state. The Court reasoned that a board controlled by market participants may have a strong incentive to make decisions that suppress competition rather than advance state interests. As a result, state supervision is necessary to ensure that individual decisions are advancing the policy interests of the state government rather than the interests of the market participants.

As a result of this decision, thousands of actions by hundreds of state boards are now expressly subject to antitrust scrutiny unless they are actively supervised by the state, potentially exposing state boards, board members, and state governments to substantial antitrust liability. This primer is designed to provide guidance in how these parties should adapt to this antitrust liability exposure.

Most of the primer is devoted to helping state boards and their supervisors identify the extent of antitrust risks/anti-competitive effects of various state board actions. In this primer, anti-competitive effects mean a reduction in competition that hurts consumers in some way. Most commonly, this would be through higher prices, lower quality, or reduced variety. There are a number of ways that board actions could reduce competition. Some of the most typical ways are: excluding some potential competitors from providing services; increasing the cost of providing services; or giving existing service providers incentive to compete with each other.

State boards and their supervisors must be able to distinguish between the types of actions that carry significant antitrust risk and those that do not. In general, because antitrust suits are so costly, the primer argues that state boards should err strongly on the side of avoiding antitrust risk. If state boards are supervised, it is still important for both the boards themselves and their supervisors to be able to

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[1] Abraham L. Wickelgren is the Bernard J. Ward Centennial Professor at the University of Texas Law School. He has a JD and a Ph.D. in economics from Harvard and worked at the Federal Trade Commission from 1999-2004. Dr. Wickelgren specializes in antitrust and law and economics. He is the co-editor of the American Law and Economics Review, has been on the editorial boards of the Journal of Industrial Economics and the International Review of Law and Economics and is a former member of the board of directors of the American Law and Economics Association.

[2] I thank Ellen Cooper, Rebecca Haw Allensworth, Vic Domen, Will Matlack, Emily Myers, Jennifer Pratt, Kayna Stavast, Kim Van Winkle, and Emilio Varanini for helpful comments. I thank Stephen Houck and the State Center for funding this project.

[3] 135 S. Ct. 1101 (2015).

identify the potential for anti-competitive effects from state board actions. While adequate supervision removes the threat of legal liability from anti-competitive state board actions, such actions can have adverse policy consequences (increasing prices/reducing variety/lowering quality). Receiving immunity under *NC Dental* may require that supervisors review the competitive consequences of a regulation, though the requirements for immunity do not dictate how the supervisor weighs these consequences against the potential benefits of a board action. Nonetheless, the primer argues that sound regulatory policy decisions require understanding the benefits of competition and giving it some weight in the regulatory process as long as the governing statute(s) allow for it. After all, the United States and all states have antitrust laws because promoting competition is generally sound policy.

The primer suggests that board actions that enforce an unambiguous legislative statute leaving no room for exercises of board discretion are purely ministerial, and thus have very little antitrust risk. When the board action is not obviously or primarily ministerial (maybe because there are multiple ways of interpreting or enforcing a statute), anti-competitive effects are most likely if a board action:

- Eliminates an entire type of competition or an entire type of competitor;
- Prohibits firms from offering a particular quality-level of a product or service;
- Restricts advertising or makes it more expensive or less effective;
- Substantially reduces the number of firms or providers that can serve a particular set of customers.

The primer contains extensive discussion of hypothetical cases in an attempt to flesh out how these anti-competitive effects might or might not present themselves in plausible scenarios.

When analyzing whether a board action is consistent with state policy, the pro-competitive benefits from board regulation can be sufficient to outweigh any anti-competitive effects. In this primer, pro-competitive benefits, effects or justifications mean either an increase in the intensity of competition in the market or an improvement in the way firms compete. Some common pro-competitive effects are (but are not limited to):

- The introduction of new products or services;
- Improved information or transparency about a product's or service's characteristics or quality;
- Improved product or service quality or safety

While antitrust law will consider the possibility that the pro-competitive benefits from a board action might outweigh its anti-competitive effects, there can be substantial uncertainty as to how a court will balance pro- and anti-competitive effects. While it is possible that courts will also consider other pro-consumer benefits from board regulation such as public health effects or third party benefits such as enhanced public safety or environmental protection, they do not consider these benefits for purely private actors. Because of the very limited case law in this area, there is also substantial uncertainty as to what benefits a court will consider even though these justifications are compelling reasons for regulation. Therefore, a board should still seek supervision if it is available whenever there are plausible anti-competitive effects. This is true even if there are substantial pro-competitive benefits

as well. When there is active supervision, neither supervisors nor boards are required by antitrust doctrine to engage in this balancing (although the supervisor may be required to assess the likely competitive effects of a regulation). However, it is sound public policy to take pro-consumer as well as both pro- and anti-competitive effects into account.

The primer also provides guidance on identifying the pro-competitive effects of regulations and how to balance them with any potential anti-competitive effects. There are many sound reasons for board regulation, as noted above. In addition to protecting public health and safety, one of the most common pro-competitive justifications for non-ministerial board action will be that the action will prevent firms/professional service providers[4] from taking advantage of uninformed consumers. In such cases, however, the board should always consider whether it would be effective (and permissible under the statute) to merely require the firm to provide consumers with accurate information rather than prohibit the provision of a particular good or service. While board members almost certainly have greater expertise about the market, they know less than any given consumer about that consumer's preferences or financial constraints. As a result, non-ministerial board actions should be based on evidence that consumers are likely to be deceived, to be misled or are otherwise likely to make mistakes, given their own preferences and financial constraints. Actions should be structured to eliminate those mistakes in a way that leaves consumers empowered to make the best decisions possible.

The primer notes that boards and their supervisors should view evidence from complaining competitors cautiously, given that a competitor can lose when its rivals are helping consumers and can benefit when its rivals are hurting consumers. Thus, boards and supervisors should weigh evidence from consumers, consumer advocates, and independent scientific studies more strongly than they weigh evidence from competitors.

It is important to note that while there may be some cases in which adequate supervision may require a detailed inquiry into both the effects of board action on competition along with its potential benefits, in many cases a costly and time-consuming inquiry will be unnecessary. A detailed inquiry will only be appropriate if the evidence for consumer harms that the board action is trying to prevent is reasonably convincing but not overwhelming. If the consumer protection justification for the board action is likely pre-textual, then the regulation can be overturned simply on the presumption that more competition is generally better. On the other hand, if there is substantial evidence that consumers are being duped and the board action is necessary to stop it, then there is also very little need for elaborate evidence of competitive effects. A careful analysis of the harm to competition from board action is probably only indicated if the evidence of consumer harm is convincing but only applies to some small subset of consumers. In that case, it could be possible that if the benefits from greater competition are large enough, a supervisor might reject the board's action; but if they were not, it would uphold it. Such situations are probably fairly uncommon, suggesting that heavily fact-laden investigations will rarely be

[4] From here on out, this primer will often just use the terms firm or industry as short-hand when referring to either firms or other types of professional service providers that may be subject to board regulation.

necessary. The primer provides many examples to help boards, their counsel, and supervisors determine whether a detailed inquiry is necessary.

Lastly, the primer discusses alternative ways to generate board immunity. Given the ambiguity in the Supreme Court's language about boards controlled by market participants, the primer argues that changing the composition of boards is unlikely to remove the threat of antitrust liability unless market participants are completely or nearly completely removed from state regulatory boards. This would make it extremely difficult to staff those boards with members with sufficient expertise in the industry. Thus, the primer argues that having a separate state agency or state officer supervise board decisions is likely the superior approach in most instances.

This state supervision can either be mandatory or at the discretion of the state board. Discretionary review can lower the upfront burden on state governments by greatly reducing the amount of supervision that is necessary. Given that state board members are not antitrust experts, and that state governments sometimes agree to cover all legal expenses for state boards, however, there is a risk that boards would not ask for supervision as much as they should. This primer suggests that some period of mandatory supervision might be optimal until boards learn more about which actions are safe and which present a non-trivial antitrust risk. But, in the long-run, as suggested by the California Attorney General, state boards may learn to recognize the type of decisions that carry so little risk that supervision is not necessary.[5] For these types of decisions, discretionary review may be optimal.

The *NC Dental* decision presents significant challenges for state boards and state governments. But, it also presents an opportunity to emphasize the importance of competition and think about how to regulate in a way that minimizes any anti-competitive effects while ensuring that these regulations promote state policy and provide the greatest possible benefits to consumers in the state. This primer is an effort to help states take advantage of this opportunity.

[5] Kamala D. Harris , California Attorney General, and Susan Duncan Lee, Deputy Attorney General, OPINION : No. 15-402, September 10, 2015.

I. Introduction

The *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[6] (*NC Dental*) Supreme Court decision took many state regulatory boards and state governments by surprise. Many state boards and state governments were left wondering how best to respond to the fact that state boards may not have the antitrust immunity they thought they did. This primer discusses the *NC Dental* decision and its implications for state boards and state governments. It provides some guidance for how states and their regulatory boards should respond both to avoid costly and time-consuming antitrust suits and to ensure that boards make decisions that are in accord with state policy and in the best interests of the state's citizens.

Section II of the primer provides an overview of the *NC Dental* decision, including the key holdings of the case, the Court's rationale, and the impact of that decision on state regulatory boards across the country. Understanding the Court's rationale is essential to inferring how the Court might decide later cases. Section III gives a general introduction to antitrust law and competition policy,[7] including how the antitrust laws might affect the various actions state boards might take in the wake of *NC Dental*. Section III also explains the value of competition and why antitrust laws protect competition. This section is intended to help state boards and their supervisors consider the benefits of competition when making decisions, even when this is not required by antitrust law.

Section IV provides general guidance on antitrust/competition issues that may arise in regulatory board actions. It discusses two special cases (ministerial actions and rulemaking) and then provides information about how to identify both anti- and pro-competitive effects from a board action.[8] This section is designed to help boards and/or supervisors do at least an abbreviated version of the type of analysis that a court would perform in an antitrust case. This will both improve policy decisions and clarify the extent of the antitrust risk[9] from a board action, absent active supervision. Section V applies this analysis to many sample cases.[10] They are divided into cases with very little antitrust risk, cases with some risk, and cases with significant antitrust risk.

Section VI uses the discussion of sections IV and V to provide some practical advice to state boards and their supervisors about how to think about integrating both competition and consumer protection concerns into their decisions. This section also expressly addresses the distinction between the nature of supervisory review that is legally required for antitrust immunity and the review that might be optimal even once the threshold for immunity has been passed. Section VII addresses the

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[6] 135 S. Ct. 1101 (2015).

[7] Competition policy refers to how the government works to promote vigorous and informed competition in the market in order to provide consumers with a variety of low-priced, high-quality goods and services.

[8] The primer also discusses pro-consumer effects that are not strictly pro-competitive.

[9] Antitrust risk refers to the likelihood that a board action would lead to an antitrust suit against the board as well as the likelihood of losing such a suit. While losing a suit is obviously a much greater risk, the cost of even having to defend against such a suit is something boards would likely prefer to avoid.

[10] Although some of these examples are based on actual cases, the factual situations have often been altered so as to make the discussion of the cases more instructive. Thus, despite any resemblance to actual cases, the reader should view all these cases as hypothetical.

institutional design question, discussing the various alternatives states have to provide immunity to state boards under *NC Dental*. It also discusses how states might design supervisory structures, the evidence that boards should provide to supervisors, and the standard of review that supervisors should use in reviewing the decisions of state boards. Section VIII provides conclusions.

II. Overview of *NC Dental*

In the landmark *NC Dental* case, decided in 2015, the Supreme Court held that state boards that are controlled by market participants are only immune from antitrust scrutiny (in other words, cannot be found to have violated the antitrust laws) if their actions are consistent with a clearly articulated state policy and are subject to active supervision by the state. If a state board's action does not satisfy these two requirements, courts can consider whether this action violates the antitrust laws, potentially exposing the state, the state board, and its individual board members to treble damage claims.

A. Facts and Background

In *NC Dental*, the North Carolina State Board of Dental Examiners, which had six practicing dentists among its eight members, decided that the state dental practice act permitted only dentists to whiten teeth. The board then sent cease-and-desist letters to non-dentist teeth whiteners and to their suppliers and landlords. In 2008, the Federal Trade Commission (FTC) began an investigation and in 2010 determined that the Board's action violated Section 1 of the Sherman Act.[11] After decisions in the FTC's favor at all lower levels (an Administrative Law Judge, the Federal Trade Commission, and the Fourth Circuit Court of Appeals), the Supreme Court agreed to hear the case.

At the FTC's administrative level, an administrative law judge held a hearing on the merits and determined that the Board's actions unreasonably restrained trade in violation of Section 1 of the Sherman Act. On appeal, the Board's only defense was that as a state agency it was immune from the antitrust laws. This defense is known as the state action doctrine which provides state action immunity. The FTC argued that because the Board was controlled by market participants, it was a public/private hybrid that must be actively supervised by the state, even if acting pursuant to a clearly articulated state policy to displace competition with regulation. The FTC argued that the Board, controlled by market participants, had a strong incentive to use its regulatory power to reduce competition in the market.

B. Supreme Court Decision, Immunity and Active Supervision

In a 6-3 decision, the Supreme Court agreed with the FTC and affirmed the Fourth Circuit decision. The Court held that because the Board is controlled by market participants, it is only entitled to antitrust immunity if it is acting pursuant to a clearly articulated state policy and is actively supervised by the state. In its opinion, the Court did not address whether the Board was acting pursuant to a clearly articulated state policy because that was not an issue in the case. The Court simply assumed there was a clearly articulated state policy and focused on the definition of active supervision.

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[11] Because the action was brought by the FTC, it was brought under Section 5 of the Federal Trade Commission Act which empowers the FTC to enforce the Sherman and Clayton Acts.

The Court declined to give precise parameters for exactly what constitutes active supervision, saying it is "flexible and context-dependent." The supervisor need not micromanage every decision, but there has to be enough supervision to ensure that the board's decision promotes state policy and not just the individual interests of the board members.

The Court pointed to *Federal Trade Commission v. Ticor Title Insurance Co*[12]as an example of inadequate supervision. In that case, state ratings bureaus, licensed by the state, but controlled by title insurance companies, set title insurance rates. The ratings bureaus would then file the rates with the state insurance commission. The rates would become effective unless the insurance commission rejected them within 30 days. An Administrative Law Judge found that the rates were typically subject to only minimal scrutiny by the state insurance commission. The Supreme Court found that the existence of a procedure for state supervision and potential rejection of the proposed rates were not sufficient to constitute adequate supervision. The state must not only have the power and procedures to review a decision, it must actually do so. Otherwise there is no way to determine if the particular decision is in accord with state policy. A large part of the rationale for this decision, echoed in *NC Dental*, is to ensure that states are politically accountable for any violations of antitrust laws that state boards enact. Unless the supervision yields a clear determination that the state government supported the state board's action, the supervision is unlikely to be deemed sufficient for antitrust immunity.

The Court held that for state boards controlled by market participants to obtain immunity through active supervision, the supervisor, who cannot be a market participant, must have the power to veto or modify that decision. Moreover, the supervisor must actually review the substance of the decision to determine whether it promotes state policy. It is not enough to simply establish that the Board followed the proper procedures set up by the state. While the supervisor is not obligated to perform an antitrust analysis, in many cases the task of determining whether a board action is consistent with state policy will necessarily entail a review of the potential for anti-competitive and pro-competitive effects in order to generate antitrust immunity. If these requirements are met, the electorate can clearly see that the state itself endorses and takes responsibility for the decision and its competitive effects.[13] The state will not be able to evade responsibility by having delegated the decision-making to a board.

The other means of preserving state action immunity for actions of a regulatory board is to ensure that a board is not controlled by market participants. The Court did not, however, provide much guidance on exactly when a Board is controlled by market participants. Given that the Court used the word "controlled" rather than a more precise word like majority, it is unlikely that having a majority of non-market participants would necessarily guarantee immunity for board actions. For example, if many of the non-market participant board members regularly deferred to the market participants, courts following *NC Dental* the Court could still consider such a board "controlled" by its market participant members. Thus, a board with even a small number of market participants might risk having to litigate

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[12] 504 U.S. 621 (1992).

[13] See Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Virginia L.R. 1387, 1440. (2016). This is discussed more fully in Section VII.B.

many of the antitrust issues as well as the question of immunity. For example, a plaintiff might argue that if the board took an action that displaced competition and had little consumer protection rationale, this would be convincing evidence that the board must be controlled by market participants. As a result, unless the number of market participants on the board was minimal, immunity would still be a contentious issue in the absence of active supervision.

It is important to note, however, that the *NC Dental* decision only says that state boards controlled by active market participants that are not actively supervised lack immunity from the antitrust laws. This means that board actions taken without supervision can be *challenged* as violations of the antitrust laws. It does not mean that every such action in fact violates the antitrust laws. Because boards are typically made up of market participants from independent businesses or professional practices, a board decision will likely be found to be an agreement that is subject to review under Section 1 of the Sherman Act. This is much like the actions of trade association, to which the Court likened these boards. Thus, if an action is found to unreasonably restrain trade, even if it does not completely eliminate competition, then it would be a violation of Section 1. However, as discussed in the next section, for most board actions, the board would be able to defend against such a claim by showing that the action had predominantly pro-competitive effects or, possibly, by showing it had other substantial pro-consumer effects.[14]

III. Antitrust Law/Competition Policy Overview

While state boards can obtain antitrust immunity for their decisions through active supervision by the state, some knowledge of antitrust concepts by board members, their counsel, and their supervisors is important for several reasons. First, it will take some time for many states to set up the supervisory structures that will create immunity. In the meantime, a board's decisions will still be subject to the antitrust laws. Furthermore, not all states will supervise every decision made by every board. In many cases, states may give the boards some discretion as to when to ask for supervision. In these states, the boards need to know which actions present a significant enough antitrust risk to warrant asking for supervision. Lastly, while a state board and its supervisor may ultimately opt for regulation to the detriment of competition, their decisions should take into account the goal of antitrust law: to protect competition that promotes consumer welfare. A better understanding of antitrust principles may help boards determine the likely competitive effects of their actions and the likely effect on consumers. These are important considerations in formulating regulations that serve the best interests of the citizens of the state regardless of antitrust immunity.

A. Overview of Antitrust Law Applicable to State Boards

Section 1 of the Sherman Act prohibits any "contract, combination, or conspiracy in restraint of trade." This is generally interpreted to mean agreements that reduce competition in a market by people or entities that operate or are part of different businesses that provide the same goods or services.

[14] The term "possibly" is used here because, as mentioned above, it is unclear whether the court will expand the range of admissible justifications for board regulation beyond those which are acceptable for purely private agreements.

Under Section 1, the courts have often scrutinized the actions of trade associations by interpreting a decision of a trade association as an agreement among the members of that association. Using the same analysis, a decision by a board made up of active market participants could also be subject to Section 1 scrutiny.

1. *Per Se v. Rule of Reason*

If a board action is subject to scrutiny under Section 1 and is challenged, then a court would evaluate whether the board action is an unreasonable restraint of trade. There are two broad categories that courts use to analyze restraints of trade, "per se" and "rule of reason." Some restraints are deemed so clearly anti-competitive that they are per se illegal. This means that the plaintiff need only prove that the defendant took the action deemed per se illegal. Once that is established, the defendant is liable even without any direct proof that the action reduced competition or harmed consumers and the defendant may not offer any pro-competitive justifications for the action.[15] If a restraint of trade is judged under the rule of reason, this means that the plaintiff has the burden of proof to show that the restraint has an anti-competitive effect. If the plaintiff does so, then the defendant has the burden to establish that the restraint also has some pro-competitive benefits. If the defendant does so, then the court will balance the anti-competitive effects with the pro-competitive effects to determine if the restraint unreasonably restrains trade.

The paradigmatic case of a per se illegal action is price fixing. The rate setting in *Ticor,* for example, is the type of action that is per se illegal because a group of competitors were setting title insurance prices by agreement rather than by competition in the market. Thus, once the rating bureaus in *Ticor* lost on immunity, hey were not able to defend on the grounds that the rates were justified because price fixing is per se illegal.

In addition to price fixing, agreements in which competitors agree how much of a particular product or service each will produce or sell, or agreements in which competitors agree which consumers (or types of consumers) each will target are other examples of per se illegal agreements. Group boycotts, agreements not to buy from or sell to a particular firm or group of firms, are often, but not always, deemed per se illegal. This illustrates that the decision between whether a particular agreement is per se illegal or subject to the rule of reason is not always clear cut.

2. *Legitimate/Illegitimate Pro-Competitive Justifications*

As part of the rule of reason analysis, courts have traditionally deemed only certain types of arguments as admissible pro-competitive justifications. For example, courts have typically rejected arguments that the competitive process produces the wrong outcomes and that, therefore, agreements that limit competition are desirable. Instead, to be considered a pro-competitive justification, the typical private defendant must argue that the agreement either enhances or improves competition in some way. As discussed briefly above, it is not yet clear whether courts will subject state boards controlled by market participants to the same limitation. A court could decide that although they do not

[15] If the suit is for damages, however, proof of anticompetitive harm may be necessary to establish damages.

get state action immunity, state boards controlled by market participants are still state actors whose decisions should be treated differently than agreements between purely private actors. If so, a court could decide that it is appropriate for a court to weigh non-competition related public policy objectives against anti-competitive effects for state board action even though it would not do so for private agreements that restrain trade. That said, it is also conceivable that a court would treat decisions of a state board controlled by market participants (without adequate supervision) just as it treats decisions by private market participants who act collectively. This possibility warrants exploring what justifications courts accept for agreements between private actors.

For example, in *National Society of Professional Engineers v. United States*[16], the government challenged the association's canon of ethics that prohibited competitive bidding by its members. The association's defense rested on the claim that eliminating competitive bidding was necessary to minimize the risks to the public that come from the inferior engineering that competitive bidding would produce. The lower courts rejected this claim without investigating its factual basis. The Supreme Court upheld this decision saying that this defense "rests on a fundamental misunderstanding of the Rule of Reason. . . ."[17] Rather, the Court said, any Sherman Act case must rest on the assumption that competition is good. An argument that competitive bidding would produce unsafe products runs contrary to that assumption and so cannot be used as a pro-competition justification for the agreement.

It is important for boards that have discretion to seek supervision, or if such supervision is not yet available, to determine whether the rationale for the board's decision could be characterized as a "competition is bad" justification. Unfortunately, it is not always obvious what justifications a court might consider to be inadmissible on this basis. While broad restrictions on price advertising have been found in many cases to be illegitimate because they are based on "competition is bad" arguments, restrictions that arguably prevent misleading advertising have been found to warrant more detailed rule of reason analysis.[18] Thus, to the extent the board's actions can reasonably be thought of as either providing consumers with more information or limiting primarily misleading or deceptive information, this type of justification would likely be deemed admissible. Of course, even if the justification is deemed to be pro-competitive, the court will then weigh that justification against the plaintiff's evidence of anti-competitive effects. It does not mean that the action is automatically legal.

3. *Rule of Reason Process*

As mentioned above, not all agreements will have an anti-competitive effect. For agreements that do, once a court determines that there is a plausible (and admissible) pro-competitive justification for the agreement, then the court uses a rule of reason analysis. Under the rule of reason, the plaintiff

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[16] 435 U.S. 679 (1978)

[17] *Id.* At 681.

[18] See *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999). In this case, the court distinguished attempts by trade association to block advertising that promotes competition, like price advertising, from advertising restrictions that only block advertisements that might actually impair competition by either misleading consumers or reducing consumer confidence in advertisements. If the defendant can credibly argue that its advertising restrictions actually promote competition by making advertising a more effective vehicle for competition, then this warrants rule of reason analysis.

must establish that the agreement has an anti-competitive effect. If it does so, then the defendant must establish its pro-competitive justification for the agreement. Finally, the court must weigh the pro- and anti-competitive effects to determine whether the agreement on-balance enhances or reduces competition. Does it benefit or harm consumers?

Under the rule of reason, the court may not just balance the pro- and anti-competitive effects of the agreement at issue. Sometimes, it will engage in a "less restrictive alternative" analysis whereby it will determine whether there was a practical alternative agreement (or board regulation) that could have achieved the same pro-competitive benefits as the actual agreement but with significantly less anti-competitive effect. If so, then the court will rule for the plaintiff even if the pro-competitive effects of the agreement outweigh the anti-competitive effects.[19]

B. Benefits of Competition

Even if a state board is adequately supervised, and thus has immunity from the antitrust laws, the board and the supervisor should still consider antitrust principles as a useful policy guide. Greater competition in a market has many benefits. It generally leads to lower prices and higher quality as firms compete to offer the bundle of price and quality that consumers prefer. It allows different firms to cater to different segments of consumers with different tastes. For example, many consumers may feel that it is worth paying a higher price for higher quality products or services. Other consumers, perhaps those with more limited means, might be shut out of a market altogether if firms are only allowed to produce high quality, high priced products. A more competitive market allows a subset of firms to cater to those consumers who do not value, or cannot afford, high quality. Lastly, while increased competition generally lowers overall firm profits, the combined welfare of consumers and firms increases as a market becomes more competitive. That is, consumers generally gain more than firms lose when prices fall towards the competitive level because more consumers purchase the good or service than when prices are higher. These extra transactions make both firms and consumers better off.

Of course, states establish regulatory boards when there is reason to think that a completely unfettered market will not produce the most desirable outcome for the public. Sometimes practices, like brain surgery, are too dangerous to leave unregulated. Regulation may also be important for public health reasons. For example, we would not want individual consumers to be able to save money by going to a tattoo artist that didn't use sterile equipment because the increased risk of getting hepatitis would affect people aside from the individual consumer. There are other types of negative effects on third parties (what economists call negative externalities) that can warrant regulation as well. Requiring electricians or engineers to be licensed and perform work up to code helps protect not just their direct

[19] See Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 *Colum. L. Rev.* 927, 929 (2016). For example, in *O'Bannon v. NCAA*, 802 F.3d 1049, 1074-76 (9th Cir. 2015), the court held that the NCAA's rule prohibiting payments to student athletes violated the antitrust laws because a less restrictive rule that allowed a larger scholarship to cover the full cost of attendance could achieve the pro-competitive benefits of preserving amateur athletics while reducing the anti-competitive effect of limiting player compensation.

consumers, but anyone else who may be affected if a building catches on fire due to faulty wiring or collapses due to shoddy engineering practices.

In other cases, however, the biggest problem may be that consumers do not have sufficient knowledge to make informed choices. For example, for consumers to be able to make the right quality/price tradeoff for their own budgets, they must have a reasonably good understanding of what different quality levels mean and what consequences are likely to flow from higher or lower quality. Regulatory boards can enhance competition by ensuring that consumers have this information and are not fooled by bad actors.

Thus, just because competition has benefits does not mean that all regulation is counter-productive. Rather, both competition and regulation can play an important role in protecting the interests of consumers. This means regulatory boards and their supervisors, whether they have antitrust immunity or not, should be aware of the benefits of competition as well as the benefits of regulation and understand how their decisions might affect that competition. In addition, supervisors should understand that even well-meaning regulatory boards controlled by market participants may have a hard time disentangling their private interest from the public interest. Thus, supervisors should carefully scrutinize the justifications regulatory boards put forth for decisions that may reduce competition. Furthermore, supervisors should also consider less restrictive alternatives and examine whether there is an alternative regulation or rule that could achieve much of the same consumer protection benefit with less effect on competition.

One common less restrictive alternative that supervisors should consider is providing consumers with more or better information about the quality or qualifications of service providers in order to prevent shady operators from taking advantage of limited consumer information, rather than prohibiting practice by certain providers who might have less, or different, training in a particular area. This could be accomplished by certifying certain firms or providers. While in some circumstances, providing such certification might require legislative action, in other cases it might not. For example, consider a situation in which a board requires a test for providers to receive a license and the board has discretion over the required minimum score. If some providers are complaining that the required score is too high (say, much higher than for similar tests in other states), a board might also have discretion to lower the passing score but require providers that did not meet the higher score cutoff to make their customers aware that they did not pass with distinction.

IV. Antitrust/Competition Policy Guidance—General

A. Ministerial Actions and Court Actions— Potential Safe Harbors

If a board is merely carrying out or enforcing the specific language in a state statute in a consistent way and has no ability to exercise discretion in that enforcement, then its actions are purely

ministerial and will not have any independent anti-competitive effect.[20] Any anti-competitive effect will be due entirely to the statute itself for which the board cannot be liable. For example, if a statute says that a tattoo artist must have a license to give someone a tattoo in a state, then issuing a cease and desist letter to a parlor using an unlicensed tattoo artist or fining the parlor is merely a ministerial action and carries no antitrust risk.

While there will be cases that are clearly ministerial or clearly non-ministerial, there will also be cases where that boundary is less clear. For example, if a state statute lends itself to multiple interpretations, then an action taken pursuant to that statute may be viewed by the board as purely ministerial, but by a court as board-developed regulation. Consider the *NC Dental* case. The state statute prohibited practicing dentistry without a license. Because it is a near certainty that a court would view filling a tooth as the practice of dentistry, sending a cease- and- desist letter to an unlicensed provider who was filling teeth would almost certainly be viewed as ministerial and, therefore, would carry no antitrust risk. On the other hand, it is far from obvious whether a court would determine teeth whitening to be practicing dentistry. Thus, there is significant antitrust risk if sending a cease- and- desist letter is likely to reduce competition. While the board may interpret teeth whitening as dentistry, the board must recognize that a court may have a different view. When alternate interpretations of a statute are reasonable, and the board's action is not merely ministerial under one reasonable interpretation, there could be significant antitrust risk associated with acting on the board's interpretation. As a result, it may be best to view the ministerial safe harbor on a sliding scale. The more unambiguously the regulation is merely enforcing the statutory requirements, the more protection this safe harbor provides.[21]

In addition, even a purely ministerial action could be subject to some antitrust risk if it is not done consistently, but instead is enforced selectively against firms that are aggressive competitors. For example, in the tattoo case above, if a board has knowledge of and does not bring enforcement actions against established tattoo parlors that use unlicensed artists, but it does bring an action against a new entrant that has been cutting prices below established levels (generating additional competition that reduces the profits of existing market participants), this could present some antitrust risk. Even though the action, judged by itself, is purely ministerial, the pattern of enforcement can be viewed as deterring competition.

Even in these two situations, however, a board can still insulate itself from antitrust liability even without seeking approval from a state supervisor if it files suit in court to enforce the state statute against the putative violator. That is, while the board is potentially subject to antitrust liability if it enforces a statute on its own, it is immune if it asks the court to enforce the statute. If the court enforces the statute, then the state is taking the action, not the board that is controlled by market participants. Unless the suit is objectively baseless, the collective filing of a lawsuit is protected from

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[20] As the FTC has put it "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." FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, 2015.

[21] As is discussed in the next section, a board could also consider promulgating regulations covering the practice.

antitrust liability by the First Amendment.[22] Thus, if the state dental board in *NC Dental* had filed suit to enjoin the non-dentist teeth whiteners, instead of sending cease and desist letters, there would likely have been no antitrust issue.

B. Rulemaking—A Special Case

States vary a great deal in the degree of review over administrative rules. In some states, there is no procedure for either legislative or gubernatorial approval of new administrative rules although there may be some form of judicial review. In other states, legislatures have the authority to review and reject a rule on their own, while in other states legislatures have this power only if the Governor approves. There are other states in which only the Governor or both the Governor and the legislature have the power to reject rules promulgated by state boards.[23]

While rules are obviously subject to antitrust scrutiny in states where there is no formal review process, the existence of review in the other states does not guarantee antitrust immunity for board generated rules. If legislative, judicial, or gubernatorial review focuses only on whether the board followed proper procedure or has the legal authority to promulgate the rule in question, this would not satisfy the active supervision requirement of *NC Dental*. On the other hand, if the review is substantive in that the reviewing body examines whether the rule is in accord with state policy and rejects the rule if it is not, then this would constitute active supervision and give the rule immunity from antitrust challenge.[24]

C. Detecting Anti-competitive Effects

If an action is not purely ministerial, the next step to assessing antitrust risk (if a board is unsupervised or if the board has the discretion to seek supervision) is to determine whether there are any plausible anti-competitive effects from the board's action. The following is a list of some indications that there may be plausible anti-competitive effects:

- The action eliminates an entire type of existing or potential competition or an entire type of competitor.
- The action prohibits firms from offering a particular level of quality for a product or service.
- The action restricts advertising or makes it significantly more expensive or less effective.
- The action substantially reduces the number of firms or providers that can serve a particular set of customers.
- The action substantially raises the cost of meeting the licensing requirements to participate in a market, e.g., by requiring hours of training beyond that which might be deemed necessary. These costs ultimately lead to higher prices for consumers when they pay for these services.

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[22] See *Professional Real Estate Investors v. Columbia Pictures Industries* 508 U.S. 49 (1993).

[23] Neil D. Woods, *Separation of Powers and the Politics of Administrative Rule Review*, 15 State Politics and Policy Quarterly 1, 6-7 (2015).

[24] Of course, even though the rule itself would have immunity, the board could still possibly be subject to antitrust liability for selective enforcement of the rule if the enforcement decisions were not supervised as well.

If the action likely will have any of these effects, the board should seek supervision if it is available. In addition, the board should make an effort to provide the supervisor with any information it has regarding the magnitude of these effects. It should also provide information about the competitors that will remain in the market and whether (and why) their presence is likely to be sufficient to make up for any lost competition that the action creates. Lastly, the board should identify the reasons why it believes that the benefits of the action to consumers will likely outweigh any remaining anti-competitive effects, as discussed next.

D. Identifying Pro-competitive or Pro-consumer Justifications

The best justification for any board decision will be that it is compelled by state law or policy. In the absence of supervision, the board should be extremely careful to act pursuant to a state law, or else it risks an antitrust judgment against it. If the board is supervised, however, the supervisor can determine if, in fact, state policy requires the board's action.

If the board decision is not required by state law, then it should be addressing a specific market failure. The most common market failures that justify regulation are natural monopoly (when a market is only big enough to support one firm) or other forms of market power (when a small number of firms control the market), externalities (effects on parties who are not involved in a transaction), and inadequate consumer information.[25] Of these, the primary focus of state board regulation will be addressing externalities or information problems because federal agencies and other state agencies are better positioned to regulate for monopoly or market power reasons. As discussed above, however, state boards can benefit from an appreciation of these market failures due to inadequate competition so as not to address one market failure while creating another one.

1. Preventing Consumer Harm

Other than being required by state law, the most common justification for board action will be that it prevents firms/providers from taking advantage of uninformed or unsophisticated consumers. If consumers either cannot observe or cannot evaluate the quality of a service provider, then they will not be able to select the provider that offers the best combination of price and quality for their needs. Furthermore, service providers can benefit from appearing to offer higher quality services than they actually do provide, which can mislead consumers into purchasing services from providers they would not have chosen if they were able to accurately evaluate all their options. Board regulation can play a valuable role in preventing this market failure.

A supervisor or a court charged with determining whether a board action taken ostensibly to prevent consumer harm is consistent with state policy should consider both the justification and any possible anti-competitive effects of the action. The board should provide evidence of the consumer harm that its action will prevent – ideally, hard evidence that particular consumers have been injured,

[25] These are the primary factors that the Colorado Department of Regulatory Agencies recommend agencies consider when performing cost-benefit analysis for proposed regulations or in reviewing regulations. See Colorado Office of Policy, Research and Regulatory Reform, "2012 Sunset Review: Requirements and Procedures Regarding the Preparation of a Cost--Benefit Analysis of Proposed Rules," October 15, 2012.

defrauded, or have purchased something that they did not want as a result of a provider's conduct that would be blocked by the board's action. In many cases, of course, such evidence will not be available. Boards should certainly forward evidence of complaints from customers or anecdotal reports of consumer harm to a supervisor. If the likely anti-competitive effect is small, a supervisor may very well find these to be sufficient. But, the larger the likely anti-competitive effect, the better the evidence should be that the action is necessary to protect consumers.

In addition to direct evidence of consumer harm, the board might also rely on information from experts. It is important to distinguish between the opinions of market practitioners and the opinions of other experts in the field (for example, those that have published in peer reviewed journals on the topic). Disinterested expert information and opinion can be a reliable basis for board policy. While practitioners' experience certainly gives them expertise, it may also give them a vested interest in the outcome. In many cases, of course, board members may not have a direct vested interest, but there may still be a risk that they will appreciate the concerns of their fellow professionals more than the concerns of consumers, possibly creating bias. Of course, just because an opinion comes from a biased source does not make it wrong. An opinion from a biased expert may provide a sound basis for further investigation. But a board and its supervisor might want to consider finding more objective corroborating evidence to weigh against any non-trivial risks of anti-competitive effects, as a court very likely would.

For example, if a group of dentists opine that tooth whitening by non-dentists poses risks to patients, such an opinion should receive much less weight than a similar opinion given by a consumer advocate. If both are simply opinions, then both should also receive less weight than if those opinions are backed up by reliable facts. At a minimum, these opinions should be more than mere conclusions. Opinions from any source should provide a detailed explanation for what the risks are and why non-dentists performing this service likely create significantly greater risks than if those same services are performed by dentists.

2. *Weighing the Evidence of Consumer Harm*

Even where there is reasonably good evidence of consumer harm, boards should consider the magnitude of this harm, the reasons consumers might be making a mistake, and if there are other ways of preventing consumer harm that might have less effect on competition. For relatively small harms (or small risks of harm), it is worth considering that consumers might not be making a mistake at all. For example, even if there were evidence that a physician is slightly more likely to misdiagnose a condition in a video conference than in an in-person visit, some patients might not be able to afford the higher price of an in-person visit. Thus, choosing a slightly riskier and/or lower quality service at a lower price may not represent a mistake but rather just reflect the financial conditions or tastes of some consumers.

Of course, many consumers may not be aware of the magnitude of the risks of particular products or services or they could be misled by firms or providers. This is one of the most common reasons for occupational regulation. Boards should consider, however, both how serious and long-lasting this misinformation is likely to be. Will consumers learn from their mistakes relatively quickly

and before much harm is done, or will consumer mistakes have serious repercussions before any learning is likely to occur? For example, the consequences associated with getting a poor haircut from a barber who provides misleading qualifications may be fairly minor. On the other hand, the risk from obtaining open heart surgery from a doctor who provides misleading qualifications is much more serious. This suggests that boards that regulate barbers should allow for more consumer mistakes and consumer learning than boards that regulate heart surgeons.

3. Information Provision as a Less Restrictive Alternative

Moreover, boards should also consider if simply requiring firms to provide accurate information to consumers can solve the problem of consumer misinformation in a way that might have less effect on competition than outright prohibition of some services or service providers. One advantage of this approach is that it enables informed consumers who would prefer a lower quality product or service to make that choice. While providing this option in some cases, such as for open heart surgery, may not be wise, there are many other cases, such as choosing an interior designer, where choosing a less-qualified provider at a lower price is a perfectly sensible choice for many consumers.

In deciding on whether information provision is an appropriate alternative, boards and their supervisors should weigh the risk that a consumer will lack the expertise to use the information to make a wise choice against the risk that more direct regulation will prevent a consumer from making a wise choice based on her individual circumstances, which may differ significantly from those of the typical consumer. State boards will still have greater knowledge and expertise about the general riskiness of the different options than will a consumer, even after the consumer has received additional information. On the other hand, any individual consumer will have greater knowledge and expertise about how her particular circumstances influence what is the best choice for her.

Direct regulation will be more appropriate when the general expertise gap remains large even after providing consumers with sufficient, accurate information to make informed choices and when the differences in individual circumstances probably do not affect the best choice for a consumer. Providing more information as an alternative to direct regulation will be more appropriate when it is likely to eliminate much of the general expertise gap and when differences in individual circumstances likely have a big impact on the best choice for a consumer.

There are also many services that fall in between the two extremes of surgery and haircuts, where the issue is more complicated. For example, while we might be concerned about a pet owner choosing a cheaper, less-qualified veterinarian for a routine examination, if pet owners are denied that choice, many may opt to forego such examinations entirely or obtain them much less frequently. In addition, by making pet ownership more expensive, it is possible that fewer animals would be adopted from shelters. The existence of unintended consequences such as these does not mean that board regulation in cases like these is necessarily unwise. Rather, it suggests that boards and their supervisors need to be attuned to these possibilities and carefully consider all of the costs and benefits both of requiring the provision of consumer information and of more intrusive forms of regulations.

4. *The Importance of Externalities*

Another potentially compelling justification for board action is "externalities." That is, a board action that limits competition may make sense if the consumer decision that the board prevents might adversely affect third parties or the public at large. This type of justification is certainly something that a supervisor should weigh against any anti-competitive effects. Safety regulation is probably one of the most prominent cases where such externalities are important. For example, if a building is not properly engineered or contains low quality wiring, there can be significant adverse effects on people who are not part of the decision about which engineer or electrician to hire. Regulating the quality of engineers and electricians in such cases is necessary to protect the interests of those third parties.

Externalities may also exist in health care contexts. For example, if there were compelling evidence that the video conferencing consultation referenced above occasionally caused physicians to misdiagnose infectious diseases, this might be a risk that an individual patient would be willing to take for a lower-priced service. But it might not be in society's interest to allow this if it would increase the spread of some infectious diseases. That said, it is very important to consider in cases like this that there are two alternatives when a regulation prohibits a lower quality service. It could cause some consumers to choose the higher quality service, but others might choose to forego that service entirely. If the fraction of consumers in the latter half is too large, what appears to be a consumer protection regulation could end up backfiring.

Another potential externality in the health care context could arise in the context of regulating prescribing physicians and veterinarians. A consumer may wish to use a doctor or veterinarian that prescribes antibiotics freely. But if antibiotic resistance becomes a significant problem, this may not be in the public interest. Board regulations that ensure that providers have the proper training in the importance of managing externalities such as this can advance the welfare of everyone in the state.

Board regulation has a valuable role to play in protecting individual consumers and public health and welfare. By highlighting the important issues for determining how strong the need for regulation is and what the potential intended and unintended consequences are, the board and its supervisors can more effectively weigh the benefits of such regulation against any anti-competitive effects. This analysis suggests that consumer protection regulation of some sort is more likely necessary (1) if it protects the safety or health of non-consumers; (2) if it protects consumers against health and safety risks that are serious and/or irreversible, particularly if these risks are hard for typical consumers to either discern or understand; (3) if it protects consumers in situations in which one bad decision can have serious financial, health or safety consequences so that learning and market reputation may not work quickly enough to solve the problem; or (4) if it protects against other externalities such as environmental degradation or depletion of natural resources.

V. Antitrust/Competition Policy Guidance—Examples

A. Actions with Very Little Antitrust Impact/Risk

If a board fines an individual provider or firm for a failure to comply with a specific state law, there is very little antitrust risk for two reasons. First, the board is simply acting in a ministerial capacity, enforcing a policy decision made by the legislature (assuming enforcement is done with reasonable consistency). Second, a fine on a single market participant is unlikely to significantly impact competition. The following examples illustrate situations in which a supervisor could very quickly approve board action.

1. Fine for Inadequate Record Keeping

Consider a case in which a state law requires a car dealer to maintain certain business records of the loans it has made and empowers a state commission made up of market participants to enforce it. A dealer does not maintain the records required by law. The state commission fines the dealer, but this fine does not threaten the dealer's business. There is probably no need to ask for supervision here because the fine is based on unambiguous violation of the statute and the board has clear statutory authority to enforce this law. Furthermore, a small fine will not put the dealer out of business, and so won't reduce competition in the market. Lastly, the fine only affects one of a large number of dealers in an area; competition is likely to remain strong even if one dealer's ability to compete is affected slightly.

Slightly different facts could transform the example into one where there might be enough antitrust risk to warrant requesting supervision. For example, assume that the law was somewhat ambiguous about which loans required thorough records or exactly which records were required when the dealer had some records. If the board systematically decided that certain types of discounted loans required more detailed records and fined dealers without such records, there could be a non-trivial antitrust risk. Alternatively, if the board enforced the regulation more strictly against dealers who offered lower prices or enhanced service, this could also present an antitrust risk. In both of these cases, the board is not acting solely in a ministerial capacity and its enforcement policy is affecting the incentives of dealers to compete with each other. A pattern of harassing certain competitors with small fines can present competitive risks that a single fine against a clear violator would not.

2. Fine for Unlicensed Service Provision

An engineering firm hires an engineer who is not licensed in the state. This engineer performs services before receiving a license. She later applies for a temporary license, but never applies for a full license despite board warnings that she must have a full license to continue offering services. State law requires engineers to have in-state licenses. The state board imposes a fine on both the firm and the engineer of less than $2,000 each. This is another case where, absent unusual circumstances, the antitrust risk from the board's action is so small that asking for supervision is likely unnecessary.

There are several reasons the antitrust risk is small in this case. First, the board is simply imposing a fine for a clear violation of state law. Second, the fine is imposed on just one engineering firm out of presumably a large number in any given market. Third, the fine is not likely to endanger the ability of either the firm or the engineer to participate in the market. Fourth, the fine is not for any action, like charging low prices, that tends to increase competition in the market.

Selective enforcement is the type of unusual circumstance that might create some antitrust risk in this action. For example, the board might be aware of many cases in which an engineer did not apply for a permanent license, but the board only prosecuted this firm because it was charging lower prices or in some other way competing more aggressively than other firms that used unlicensed engineers. In that case the action could possibly be anti-competitive and active supervision might be warranted; the board's pattern of actions could be construed as incentivizing firms to compete less aggressively in order to be treated leniently by the board.

3. *Revoking License for Fraud*

A physician is convicted of Medicaid fraud. The state medical board revokes his license. Again, absent similar unusual circumstances, this action carries very little antitrust risk for many of the same reasons as above. Even if Medicaid fraud is not explicitly mentioned in the state statute, as long as the statute gives the board the power to discipline physicians for unprofessional or unethical conduct, revoking a license for a conviction for fraud almost certainly falls under this statute. Furthermore, to the extent the action deters fraud, it is easily characterized as primarily pro-competitive. Since the action only affects one (or a very small number of) physicians, it also has only negligible anti-competitive effects.

This does not mean, however, that any discipline for unprofessional or unethical conduct carries no antitrust risk. In the above hypothetical, the physician has been convicted by a court (not by market participants) of a crime related to the practice of medicine. If, instead, there were no independent, judicial determination of malfeasance, the action would be riskier. It would be riskier still if the disciplinary action were directed against a class of service providers or a type of service that might compete with traditional service providers or services, unless this conduct was explicitly prohibited by statute.

4. *Filing Suit to Bar a Competitor*

The state board of veterinary medicine files suit against a veterinarian for offering mobile vaccinations at reduced prices, claiming that the state veterinary practice act requires all veterinary vaccinations to occur in an office space with access to emergency facilities. Because the state board is filing suit, the action is protected as an attempt to influence government action (see *Professional Real Estate Investors*). Depending on the wording of the state statute, there could be substantial antitrust risk if the board had tried to bar this veterinarian from offering these vaccinations by sending a cease and desist letter. If the board sends such a letter, the antitrust laws view it as a group of competitors trying to block a rival from competing with them. Unless the board has a strong pro-competitive justification, this presents a significant risk of violating the antitrust laws. Because the board is not

sending a cease and desist letter, but instead is asking a court to block this practice, however, the actual anti-competitive action, if there is one, will be taken by the court and not by the state board. This insulates the board from any possibility of an antitrust action.

B. Actions with Some Risk

The following examples illustrate situations in which a somewhat more detailed inquiry might be required to satisfy the active supervision requirement. The discussion of these examples should help illuminate the extenuating circumstances boards, their counsel, and supervisors should look for to determine (1) whether there is any significant antitrust risk in the absence of active supervision and (2) the extent of the inquiry that might be necessary for a supervisor to satisfy the active supervision requirement.

1. Discipline for Misleading Advertising

A state chiropractic act authorizes the state board to discipline licensees whose advertisements are fraudulent, deceitful, or misleading. A chiropractor advertised herself as "one of the best chiropractors in town" and as "specializing in back-pain treatment." The chiropractor had received no special awards or designations and had no training beyond the usual training for all chiropractors (who all receive training in back-pain treatment). The board wants to fine the licensee $500 for misleading advertising.

Punishment for obviously fraudulent advertising would be quite safe. In this case, however, the advertising is not objectively false. A reasonable consumer should know that "one of the best" is subjective, and the chiropractor could possibly claim to focus on back-pain cases or to have done independent study on this issue. Furthermore, there are plausible anti-competitive effects from prohibiting this type of advertising. It might make it harder for a lesser known chiropractor to compete with more established ones by improving her visibility. It might dis-incentivize competition on quality or competition through specialization. Notice that even if the advertising has no objective information in it, it is more valuable for a high-quality chiropractor to attract first time patients who are particularly quality-sensitive than it is for a low-quality chiropractor because the high-quality chiropractor is more likely to keep these patients longer. Thus, the willingness to spend money to say one is high-quality can itself be a valuable signal to patients. The same can be said of spending money to say one specializes in back-pain.

This suggests both that the board's disciplinary action that deters this type of advertising could arguably have anti-competitive effects and that it is not unambiguously simply enforcing a law against misleading advertising. Even without objective information, if the advertisement provides a valuable signal to customers, it is arguably not misleading.

This does not mean the disciplinary action is necessarily anti-competitive or a violation of the antitrust laws without active supervision. Rather, it only means there could be a non-trivial risk of an antitrust action. The board might have credible evidence that in this case the advertisement is misleading. The prevention of misleading advertising is certainly pro-competitive. But, because there is

at least a somewhat plausible argument for an anti-competitive effect, the board should probably seek supervision if it is available.

Whether or not supervision is available, before taking a disciplinary action in a case like this, a board should consider the quality of the evidence that these ads mislead consumers. If the evidence is merely complaints from competitors, it would be good policy for the board to search for more credible evidence before taking action or even asking for supervision. One obvious source of evidence would be to survey the patients of this chiropractor to see if they were misled. Evidence of this type would certainly be important in litigation and is the type of evidence that a supervisor concerned with competition would want to consider.

2. Discipline for Low-Quality Service

An accountant has been offering to do tax returns at half the price of her competitors. As a result, she has obtained a huge increase in the number of consumers. It turns out that she filed some of her customers' tax returns after the deadline, and these customers received penalties as a result. These customers were never notified by the accountant that their returns were filed late. Complaints by other accountants lead the board to investigate this accountant and discover these deficiencies. The state accountancy act requires all accountants to adhere to the board's code of conduct, which includes timely service and prompt customer notice of any delays. The board wants to fine the offending accountant $5,000.

While the accountant has arguably violated the code of conduct, fining her for delayed returns in this instance could be seen as a penalty for aggressively low-pricing. This is because the board action may have been instigated by complaining rivals and because the likelihood of receiving such a fine is greater when one lowers price and receives a large increase in demand. Furthermore, customers may have plausibly been willing to accept a larger than normal probability of such an error in exchange for a substantially reduced price.

None of this means the fine is necessarily illegitimate. But, it does suggest there is a non-trivial antitrust risk associated with imposing such a fine in these circumstances. As such, the board would be wise to seek supervision before imposing the fine. Because the main rationale for the code of conduct is consumer protection, the board should investigate whether the accountant has reimbursed the customers for any IRS fines. The board may also want to investigate how the consumer savings for those customers who did not pay fines compared to the magnitude of the fines for customers whose returns were delayed. While not dispositive, it might give some indication of whether the net effect of the accountant's actions benefited or harmed consumers as a group. In addition, the magnitude of the fines would indicate how much consumer harm might occur. Such information would be useful for the supervisor to consider and, in the absence of supervision, could be helpful in assessing the strength of the board's pro-competitive justification.

3. *Veterinary Discipline for Low-Dosage Vaccines*

A single veterinarian in one location in a state starts giving lower than the recommended dosages when vaccinating small animals. Another veterinarian complains to the state veterinarian board that these low dosages violate state regulations to follow the label directions in all vaccinations. The board, which is controlled by veterinarians, engages in disciplinary action against the veterinarian.[26]

If the statutory language is relatively clear, the antitrust risk facing the board is likely small (but maybe not insignificant if there is some ambiguity). The state board has the statutory responsibility to decide whether the challenged practice is in accord with state regulatory requirements. Factors that make the risk small in this case include that the challenged practice is a particular way of administering vaccines rather than a new type of competitor in the market. In addition, notice that the firm subject to disciplinary procedures is only one veterinarian out of probably thousands within the state, and likely tens within a local area. Thus, unlike the AMC case discussed below in section V.C.3 in which the subject firm had substantial market share, preventing this veterinarian from providing low-dose vaccines is very unlikely to significantly affect competition in the market. Because the antitrust laws are designed to protect consumers, not competitors, actions that adversely affect one firm in the market but are not likely to affect competition in the market, are not likely to be found to violate the antitrust laws.

On the other hand, if the evidence showed that this veterinarian's use of low-dosage vaccines was capturing an increasing portion of a particular market from other veterinarians, then there would be the potential for antitrust injury. This would not necessarily make the board's decision a violation of the Sherman Act. It would mean that under the rule of reason the board would have to show as a pro-competitive justification that its decision was a valid interpretation of the state regulations designed to protect consumers. Thus, unless the statutory language is very clear, it would probably make sense for the board to ask for supervision by a state actor so that this decision can be made by a state agency with relevant expertise and thereby provide the board with state action immunity.[27]

C. Actions with Significant Antitrust Risk

The following examples are ones in which at least some active supervision is almost certainly necessary to provide state action immunity for board actions that would otherwise present a significant risk of an antitrust challenge. These are also cases in which supervisors, if they are to approve the board's action, need to clearly evaluate the competitive effects of the board's action in order to make it

[26] While the fact that the complaint was brought by a fellow veterinarian may make it somewhat more suspect than a consumer complaint, this is a case in which consumers may not have the knowledge to complain about the practice. In addition, there is the potential for negative externalities if low-dose vaccines are not as effective as higher dose vaccines, and thus one consumer getting a low-dose vaccine could pose risks to other animals or humans from the spread of the disease the vaccine is designed to prevent.

[27] Of course, a board requirement that merely required the veterinarian to make all of his customers aware that he was giving a lower than recommended dose would almost certainly pose no risk since this would not impede competition but rather would make it function better by insuring that consumers were informed.

clear that the state is conscious of the effects of its actions on competition, as may be required under *NC Dental*.

1. *Telemedicine*

A state medical board composed of a majority of practicing physicians adopts a rule that requires any physician to complete an in-person examination of a patient before the physician can use video conferencing to examine that patient. While an adversely affected party can challenge the rule for being outside the scope of the board's statutory authority or for not complying with the procedures of the state's Administrative Procedures Act, no state official who is not an active market participant has the authority to reject or modify the rule if it does not comport with state policy. As a result, the board's issuance of the rule is unlikely to have state action immunity from the antitrust laws.

Because the rule may greatly reduce the attractiveness or availability of telemedicine to patients and make it harder for telemedicine providers to compete with traditional physicians, a telemedicine provider will likely have a colorable antitrust claim against the state medical board. In the situation described above, because the board is not actively supervised by the state, the state attorney general's office could have to defend a potentially very expensive antitrust action against the medical board.

If, instead, the board were actively supervised, there would be two benefits. First, whatever policy the board adopts and the supervisor ratifies after supervision would enjoy antitrust immunity. Second, the supervisor would have the opportunity to ensure that any board rules regulating telemedicine advance the state's interests and policies, rather than merely the interests of physicians. Because most states likely view greater access to and lower prices for safe and effective medical treatment to be in the state's interests, the supervisor would likely consider many of the same issues that would be relevant in an antitrust case, unless the authorizing statute clearly forbids considering those issues.

As long as it is permitted under the relevant statute, the state supervisor's or supervisory agency's analysis should include evaluating the evidence that telemedicine enhances competition, leading to lower prices and greater access to health care. In fact, some scholars have argued that under *NC Dental*, supervision will only create state action immunity if supervisors assess the competitive impact of the board's decision in order to fulfill the requirement that the state own any decision to displace competition.[28] The supervisor should also consider the evidence that led the medical board to fear that telemedicine would result in substandard care for patients. In so doing, it will fulfill the *NC Dental* requirement that the supervisor evaluate the substance of the action. In addition, this type of review will enable the supervisor to balance the potential competitive harms from the new rule with the potential consumer protection benefits to determine whether the rule is consistent with the policies and interests the state seeks to advance.

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[28] See Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Virginia L.R. at 1442. Of course, if the statute itself specifically precludes considering effects on competition, that would fulfill the requirement that the state is clearly taking responsibility for displacing competition.

There are several advantages to having state supervisors rather than a court perform this analysis. First, it is substantially cheaper. Antitrust cases are notoriously expensive. Second, the state can consider potential benefits of a rule or regulation that a court may not be able to in an antitrust case. The Supreme Court has stated that antitrust defendants' attempts to defend their actions "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act."[29] While, as noted above, it is far from certain that a court would not apply this reasoning to a state board, it is possible that they would. Depending on the wording of the statute authorizing state board regulation, however, a state regulator may have the freedom to consider threats to public safety and the ethics of a profession even if any negative effects result from competition itself (although, as noted above, protection of competition will very often be an important state interest as well). Third, the state itself is able to retain the decision-making authority when it engages in active supervision whereas it can only advocate for its position in litigation.

How should the supervisor make this decision?

In reviewing the board's rule in this example, the supervisor should begin by analyzing the benefits of telemedicine. In addition to evaluating the evidence from the affected telemedicine firm, the supervisor could also request statements from large consumers of telemedicine, such as employers or insurance companies whose employees and customers use telemedicine services. These large consumers will often have a great deal of sophistication and information about why they use telemedicine, what benefits it provides for its customers, and how it affects competition in the marketplace. If appropriate, the supervisor could consider the experience of other states that have allowed telemedicine. Especially important would be evidence of how often eliminating access to telemedicine would lead patients to forego treatment altogether rather than visiting more traditional medical service providers. On the other side, the supervisor can review evidence of complaints, any studies of adverse health effects, and the testimony of medical organizations that worry about potentially inferior treatment that customers might get from telemedicine providers.

It is always important to keep in mind, however, that the highest quality services are often not appropriate for all consumers. Consumers must not be misled into believing they are receiving higher quality services than they are actually receiving. But, consumers with limited means (or employers and/ or insurance companies who are trying to keep costs down) should retain the ability to consciously choose less comprehensive services for lower prices. That said, if there were compelling evidence of adverse health impacts from telemedicine, protecting consumers against these impacts is the proper role of a state medical board. But, the board should have objective evidence of these adverse impacts before making a rule like this, and the state supervisor should defer its approval until the board can provide such evidence.

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[29] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 680 (1978).

2. *Prepaid Legal Services*

An online company offers legal documents and pre-paid legal services through a licensed attorney in the state. In addition to providing some services at no additional cost (the pre-paid in the pre-paid services), these contracts also guarantee the customer a 25% discount from normal rates for additional services from participating attorneys. A state bar association refuses to allow the company to offer these plans in its state.

The state bar association is made up of practicing attorneys in the state, and its decision to deny registration for these pre-paid legal service plans was not subject to review by any state agency. As a result, under *NC Dental*, this decision does not have immunity from the antitrust laws. The decision to prohibit the company from offering its services could then be characterized as a group boycott[30] in violation of Section 1 of the Sherman Act. Not all group boycotts, however, are necessarily per se illegal. Whether or not this decision would be deemed an illegal boycott would likely depend on whether the bar association could establish that prohibiting this type of prepaid legal services in the market somehow enhanced competition by protecting consumers against unscrupulous providers.

As explained above, the state bar's decision can avoid antitrust scrutiny, and the decision on its legality can be left in the state government's hand, if the state actively supervises the state bar's decision to prevent someone from offering services in their state. In so doing, the state bar should provide evidence to the supervisor supporting its belief that its decision is consistent with state policy because without reviewing such evidence, the supervisor cannot be said to have reviewed the substance of the decision to ensure it is in accord with state policy. Such evidence might include facts tending to show that prepaid legal service plans are likely to mislead consumers into accepting services from someone who is either not as qualified as the consumer believes or will not provide the services the consumers believe they are receiving, or in some other way lead consumers to make a decision that they would not make were they more sophisticated and well-informed. Unlike a court hearing an antitrust claim, the supervisor could also consider (as long as it is consistent with the underlying statute) whether there are any adverse effects on third parties from offering these services (e.g., they lead other parties to bear legal expenses that they might not otherwise have to bear).

On the other hand, the active supervision should (and, as noted above, may be required to, unless clearly prohibited by the governing statute) include an examination of the beneficial effects on competition that such prepaid plans might offer. They might be offering consumers a lower-priced alternative. They might also be spurring traditional attorneys to offer lower prices in order to compete with the prepaid plans. To obtain evidence of this, a supervisor could examine how the price of the relevant legal services changed in states in which such services were allowed compared to states that did not have such services.

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[30] A group boycott is when a group of firms agree that they will not buy from or sell to another firm.

3. *Real Estate Appraisal Management Companies*

Appraisal Management Companies (AMCs) act as intermediaries between lenders and real estate appraisers. In so doing, they ensure that the appraisal process is insulated from the lender's immediate financial interest. This reduces the risk that the relationship will violate federal laws enacted in the wake of the housing crisis, and is designed to remove bias from the appraisal process. Studies indicate appraisers hired by AMCs typically receive lower fees than independent appraisers hired directly by lenders.

A state initiates a licensing requirement for AMCs. The state real estate appraiser board, which is majority-controlled by independent fee appraisers, refuses to license one of the largest AMCs operating in the state. Because the board is not actively supervised by the state, this action is not immune to antitrust scrutiny. The decision to prohibit this AMC from the market could be challenged as an anti-competitive group boycott.

Because the state has developed licensing requirements for AMCs, the board has the power to deny licenses to AMCs that fail to meet the requirements established by the state. On the other hand, the reasons for the denial of the license may appear pre-textual or licensing requirements developed by the board may appear anti-competitive. If, in those circumstances, there is evidence that the purpose of the denial is elimination of a competitor that is driving down the fees of independent real estate appraisers, then the board could be liable for a violation of Section 1 of the Sherman Act. Given that the board has the responsibility to review and approve or deny licensing applications; it is unlikely that the denial would be per se illegal. But, if there is strong evidence that the AMC met the normal licensing requirements (or that the board-developed licensing requirements were anti-competitive), then the action could be found illegal under an abbreviated rule of reason approach in which the court examines whether the pro-competitive justifications for the agreement are plausible enough to warrant a complete rule of reason analysis. Otherwise, the case would likely receive full-blown rule of reason treatment. Recall that rule of reason analysis first requires proof of anti-competitive effect and then a balancing of the pro- and anti-competitive effects of the agreement.

As in the other examples, however, a far superior approach would be to subject the board's decision to active supervision by a non-market participant in the state government. To satisfy active supervision, the supervisor must either evaluate the evidence that the AMC did not meet the licensing requirements or evaluate the competitive effects of the licensing requirements if these were developed by the board. If that evidence reasonably supports the board's decision, then the supervisor can approve the action and immunize the board's decision. If, on the other hand, the supervisor's review of the licensing application and surrounding evidence reveals that the firm does substantially meet the requirements for licensing given in the statute, then the board's decision can be reversed without subjecting the board to a costly antitrust suit.

The supervisory process could also yield an intermediate outcome. The supervisor might find the evidence for denying the license insufficient but might ask the board to present more evidence if it wants the supervisor to review the decision again. This type of action would be most appropriate where

no compelling evidence exists that the board's initial denial was motivated by a desire to reduce competition, but the support for refusing the application was nonetheless not quite sufficient. By requiring the board to produce better evidence, the supervisor may be able to determine if the denial is motivated by a desire to suppress competition or is necessary to protect consumers in the appraisal process.

It is worth noting that this case is somewhat different from the other examples in that it concerns an action taken against an individual competitor. As discussed above, these actions are typically less likely to need supervision than rule-making or generalized actions against classes of competitors. In this case, however, because the competitor was a significant source of price competition, there is more antitrust risk than in the typical case. Antitrust law pays particular attention to efforts to eliminate a very aggressive competitor who may be an important force in making a market more competitive. If supervision is discretionary, then boards need to be cognizant of the role of the subject of disciplinary or licensing action in the competitive process. While in most cases these actions may not pose a significant antitrust risk, there will be a few cases, like this one, in which this risk is significant. If the target generally charges lower prices (especially if there is a record of board members or competitors complaining about this) or has a significant market share even if only among some sub-set of customers the board would be wise to ask for supervisory approval.

4. License Examinations for Hearing Instrument Providers

A state requires all people selling hearing aids to be licensed. It provides for a state board composed mostly of market participants to determine whether applicants are competent. This state board devises a test for licensure that is substantially more difficult than tests in almost all other states. Subsequently, the state has substantially fewer licensed hearing aid specialists than other states relative to the over-60 population, the group that constitutes the vast majority of the consumers for hearing aids.

Several employees of a hearing aid firm, many of whom have passed tests in other states, fail the licensure exam. The firm sues the state board. The board decision to deny the license to the employees would have antitrust immunity if the board had adequate supervision. If the development of the test and the standards for passing the test were subject to supervision by a state actor, this would very likely be sufficient even if the individual decision, which is based entirely on the test result, were not reviewed by the state. The final decision would be purely ministerial. But, because the test and the standard for passing the test were not reviewed by the state and the board is controlled by market participants, the decision to deny the licenses would not have antitrust immunity.

Here the board is being sued over the denial of individual licenses. Because the denial is based on a board rule that restricts entry generally into the market, however, it is much more vulnerable to an antitrust challenge than the typical license denial case. If, in fact, the plaintiff can show that the difficulty of the test and the high passing requirements lead to many fewer competitors in the market, it has the potential to show an injury to competition.

Of course, a case like this will not be a per se violation. The board is charged with ensuring that hearing specialists who serve the public are qualified. This is a legitimate pro-consumer justification for having a test for licensure. The plaintiff would likely have to show more than just a smaller number of hearing specialists per capita than in other states. It would also need some evidence that this results in higher prices or reduced quality for consumers. Quite possibly the number of licensed providers is large enough (even with the more difficult test) that further entry would have only an insignificant effect on prices. On the other hand, if large numbers of hearing specialists are applying for licensure (and relocating from other states), this is evidence that entering into this market is quite profitable. That, in and of itself, suggests that prices likely exceed what they would otherwise be if there were more competition. The court could potentially use such an argument to say that the burden should be shifted to the defendants to show the absence of a price effect.

Even if the court finds a price effect, however, the board could still show that the licensing standard was justified by arguing that the improved quality and consumer protection benefits justified the higher prices. But, without active supervision, the court would ultimately have to decide whether this was the case. If many states have lower requirements, it might be very difficult to convince a court of this without clear evidence that the lower standards of other states have caused demonstrable consumer harm.

If there is the potential for state supervision, the antitrust risks in this case would almost certainly justify having the supervisor evaluate the test and the standards for passing the test to determine if the stricter standard comported with state policy. In so doing, the supervisor should consider the potential competitive harms of limiting the number of competitors in the market. One possible approach would be to have professionals who are not market participants (such as community college professors who prepare students for this exam) take the examination to evaluate it. If they find the exam to be more difficult than necessary to ensure high quality providers, the supervisor could solicit bids from outside firms to develop a more appropriate licensing exam.

Another possible solution is to provide adequate and accurate information. Given that different consumers may have different ideas of the ideal price/quality trade-off, this might be a good case for adopting certifications along with licensing if the statute does not prohibit it.[31] That is, the board could provide a high-pass certification for candidates scoring particularly high (or an advanced certification for candidates taking a more difficult test) while not excluding from the market hearing specialists that met a lower standard that was more consistent with the standards in other states. This would be a way to allow consumers who wish to pay more for more qualified providers to identify those providers while not limiting competition for those consumers who are less sensitive to quality or more price-conscious.

[31] There are a range of possible certification options that may or may not be available given the statutory language. It is unlikely that informing applicants of their test score and/or the percentile they received would violate the statue. This would enable those with high scores to advertise that fact. The statute probably does not explicitly authorize some type of "high-pass" designation, but it may not explicitly prohibit it. Requiring those who receive a "low-pass" to advertise this fact is more likely to require legislative action.

Of course, anyone who failed a licensing test could claim that the test is too difficult or inappropriate, or that the standard for passing is too high. One way to avoid such a problem would be to outsource the development of the test to a respected, non-market participant, third party with no ties to any industry professional associations.[32] There are independent private companies that specialize in developing licensing tests. In addition, for many fields requiring licenses, there are programs that train these service providers in universities or community colleges. The professors in these programs would also have the expertise to design an appropriate test. If a supervisor chose one of these outside entities to design a licensing test or evaluate the existing test and reviewed the substance of the test after the fact, this would ensure that the test was not developed to limit competition and provide the board with state action immunity for using the test to approve service providers.

VI. Practical Advice for State Boards and Their Supervisors—Integrating Competition and Consumer Protection Concerns

A. Recognizing Board Expertise and its Limits

State board members are typically experts in the substance of the occupation they are regulating, but they cannot be expected to be experts in competition analysis. This means they will naturally be more attuned to the potential dangers of a given practice than to its potential competitive effects. As a result, one of the best ways for state boards to avoid antitrust problems is to recognize this divergence in expertise and the natural bias that may accompany it.

Recognizing this bias has two implications. First, the board should recognize that there may be competition issues of which it is not aware, leading the board to seek outside guidance, either in the form of active supervision or from advice of board counsel, before it takes any action that it is not sure falls within a safe harbor. Antitrust cases are extremely expensive and time consuming to litigate. Putting to one side potentially complex issues of indemnity, defendants can also be subject to treble damages (paying three times the harm they cause) if found liable. Thus, boards should err strongly on the side of avoiding liability.

Second, the board should pay close attention to the impetus for its actions. If the complaints that lead to board action come from market participants, those complaints should be treated as especially suspect. Market participants have neither the incentive nor the expertise to recognize competition concerns and have every incentive to exaggerate consumer protection concerns from competitors' actions. It is important to remember that from a purely financial perspective, in most cases a market participant will benefit when another market participant takes an action that hurts consumers and will suffer when that rival takes an action that benefits consumers. On the other hand, if the complaints originate from consumers, those complaints are much less likely to be affected by this bias and should be given much greater credence.

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[32] It is important that the firm developing the exam be independent of any professional associations so that it has no incentive to structure the exam to limit entry.

Information from market participants is still useful. Those who stand to benefit the most from reporting malfeasance and have the most knowledge about an industry will be those who are most likely to uncover such malfeasance. While complaints by competitors should not spur immediate action in most cases, they should trigger a search for independent, objective evidence that will reveal whether the behavior in question harms consumers.

B. Objective Sources of Information/Evidence

There are several sources that state boards should examine in order to find credible, objective evidence. First, the board should look to see if other states have considered the issue in question. If they have, the board should ask them what evidence they used to make their decision. Second, if the issue concerns scientific practice, then there may be academic studies of the practice that the board can review. Third, the board can examine any consumer complaints (or studies done by consumer groups that might be related). Fourth, the board can interview large consumers such as health or dental insurance companies, or potentially develop an online survey to determine consumers' views about the practice. Fifth, the board can consult experts in the particular field of practice, competition law, or economics, again, being cognizant of any vested interests those experts may have. If none of these sources reveal any convincing evidence about the dangers of the practice and the board is still concerned, in some cases it might be feasible for the board to gather data on the outcomes of the practice and return to the issue in the future after this data is available.

When supervisors review board decisions, they should also pay close attention to the impetus and evidence for the board's action. If the main source of the board's information appears to come from complaints by competitors, the supervisor should seriously consider refusing to approve the action until the board provides better/more objective evidence. On the other hand, if the supervisor's review establishes that the state board is motivated by genuine consumer complaints or scientific studies that reveal the dangers of a particular practice, then the supervisor should approve the board's action or recommend some alternative restriction that achieves a similar goal but with less competitive impact.

C. Responding to Evidence of Consumer Harm

When state boards do find credible evidence that an action or behavior harms consumers, they should consider providing more information to consumers as an alternative to outright prohibition. While there may be some situations in which all consumers are almost certainly harmed by some action, in many cases the effect on consumers could differ. A service or product that could be harmful for some consumers could provide a benefit to others. If so, requiring the provider to clearly disclose the nature of the service and its limitations and risks may provide the best balance of promoting consumer protection concerns and competition. The consumers who do not benefit from the product or service will then know to avoid it, while those who nonetheless want to purchase it can still do so.

To see how this might work, consider the hearing instrument license examination case from the last section. While the state board might have legitimate concerns that those who score lower on the examinations might not provide as high quality service as those who score higher, it can provide this information without denying licenses to providers who fail but who would have received licenses in

most states. Instead of setting an unusually high bar for passing the license exam, the board could provide more than one level of certification based on the exam results. For example, the board could have a low pass grade and a high pass grade and then require hearing instrument providers to prominently disclose their grade to all prospective customers. This provides valuable information for customers who want to (and can afford to) avoid lower-quality providers while not eliminating the potential for lower-cost providers to provide services to those who are more price sensitive or have more limited means.

Unless there is good reason to think that the information the board can require firms to provide will still not enable consumers to make sensible decisions, requiring more information will often serve consumers better than reducing consumer choice by prohibiting a service provider altogether. Thus, boards should always give serious consideration to remedies that provide information so as not to risk eliminating the potential for lower-cost competitors to enhance competition in the market. This also has the benefit of not having the board substitute its judgment and preferences for those of the consumers.

D. Identifying the Source of the Consumer Mistake

This suggests another important consideration for boards before they take action against a particular firm or provider. They should consider exactly which consumers will be affected and why they will be better off as a result. As part of this inquiry, the board should have a good explanation for why the consumers that were previously patronizing this firm or provider were making a mistake. That is, because this patronage was voluntary, the board's action can only make sense if the board knows more about what is good for this particular subset of consumers (who are typically not the average consumer in the marketplace) than they do. Given the board's expertise, this is certainly possible, but they should have a good explanation of why consumers are making this persistent mistake and why there is no less restrictive way of correcting that mistake than simply eliminating this choice altogether.

E. Enforcement Considerations

If the board does decide that it needs to prohibit a provider or activity altogether, it should carefully consider whether it is best to send cease-and-desist letters or to file suit to enjoin the practice. As mentioned above, if the board files suit, then it is very likely immune from antitrust liability. On the other hand, the cease-and-desist letter is almost certainly a faster, more efficient way to stop the practice. If the board has active supervision, this supervision can remove the antitrust risk from a cease-and-desist letter. Otherwise, unless the action is one of the types described above with almost no antitrust risk, the board is on much safer ground asking for a court injunction.

Another possibility is that the board could ask for an administrative action to rule on its cease-and-desist letters. If administrative action by a state government agency is required to make the cease-and-desist enforceable, then the board is likely immune from antitrust liability because any final action is taken by the state administrative agency rather than the board itself.

F. Supervisor Decision-Making Process

Figure 1 provides a decision tree for supervisors when evaluating a board regulation. With minor adjustments, the decision-making process suggested by this decision tree is also relevant for state boards themselves. In evaluating a regulation, the first step is to determine if such action is almost certainly required by state law, leaving no room for an exercise of board discretion. If so, then there is no need for further examination; the supervisor should simply approve the regulation.

If the statute may not require this regulation, or if some aspects of the regulation are required but others are left to the board's discretion, then the supervisor should assess the evidence the board provides for why this regulation is needed. In particular, it should focus on what market failure the regulation addresses and how credible is the evidence that consumer harm will occur without the regulation. If the board does not provide credible evidence (for example, say the only evidence is that industry members are complaining about the actions of competitors, and the board has not provided any independent confirmation that those actions are dangerous in some way), then the supervisor should reject the regulation.

On the other hand, if there is either some credible evidence or very strong credible evidence of the need for this regulation, then the supervisor should proceed to evaluate the competitive effects of the regulation. If the risk of significant anti-competitive effects is minor, then there is no reason not to approve the regulation. On the other hand, if there is a plausible risk of anti-competitive effects, then the supervisor should consider the magnitude of the need for the regulation. If either the harm the regulation is addressing is small or the evidence for that harm is not completely convincing, the supervisor should send the regulation back to the board asking it to consider a less restrictive alternative. On the other hand, if there is strong evidence that the regulation is addressing significant harm, then the supervisor might want to either perform a cost-benefit analysis itself or ask the board to perform one. Alternatively, if the supervisor believes there may be a practical, substantially less restrictive alternative, s/he could ask the board to consider this alternative or provide evidence for why it would not fully address the harm at issue.

VII. Generating Immunity: Structural Suggestions for State Government Responses to *NC Dental*

A. Non-Market Participant Control versus Active Supervision

The Supreme Court, in its *NC Dental* decision, held that state boards controlled by market participants do not have antitrust immunity unless they are actively supervised. This suggests two possible routes for immunity: ensuring that state boards are not controlled by market participants or ensuring that they are actively supervised. While changing the composition of state boards might ease the burden on state governments, it is a much less reliable way to generate immunity and risks forfeiting the value of having the expertise of market participants on the state boards.

As explained in Section II above, the Supreme Court's use of the phrase "controlled by market participants" creates an ambiguity that might make it hard for a state board that includes any market

participants to avoid litigation. Thus, if the purpose is to immunize the state board and avoid expensive lawsuits, state boards need to have no or very few market participants as board members. Since market participants are those with the most interest and knowledge about their field, it might be difficult to get informed board members who are willing to put in the work to make the board effective in such a situation.

When a board is actively supervised, on the other hand, the Court's requirements for state action immunity are much clearer. A state governmental actor must review the substance of the decision to ensure 1) the decision is in accord with state policy and 2) the state is held accountable for these decisions. Granted, this review may require the state to hire some additional employees. The state will likely save substantial resources in the long-run, however, since it will not have to spend time and money defending expensive antitrust lawsuits against its boards.

B. Designing Active Supervision

1. Treatment of Competitive Effects

As discussed above, for a board decision to have antitrust immunity, the state must have reviewed the substance of the board decision to make sure it is in accord with state policy. Unless the statute that authorizes a board to act leaves no room for board discretion, a supervisor's substantive review will likely include an analysis of many of the same factors that a court would consider in performing a substantive antitrust analysis. Those factors include not only the pro-competitive justifications for the regulations, but also an assessment of the possible anti-competitive impacts of the board's decision. By doing so, the supervisor will ensure that the state is clearly accountable for any anti-competitive effects from the regulation.[33] Moreover, assessing the competitive effects of any board regulation is good policy. It is wise to do so rather than risk losing immunity. While federal antitrust law does not dictate how supervisors must factor those effects into their review process, it is prudent for them to give substantial weight to competitive concerns that necessarily impact consumer welfare, as state regulatory boards exist largely to protect consumers.

Supervisors who are going to consider competitive concerns should have some background and/or training in antitrust or competition policy. Without such background or training, it will be difficult for the supervisor to provide a meaningful check on any inclinations a state board may have to restrict competition. The antitrust division of the state's attorney general's office is a good source of training for supervisors, board counsel, and boards themselves.

2. Mandatory versus Discretionary Supervision

Another important issue is whether the supervision is mandatory or discretionary. In Oklahoma, for example, a member of the state Attorney General's office reviews every state board decision other

[33] See Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Virginia L.R. at 1440, arguing that this is implied by need to "resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State." *NC Dental* at 1112.

than rule-making. Rule-making goes through a separate process of governmental approval which satisfies the active supervision requirement. As long as this supervision is deemed adequate, this mandatory process almost guarantees that every board decision has immunity. On the other hand, it also leads to a substantially greater workload for the supervisor. A large number of board decisions have essentially no antitrust risk, but the supervisor still has to review them. Even very quick reviews of all these decisions greatly add to the state's workload.

An alternative approach would give the boards discretion to ask for supervision if they believe their decision carries antitrust risk, but they need not ask for supervision for every decision they make. While there is no guarantee that decisions in the low-risk category will not be the subject of an antitrust lawsuit, such decisions are far more likely to be dismissed at an early stage for lack of merit without the need for state action immunity. For boards that are good at assessing antitrust risk, this is likely a superior option, greatly reducing the state's supervision burden. But, if some boards make even a few mistakes that result in lawsuits, the cost of those few mistakes could easily outweigh the savings from reduced supervision costs. If, as is sometimes the case, the state bears the cost of defending the lawsuits and indemnifying the board members from personal liability, one can imagine the board not having the incentive to be sufficiently cautious in asking for supervision.

If states do not want to bear the burden of reviewing every state board decision but fear costly mistakes during the transition period, one possible way to mitigate the remaining litigation risk would be to have mandatory review for some initial period. During that period, the supervisors could instruct the boards and their counsel about why this was or was not the type of decision that they should ask the supervisor to review when review becomes discretionary. The supervisor could emphasize the dangers of failing to ask for supervision when necessary. The state's workload would be much larger during this initial period. If supervisors successfully educated the state boards, however, the state could move to a discretionary system that would be involve fewer monitoring costs in the future.

3. Evidence/Information for Supervisor

Whether supervision is mandatory or discretionary, to minimize the burden on the supervisor and to ensure the review meets the standard for generating immunity, the board should provide the supervisor with the evidence and reasoning that formed the basis for its decision. This should include:

- The statutory basis for the decision;
- If the statutory language does not require this decision, the consumer protection or other policy rationale for the decision and the evidence supporting this;
- If the statutory language does not require this decision, what other options the board could have undertaken, and why it chose the action it did instead (in particular, the board should address the option of merely requiring that consumers receive more accurate or detailed information);
- If the statutory language does not require this decision, a brief description of the competitive landscape (how does the board action affect the number of competitors, the incentive of those competitors to compete in prices, quality, variety, location, etc....); and

- Why, on balance, consumers are better off as a result of their decision (and any evidence supporting this).

4. *Standard of Review*

In reviewing this information, supervisors should be aware of the nature of the board's expertise. Nevertheless, they should also avoid being too deferential to that expertise or the review may not be substantive enough to confer immunity. In particular, the supervisor should carefully distinguish between the areas in which the board has expertise and those in which it does not. For example, on scientific matters related to the profession in question, the board likely has more expertise than the supervisor. After all, this is the primary reason for having boards made up of market participants. This means that it is reasonable for a supervisor to give the board the benefit of the doubt when assessing scientific evidence. Of course, to earn this benefit of the doubt, the board should explain the scientific evidence behind its decision.

On the other hand, the supervisor probably has greater expertise than the board in judging what is in accord with state policy and how to interpret a state statute. Moreover, the board probably does not have expertise on competition policy. Thus, the supervisor should be much less inclined to give the board deference on such issues as the competitive effects and consumer protection impacts of the decision. Lastly, the supervisor should always have the option of not rendering a decision immediately, but instead asking the board to provide more compelling information or evidence for its decision.

5. *Sources of Supervision*

States that implement active supervision of regulatory boards need to determine what part of the government will do the supervising. The only unambiguous requirement under *NC Dental* is that the supervision must come from a non-market participant that is part of the state government. That said, much of the rationale for this requirement is couched in terms of making the state government politically accountable for any anti-competitive regulations that it implements.[34] This suggests that the supervisor must be a part of the government which either is itself politically accountable or whose decisions will be attributed to a politically accountable governmental actor.

A committee of the state legislature would obviously satisfy this requirement and be acceptable under *NC Dental*, but it may also raise constitutional issues in most states. Thus, it is probably inevitable that supervision occur through some part of the executive branch. If the Governor's office directly provides supervision, possibly through a regulatory czar appointed by the Governor for this purpose, this would almost certainly satisfy the political accountability requirement of *NC Dental*. Similarly, if the Attorney General creates such a position that provided adequate supervision, this would also very likely generate antitrust immunity because the Attorney General is also politically accountable either because s/he is directly elected or because s/he is a high level appointee of a politically accountable actor (e.g., the Governor).

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[34] See Allensworth, supra note 19, at 1436 for a fuller discussion of this issue.

VIII. Conclusion

The *NC Dental* decision does represent a substantial shift in the legal treatment of the decisions of state regulatory boards. State boards and state governments need to revise their practices in order to avoid the substantial risk and expense associated with antitrust lawsuits and antitrust judgments. The purpose of this primer is to help state boards and state governments do exactly that while also providing guidance as to how to balance potential anti-competitive and pro-competitive effects from state board decisions, whether or not these decisions are immune from antitrust scrutiny. Such practices will ensure that state board decisions are in the best interest of the state and its consumers.