Lessons Learned from the NC Dental Board Decision by a State Bar Officer and Antitrust Lawyer

By Mark W. Merritt

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As an antitrust lawyer and state bar officer who was intimately involved with the *NC Dental Examiners Board v. Federal Trade Commission* decision, I am more acutely aware than most that state bar regulating authorities must heed the antitrust warnings of that important Supreme Court decision or risk losing autonomy in regulation of the practice of law. At the same time, it is clear, from *Dental Board,* that conscientious bar regulators will be on solid antitrust ground as long as they remain squarely within their authority, use careful rulemaking to support their actions, make a record that justifies the action, stay prepared to sue to curtail unauthorized practice, and always set a high ethical tone.

Over the past two years, I have served as Vice President and President-Elect of the North Carolina State Bar. The North Carolina State Bar is a mandatory bar created by statute and is tasked with setting ethical standards, handling attorney discipline and preventing the unauthorized practice of law. The State Bar is separate from the North Carolina Bar Association, which is a professional association that most North Carolina lawyers have elected to join. During my time as a State Bar officer, the State Bar was the target of two lawsuits by LegalZoom. The first lawsuit was filed in state court, with LegalZoom claiming that the State Bar was wrongfully attempting to prevent it from providing certain online legal forms. The second lawsuit was a federal court action that alleged that the State Bar violated Section 1 of the Sherman Act by failing to approve two pre-paid legal service plans offered by LegalZoom. Those cases have been settled, and the State Bar and LegalZoom worked collaboratively to pass legislation that amended the statutory definition of the practice of law in North Carolina to provide appropriate regulation of online providers of legal forms.

I am also an antitrust lawyer, and I represented the State Bars of North Carolina, Florida and West Virginia in filing an amicus brief in the Supreme Court urging that court to overturn the Fourth Circuit's holding that the North Carolina Dental Board was not entitled to state action immunity and had violated Sherman Act Section 1 in its use of its regulatory authority to exclude non-dentists from providing teeth whitening services in North Carolina. In these capacities, as a State Bar officer with regulatory responsibilities and as an antitrust lawyer who has studied state action immunity for many years, I am often asked my views of the *Dental Board* decision and its potential effect on state bars. My answer is that the potential liability of state bars under antitrust law is a completely manageable risk if we pay attention to the lessons from the *Dental Board* decision.

Lesson 1. Know and Respect Your Statutory and Regulatory Authority and Limits

One of the fundamental themes that emerges from the various opinions in the *Dental Board* case is that the FTC, the Fourth Circuit and the Supreme Court concluded that the Dental Board had overstepped its authority. Even though the Supreme Court assumed that the clear articulation prong of the state action immunity doctrine was satisfied, it noted several times in the opinion that the statute that granted authority over the practice of dentistry "does not, by its terms, specify that teeth whitening 'is the practice of dentistry.'" *See Dental Board*, 135 S. Ct. at 1108, 1110 and 1116 (2015). The Court exhibited this skepticism over the Dental Board's authority even though the relevant statute defined the practice of dentistry to include someone who "[r]emoves stains, accretions or deposits from human teeth." N.C. Gen. Stat. § 90-29(b)(2). I have often wondered if the case would have had a different result if the people operating in kiosks in malls had been pulling teeth instead of whitening them, but one cannot help conclude that the Dental Board put itself on thin ice by regulating in an area that did not clearly fall within its statutory mandate. A question remains after the *Dental Board* case if the result would have been different if the authorizing statute compelled or required the regulatory conduct in question to be undertaken. The clear takeaway is that any state bar should be careful to act within its statutory and regulatory authority.

Lesson 2. Use Rulemaking

The Supreme Court was clearly troubled by the fact that the Dental Board went after teeth whiteners not only on the basis of shaky statutory authority but also without the use of rulemaking. The Court noted that the Dental Board's concern over teeth whitening "did not result in a formal rule or regulation reviewable by the independent Rules Review Commission." *See Dental Board,* 135 S. Ct. at 1108. The Court then described the use of cease and desist letters to teeth whiteners, product manufacturers and mall operators stating that teeth whiteners were in violation of the Dental Practices Act, without benefit of underlying rules. The use of rulemaking tends to ensure an orderly and more thoughtful consideration of proposed regulation and in many states will require review by a higher authority. In North Carolina, any rule enacted by the State Bar must be reviewed and approved by our Supreme Court, which is clearly a sovereign state actor. *See Dental Board,* 135 S. Ct. at 1110 (noting that decisions of a state supreme court "acting legislatively, rather than judicially," are *ipso facto* immune from the antitrust laws) and 1114 (citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 361-362 (1977), as an example of state action immunity being granted partly because the Arizona State Bar's rules were "subject to pointed re-examination by the policymaker"). State bars have the ability to use rulemaking as another way to manage antitrust risk.

Lesson 3. Make a Record that Justifies the Regulatory Action

When a state bar acts to regulate the profession, its lodestar should be to protect and promote the public interest and not the economic interests of attorneys. In any antitrust litigation or a government investigation, plaintiffs' attorneys or government investigators will examine the record for evidence of anticompetitive intent as the true motivator for regulatory conduct. The FTC, in pursuing its enforcement action against the Dental Board, was clearly influenced by evidence that the Dental Board's motivation was economic self-interest as opposed to protecting public health and safety. In its Opinion, the Commission noted that the complaints about the teeth whiteners came from dentists who competed against them, that the focus of the complaints was on the low prices that the teeth whiteners offered and "only

on rare occasion did they indicate possible consumer harm." *See In re The North Carolina Board of Dental Examiners,* Docket No. 9343 2012, at 4, *available at* www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf.

The Supreme Court similarly took note of this evidence. *See Dental Board,* 135 S. Ct. at 1108 ("Few complaints warned of possible harm to consumers.") To the FTC initially and the Supreme Court ultimately, it would appear that the Dental Board's reliance on health and safety as the rationale for its conduct was not borne out by the contemporaneous record when decisions were being made.

The lesson to state bars is that building a record to justify regulation is important. In the post *Dental Board* world, a state bar that is regulating in a manner that could be attacked as exclusionary or anti-competitive needs to identify and substantiate the consumer harm that it is attempting to address and establish a record that an appropriate investigation of those harms has occurred. That investigatory record should be appropriately memorialized in internal documentation to serve as the needed proof that actions taken were in the public interest and in fact motivated the regulation being attacked.

Another facet of the post *Dental Board* world is how to respond to those members of the bar that do encourage bar leaders to protect the economic interests of lawyers and not to regulate in the public interest. In the past, the appropriate reaction may well have been to ignore such a communication as simply being irrelevant. In a world where regulatory conduct may later be subject to scrutiny under the Sherman Act, the appropriate response is more likely to be to set the record straight and explain why your conduct is being done for the right reasons. This is especially important for unified bars where the line between regulator and professional association may be harder to define. For states like North Carolina, Virginia and West Virginia, where there is a mandatory regulatory bar and a separate bar association, these lines are easier to maintain.

Lesson 4. When in Doubt, Sue

An interesting aspect of both the Fourth Circuit's and Supreme Court's decisions in the *Dental Board* case is that each court was troubled by the fact that the Dental Board sent cease-and-desist letters to teeth whiteners rather than exercising its statutory right to sue them for the unlicensed practice of dentistry. *See Dental Board,* 135 S. Ct. at 1116 ("The Board relied on cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official."); *North Carolina State Board of Dental Examiners v. Federal Trade Commission,* 717 F.3d 359, 370 (2013) ("Here, the cease-and-desist letters were sent without state oversight and without the required judicial authorization.") As a matter of logic, that power to issue a cease-and-desist letter would seem to be implied by the statute that gave the Dental Board the right to sue to prevent the unlicensed practice of dentistry. The rationale behind the criticism of cease-and-desist letters appears to be that a court serves as an appropriate check on the unauthorized or inappropriate exercise of regulatory power.

This theme is seen in the Final Order entered by the FTC in the *Dental Board* case, which prohibited the Dental Board from the use of a cease-and-desist letter, *see In re The North Carolina Board of Dental Examiners,* Final Order, Section 2, §§ C & D, but does not prohibit the "filing, or causing to be filed, a court action against a Non-Dentist Provider for and alleged violation of the Dental Practice Act." *Id.* at

Section 2, G. ii. The FTC expands on this point in its *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (Oct. 2015), *available at*www.ftc.gov.system/files/attachments/competition-policy-guidance.active_supervision_of_state_boards.pdf. The Staff's guidance states: "in general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls with the 'sham exception'". *See id.* at 6. The unmistakable message is that it is safer to sue than to attempt to forestall the need for a lawsuit with a cease-and-desist letter.

Lesson 5. Ethical Behavior is Important; Setting a Tone at the Top

An important argument in favor of state action immunity in the *Dental Board* case was that removing state action immunity would discourage professionals from participating in the regulation of their profession. The Supreme Court could have addressed this argument simply by noting that states can address this issue by having a regulatory structure that ensures active supervision by non-market participants. Instead of relying solely on this argument, the Supreme Court notes "a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling." *See Dental Board,* 135 S. Ct. at 1115. The Court notes the long history of professional self-regulation in this country and the ethical standards that self-regulation has engendered.

Clearly, the Court is encouraging professionals to continue the important work of self-regulation with these statements, but it also offers a potential incentive. The Court states that it is not deciding the issue of whether there is immunity from money damages for professionals who may violate the antitrust laws in their role as state regulators. *See id.* One can only wonder if the juxtaposition of the discussion of ethics and other immunities is not both an exhortation and a reminder that regulators who act ethically and in good faith may have immunity from damages under the Eleventh Amendment if they are later found to violate the antitrust laws.

Conclusion

As state bar leaders, we would be making a mistake if fears about antitrust liability make us timid in enforcing the high ethical standards of our profession or in carrying out the regulatory mandates given to us by statute or our state supreme courts. The Sherman Act can be violated only when there is harm to competition, and it is unlikely that promulgating ethical rules or to disciplining individuals lawyers will affect competition in a manner that violates the Sherman Act. *See FTC Staff Guidance* at 6 (Setting out examples of state agency conduct that is not likely to raise antitrust concerns). Antitrust risk is a manageable risk and an avoidable risk, and I doubt that most state bars would make the kinds of mistakes that the Dental Board made. We only have so many hours in a day, and in my state I am far more concerned about a judicial system that is underfunded, a justice system that many of our citizens cannot afford or access and the many critics who attack our profession from a host of directions. Those are realities. We can manage the potential antitrust risks.