
Note

Licensing Liability: Responding to Judicial Expansion of Antitrust Enforcement in *North Carolina Dental*

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INTRODUCTION

On January 20, 2017, Dr. Chet Evans wrote an open letter to members of the podiatric profession and state policymakers, threatening to resign from his position as chair of the Florida Board of Podiatric Medicine unless the State agreed to indemnify him and others similarly situated against personal liability for the actions of the board.¹ This letter followed a letter from members of the board addressed to Governor Rick Scott, written a month earlier.² On February 3, 2017, Dr. Evans made good on his promise and submitted his resignation, as did fellow board member Dr. Scott Koppel.³

These events occurred in the wake of *North Carolina State Board of Dental Examiners v. FTC*, a 2015 Supreme Court decision greatly expanding the antitrust liability of state licensing boards.⁴ In a six to three decision, the Court held that state

* J.D. Candidate 2019, University of Minnesota Law School. Thanks to Professor Daniel Schwarcz for his expertise and thoughtful comments throughout this process. I would also like to thank The Center of State Enforcement of Antitrust and Consumer Protection Laws for valuable insight in selecting this topic, especially Professor Prentiss Cox, Chairman Kevin O'Connor, and Executive Director Steve Houck. Thanks also to the editors and staff members of *Minnesota Law Review* for their work on this Note and all of Volume 103, with special thanks to Frances Fink, David Hahn, and Joshua Davis for editorial contributions. Copyright © 2018 by Lesley E. Roe.

1. Chet Evans, *Podiatric Medical Board Volunteers Nationwide NOT Immune to Lawsuit: An Open Letter to the Podiatric Profession*, PODIATRY MGMT. ONLINE (Jan. 20, 2017), <http://podiatrym.com/search3.cfm?id=98854>.

2. FLA. BD. OF PODIATRIC MED., MEETING MINUTES 7 (2017), <http://floridaspodiatricmedicine.gov/meetings/minutes/2017/02-february/020317-minutes.pdf> (discussing the letter to Governor Scott).

3. *Id.*

4. 135 S. Ct. 1101 (2015).

boards may be subject to antitrust liability for actions that restrain competition, if a controlling number of board members are active market participants, and if the board is not adequately supervised by the state.⁵ Prior to *North Carolina Dental*, many boards assumed that, as agents of the state, licensing boards were immune to antitrust liability, regardless of the board's composition.⁶

North Carolina Dental's effect on the Florida Board of Podiatric Medicine was hardly unique. The daily operations of thousands of occupational regulatory boards across the country were thrown into a state of uncertain legal status when the Supreme Court's decision was announced.⁷ On average, each state has about thirty-nine licensing boards.⁸ After *North Carolina Dental*, each board became a substantial liability risk to the state, almost overnight.

Many states scrambled to mitigate the legal exposure *North Carolina Dental* created.⁹ In Florida, a bill was introduced in

5. *Id.* at 1117.

6. *See, e.g.*, Op. Cal. Att'y Gen. No. 15-402, at 2 (2015) ("Before *North Carolina Dental* was decided, most state licensing boards operated under the assumption that they were protected from antitrust suits under the state action immunity doctrine.")

7. Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567, 1569 (2017) (noting that there are 1790 occupational licensing boards across the country).

8. *Id.*

9. Some states responded to the decision by first seeking guidance through the state attorney general's office. *See, e.g.*, Op. Cal. Att'y Gen., *supra* note 6; Idaho Exec. Order No. 16-01 (Jan. 13, 2016); Letter from Pam Bondi, Fla. State Att'y Gen., to Andy Gardiner, President of the Fla. State Senate (Dec. 9, 2015), <https://media.nasba.org/files/2015/12/Florida-Attorney-General-Letter-to-Legislature.pdf>. Others took executive action through the office of the governor. *See* Del. Exec. Order No. 60 (2016) (establishing a Professional Licensing Review Committee by executive action in a direct response to *North Carolina Dental*); Okla. Exec. Order No. 2015-33 (2015) (mandating that all non-rulemaking actions of state boards comprised of a majority of market participants are subject to review by the Oklahoma Office of the Attorney General); *see also* Ala. Exec. Order No. 7 (2011) (disbanding occupational boards through executive action with a stated purpose of "creating a competitive business environment," noting that the regulatory burden imposed by the board was no longer necessary). While issued several years before *North Carolina Dental*, the Alabama Executive Order demonstrates an important role that governors' offices may play by disassembling unnecessary boards without going through legislative repeal. Ala. Exec. Order No. 7. Still other states attempted legislative action in response to the increased litigation risk facing licensing boards. *See, e.g.*, H.B. 2501, 52d Leg., 2d Reg. Sess. (Ariz. 2016) (establishing a system to review rules issued by health profession regulatory boards for potential anticompetitive effects); S. Con. Res. 65, 2016 Leg., Reg. Sess. (La. 2016) (establishing a Task Force on Meaningful Oversight to evaluate whether Louisiana's current

January of 2017 seeking to indemnify individual board members against antitrust liability.¹⁰ This action evidently came too late for Drs. Evans and Koppel. While their resignations are among the most drastic individual responses to *North Carolina Dental*, the threat facing the doctors was far from illusory. At the time the doctors resigned, at least three cases citing *North Carolina Dental* had been filed in Florida;¹¹ additionally, the State Attorney General's Office had advised state boards that "there is no coverage of defense costs, damages or attorney fee awards in the event a Board Member is sued for [an] Antitrust Violation."¹² Because federal antitrust statutes provide for treble damages, the Florida Attorney General opined that damages following from antitrust liability may constitute punitive damages, placing them in a category not covered by Florida's indemnification scheme.¹³ The absence of indemnification, the frequent market-sensitive decisions that make up the board's core functions, and automatic treble damages under the Sherman Act combined to create a high disincentive for the two doctors to continue their volunteer service on the Florida Board of Podiatric Medicine,

healthcare licensing system complies with *North Carolina Dental*); S.B. 2, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (providing for legislative review of agency action including board action); H.B. 1007, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (amending occupational licensing board statutes in response to *North Carolina Dental*).

10. S.B. 582, 2017 Leg., Reg. Sess. (Fla. 2017).

11. *Ramos v. Tomasino*, No. 16-CV-80681, 2016 WL 8678546, at *1, *3 n.3 (S.D. Fla. Aug. 25, 2016), *aff'd in relevant part*, 701 F. App'x 798 (11th Cir. 2017) (dismissing antitrust claims of disbarred attorney against Florida State Bar and holding that the State Bar is an "arm[] of the State" and therefore *North Carolina Dental* does not apply); *Rosenberg v. Florida*, No. 15-22113-CIV, 2015 WL 13653967, at *7 (S.D. Fla. Oct. 14, 2015) (dismissing antitrust claims against Florida State Bar filed by attorney suspended from practice of law for one year and holding that *North Carolina Dental* does not apply "because The Florida Bar is an arm of the state (a sovereign entity)—not a non-sovereign actor that is authorized by the State to regulate its own profession"); *Baker Cty. Med. Servs., Inc. v. State*, 178 So. 3d 71, 77 (Fla. Dist. Ct. App. 2015) (discussing antitrust liability of state's agency for Healthcare Administration when it exceeded its authority in extending a certificate of need to a corporation, even though antitrust was not among the claims brought by plaintiffs).

12. FLA. OFFICE OF THE ATT'Y GEN., US SUPREME COURT RULING IN NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS V. FTC: OVERVIEW, IMPLICATIONS, AND THE NEW REGULATORY LANDSCAPE 38 (2016), <http://www.myfloridalicense.com/dbpr/re/documents/FREAB%20Meeting%20Documents/2016/0416GM/0416FREABAntiTrust.pdf>.

13. *Id.*

notwithstanding the corrective legislation introduced in the State Senate.¹⁴

Ultimately, the Florida bill died in committee after reaching the House.¹⁵ As a result, members of licensing boards across all occupations in Florida are exposed to the same personal liability risk that drove Dr. Evans out of a board position he held for seven years. The practical issues raised by *North Carolina Dental* are particularly acute in Florida, where the existing indemnification scheme for lawsuits brought against public actors in their official capacity has an unclear application to antitrust litigation.¹⁶ However, the increased liability of licensing boards affects regulators of every profession across every state in the country.

This Note will discuss several legislative and state executive-level responses to *North Carolina Dental*, and conclude by recommending a legislative partnership between states and the federal government, intended to address both the litigation risk facing licensing boards, as well as the legitimate economic concerns informing the Court's 2015 decision. Part I will lay the groundwork for this ultimate recommendation by discussing the role of occupational licensing in the United States, the legal environment of boards before and after *North Carolina Dental*, and state and federal legislative responses to the Court's decision. Part II will argue that the liability risk states now bear under *North Carolina Dental* is so great that a legislative response is necessary, but that neither state nor federal responses to date are sufficient to address the legal predicament facing licensing boards. Part III will draw from existing legislative responses, as well as current scholarship on state board liability, to outline key elements of cooperative legislation capitalizing on the strengths of both the federal and state levels, while avoiding the pitfalls that make legislation at either level insufficient on its own.

14. 15 U.S.C. § 15 (2012) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

15. *Bill History*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2017/00582/?Tab=BillHistory> (last visited Oct. 14, 2018).

16. FLA. OFFICE OF THE ATTY GEN., *supra* note 12 (“Risk Management advises that there is no coverage of defense costs, damages or attorney fee awards in the event a Board Member is sued for Antitrust Violation.”).

I. NORTH CAROLINA DENTAL AND REACTIONARY RESCUE LEGISLATION

This Part provides an overview of the major governmental systems and legal doctrines implicated by *North Carolina Dental* and the legislation that has followed the Court's 2015 decision. Section A discusses state licensing boards as public-private actors, acting with delegated authority from the state, but comprised primarily of private actors. Section B describes the scope of occupational licensing boards and the role they play in regulating service economies. Section B also identifies competing interests shaping the debate over whether licensure helps or harms consumers. Section C provides a brief history of state action immunity—a longstanding facet of the Supreme Court's antitrust jurisprudence which holds that states are sovereign actors, not subject to federal antitrust laws. Section C describes the intersection of *North Carolina Dental* and state action immunity, and outlines the dilemma now facing state licensing boards—charged with making market sensitive decisions to protect consumers, but bearing potential antitrust liability for their actions. Section D outlines federal and state legislative responses to *North Carolina Dental*, designed to help resolve this dilemma. Finally, Section E provides an overview of the Restoring Board Immunity Act of 2017,¹⁷ which is a federal bill introduced in response to *North Carolina Dental*.

A. OCCUPATIONAL LICENSING BOARDS: A PUBLIC-PRIVATE PARTNERSHIP

Occupational licensing has a long history in the United States, and has historically been a state, rather than federal, issue.¹⁸ In 2015, there were 1790 state licensing boards in the United States, all of which were created by statute and charged with regulatory responsibilities.¹⁹ The California Board of Psy-

17. H.R. 3446, 115th Cong. (2017); S. 1649, 115th Cong. (2017).

18. See, e.g., *Douglas v. Noble*, 261 U.S. 165, 169–70 (1923) (upholding licensing requirement for practice of dentistry); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (upholding a West Virginia statute prohibiting the unlicensed practice of medicine).

19. See Allensworth, *supra* note 7 (reporting 1790 state licensing boards created by statute in her fifty-state survey).

chology, for example, is authorized by California's Psychology Licensing Law.²⁰ Similarly, the Minnesota Board of Medical Examiners is established by the Minnesota Medical Practice Act.²¹ This statutory authorization and delegation of legislative power mirrors the creation of traditional state agencies.

Licensing boards resemble traditional state agencies in several respects. For example, the North Carolina State Board of Dental Examiners (the Board) is created by statute and labeled as a state agency.²² The Board is statutorily charged with creating, administering, and enforcing the State's licensing system.²³ As a State agency, the Board is subject to North Carolina's Administrative Procedure Act, § 150B-1 *et seq.*²⁴ In all these ways, the Board is similar to a traditional state agency. While the North Carolina Board is not necessarily representative of all occupational licensing boards, preliminary research suggests that it is not unreasonable to use the specific example of the North Carolina Board as a proxy for conceptualizing the statutory characteristics of many occupational licensing boards across the country.²⁵

State licensing boards are unlike traditional state agencies, however, in that they are generally comprised of private parties, rather than full-time employees of the state. The vast majority of occupational boards are made up at least in part of industry insiders.²⁶ This is a common practice because industry insiders often have a great deal of experience in the regulation of their profession, and for this reason are uniquely qualified to serve on occupational licensing boards.²⁷ In addition, industry insiders

20. CAL. BUS. & PROF. CODE §§ 2900-2996.6 (West 1968).

21. MINN. STAT. §§ 147.01-.37 (2017).

22. See N.C. GEN. STAT. § 90-22(b) (2017). For an example of how the Minnesota Board of Medical Practice is similarly classified as a state agency, see also ROBERT A. LEACH, MINN. BD. OF MED. PRACTICE, REPORT TO THE LEGISLATURE IN COMPLIANCE WITH MINNESOTA STATUTES SECTION 3D.06 (SUNSET REVIEW) 2 (2012).

23. N.C. GEN. STAT. §§ 90-29 to 90-41 (2017).

24. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1108 (2015).

25. The review of state boards and their authorizing statutes conducted in the course of this research has not produced any substantial deviations from the general pattern of (1) state authorization; (2) delegation of legislative authority for a public purpose; and (3) applicability of administrative statutes to the board in question.

26. Allensworth, *supra* note 7, at 1570 (discussing how eighty-five percent of licensing boards in 2017 were statutorily required to be made up of active market participants).

27. See *Occupational Licensing: Regulation and Licensing: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law Before the*

are more able and willing to volunteer their time for government service, or to accept lower compensation than academic experts not otherwise employed.²⁸ This results in a lower cost to state governments.²⁹

Because licensing boards are created by statute and perform regulatory functions with authority delegated by the state legislature, but are comprised primarily of private actors, these boards may be considered public-private partnerships. State licensing boards stand alongside a growing number of public-private partnerships that exist in both the federal and state regulatory spheres.³⁰ The public-private nature of the Board was central to the Supreme Court's decision in *North Carolina Dental*.³¹ The Court took pains to underscore the perverse incentives that may drive boards "dominated" by market participants to reach anticompetitive regulatory decisions.³² *North Carolina Dental* joins a catalog of cases in which the Supreme Court has

H. Comm. on the Judiciary, 115th Cong. 6 (2017) [hereinafter *Hearing on Occupational Licensing*] (written statement of Sarah Oxenham Allen, Senior Assistant Att'y Gen., Antitrust Unit, Office of the Virginia Att'y Gen.), <https://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-Wstate-AllenS-20170912.pdf> (noting the market expertise that active practitioners bring to licensing boards). Justice Breyer observed at oral argument that brain surgeons are better positioned to decide "who can practice brain surgery in this State" than "a group of bureaucrats." Transcript of Oral Argument at 31, *N.C. Dental*, 135 S. Ct. 1101 (No. 13-534), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-534_16h1.pdf. *But see* Allensworth, *supra* note 7, at 1570 ("[S]elf-regulation may allow for expertise in decision making, but it comes at a very high price in the form of professional self-dealing.").

28. *See Hearing on Occupational Licensing*, *supra* note 27, at 5 (written statement of Sarah Oxenham Allen) (noting the high cost of removing market participants from all state regulatory boards because "most market-participant board members are unpaid").

29. *See id.*

30. *See, e.g.*, Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816 (2000) (discussing the role of non-government actors in the exercise of administrative authority); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 376–79, 469–70 (2004) (heralding new public/private partnerships as the new frontier in administrative law); *see also* DOT v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1232 (2015) (discussing the constitutionality of Amtrak, a paradigm of public/private partnerships in the modern administrative state, in which Congress vested public standard setting authority in Amtrak, while simultaneously designating Amtrak as a private, non-governmental corporation).

31. *N.C. Dental*, 135 S. Ct. at 1105 ("Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants.").

32. *Id.* at 1106.

taken issue with the legality of private or partially-private institutions exercising public regulatory power.³³ The dual nature of the Board was a key contributor to the Court's finding of illegality, and this feature of licensing boards should not be overlooked.

B. OCCUPATIONAL LICENSING: HISTORICAL BACKGROUND AND CURRENT CRITICISMS

Occupational licensing boards exist in every state, and are responsible for regulating hundreds of professions across the country.³⁴ Professional licensing has grown dramatically in recent decades.³⁵ This increase has been driven in part by the expansion of the service economy,³⁶ as an increasing number of boards are commissioned to protect consumer welfare.³⁷ As licensing has proliferated the U.S. economy, professional licensing boards have not been without their critics—which hail from both political and academic spheres.

1. Historical Background and Current Scope of Occupational Licensing Boards

In 2017, there were 1790 state occupational licensing boards in the United States.³⁸ These boards engage in a variety of activities, including: sanctioning practitioners; responding to con-

33. See, e.g., *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1232 (analyzing the status of Amtrak considering its pseudo-private status and regulatory powers); *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936) (noting that the Bituminous Coal Conservation Act of 1934 may be unconstitutional for delegating legislative power to private parties); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935) (striking down delegation of regulatory power to private parties).

34. STAFF OF THE BUREAU OF COMPETITION, FED. TRADE COMM'N, *FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS 1* (2015) [hereinafter *FTC STAFF GUIDANCE*].

35. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 *BRIT. J. INDUS. REL.* 677, 678 (2010).

36. In 2006, seventy-seven percent of jobs in the U.S. economy were in the service sector. Bureau of Labor Statistics, U.S. Dep't. of Labor, *Industry Output and Employment Projections to 2018: Table 2.1. Employment by Major Industry Sector, 2006, 2016, and Projected 2026*, *MONTHLY LAB. REV.*, http://www.bls.gov/emp/ep_table_201.htm (last modified Oct. 24, 2017). This same report found that twenty-nine of the thirty fastest growing jobs were located in the service sector. *Id.*

37. See, e.g., MINN. STAT. § 147.001 (2017) (“The primary responsibility and obligation of the Board of Medical Practice is to protect the public.”).

38. Allensworth, *supra* note 7.

sumer complaints; prohibiting deceptive advertising; and circulating industry information to the public.³⁹ However, boards' most relevant function for purposes of this discussion is licensure, or determining who may act as a provider in a regulated market. Medicine and law are examples of professions that have traditionally required licensure.⁴⁰ As state economies and service industries have grown, so too has occupational licensing. In 2015, over 800 distinct occupations in the United States required practitioners to be licensed.⁴¹ Regulated occupations range from cosmetologists to interior designers.⁴² Approximately one in four U.S. workers required a license to perform their chosen occupation in 2015; in the 1950s, that rate was just one in twenty.⁴³

2. Criticisms of Occupational Licensing

Critics of occupational licensing argue that licensing boards overstep their intended purpose of providing for consumer health and welfare, and insulate economic incumbents by keeping would-be competitors out of the market.⁴⁴ Critics point out that state governments derive some financial benefit by collecting licensure fees.⁴⁵ Additionally, regulated professionals and

39. See ABRAHAM L. WICKELGREN, RESPONDING TO THE NORTH CAROLINA DENTAL DECISION: A PRIMER FOR STATE REGULATORY BOARD COUNSEL AND BOARD SUPERVISORS 19–22 (2017) (identifying functions of regulatory boards other than licensing that may carry varying degrees of antitrust liability).

40. See FTC STAFF GUIDANCE, *supra* note 34. *But see* Allensworth, *supra* note 7, at 1570 (suggesting that traditionally licensed occupations like law and medicine are “inefficiently regulated in ways that increase wages without addressing quality,” and as a result, licensure schemes in these professions should be subjected to scrutiny).

41. FTC STAFF GUIDANCE, *supra* note 34 (citing Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014)).

42. *Id.*

43. See Kleiner & Krueger, *supra* note 35.

44. See *Hearing on Occupational Licensing*, *supra* note 27 (testimony of Robert Everett Johnson, Att’y, Institute for Justice).

45. See Gerald S. Kerska, *Economic Protectionism and Occupational Licensing Reform*, 101 MINN. L. REV. 1703, 1741 (2017) (citing *State Tax Collection Sources 2000–2013*, TAX POL’Y CTR., <http://www.taxpolicycenter.org/statistics/state-tax-collection-sources-2000-2013> (last visited Oct. 14, 2018)). *But see* MINN. STAT. § 214.06 (2017) (authorizing licensing boards, other than for health-related occupations, to collect sufficient relicensing fees to cover the board’s anticipated expenditures, and not more).

trade associations have a powerful voice in lobbying state governments to implement and sustain licensure requirements.⁴⁶

Critics of occupational licensing hail from both sides of the political aisle. In 2015, the Obama Administration issued a report outlining the economic harms of occupational regulation.⁴⁷ In 2017, federal legislation denouncing occupational board over-regulation was introduced by a slate of Republican lawmakers.⁴⁸ Advocates for licensing reform can be found in the federal government,⁴⁹ academia,⁵⁰ and the media.⁵¹ According to the Federal Trade Commission, “Unnecessary licensing restrictions erect significant barriers and impose costs that cause real harm to American workers, employers, consumers and our economy as a whole, with no measurable benefits to consumers or society.”⁵²

46. See Kerska, *supra* note 45, at 1724–25 (discussing the motivations and impacts of economic incumbents lobbying lawmakers to maintain high barriers to entry).

47. Compare OFFICE OF ECON. POLICY, DEPT OF TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf, with the policy of least-restrictive alternatives to licensing and the anti-licensure rhetoric in the Restoring Board Immunity Act, sponsored by Republican Congressmen. Restoring Board Immunity Act of 2017, H.R. 3446, 115th Cong. (2017). In the House of Representatives, the bill is sponsored by Representative Darrell Issa (R-CA), and co-sponsored by Representative Tim Walberg (R-MI). *H.R. 3446-RBI Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/3446/cosponsors> (last visited Oct. 14, 2018). In the Senate, the bill is sponsored by Senator Mike Lee (R-UT) and co-sponsored by Senators Ted Cruz (R-TX) and Ben Sasse (R-NE). *S. 1649-RBI Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1649/cosponsors> (last visited Oct. 14, 2018).

48. See *supra* note 47. The bill is intended to “help States combat abuse of occupational licensing laws by economic incumbents.” H.R. 3446; see also S. 1649, 115th Cong. (2017).

49. See *License to Compete: Occupational Licensing and the State Action Doctrine: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (2016) (written statement of the Federal Trade Commission).

50. See, e.g., Allensworth, *supra* note 7.

51. See, e.g., Patricia Cohen, *Moving to Arizona Soon? You Might Need a License*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/business/economy/job-licenses.html>; Josh Zumbrun, *Occupational Licenses May Be Bad for the Economy, But Good for Workers Who Have Them*, WALL ST. J. (Apr. 18, 2016), <https://www.blogs.wsj.com/economics/2016/04/18/occupational-licenses-may-be-bad-for-the-economy-but-good-for-workers-who-have-them>.

52. *Economic Liberty: Opening Doors to Opportunity*, FED. TRADE COMMISSION, <https://www.ftc.gov/policy/advocacy/economic-liberty> (last visited Oct. 14, 2018); see also FED. TRADE COMM’N, STAFF POLICY PAPER, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE REGISTERED NURSES (2014) (advocating for avoidance of unnecessary regulation); Letter from Fed. Trade Comm’n & U.S. Dep’t of Justice, to Daniel E. Shearouse,

In 2015, the Obama Administration issued a report finding that unnecessary licensing requirements “raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across state lines.”⁵³ Special interest groups including the Institute for Justice,⁵⁴ the Heritage Foundation,⁵⁵ the Brookings Institution,⁵⁶ and Reason Foundation⁵⁷ all advocate for reducing occupational licensing requirements.

Critics have challenged occupational licensing as an unconstitutional restriction of free speech,⁵⁸ as a due process violation, and as denial of equal protection under the law.⁵⁹ Licensing laws are criticized as disproportionately burdening military families,⁶⁰ and people in low-paying jobs.⁶¹ Licensing has also been

Clerk of Court, Supreme Court of S.C. (Apr. 15, 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-south-carolina-supreme-court-concerning-proposed-guidelines/v080010sc.pdf (describing their comment before the South Carolina Supreme Court concerning proposed guidelines for residential and commercial real estate closings).

53. OFFICE OF ECON. POLICY, DEP'T OF TREASURY ET AL., *supra* note 47, at 3.

54. Paul Avelar & Nick Sibilla, *Untangling Regulations*, INST. FOR JUST., <http://ij.org/report/untangling-regulations> (last visited Oct. 14, 2018); Ari Bargil, *Florida's Dirty Dozen*, INST. FOR JUST., <http://ij.org/report/floridas-dirty-dozen> (last visited Oct. 14, 2018); Dick M. Carpenter, II et al., *License to Work*, INST. FOR JUST., <http://ij.org/report/license-work-2> (last visited Oct. 14, 2018); *Economic Liberty*, INST. FOR JUST., http://ij.org/pillar/economic-liberty/?post_type=case (last visited Oct. 14, 2018); *Entrepreneurial Survival Guide*, INST. FOR JUST., <http://ij.org/report/entrepreneurs-survival-guide> (last visited Oct. 14, 2018).

55. James Sherk, *Creating Opportunity in the Workplace*, HERITAGE FOUND. (Dec. 16, 2014), <https://www.heritage.org/jobs-and-labor/report/creating-opportunity-the-workplace>.

56. MORRIS M. KLEINER, HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES (2015), https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf.

57. ADAM B. SUMMERS, REASON FOUND., OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES (2007), <https://reason.org/wp-content/uploads/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf>.

58. *See* Complaint for Declaratory & Injunctive Relief, *Del Castillo v. Philip*, No. 3:17-cv-00722 (N.D. Fla. Oct. 3, 2017) (challenging restriction of plaintiff's freedom to provide dietary advice on free speech grounds).

59. *See* *Martinez v. Mullen*, 11 F. Supp. 3d 149, 152 (D. Conn. 2014), *aff'd sub nom.* *Sensational Smiles, LLC v. Mullen*, 793 F. 3d 281 (2d Cir. 2015) (challenging restriction on non-dentist teeth whitening services as a deprivation of the due process right to engage in a lawful profession).

60. *See* *Kerska*, *supra* note 45, at 1707–08.

61. *See* Dick M. Carpenter, II et al., *The Occupations*, INST. FOR JUST., <http://ij.org/report/license-to-work/the-occupations> (last visited Oct. 14, 2018).

accused of perpetuating and steepening income inequality in the United States.⁶² Beyond these arguments that licensing laws create economic victims, many argue that licensing laws hurt the economy as a whole. Economists estimate that occupational licensing costs consumers between \$116 and \$139 billion annually in the form of higher-priced services.⁶³ The economic, constitutional, and social-policy based criticisms of occupational licensing make clear that, regardless of the intentions of state licensing, the effects are more far-reaching than merely protecting consumers.

C. *NORTH CAROLINA DENTAL* AND A NEW ERA OF ANTITRUST ENFORCEMENT

Prior to *North Carolina Dental*, the majority view was that occupational regulatory boards, as state agencies, were immune from antitrust liability under the state action immunity doctrine.⁶⁴ In *North Carolina Dental*, however, the Supreme Court held that occupational licensing boards controlled by market participants are not entitled to state action immunity because members have a strong incentive to act in their own interest rather than in the public interest.⁶⁵ This Section describes the genesis and evolution of the state action immunity doctrine, then explains how *North Carolina Dental* built on that doctrine to change antitrust liability facing “hybrid” state actors, or arms of the state controlled in part by private persons.

(noting the prevalence of licensing requirements in low- and moderate-income occupations).

62. See Jonathan Rothwell, *Myths of the 1 Percent: What Puts People at the Top*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/upshot/income-inequality-united-states.html>.

63. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 115 (2006).

64. See *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) (suggesting that traditional state agencies are likely immune to antitrust challenges, because the Court held that the Commission’s execution of a statutory prorate program was entitled to state action immunity). *But see* Edlin & Haw, *supra* note 41 (questioning status of immunity prior to *North Carolina Dental*).

65. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1105–06 (2015).

1. An Overview of the State Action Immunity Doctrine Prior to *North Carolina Dental*

Federal antitrust law is intended to encourage competition and preserve free markets by strongly disincentivizing anticompetitive conduct.⁶⁶ However, the Supreme Court has held that states acting in their sovereign capacities are entitled to restrain competition if doing so furthers other public goals.⁶⁷ This doctrine is known as state action immunity. Many commentators view the development of state action immunity as a necessary restriction on the reach of federal antitrust law.⁶⁸ After the New Deal Era expansion of the Commerce Clause, the reach of the federal government to regulate intrastate matters increased dramatically.⁶⁹ This in turn expanded the application of federal antitrust statutes like the Sherman Act far beyond the expectations of the enacting Congress, which could not have anticipated that federal antitrust law would be used to prosecute state-level officials.⁷⁰

The Supreme Court introduced the concept of state action immunity in the 1943 case *Parker v. Brown*.⁷¹ In this case, a California raisin producer challenged a state statute authorizing a program controlling marketing of the raisin crop.⁷² The statute at issue authorized programs to restrict competition among growers and maintain prices in order to serve a public goal other than competition—specifically, to “conserve the agricultural wealth of the State.”⁷³ The plaintiff-raisin producer challenged the validity of the program on several grounds, including the

66. *See id.* at 1109 (“Federal antitrust law is a central safeguard for the Nation’s free market structures The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.”).

67. *Id.* (holding that state legislatures may “impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives”); *Comty. Commc’ns Co. v. Boulder*, 455 U.S. 40, 53 (1982) (holding that “the States possess a significant measure of sovereignty” and are thus entitled to enact legislation that restrains competition in order to further public ends).

68. *See* Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1390 (2016).

69. *See id.*

70. *See id.*

71. 317 U.S. 341 (1943).

72. *Id.* at 344.

73. *Id.* at 346.

Sherman Act.⁷⁴ If the marketing program had been an agreement between private persons, the program would have violated the Sherman Act.⁷⁵ However, because the program was organized under state law, no antitrust liability attached. The Court explained, "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."⁷⁶ The Court held that the Sherman Act is intended to govern individual private action, and not state action. Thus, the state action immunity doctrine was born.

The Supreme Court returned to the issue of state action immunity in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, decided in 1980.⁷⁷ Here, the Court addressed the applicability of state action immunity to programs in which the state government is a passive facilitator, rather than an active administrator.⁷⁸ The state government in *Midcal* was passive in the sense that, although the state legislature consented to a specific regulatory scheme, the scheme was ultimately administered by private parties without state oversight.⁷⁹ Under California's price maintenance statutes for wholesale wine trade, wine producers and wholesalers were required to file contracts with the state.⁸⁰ These contracts governed the price at which wholesalers were permitted to sell producers' wines to individual merchants.⁸¹ If no contract existed, wholesalers filed a price schedule.⁸² Schedules and contracts for each producer's wines were binding on all wholesalers in the defined trading area.⁸³ The State of California exerted no control over wine prices, and did not review the reasonableness of the filed contracts or price schedules.⁸⁴

As in *Parker*, the Court held that California's statutory scheme for fixing wholesale wine prices would plainly violate the

74. *Id.* at 348-49.

75. *Id.* at 350.

76. *Id.* at 350-51.

77. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

78. *Id.*

79. *Id.*

80. *Id.* at 99.

81. *Id.*

82. *Id.*

83. *Id.* at 99-100.

84. *Id.*

Sherman Act if it were organized by private parties.⁸⁵ Next, the Court moved to consider “whether the State’s involvement in the price-setting program [was] sufficient to establish antitrust immunity under *Parker*.”⁸⁶ To answer this question, *Midcal* laid down a two-part test.⁸⁷ First, there must be a “clearly articulated and affirmatively expressed” state policy intending to displace competition.⁸⁸ Second, the state must actively supervise the actor charged with executing the policy.⁸⁹

The Court held that the wine pricing scheme met the first prong but failed the second, and as a result was not entitled to antitrust immunity.⁹⁰ The Court found insufficient evidence of active state supervision, noting that the state did “not monitor market conditions,” engage in examination of the statutory program, or regulate the terms of the contracts or price schedules.⁹¹ The fact that the price fixing scheme was statutorily endorsed by the state did not excuse the fact that it was principally a private agreement which had received the blessing of the California State legislature.⁹² In the absence of active state supervision, the Court held, “The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”⁹³

Finally, in *Town of Hallie v. City of Eau Claire*, the Court considered the applicability of state action immunity to municipalities.⁹⁴ The Court held that cities are unlike private persons

85. *Id.* at 103.

86. *Id.*

87. *Id.* at 105.

88. *Id.* (internal citations omitted). In most antitrust claims against state licensing boards, *Midcal*’s first prong will be easily met, and litigation will hinge primarily on whether the active supervision requirement is fulfilled. See Alenworth, *supra* note 7, at 1584 (“Boards typically meet the ‘clear articulation’ prong easily; courts have held that the ubiquitous statutory language giving licensing boards the authority to create professional entry and practice requirements suffices.” (citing *Benson v. Ariz. State Bd. of Dental Exam’rs*, 673 F.2d 272, 275–76 (9th Cir. 1982))). For a more robust discussion of *Midcal*’s first prong, see *FTC v. Pheobe Putney Health System, Inc.*, 133 S. Ct. 1003, 1013 (2013), holding that the clear articulation requirement is satisfied where “the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.”

89. *Midcal*, 445 U.S. at 105.

90. *Id.*

91. *Id.* at 105–06.

92. *Id.*

93. *Id.* at 106.

94. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

seeking state sanctioning of otherwise anticompetitive agreements, like the producers and wholesalers in *Midcal*, because cities are public institutions unlikely to have self-interested motivations in issuing these regulations.⁹⁵ However, cities do not act with the sovereignty of the state legislature, and as such are not entitled to *Parker* immunity.⁹⁶ Attempting to chart a middle ground, the Court held that cities are immune to antitrust challenges as long as they satisfy *Midcal*'s first prong—acting in accordance with a clearly articulated state policy.⁹⁷ *Hallie* thus created a “shortcut” for public actors like cities, which lack the sovereignty of the state legislature or state supreme court.⁹⁸

2. State Action Immunity and Occupational Licensing Boards After *North Carolina Dental*

Prior to *North Carolina Dental*, many states operated under the assumption that licensing boards were immune to antitrust liability under the state action doctrine of *Parker*, or at least were subject only to the clear articulation requirement under *Hallie*'s shortcut.⁹⁹ However, in *North Carolina Dental*, the Court found that the North Carolina Board of Dental Examiners was more similar to a private group, like a trade association, than a traditional state agency.¹⁰⁰ In so holding, the Court specifically noted the inherent danger of market participant board members acting in self-serving ways rather than in the public interest.¹⁰¹ As a result, the Court held that the antitrust claim facing the Board was subject to review under *Midcal*'s two-part

95. *Id.* at 47.

96. *Id.*

97. *Id.* at 46 (“The active state supervision requirement should not be imposed in cases in which the actor is a municipality.”).

98. See Allensworth, *supra* note 68, at 1400 (describing *Hallie*'s “shortcut”).

99. See, e.g., Op. Cal. Att'y Gen., *supra* note 6, at 4–5. *But see* Hoover v. Ronwin, 466 U.S. 558, 579–81 (1984) (holding that an accountancy board limiting the number of new licenses to be issued could be subject to antitrust scrutiny if the state supreme court did not have ultimate authority over the issue); Bates v. State Bar of Ariz., 433 U.S. 350, 359–60 (1977) (holding that a board controlled by attorneys was immune from antitrust concerns only because the adopting regulations deterring attorneys from advertising or engaging in price competition was ultimately the Arizona Supreme Court's decision). Thus, while many state occupational boards assumed that they were entitled to antitrust immunity under the state action doctrine, there is ample Supreme Court case law prior to *North Carolina Dental* suggesting that boards fully controlled by market participants are not immune to antitrust challenges.

100. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1106 (2015).

101. *Id.* at 1116–17.

test.¹⁰² The Court found that the Board failed to satisfy *Midcal's* active supervision requirement, and as a result had violated the Sherman Act without the cover of state action immunity.¹⁰³

Understanding the nuances and implications of the Court's holding in *North Carolina Dental* requires a brief review of the facts and circumstances surrounding this case. Practicing dentists had complained to the Board that non-dentists were offering teeth whitening services at below-market rates.¹⁰⁴ In response, the Board issued cease and desist letters to providers of teeth whitening services acting without a dentistry license.¹⁰⁵ The issuance of the cease and desist letters ultimately led to the Board's liability under the Sherman Act.¹⁰⁶ The decision to issue the cease and desist letters was not subject to review by the state.¹⁰⁷ In addition, the decision to issue cease and desist letters rather than taking the non-dentist teeth whiteners to court meant that the Board's action was self-executing, in that it did not require approval or ratification by any independent body in order to be effective.¹⁰⁸ The Board's determination that the term dentistry in its authorizing statute included the practice of teeth whitening was similarly unsupervised by the State.¹⁰⁹ Accordingly, once the Court decided that the Board was not subject to *Parker* immunity or *Hallie's* shortcut, but rather to *Midcal's* two-prong test, the case had essentially been decided against the Board.¹¹⁰

North Carolina Dental is problematic for state occupational licensing boards for two main reasons: it creates a heavy liability

102. See *id.* at 1114 (“The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity.”).

103. *Id.* at 1117.

104. *Id.* at 1108.

105. *Id.*

106. *Id.* at 1108–09.

107. *Id.*

108. See Transcript of Oral Argument at 10–11, *N.C. Dental*, 135 S. Ct. 1101 (No. 13-543) (raising the issue of self-executing board action in a question by Justice Ginsburg, who stated, “[Y]ou can have such a board, but there needs to be a check of supervision; that is, they can’t just go make their regulations without approval from some State entity and they can’t go around issuing cease and desist orders. They have to come to a court . . . and the court would act as a check”); see also WICKELGREN, *supra* note 39, at 13 (noting that when a board “enforces a statute on its own,” the action carries antitrust risk, but the board is likely “immune if it asks the court to enforce the statute”).

109. *N.C. Dental*, 135 S. Ct. at 1110.

110. *Id.* at 1105–06.

risk, and is light on guidance regarding how to comply with the legal framework it sets out.

First, antitrust suits are notoriously complex and expensive to defend, not least of all because the Sherman Act awards automatic treble damages.¹¹¹ Much of what occupational boards do in terms of regulating service providers is subject to attack under Section 1 of the Sherman Act, which provides, that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce” is illegal.¹¹² The legal exposure of the approximately 1790 occupational boards across the United States is therefore substantial.¹¹³

Second, the *North Carolina Dental* decision is ambiguous and vague in several respects. The decision fails to define what it means for a board to be “dominated” by market participants—a condition the opinion suggests is necessary to trigger *Midcal*’s two-pronged scrutiny.¹¹⁴ To this end, advisory opinions have counseled states to understand any number of active market participants on the board—even a single member—makes *Parker*’s automatic state action immunity unavailable.¹¹⁵

The *North Carolina Dental* decision is also ambiguous regarding the requirements of active state supervision, merely stating that this is a context-dependent inquiry.¹¹⁶ The Court attempts by negative definition to sketch the shape of adequate active supervision processes, explaining that the mere option to veto board action is insufficient.¹¹⁷ Ultimately, however, there is scarce guidance regarding how to fulfill *Midcal*’s second prong, and it will be up to the lower courts to define what is necessary through litigation.

On the issue of active state supervision, not only does *North Carolina Dental* leave unresolved the question of which processes are required to constitute active supervision, it also fails

111. See 15 U.S.C. § 15(a) (2012). Justice Kennedy raised this same issue at Oral Argument. Transcript of Oral Argument at 39, *N.C. Dental*, 135 S. Ct. 1101 (No. 13-543) (“[I]f I were a private practitioner and . . . a neurologist came to me and said, I think it’s important for us to do standards, can I get on this board? I say, have no part of it. Triple damages, attorneys’ fees. You can’t even afford to defend this case. Get off that board.”). Justice Breyer also raised the issue of treble damages at Oral Argument. *Id.* at 31.

112. 15 U.S.C. § 1 (2012).

113. Allensworth, *supra* note 7.

114. *N.C. Dental*, 135 S. Ct. at 1106.

115. See WICKELGREN, *supra* note 39, at 4.

116. *N.C. Dental*, 135 S. Ct. at 1106–07.

117. *Id.* at 1107.

to address the necessary composition of the supervising body. Stated differently, *North Carolina Dental* provides little to no instruction regarding how supervision ought to be achieved or who should do the supervising.

On the issue of who should be doing the supervising, *Midcal* dictates that immunity attaches where the supervising body acts with the sovereign power of the state.¹¹⁸ It is unclear, however, which state bodies act with sufficient state sovereignty, and which do not. At oral argument, Justice Breyer used the term “Stateness” to refer to the degree to which a given public body has the sovereign properties of the state.¹¹⁹ To trigger state action immunity, the supervising body must act with sufficient “Stateness” to transform the ruling of the board into the ruling of the state.¹²⁰ Where the line of sufficient “Stateness” lies is unsettled, and the Court has provided very little by way of guideposts to inform the analysis. State legislatures and state supreme courts plainly act with sufficient “Stateness.”¹²¹ However, it is impractical to require the legislature or supreme court to substantively review and affirmatively adopt every recommendation of each professional licensing board in the state. Authorizing a traditional state agency with no market participants to review and adopt licensing board decisions is likely, but not certain, to carry sufficient “Stateness.”¹²² *Hallie* dictates that cities do not act with sufficient “Stateness” absent a clearly articulated policy to displace competition, but the sovereign status of state bodies between a state legislature and supreme court on one pole, and cities on the other, leaves much to be defined.¹²³

118. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 103–04 (1980).

119. Transcript of Oral Argument at 22, *N.C. Dental*, 135 S. Ct. 1101 (No. 13-534).

120. *Midcal*, 445 U.S. at 103–04.

121. There is a general consensus that acts of state supreme courts and state legislatures are sovereign state acts entitled to immunity. See Transcript of Oral Argument at 29, *N.C. Dental*, 135 S. Ct. 1101 (No. 13-534) (discussing that state supreme courts and legislatures act on behalf of the state).

122. Allensworth, *supra* note 68, at 1435–36 (“[T]he *NC Dental* [sic] Court’s declaration can be read as indicating that an inherently captured board can no longer bootstrap the supervision requirement by reporting to another version of itself: a self-interested sub-state entity. That leaves two possible categories of supervisors: sovereign branches of the state government or sub-state entities that are not so self-interested as to need supervision themselves.”).

123. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38–40 (1985).

In sum, the ambiguities that follow from *North Carolina Dental* are substantial. States have very little guidance regarding: (1) at what point boards are considered “dominated” by market participants; (2) the review processes necessary to constitute “active supervision;” or (3) the composition of the state body responsible for supervision. The result is a confused and jumbled area of the Court’s jurisprudence. The opaque nature of the law can only encourage further litigation, ratcheting states’ liability risk under *North Carolina Dental* ever higher.

D. STATE RESPONSES TO *NORTH CAROLINA DENTAL*

Many states acted quickly to address the newly recognized antitrust liability facing regulatory boards under *North Carolina Dental*. State responses aimed at fulfilling the active supervision requirements of *Midcal*’s second prong have taken various forms, including executive orders,¹²⁴ state attorneys’ general opinions,¹²⁵ and legislation attempting to establish state action immunity.¹²⁶

Connecticut, for example, amended its existing statutes, effective 2016, to give the Commissioner of Consumer Protection greater power over the boards overseen by the department.¹²⁷ The authorizing statute was amended so that any licensing or certification-related decision of the board with adverse consequences to a party is considered a recommendation, subject to the commissioner’s final decision.¹²⁸ Similar amendments were made to authorizing statutes for boards under Connecticut’s Department of Education¹²⁹ and the Department of Public Health.¹³⁰ Similarly, Georgia acted quickly to pass legislation giving the governor supervisory power over decisions made by occupational licensing boards across the state.¹³¹

Other states have central review offices currently in place likely to satisfy *Midcal*’s requirement that board decisions are

124. See *supra* note 9 and accompanying text (cataloging executive orders out of Delaware and Oklahoma).

125. See *supra* note 9 and accompanying text (highlighting California, Florida, and Idaho as states responding with state attorneys’ general opinions).

126. See *supra* note 9 and accompanying text (taking note of legislative responses in Arizona, Arkansas, Louisiana, and North Carolina).

127. CONN. GEN. STAT. § 21a-7 (2017).

128. *Id.* § 21a-7(a)(1).

129. *Id.* § 10-153f(b).

130. *Id.* § 20-8a(g).

131. See Georgia Professional Regulation Reform Act, H.B. 952, 153d Gen. Assemb., 2d Sess. (Ga. 2016) (codified at GA. CODE ANN. § 43-1C-3).

subject to active supervision. Colorado, for example, has a Division of Professions and Occupations (DPO), housed in the Colorado Department of Regulatory Agencies (DORA).¹³² DPO views promoting competition in the Colorado business community as a primary responsibility of the Office.¹³³ DPO's core functions are licensing, regulation, and investigation of consumer complaints across approximately fifty occupations.¹³⁴ Outside of merely overseeing licensing decisions, DPO helps to set a regulatory agenda for the State, which in recent years has included: intensifying regulation and licensing requirements for the massage industry in response to human trafficking violations;¹³⁵ preventing diversion of controlled substances by healthcare practitioners, particularly in the face of the opioid epidemic;¹³⁶ and relaxing licensure requirements for mental health practitioners in response to a statewide labor shortage.¹³⁷ DPO goes beyond merely adding an additional layer of bureaucracy, giving board licensure decisions the State's rubber-stamped seal of approval. Instead, DPO helps to unify regulatory and licensing efforts across the state, and drives efficiencies by using common systems to recruit and license qualified practitioners, conduct investigations and inspections, communicate with and educate consumers and industry practitioners, and administer regulatory programs.¹³⁸

Similarly, California's licensing boards are already centrally housed within the Department of Consumer Affairs.¹³⁹ In an opinion letter issued just months after *North Carolina Dental* was issued, California State Attorney General Kamala Harris opined that California could comply with *North Carolina Dental* with "minimal adjustments to procedures and outlooks" by using "existing resources" to create "lines of active supervision . . . for the boards' most market-sensitive actions."¹⁴⁰

132. See COLO. REV. STAT. § 24-34-102 (2016) (creating the Division of Professions and Occupations).

133. COLO. DEPT OF REGULATORY AGENCIES, FY 2016/2017 ANNUAL REPORT 1-2 (2017) (acknowledging competitive considerations).

134. *Id.* at 4.

135. *Id.* at 22.

136. *Id.* at 8-9.

137. *Id.* at 21.

138. See *id.* at 1-2 (explaining the mission of the Division of Professions and Occupations and its enacted initiatives).

139. Op. Cal. Att'y Gen., *supra* note 6, at 13.

140. *Id.*

Existing state structures such as those in Connecticut, Colorado, and California, have the advantage of already being ingrained in state regulatory and licensure systems. Reliance on these structures also has the benefit of preventing duplicative regulation between state and federal governments.

E. THE RESTORING BOARD IMMUNITY ACT OF 2017: A FEDERAL RESPONSE TO *NORTH CAROLINA DENTAL*

In addition to legislative responses from states, federal lawmakers also introduced legislation seeking to address the increased liability of state occupational boards. In July of 2017, identical versions of the Restoring Board Immunity Act (RBI Act) were introduced in the House and Senate.¹⁴¹ At the time of this writing, both bills were pending in committee.¹⁴²

The RBI Act outlines two paths to immunity for state licensing boards. States may either establish a “mechanism for meaningful active supervision of licensing boards by State officials” or establish a “mechanism for meaningful judicial review of board actions in the State courts.”¹⁴³ Hereafter, these two paths to immunity will be referred to as “active supervision” and “judicial review,” respectively. The bill mandates procedures that boards making licensing decisions must follow.¹⁴⁴ Other functions of state occupational boards are not addressed by the RBI Act, and the statute provides no means of obtaining antitrust immunity for acts of the board not related to licensing.¹⁴⁵

1. Obtaining Immunity via Active State Supervision

To gain immunity through active supervision, the following elements must be met: First, the board must be acting pursuant to a nonfrivolous interpretation of state law.¹⁴⁶ This requirement is largely equivalent to the “clearly articulated policy,” or the first prong of *Midcal*.¹⁴⁷ Second, the State must adopt a policy of

141. H.R. 3446, 115th Cong. (2017); S. 1649, 115th Cong. (2017).

142. This information is still accurate as of September 4, 2018.

143. H.R. 3446 § 2(1).

144. *Id.* § 5.

145. Marketing plans like the one adopted in *Midcal* to control cost and supply, for example, do not implicate licensing, but do implicate antitrust concerns. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 99 (1980). Restrictions on advertisements and inconsistent enforcement of occupational regulations are other examples of anticompetitive actions boards may take that are not related to licensing.

146. H.R. 3446 § 5(a)(1).

147. *Id.*

using “less restrictive alternatives” to licensing whenever possible.¹⁴⁸

a. Part One: State Implementation of Federal Policy

For boards to receive immunity under the RBI Act, a state must adopt the RBI Act’s licensure policy.¹⁴⁹ Under this policy, less restrictive alternatives must be used in lieu of licensing across all regulated professions, unless adoption of alternatives will not suffice to protect consumers from “real, substantial threats to public health, safety, or welfare.”¹⁵⁰ The bill defines less restrictive alternatives as “inspections, bonding or insurance requirements, registration, and voluntary certification.”¹⁵¹

In addition to substituting less restrictive alternatives wherever health, safety, and welfare concerns allow, a state must also adopt a policy of construing the authority of licensing boards narrowly, covering only individuals selling “goods or services that are included explicitly in the statute or regulation.”¹⁵² Under this construction, the North Carolina Board of Dental Examiners would have lacked power to regulate teeth whiteners, because teeth whitening is not explicitly included in the statutory definition of dentistry.¹⁵³

b. Part Two: State Implementation of Federal Legislation

To achieve immunity under the RBI Act, a state must enact legislation providing for active supervision of all licensing decisions made by all occupational licensing boards.¹⁵⁴ This entails the establishment of an Office of Supervision of Occupational Boards (Office) to review board licensing activity and audit for compliance with the policy outlined above.¹⁵⁵ To be enforceable, board decisions must be affirmatively endorsed in writing by the Office.¹⁵⁶ The statute outlines with some detail the responsibili-

148. *Id.* § 3(5).

149. *See id.* § 4(b) (requiring states to perform the licensure policy obligations listed in sections five and six to receive immunity).

150. *Id.* § 5(a)(2).

151. *Id.* § 2(4).

152. *Id.* § 5(b)(3).

153. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1110 (2015).

154. H.R. 3446 § 5(c).

155. *Id.* § 5(c)(2)(A).

156. *Id.* § 5(c)(2)(B)(i).

ties of the Office, its interaction with state boards, and its composition.¹⁵⁷ In addition, a state must review all existing occupational regulations for compliance with the policy outlined above.¹⁵⁸ Over a five-year period, a state must determine whether any currently existing licensing requirements may be replaced with less restrictive alternatives.¹⁵⁹

2. Obtaining Immunity via Judicial Review

The path to immunity through judicial review mirrors the active supervision path. The judicial review path also requires states to adopt federal law and implement federal policy. In addition, a state must create a private right of action to prevent enforcement of occupational licensing laws.¹⁶⁰ Judicial review of the licensing requirement must be *de novo*, and may not rely on “hypothetical risks to public safety” to justify the licensure law.¹⁶¹

II. THE EXTENT OF BOARD EXPOSURE UNDER *NORTH CAROLINA DENTAL* AND THE EFFICACY OF RESCUE LEGISLATION

After *North Carolina Dental* was decided, state boards moved from presumed antitrust immunity to potential liability for any market-sensitive act.¹⁶² However, given the scope of the legislative and executive response to this increased litigation risk, it is worth examining whether the litigation risk facing state boards is substantial enough to justify such a reactionary outpour. After reviewing the risk posed to states, state boards, and individual board members, this Part will survey litigation that has followed *North Carolina Dental* to date in order to establish a preliminary sense of the legal risk states now bear. After concluding that the litigation risk is too great to go unaddressed by states, this Part will next argue that both federal and state legislative responses seeking to limit board liability are insufficient, and that a new approach must be sought.

157. See *id.* §§ 5(c)(2)–(3) (describing the duties of the office, as well as the internal review procedures).

158. *Id.* § 5(c)(5).

159. *Id.* § 5(c)(5)(B).

160. *Id.* § 6(b)(1)(C).

161. *Id.* § 6(b)(2).

162. See *supra* note 99 and accompanying text.

A. DEFINING THE TRUE RISK TO STATE BOARDS POST-*NORTH CAROLINA DENTAL*

North Carolina Dental raises difficult questions of whether and to what extent state licensing board members are covered by state indemnification regimes, which in many states are designed only to cover more limited risk of liability attaching to due process lawsuits. Prior to *North Carolina Dental*, state licensing boards already shouldered substantial litigation risk. Licensing boards are regularly sued on due process grounds by applicants denied licensure.¹⁶³ However, antitrust lawsuits are different than due process suits in several respects. First, and perhaps most relevant to state legislators seeking to protect legal defense funds from drainage, antitrust liability under the Sherman Act carries treble damages.¹⁶⁴ This was not at issue in *North Carolina Dental* because plaintiffs were seeking only an injunction, and no monetary damages.¹⁶⁵ Second, antitrust lawsuits are often highly complex and technical, sometimes involving analysis of economic impacts that require expert testimony in a way that due process claims do not.¹⁶⁶ Antitrust lawsuits are costly to litigate, even when favorably resolved.¹⁶⁷

Part of the reason the response to *North Carolina Dental* has been so substantial may be the sheer number of boards the

163. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975) (challenging the decision of a state medical board on Due Process grounds); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (challenging the decision of state board of optometry on Due Process grounds); see also *Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373 (1985) (challenging denial of membership in American Academy of Orthopedic Surgeons on Due Process grounds).

164. See 15 U.S.C. § 15(a) (2012).

165. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1106 (2015).

166. See Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of Experts*, 106 NW. L. REV. 1261 (2012) (discussing the cost and complexity of expert witness testimony in antitrust litigation).

167. In 2017, antitrust and securities litigation combined to make up twenty-one percent of all class action defense spending, despite the fact that antitrust suits are relatively uncommon. CARLTON FIELDS, *THE 2018 CARLTON FIELDS CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION* 7 (2018), <https://classactionsurvey.com/pdf/2018-class-action-survey.pdf>. In 2017, antitrust litigation constituted 12.6% of all corporate class action defense matters, but accounted for 13.5% of spending. *Id.* Other than consumer fraud, no other type of class action defense carried such a disparity between cost of defense and frequency of litigation. *Id.*

decision impacts.¹⁶⁸ In 2017, there were 1790 active state licensing boards.¹⁶⁹ Almost by definition, licensing boards act to restrict access to the market for some providers. Depending on facts and circumstances, this may be an anticompetitive act subject to liability under the Sherman Act. Even in cases where no liability is found, the hassle and expense of litigating antitrust challenges are substantial. In a recent antitrust case filed against a state board of medical examiners in which the board was ultimately found not liable, the cost of defending the suit was hundreds of thousands of dollars.¹⁷⁰

Further, under the Sherman Act, antitrust liability attaches whenever there is an unreasonable restriction of trade, even if the board's action does not eliminate competition, as it did in *North Carolina Dental*.¹⁷¹ Given the nature of the board's regulatory function, if boards are unable to satisfy the clearly articulated policy and active supervision requirements of *Midcal*, much of the board's activity will be effectively hamstrung by antitrust law.¹⁷²

The litigation risk discussed above in the context of board liability is further exacerbated when considered in the context of board members being sued in their individual capacity. The vast majority of antitrust suits against state boards filed since *North Carolina Dental* have named board members in their individual capacities, seeking damages.¹⁷³ Defendants in *North Carolina Dental* argued that imposing antitrust liability on state licensing boards would create a disincentive to private citizens to serve on boards.¹⁷⁴ The Court dismissed this concern on the basis that most individual board members are indemnified by the state,

168. See Allensworth, *supra* note 7, at 1571 (opining that, because pre-*North Carolina Dental* supervision of licensing boards was threadbare in many states, and because active market participants "control almost every board," the monetary risk to states under *North Carolina Dental* is substantial).

169. *Id.* at 1570.

170. See *Hearing on Occupational Licensing*, *supra* note 27, at 37 (additional written responses of Sarah Oxenham Allen) (citing summary judgement decision in favor of the Virginia Board of Medicine, affirmed by the Fourth Circuit in *Petrie v. Virginia Board of Medicine*, 648 F. App'x 352 (4th Cir. 2016)).

171. 15 U.S.C. § 1 (2012).

172. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 103–04 (1980).

173. See *Hearing on Occupational Licensing*, *supra* note 27, at 36 (additional written responses of Sarah Oxenham Allen) ("[A]t least two-thirds of the dozens of antitrust cases that have been brought against state licensing boards following *North Carolina Dental* have also named as defendants board members in their official and individual capacities and requested damages from them.").

174. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1115 (2015).

and because no monetary damages were sought in *North Carolina Dental*.¹⁷⁵ While antitrust suits brought by government agencies are unlikely to seek damages against individual board members, private plaintiffs suing state licensing boards are able and likely to seek treble damages against individual board members.¹⁷⁶

The aftermath of *North Carolina Dental* has demonstrated that the Court's dismissive treatment of individual board member liability failed to take full account of the ways in which state indemnification regimes interact with treble damages sought under federal antitrust laws. Many states cap indemnification funding at a certain dollar amount, or refuse to indemnify defendants against punitive damages.¹⁷⁷ As noted above, the uncertain application of Florida's indemnification scheme to antitrust damages caused two board members to resign.¹⁷⁸

Similarly, California's indemnification statute for state government employees is uncertain to shield board members from individual liability. The Government Claims Act, like many state statutes, does not indemnify litigants against punitive damages.¹⁷⁹ Whether treble damages constitute punitive damages for which board members may not seek indemnification is an open question. Although the California Attorney General has opined that treble damages do not constitute punitive damages within the meaning of the Government Claims Act, this represents yet another unresolved question that California and states with similar caps on indemnification must navigate in the post-*North Carolina Dental* legal landscape.¹⁸⁰

175. *Id.* at 1115–16.

176. Allensworth, *supra* note 7, at 1590 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–92 (1975) (remanding case to allow private plaintiffs to seek treble damages against members of state bar association)); John E. Lopatka & William H. Page, *State Action and the Meaning of the Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 292 (2003) (explaining that individual members of public/private hybrid offices are subject to “the whole panoply of antitrust remedies”).

177. *State Sovereign Immunity and Tort Liability*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx> (last updated Oct. 14, 2010) (noting that thirty-three states statutorily limit the amount of damages that may be paid by the state); *see also* Op. Cal. Att'y Gen., *supra* note 6, at 15–18 (questioning whether treble damages constitute punitive damages and thus whether the state must pay them); *see also supra* note 16 and accompanying text.

178. *See supra* notes 1–3, 12, and 16 and accompanying text.

179. CAL. GOV'T CODE § 818 (West 2018).

180. *See* Op. Cal. Att'y Gen., *supra* note 6; *supra* note 6 and accompanying text.

Finally, even where board members do have a right to indemnification, there is no right to exculpation.¹⁸¹ The time taken by litigation, the stress attached to being named as a defendant, and the potential personal privacy cost of discovery are all strong disincentives to professionals serving on state licensing boards. These concerns are not theoretical; in a 2016 case brought against the Virginia Board of Medicine, each of the five board members named in the suit faced deposition and were required to produce private information regarding their professional practice and personal finances.¹⁸²

By any account, the Court's decision in *North Carolina Dental* gave rise to a flood of litigation against state boards and their individual members. This liability risk is exacerbated by treble damages and the uncertain application of indemnification schemes.¹⁸³ The effects of *North Carolina Dental* have proved far-reaching and are unlikely to subside in the near future, absent legislative intervention.

B. OVERVIEW OF POST-*NORTH CAROLINA DENTAL* LITIGATION AGAINST STATE LICENSING BOARDS

Perhaps the best indication of the scope of risk that follows from *North Carolina Dental* can be gleaned from an overview of litigation that has occurred since the Supreme Court issued the decision in 2015.¹⁸⁴ Since that time, suits have been filed in at

181. See *Hearing on Occupational Licensing*, *supra* note 27, at 7 (written statement of Sarah Oxenham Allen) (describing methods for achieving immunity for board members).

182. *Id.* at 37 (additional written responses of Sarah Oxenham Allen).

183. See 15 U.S.C. § 15 (2012); *supra* note 16 and accompanying text.

184. See Allensworth, *supra* note 7, at 1579–82, for a broad synthesis of the antitrust litigation spawned by *North Carolina Dental*, describing suppression of innovative practices, unreasonable and unfair entry barriers, and scope-of-practice challenges as the three major categories of litigation against state licensure boards.

least nine states including Arizona,¹⁸⁵ California,¹⁸⁶ Connecticut,¹⁸⁷ Georgia,¹⁸⁸ Indiana,¹⁸⁹ Louisiana,¹⁹⁰ Missouri,¹⁹¹ Nevada,¹⁹² North Carolina,¹⁹³ Pennsylvania,¹⁹⁴ Texas,¹⁹⁵ and the District of Puerto Rico.¹⁹⁶ State board antitrust challenges have been heard by the Third,¹⁹⁷ Fourth,¹⁹⁸ Fifth,¹⁹⁹ Ninth,²⁰⁰ and Tenth Circuits.²⁰¹ This list does not purport to be comprehensive, but is intended to give some indication of the scope of litigation

185. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir.), *cert. granted*, 138 S. Ct. 499 (2017).

186. *Gonzales v. Dep't of Real Estate*, No. 2:15-cv-2448 GEB GGH PS, 2017 WL 2464515, at *1 (E.D. Cal. June 7, 2017), *report and recommendation adopted* by No. 2:15-cv-2448 GEB GGH PS, 2017 WL 3953893 (E.D. Cal. Sept. 8, 2017).

187. *Robb v. Conn. Bd. of Veterinary Med.*, 157 F. Supp. 3d 130 (D. Conn. 2016).

188. *Complaint for Damages, Declaratory Judgment, & Injunctive Relief, Julien v. Ga. Bd. of Dentistry*, No. 1:17-cv-04045-AT, 2017 WL 4583234, at *1 (N.D. Ga. Oct. 12, 2017); *Colindres v. Battle*, No. 1:15-cv-02843-SCJ, 2016 WL 4258930, at *1 (N.D. Ga. June 6, 2016).

189. *Prime Healthcare Servs.-Monroe, LLC v. Ind. Univ. Health Bloomington*, No. 1:16-cv-00003-RLY-DKL, 2016 U.S. Dist. LEXIS 136474, at *1 (S.D. Ind. Sept. 30, 2016).

190. *Rodgers v. La. Bd. of Nursing*, 665 F. App'x 326, 326 (5th Cir. 2016), *cert denied*, 137 S. Ct. 2162 (2017) (denying nursing student's antitrust claim against state board after the board terminated a university's nursing program, and holding that the "district court was not required to determine whether the policy was actively supervised by the state in evaluating the board's claim for sovereign immunity").

191. *Wallen v. St. Louis Metro. Taxicab Comm'n*, No. 4:15-cv-1432 HEA, 2016 WL 5846825, at *1 (E.D. Mo. Oct. 6, 2016).

192. *Strategic Pharm. Sols., Inc. v. Nev. State Bd. of Pharmacy*, No. 2:16-cv-171-RFB-VCF, 2016 WL 3002370, at *1 (D. Nev. May 24, 2016) (dismissing action without prejudice as a result of settlement requiring legislative action).

193. *Jemsek v. N.C. Med. Bd.*, No. 5:16-CV-59-D, 2017 U.S. Dist. LEXIS 23570, at *1 (E.D.N.C. Feb. 20, 2017).

194. *Bauer v. Pa. State Bd. of Auctioneer Exam'rs*, 188 F. Supp. 3d 510 (W.D. Pa. 2016).

195. *Allibone v. Tex. Med. Bd.*, No. A-17-CA-00064-SS, 2017 WL 4768224, at *1 (W.D. Tex. Oct 20, 2017); *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606 (W.D. Tex. 2016).

196. *Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado*, No. CV 14-1533, 2015 WL 9484490, at *1 (D.P.R. Dec. 29, 2015).

197. *See Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567 (3d Cir. 2017).

198. *Petrie v. Va. Bd. of Med.*, 648 F. App'x 352 (4th Cir.), *cert denied*, 137 S. Ct. 524 (2016).

199. *Rodgers v. La. Bd. of Nursing*, 665 F. App'x 326 (5th Cir. 2016).

200. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017).

201. *Auraria Student Hous. v. Campus Vill. Apartments*, 843 F.3d 1225 (10th Cir. 2016).

that has followed in the wake of *North Carolina Dental*. However, commentators suggest that the litigation risk indicated by litigation to date may grossly understate the true liability facing boards across the country.²⁰²

Despite the extensive litigation that has followed *North Carolina Dental*, common law is unlikely to provide an adequate solution to state board antitrust liability. Litigation has failed to produce general principles at common law in part because the issues in these cases are too diverse to create coherent, broadly applicable common law doctrine.²⁰³ State licensing boards regulate a wide variety of professions, and perform a multitude of regulatory functions.²⁰⁴ As a result, the issues presented in the post-*North Carolina Dental* cases to date are too wide ranging to begin coalescing around tidy common law principles.²⁰⁵

An additional reason for pursuing a legislative, rather than common law solution is that as litigants continue to test the contours of *North Carolina Dental* in court, the litigation costs will continue to strain state legal defense funds.²⁰⁶ Defendants in litigation following from *North Carolina Dental* are—of necessity—state bodies, dependent on taxpayer support to defend themselves. Reliance upon common law to provide answers to the ambiguities of *North Carolina Dental* therefore places a heavy fiscal burden on states, and diverts resources from other areas of public concern.²⁰⁷

202. Allensworth, *supra* note 7, at 1580 (“[F]or every board that has been sued, there are more than one hundred others that are potentially vulnerable.”).

203. Compare *Rodgers*, 665 F. App’x at 326 (considering the antitrust liability of a state medical board after the board terminated a nursing program from which petitioner had graduated), with *Bauer v. Pa. State Bd. of Auctioneer Exam’rs*, 188 F. Supp. 3d 510 (W.D. Pa. 2016) (considering the antitrust liability of the Pennsylvania State Board of Auctioneers for imposing citations and fines on an attorney who auctioned toy trains on the internet).

204. E.g., *List of Iowa Boards and Commissions*, IOWA.GOV, <https://openup.iowa.gov/boardlist> (last visited Oct. 14, 2018) (listing over 200 boards, commissions, and councils, including professional boards managing podiatry, speech pathology, barbering, and message therapy).

205. Compare *Allibone v. Tex. Med. Bd.*, No. A-17-CA-00064-SS, 2017 WL 4768224 (W.D. Tex., Oct 20, 2017) (brought because of discriminatory practices favoring one form of medical practice over another), with *Strategic Pharm. Sols., Inc. v. Nev. State Bd. of Pharmacy*, No. 2:16-cv-171-RFB-VCF, 2016 WL 3002370 (brought because the board was promoting a monopoly).

206. Cf. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1174–75 (2016) (showing that in instances of lawsuits brought against local law enforcement agencies, defending jurisdictions in some instances have to draw the funds from its general fund).

207. *Id.*

Finally, in many respects, the twisted path of the common law is what created this confused and confusing state of anti-trust law in the first place. As noted above, judicial expansion of the Commerce Clause expanded the reach of the Sherman Act far beyond the intent of the enacting Congress.²⁰⁸ In response, the Court created state action immunity in order to shield states from antitrust liability.²⁰⁹ *North Carolina Dental* represents the latest iteration of the Court's definition of state action immunity—a strain of jurisprudence itself a testament to the ill-fitting application of antitrust law to public regulatory action.²¹⁰ The result of this judge-made law culminating in *North Carolina Dental* essentially imposes a procedural requirement—states must review and affirmatively adopt the decisions of state boards in order to shield the decisions from antitrust liability—but should the *state* fail to faithfully exercise this mandated process, the *board* and its individual members bear antitrust liability and potential treble damages.²¹¹ If this is where the common law has led us, it is perhaps time for a clear and well-considered statutory scheme to lead us out.

C. FAILURES OF THE RESTORING BOARD IMMUNITY ACT OF 2017

For the reasons outlined below, federal and state responses to *North Carolina Dental* proposed to date are insufficient. The RBI Act is both inadequate and overbroad in its approach. While there are instances of states facilitating careful administrative review according to procedures likely to satisfy *Midcal's* second prong,²¹² there is no guarantee that state legislation will satisfy the Court's ill-defined active supervision requirement. A solution to federal antitrust liability dependent on state statutes is less certain than a federal solution, and may still lead to excess and expensive litigation as a result.

The RBI Act paints with too broad a brush, failing to differentiate between the many occupations regulated by boards, and

208. See *supra* Part I.C.1.; see also *Wickard v. Filburn*, 317 U.S. 111 (1942) (expanding the reach of the Commerce Clause).

209. See *supra* notes 71, 76–77, 89, 94–99 and accompanying text.

210. The Supreme Court acknowledged this ill fit in *Parker*, holding that the Sherman Act is intended to guard against individual private action, but not state action. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

211. 15 U.S.C. § 15(a) (2012) (providing for treble damages).

212. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) (stating the second prong is that the state must actively supervise the actor charged with executing the policy).

fails to hit its target, offering the carrot of immunity without addressing the Court's underlying concerns regarding boards' anticompetitive actions.²¹³ The RBI Act applies only to licensure, and fails to address a myriad other board functions which may have anticompetitive effects that should be weighed and balanced. In this sense, the RBI Act simultaneously does too much—imposing a federal regulatory agenda over the top of existing state statutes and regulations—and not enough, by failing to address nuances of the very different industries that licensing boards regulate.

1. The Restoring Board Immunity Act Addresses Only Licensing Activity

As discussed above, occupational licensing boards possess regulatory responsibilities for occupations within each state that expand far beyond the act of licensing.²¹⁴ Under the facts of *North Carolina Dental*, licensure was not explicitly at issue.²¹⁵ Rather, the Board made a determination that the practice of dentistry included teeth whitening and issued cease and desist letters to non-dentists offering this service.²¹⁶ While the RBI Act may encapsulate this situation by mandating that licensing laws be narrowly enforced against occupations “that are included explicitly in the statute or regulation that defines the occupation’s scope of practice,”²¹⁷ the bulk of the bill is aimed at acts of licensing and reducing licensure requirements.²¹⁸ Other board actions, such as regulating advertisements, disciplinary proceedings, and other common duties of boards, receive neither legislative guidance nor immunity under the RBI Act. This gap leaves states with a great deal of antitrust liability.

Neither can the RBI Act claim to shield states from all licensing-related liability. Indeed, much of the litigation outlined above may not be prevented by the immunity offered to states under the RBI Act. Take for example the Texas telemedicine provider who sued the State Board of Medicine in 2015, shortly after *North Carolina Dental* was issued. The telemedicine provider

213. See *supra* note 145 and accompanying text.

214. See *supra* Part I.A.

215. *N.C. Dental State Bd. of Exam’rs v. FTC*, 135 S. Ct. 1101, 1108 (2015).

216. *Id.*

217. H.R. 3446, 115th Cong. § 5(b)(3) (2017).

218. Immunity under the bill “shall not apply to an action unrelated to regulating the personal qualifications required to engage in or practice a lawful occupation.” *Id.* § 4(d).

disputed the validity of the Board's rule that a doctor-patient relationship can only be established via an in-person meeting.²¹⁹ This rule effectively keeps telemedicine providers out of the market—a restriction of trade that implicates antitrust concerns. However, the RBI Act only addresses licensure, not Board regulations that function to constrain competition. It is unclear that the RBI Act, even if enacted and adopted by the State of Texas, would provide the Board of Medicine with any legal cover whatsoever in challenges of this variety.²²⁰

2. The Restoring Board Immunity Act Likely Carries High Implementation Costs and Arbitrary Alternations to State Statutes

States like Colorado, discussed above, already have a supervisory agency overseeing the work and decisions of occupational boards.²²¹ DORA has successfully kept licensure requirements relatively low across the State,²²² balancing the importance of an unrestricted economy with health and safety considerations for Colorado residents. Overhauling this system, or even adapting it to conform to the RBI Act's conception of an Office of Supervision of Occupational Boards,²²³ places form over function, and creates redundancy between state and federal government.

Colorado is not alone in having an existing infrastructure that would require substantial renovation in order to comply with the RBI Act.²²⁴ This is due in part to the particularities of the Act—for example, the stipulation that occupational licensing

219. See Amended Complaint at ¶ 111–13, *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-00343-RP (W.D. Tex. July 6, 2015), 2015 WL 4387362; see also 2015 Tex. Reg. 485 (Feb. 6, 2015) (specifying that communications via email, text, chat, or phone are inadequate to establish a doctor-patient relationship—a prerequisite to issuing prescriptions).

220. See H.R. 3446 § 4(d) (“[I]mmunity . . . shall not apply to an action unrelated to regulating the personal qualifications required to engage in or practice a lawful occupation, such as rules of an occupational licensing board governing minimum prices or residency requirements.”).

221. See COLO. REV. STAT. § 24-34-102 (2016).

222. See OFFICE OF ECON. POLICY, DEP'T OF TREASURY ET AL., *supra* note 47, at 26 (showing that the average required education or experience for licensure in Colorado is similar or lower than the majority of states).

223. See H.R. 3446 § 5(c).

224. See *supra* notes 127–31, 139 and accompanying text (discussing the licensing infrastructure of Connecticut, Georgia, and California, respectively).

boards cannot receive immunity under the Act unless a minimum of two-thirds of the members are appointed by an elected member of the state.²²⁵

In addition, much of what state licensing boards do is ministerial and administrative in nature. Requiring boards to submit even non-discretionary decisions to an Office of Supervision of Occupational Boards creates unnecessary review carrying a greater public cost of funding the Office. This also delays licensing decisions, which negatively impacts even successful applicants.²²⁶

Similarly, when a licensing board files suit against an individual to enjoin an unlicensed person from practicing a regulated profession, submitting the decision to an Office of Supervision is a redundant procedural step. Filing a lawsuit rarely carries antitrust liability.²²⁷ When a lawsuit is initiated, the court, a sovereign state body,²²⁸ makes the ultimate decision regarding any anticompetitive action, and not the non-sovereign board.²²⁹ Seeking the approval of a sovereign state actor (the Office of Supervision) in order to submit the decision to a second sovereign state actor (the state court) is cumbersome, unnecessary, and likely to create “bureaucratic ossification” without producing meaningful review of self-interested boards.²³⁰

Variation in regulatory practices among states is arguably a positive element of occupational regulation. States have freedom to experiment, to seek innovation, or to adopt a policy of stricter consumer protection—policy preferences that can peak and ebb with the politically elected officials of a state.²³¹ States with

225. *Id.* § 3(8)(c).

226. *Contra* COLO. DEPT OF REGULATORY AGENCIES, *supra* note 133, at 3 (documenting the Department’s progress toward its goal of reducing licensing processing time by one-third).

227. *See* FTC STAFF GUIDANCE, *supra* note 34, at 6 (explaining that filing a lawsuit is only susceptible to an antitrust challenge if it falls within the “sham exception”); WICKELGREN, *supra* note 39, at 20–21 (explaining that filing suit rarely triggers antitrust exposure because the ultimate decision about the defendant’s fitness to participate in the market is rendered by the court, a true state actor, insulating the board from antitrust liability).

228. *See* Hoover v. Ronwin, 466 U.S. 558, 575–80 (1984) (holding that decisions of a state supreme court are sovereign state actions not subject to scrutiny under the Sherman Act).

229. *Id.* at 574 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 360 (1970)).

230. Allensworth, *supra* note 7, at 1602.

231. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (advocating for federalism, as it provides for “unit[s] of decision making” that are at once large enough to adequately measure the costs and benefits, while small enough that there is minimal risk

space to experiment with regulatory practices are more nimble than a centrally controlled federal system, and are able to piece together regulatory systems best suited to a particular state.²³²

3. The Restoring Board Immunity Act May Disincentivize Board Consideration of Competitive Impacts of Official Action by Granting Blanket Immunity

Vigorous competition promotes consumer interests by driving down prices, increasing quality, and promoting the availability of goods and services.²³³ Incentivizing states and state regulatory boards to remain watchful of the competitive consequences of their actions is therefore desirable. Granting blanket immunity to boards may create an environment in which supervisory and review functions are mechanically carried out without reviewing the substance of the decision or the true restrictive impacts of the decision. Creating a system in which regulatory boards have guidance in crafting and executing an effective supervisory program, with the continued threat of antitrust liability if the program is not faithfully executed, is likely a greater service to consumers than an iron clad grant of immunity.

D. FAILURES OF STATE LEGISLATION

The obvious downside of turning to states to solve the liability problems posed by *North Carolina Dental* is that the validity of state statutes is unpredictable. While the U.S. Congress may enact legislation that effectively amends the Sherman Act by creating a carve-out for state regulatory boards following certain requirements, state legislators do not have the ability to amend federal law. States may statutorily implement supervisory procedures that seem likely to satisfy the Court's active supervision requirement. However, states are working to create a defense to the Sherman Act—a federal cause of action.²³⁴ A state-level statutory immunity defense to a federal cause of action creates a

to the central government).

232. *Id.* at 1608 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *LAW J. & ECON.* 23, 34–35 (1983) (describing the value of competition among diverse jurisdictions).

233. FTC STAFF GUIDANCE, *supra* note 34, at 2.

234. See, e.g., Robert Eisig Bienstock, *Municipal Antitrust Liability: Beyond*

mismatch. States cannot rewrite or supersede federal law, and where state regulatory processes violate federal antitrust law, federal law controls.²³⁵

Even if states pass statutes authorizing supervisory agencies and they comply with the Court's active supervision requirement, the uncertainty of whether the supervisory provisions are sufficient still invites litigation. In this way, passing state legislation does not keep states from being dragged into court on *North Carolina Dental* grounds. Even the most carefully crafted state statute, while it may remove liability, may still be challenged. The inefficiency of all fifty states independently crafting and enacting legislation, then defending in court the capacity of the supervisory structures to provide sufficient state supervision, cannot be the best option. Instead, a more cooperative model is needed—one that strikes a balance between the overreaching blanket policies of the proposed federal legislation, and the state solutions that have been proposed to date.

III. COOPERATIVE LEGISLATION: OUTLINING ESSENTIAL ELEMENTS OF AN EFFECTIVE MODEL STATUTE

Working from the conclusion that federal and state legislative responses to *North Carolina Dental* to date have been either inappropriate or insufficient to address the litigation risk facing state licensing boards, the following Section outlines elements of a possible solution. This recommendation does not pretend to be comprehensive, but is intended merely as a starting point for structuring a federal/state collaboration to achieve the best results for consumers and states. Factors relevant to the recommendations that follow include: providing for consumer health and safety; promoting economic competition; cost of implementation; reducing duplicative legislation; and bringing predictability to states' antitrust liability.

Immunity, 73 CALIF. L. REV. 1829, 1867 n.200 (describing one method of combating claims of antitrust at the municipal level is to argue for deference to the action because it serves the greater good).

235. The Supremacy Clause of the Constitution requires this result. U.S. CONST. art. VI, cl. 2. State laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Because the Sherman Act states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce" is illegal, state laws holding the Sherman Act inapplicable in certain circumstances may be challenged on preemption grounds. 15 U.S.C. § 1 (2012).

Unlike state statutes, federal legislation has the distinct advantage of possessing the authority to amend current federal law. Federal lawmakers have clear authority to draft federal antitrust legislation, even if the result essentially amends the Sherman Act, or supplants Supreme Court precedent interpreting the Sherman Act.²³⁶ The obvious drawback of legislating at the federal level is the difficulty of creating a federal framework sufficiently nuanced to address the regulatory and licensing function of occupational boards across the United States. To combine the authority of federal legislation and the nimbler nature of state legislation, this Part recommends cooperative legislation between states and the federal government. In this way, Congress can lend its federal authority to states, while also empowering states to utilize existing state statutory structures to address gaps in board oversight.

The federal component of this recommendation has two prongs. First, this Part envisions stand-alone federal legislation with no required action by states. Second, the legislation would create exemptions from antitrust liability for state boards compliant with certain federal objectives.

A. STAND-ALONE FEDERAL LEGISLATION: A REMEDY FOR INDIVIDUAL BOARD MEMBER LIABILITY

A key weakness of the RBI Act is its blanket treatment of discrete issues. However, there are two issues that arose in the wake of *North Carolina Dental* that are appropriate for sweeping federal legislation. The first is board members' personal liability; the second is the composition of supervisory bodies responsible for active supervision.

First, federal legislation may be employed to provide blanket exculpation of individual board members. As discussed above, many state indemnification statutes do not provide reimbursement for punitive damages.²³⁷ Others cap indemnification beyond a specified dollar amount.²³⁸ Treble damages in antitrust suits create a particular problem in this respect. A new federal bill would follow the model of 15 U.S.C. § 35, which provides that damages recovered under the Clayton Act cannot be recovered

236. U.S. CONST. art. I, § 8 cl. 3 (granting Congress power to regulate commerce between states).

237. See *supra* notes 12–13, 177 and accompanying text.

238. See Op. Cal. Att'y Gen., *supra* note 6, at 15–18; see also *supra* note 177 and accompanying text.

from local governments.²³⁹ Similarly, a new federal bill should provide that antitrust damages awarded against state licensing boards cannot be recovered against individual board members in their personal capacities.

Although this type of exculpation provision might appear to incentivize individual board members to engage in anticompetitive behavior without fear of repercussion, such fears may be allayed by institutional controls over licensing boards. Irrespective of individual board members' liability, antitrust lawsuits will remain costly for states defending their boards, because the state itself may still be held liable. This cost strongly incentivizes states to carefully train board members to assess the anticompetitive effects of board decisions. States are also incentivized to identify and dismiss individual bad actors serving on state boards. Further, the continued litigation risk for states encourages careful scrutiny of board decisions by state supervisory bodies, as required by *Midcal* and affirmed by *North Carolina Dental*.²⁴⁰

Further, as *North Carolina Dental* makes clear, antitrust immunity is premised on the adequacy of the state's supervision over the board.²⁴¹ It is a *non sequitur* to suggest that boards should not be engaging in anticompetitive conduct in the first place so as not to require immunity under *Parker*—the core function of licensing boards is to make regulatory decisions that restrict some providers from entering the market.²⁴² To say that licensing boards should not engage in anticompetitive conduct is to say that licensing boards should not give effect to their statutorily mandated purpose.²⁴³ Antitrust liability, in the context of licensing boards, hinges not on anticompetitive behavior, but on

239. *E.g.*, *Hearing on Occupational Licensing*, *supra* note 27, at 10 (testimony of Sarah Oxenham Allen) (presenting the notion that a statute similar to 15 U.S.C. § 35 could work for indemnifying board members against antitrust challenges).

240. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1105 (2015); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 97–98 (1980).

241. *N.C. Dental*, 135 S. Ct. at 1105.

242. Justice Scalia probed this issue at Oral Argument, asking “[w]hat . . . is a more obvious restriction of competition than preventing somebody from competing? . . . It seems to me [licensing and standard setting] . . . both involve anticompetitive decisions.” Transcript of Oral Argument at 46, *N.C. Dental*, 135 S. Ct. 1101 (No. 13-534).

243. *See supra* Part I.A. (explaining that boards are statutorily charged with regulating markets for the purpose of safeguarding consumer health and safety).

the adequacy of state supervision. Ensuring that individual board members are indemnified from personal liability does not distort individual incentives, but right-sizes liability by ensuring that only actors with the ability to reasonably avoid antitrust liability bear any litigation risk.

Moving next to the question of what form of state body is required to perform supervisory functions, federal law may also provide a clean, certain solution. As discussed above, the Supreme Court's guidance on this question leaves states with a great deal of ambiguity.²⁴⁴ State legislatures and state supreme courts act with sufficient "Stateness" to trigger state action immunity.²⁴⁵ Cities and municipalities, by contrast, do not act with sufficient "Stateness," and may only displace competition when acting in accordance with a clearly articulated state policy, though active supervision is not required.²⁴⁶ The Supreme Court has never specifically addressed whether traditional state agencies act with sufficient "Stateness"—all that has been said is that state agencies dominated by active market participants are not sufficiently sovereign.²⁴⁷

To resolve this ambiguity and head off further litigation on this issue without upsetting the common law scheme, Congress should acknowledge that traditional state agencies are sufficiently sovereign to supervise licensing boards and to adopt decisions of boards on behalf of the state. As discussed above, failure to recognize the capacity of traditional state agencies to perform this function would lead to impractical results.²⁴⁸ Congress may define traditional state agencies using various characteristics, but in order to preserve the current state of common law, Congress may dictate that a traditional state agency is one comprised entirely, or almost entirely, of full-time employees of the state.

B. FEDERAL ENDORSEMENT OF STATE LEGISLATION

There are two major hurdles facing states attempting to comply with *North Carolina Dental*. First, states must determine what sort of government body acts with sufficient "Stateness" to trigger state action immunity. Second, states must determine what processes and procedures satisfy the active

244. See Allensworth, *supra* note 68.

245. See *supra* note 121 and accompanying text.

246. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985).

247. *N.C. Dental*, 135 S. Ct. at 1106.

248. See *supra* Part II.C.2.

supervision requirement. The federal government imposes these requirements through the Sherman Act, and the federal government has the power to clarify what is necessary for their fulfillment.²⁴⁹ While blanket federal legislation may be effectively applied to address the composition of the supervising body, as discussed above, a more flexible approach is required to define the procedures constituting adequate supervision.

Rather than the prescriptive requirements of the RBI Act, this Section recommends a flexible federal statute that endorses state legislation. While this type of cooperative legislation is perhaps nontraditional, it is not without precedent. In the insurance context, for example, the federal government has introduced a host of legislative tools to assist states in developing their own standards, rather than imposing federal standards.²⁵⁰

One possible model is the 1990 Medicare supplement legislation, in which Congress permitted states to develop standards for Medicare supplement policies.²⁵¹ State standard drafting was guided by regulations promulgated by the U.S. Department of Health and Human Services (DHS).²⁵² This type of federal/state partnership could be effectively duplicated in the context of occupational licensing, with states following the direction of FTC guidance documents. Helpfully, the FTC has already promulgated extensive guidance to states seeking to comply with *North Carolina Dental's* active supervision requirement.²⁵³ The FTC could expand upon and formalize this guidance, mirroring DHS's guidance of state policy design.

Borrowing statutory models from the insurance context can also help to overcome the efficiency problems inherent in fifty separate states working independently to define a supervisory system that will stand up to *Midcal's* active supervision requirement. Under a recent legislative proposal, the Federal Insurance Office would evaluate state regulatory standards, identify best

249. Admittedly, it is the Supreme Court that technically imposes these requirements through the development of the state action immunity doctrine. However, this doctrine is a safe harbor from the reach of the Sherman Act—a federal statute adopted by the legislature.

250. FED. INS. OFFICE, U.S. DEPT OF THE TREASURY, HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES 8 (2013).

251. *Id.*

252. *Id.*

253. FTC STAFF GUIDANCE, *supra* note 34.

practices based on a consensus of the states, then use the collected data to promulgate national targets.²⁵⁴ This model could be effectively applied in the context of occupational licensing, again with the FTC playing a central role. The FTC's Bureau of Protection could take stock of the supervisory structures and procedures employed by states, and promulgate best practices based on the results. While such targets are nonbinding, this exercise would help to create greater uniformity in licensing review procedures between states, and would provide guidance to states seeking to substantially restructure their licensing laws to conform with the current legal landscape.²⁵⁵

Another potential model for federal/state cooperative legislation is the State Modernization and Regulatory Transparency Act (SMART Act), introduced in 2004.²⁵⁶ The SMART Act as proposed would have allowed states to develop their own insurance reform standards, and exempted states from federal requirements as long as the state's scheme satisfied certain federal objectives.²⁵⁷ Where federal objectives were not satisfied by the state's standards, this exemption would not apply, leading state law to be preempted by federal law.²⁵⁸ This same model could be effectively applied to state licensing boards. Rather than the RBI Act, Congress could pass a federal statute prescribing mandatory supervision requirements, which applies only when states' supervisory structures fail to meet certain requirements. This would preserve the existing structure of state law, while also restoring antitrust immunity to state licensing boards.

By utilizing existing or previously proposed models of cooperative legislation between federal and state governments, the challenges posed by *North Carolina Dental* may be addressed in a way that is non-duplicative, streamlined, and substantially reduces the uncertainty currently being worked out through litigation, rather than legislation.

254. See *id.* (discussing this system as a "national passport approach"); see also FED. INS. OFFICE, U.S. DEPT OF THE TREASURY, *supra* note 250, at 9.

255. See Allensworth, *supra* note 7, at 1608 (discussing the potential benefits to be derived from states looking to the review procedures of other states to create a statutory scheme capable of fulfilling *Midcal's* active supervision requirement).

256. See FED. INS. OFFICE, U.S. DEPT OF THE TREASURY, *supra* note 250.

257. *Id.*

258. *Id.*

CONCLUSION

North Carolina Dental created substantial liability for state occupational licensing boards across the country. Because licensing boards are granted authority to regulate occupations, and because the exercise of that authority very often entails anticompetitive results, *North Carolina Dental* is in many ways a liability trap for states. Recognizing this, state and federal lawmakers have sought ways to address the liability born by states and individual board members under *North Carolina Dental*. Legislative responses to date are insufficient to address the litigation chasm opened by the Supreme Court.

This Note has attempted to sketch a possible solution through a federal/state legislative partnership, lending the authority of federal legislation to state lawmakers and seeking to leverage preexisting state statutes to create an efficient answer to occupational board antitrust liability. Developing a cooperative framework between federal and state lawmakers may provide a solution that reduces litigation, improves board awareness of the competitive impacts of their decisions, and does not necessitate a complete overhaul of existing state law. The solution proposed here seeks to create a flexible statutory framework aimed at addressing the uncertainty that has followed in the wake of *North Carolina Dental*, without allowing federal legislation with ulterior motivations to substantially overhaul state law.