Meaningful Oversight of State Regulatory Boards

Task Force Recommendations to Acquire State Action Immunity

Task Force on Meaningful Oversight

SCR 65, 2016 Louisiana Regular Legislative Session

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December 29, 2016

LOUISIANA DEPARTMENT OF HEALTH

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Introduction

Pursuant to Senate Concurrent Resolution No. 65 (SCR65) of the 2016 Louisiana Regular Session, the Task Force on Meaningful Oversight (Task Force) was established to review existing laws in order to ensure compliance with *North Carolina v. F.T.C.*, to minimize exposure to antitrust claims, to review board composition to diversify membership, to develop a structure for meaningful oversight of the boards by the Department, and to present findings and recommendations to the legislature. In order to accomplish this task, SCR65 provided for a diverse membership to form this committee in order to get input from all boards or commissions that may be affected by any recommendations offered to the Legislature.

Specifically, the Task Force was charged as follows:

- Consider the findings and consequences in *North Carolina v. F.T.C.*
- Address the matter of ensuring compliance with the Court's meaningful oversight holdings.
- Review each board's composition to make recommendations on diversifying membership, including less control by associations and more involvement by consumers and other professionals.
- Develop and make a recommendation on a structure or process for meaningful oversight of the boards by the Department.

Section 1 – Task Force Report and Recommendations

Subsection 1.1 -- North Carolina State Board of Dental Examiners v. Federal Trade Commission

The above referenced case dealt with the North Carolina State Board of Dental Examiner's regulation of the practice of dentistry, specifically related to teeth whitening services. After the Board in question received complaints by dentists that non-dentists were charging lower prices for teeth whitening services, the Board issued at least 47 official cease-and-desist orders to the non-dentists often warning that the unlicensed practice of dentistry is a crime. This action, along with other Board actions, basically led to non-dentists no longer offering teeth whitening services.

In response, the Federal Trade Commission (FTC) filed an administrative complaint alleging that the Board's action ran afoul of the Federal Trade Commission Act. An Administrative Law Judge failed to afford any protection of state-action immunity and the FTC sustained the ruling reasoning that the Board must be actively supervised by the State in order to receive such protection. In getting to the merits of the case, the ALJ found that the Board had unreasonably restrained trade in violation of antitrust law. The administrative decision was sustained by the FTC and the 4th Circuit. The matter then went to the Supreme Court which decided that, in order to avail itself of state action immunity, in cases where "active market participants" are a controlling number of decision makers, the Board must be actively supervised by the State.

As one can imagine, this decision has left many questions unanswered as boards and commissions attempt to sort out its effects. In an attempt to answer some of the questions, the FTC issued staff guidance in October of 2015.

Subsection 1.2 – FTC Staff Guidance on Active Supervision

Recognizing that States had many unanswered questions after the above referenced decision and needed federal advice, the FTC put out staff guidance in October of 2015. In rendering its advice and guidance, the FTC offered several caveats which were noteworthy as follows:

- A state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers.
- A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust laws.
- The applicability of any state action defense is very fact-specific and context-dependent.
- The guidance only addressed the "active supervision" prong of the state action defense, not the clear articulation prong.
- The guidance was simply "guidance" and deviations therefrom did not necessarily mean that a violation had occurred.

In the wake of the North Carolina Supreme Court case, a board must satisfy two prongs in order to claim state action immunity. The first prong is referred to as the "clear articulation" prong.

This prong is basically satisfied in situations where "the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." In practice, the threshold of this prong is not set very high. The second prong is referred to as the "active supervision" prong, and it seeks to avoid any harm to competition fueled by private interests by having a State review and approve policies of the board before it is cloaked with immunity. This prong was the subject of the FTC guidance.

The FTC guidance made clear that just because state-action immunity is not available does not necessarily mean that action violates federal antitrust laws. As examples, the FTC mentioned that reasonable restraints on competition would not violate antitrust laws. Further, the ministerial acts of a regulatory board, made in good faith, do not give rise to liability. Finally, just because a board may file a lawsuit, such as an injunction against an allegedly unlicensed party, this does not give rise, in and of itself, to antitrust liability.

In providing guidance regarding the need for active supervision, the FTC guidance first looked at how to define "active market participant" and "controlling number" of decision makers. According to the guidance, a person is an "active market participant" in the occupation the board regulates if they are licensed by the board or if they provide any service that is subject to the regulatory authority of the board. The definition of "controlling number" is a little less clear in that it is a fact-bound inquiry that must be made on a case by case basis according to the FTC guidance. However, the guidance made it clear that a "controlling number" could be less than a majority. If a board is comprised of controlling number of active market participants, the board must be "actively supervised" in order to avail itself of any state action defense.

In determining what constitutes "active supervision", the guidance turns to the language of the North Carolina case in identifying some requirements. First, the supervisor must review the substance of any anticompetitive decision. Second, the supervisor must have the power to veto or modify the decision to ensure it is in accord with state policy. Finally, the supervisor must not be an active market participant. By examining the North Carolina case and the guidance issued by the FTC, as well as the discussions of the Task Force during our Open Meetings, we can now turn to the charge of SCR65.

Subsection 1.3 – Senate Concurrent Resolution 65

As stated above, the Task Force for Meaningful Oversight was specifically tasked with four items. In order to carry out its mandate, the Task Force initially met on August 29, 2016. During this meeting, the committee openly discussed the composition of the various boards, the ramifications of the North Carolina case, and the various actions each specific board undertakes as part of its duties. The floor was also opened to public comments at various stages. A second Task Force meeting was held on September 26, 2016. During this meeting, the committee discussed, in greater detail, the specific composition of the boards and whether more non-market participants should be added thereto. The committee also discussed what process may be suitable for active supervision while maintaining the boards' flexibility to carry out their purposes. In this regard, the committee discussed whether some decisions of the boards should not be subject to active supervision due to the low risk of anti-competitive results. The committee also discussed possible legislation to help clarify some areas of concern and to bring

some consistency to the powers of the boards in regulating their particular scope of practice. A third meeting was held on November 7, 2016, to review the draft report that would be presented to this committee as mandated by SCR65. During this meeting, all members were afforded the opportunity to comment on the draft report and provide recommendations for improving same. Each member was also given the opportunity to provide a dissent on any points upon which they did not agree with the committee as a whole. This process was followed in order to ensure that this committee was provided a full picture of the situation and to ensure that all voices were heard.

Subsection 1.4 – Findings and Consequences of North Carolina v. FTC

As stated above, the Task Force for Meaningful Oversight was specifically tasked with four items. In order to carry out its mandate, the Task Force initially met on August 29, 2016. During this meeting, the committee openly discussed the composition of the various boards, the ramifications of the North Carolina case, and the various actions each specific board undertakes as part of its duties. The floor was also opened to public comments at various stages. A second Task Force meeting was held on September 26, 2016. During this meeting, the committee discussed, in greater detail, the specific composition of the boards and whether more non-market participants should be added thereto. The committee also discussed what process may be suitable for active supervision while maintaining the boards' flexibility to carry out their purposes. In this regard, the committee discussed whether some decisions of the boards should not be subject to active supervision due to the low risk of anti-competitive results. The committee also discussed possible legislation to help clarify some areas of concern and to bring some consistency to the powers of the boards in regulating their particular scope of practice. A third meeting was held on November 7, 2016, to review the draft report that would be presented to this committee as mandated by SCR65. During this meeting, all members were afforded the opportunity to comment on the draft report and provide recommendations for improving same. Each member was also given the opportunity to provide a dissent on any points upon which they did not agree with the committee as a whole. This process was followed in order to ensure that this committee was provided a full picture of the situation and to ensure that all voices were heard.

Subsection 1.5 – Ensuring Compliance with Court's Meaningful Oversight Holdings

The second charge of the Task Force was to address the matter of ensuring compliance with the Court's meaningful oversight holdings. As mentioned above and throughout, the issue is really not a matter of complying with the Court's holdings, but more of a decision point as to whether or not to protect board decisions as state-action. If the Legislature determines that it wants to extend the protection of state-action to a board's decision, when it is controlled by active market participants, it must set up a system of "active supervision" by a non-market participant. If the Legislature is of the opinion that "active supervision" would be too cumbersome or inflexible, it could seek to alter board compositions by removing any active market participants. This would, in effect, bring the board outside the reach of the North Carolina holding. Finally, if the Legislature desired, it could attempt to provide immunity to board members from any suit alleging anti-trust violations. These situations and decision points, along with the recommendations of the Task Force are addressed in the paragraphs below.

Subsection 1.6 – Board Composition and Membership

The third charge of the Task Force, and the logical next step from the aforementioned paragraph, was to review each board's composition to make recommendations on diversifying membership, including less control by associations and more involvement by consumers and other professionals. With a couple of exceptions, the Task Force concluded that most of the LDH boards are comprised of active market participants, as defined by the Supreme Court. It is also logical to conclude that the various boards are more or less "controlled" by these participants as discussed by the Court. Against this backdrop, the Task Force had a lengthy discussion about the possibility of diversifying the board and /or adding more consumers.

In regards to diversification, including less control by associations, this really will not have much of an impact in guarding against the reach of the Supreme Court case as long as the diversification will still include "active market participants" who are in control. Granted, the fact that board members are all from the same association, and may vote as one, is clearly indicative of control, the operative threshold is that the board will still be "controlled" by active market participants regardless of association memberships or linkages. This logic also extends to the decision point of increasing the number of consumer members that sit upon the board. After much debate and discussion, the Task Force reached the conclusion that the various professions are best regulated by active market participants who are subject matter experts. It is also the feeling of the Task Force that, regardless of how many consumers are on the various boards, they will still look to the subject matter experts and probably conform their votes. It is safe to say that the Task Force feels that many consumers will not want to "go against" the votes of subject matter experts, especially in areas of scope of practice where anti-competition is often implicated. Certainly, in theory, if the various boards are devoid of active market participants, they will be beyond the reach of the North Carolina case. However, in situations where health and safety of consumers is the main objective, this is not a course that can be recommended by the Task Force.

The Task Force also examined board membership--specifically association involvement--outside the realm of the North Carolina case and had some insight discussions on this point. With a few exceptions, most boards' membership comes from the professional associations who nominate members to be approved by the Governor. According to many members of the Task Force, the largest issue, in their opinions, that arises with association members is that the regulatory board members, who are also members of associations, may have difficulty realizing that they are not working to advance the position of the respective association. This potential problem is magnified when an officer of an association is also serving on the regulatory board in question. Some boards have rules that state an officer of an association cannot serve as a regulatory board member. At the present time, three boards have officers of professional associations serving on their regulatory boards. Another concern that was raised regarding board membership is the allegation that licensees who are not members of professional organizations or associations are excluded from the possibility of being nominated to certain regulatory boards. In order to allay this concern, some boards send out notices to all licensees giving them the opportunity to self-nominate where allowed. Additionally, at least one board suggested that term limits be examined for all boards as a way to limit the influence a particular professional

association or organization may have on the regulatory board. In any respect, the Task Force felt that mandatory training should be discussed as a possible avenue to have the members focus mainly on their regulatory role and to be mindful of anti-trust implications and ethical (conflict of interest) issues.

Subsection 1.7 – Meaningful Oversight of Boards by the Department

The final charge of the Task Force under SCR65 was to develop and make a recommendation on a structure or process for meaningful oversight of the boards by the Department. Since the Task Force is of the opinion that, for the most part, "active market participants" are a necessary part of regulation, the development of a structure that provides active supervision is paramount if the legislature wants to cloak certain board decisions with state-action immunity.

In devising such a structure, the Task Force believes that statutory consistency is needed among the boards at the initial stage. At the base level, the various boards have two enforcement options in order to address possible violations of, or failure to heed, board decisions. As mentioned above, these decision areas mainly focus around practicing in a scope of practice regulated by the board without a license or the overall granting, denial, suspending, or revocation of a license to practice in the area regulated by the respective board. In order to assure statutory consistency, the Legislature should make sure that each of these two options is statutorily authorized across all boards.

The first option is the ability to seek an injunction in a court of competent jurisdiction. This mechanism, in the opinion of the task force, provides the boards with the most protection from any anti-trust liability. The reasoning is that the proposed action by the board will be heard *de novo* by an independent court based on a record compiled in accordance with the Code of Civil Procedure. Further, any decision of the lower court is subject to further review by a higher appellate court all the way up to the applicable Supreme Court. This type of process affords the maximum amount of due process and the maximum amount of "active supervision" thereby providing an anti-trust shield of sorts. Granted, the decision of the board has not been reviewed by a state actor, and may not be considered state-action for purposes of immunity, but the decision is still being vetted through the court system. If ratified by a court of competent jurisdiction, the board members should be comfortably shielded from liability. The main problem with injunctions is that the Task Force pointed out they can be quite costly if utilized often and may not have immediate effect. This leads to the second option.

The second option is the cease-and-desist order. This is similar to an injunction, but is not "ratified" by a court of competent jurisdiction. It would simply be a statutorily authorized option of the board. One of the positive features of this approach is that it is not costly since it merely involves the sending of a letter, preferably certified with return receipt requested. The further positive is that it can take effect, technically, on receipt of the letter by the target. The downsides are that this is the mechanism utilized by the North Carolina board and would expose the board members to anti-trust liability, assuming control by active market participants and lack of active supervision, regardless of the process being statutorily authorized. Thus, it is imperative, if the Legislature believes that these decisions should be afforded state-action immunity, that the decisions / actions be actively supervised. An informal poll of the Task Force members

indicated that they issued fewer than five cease-and-desist orders on average annually. Two of the boards on the Task Force indicated they may issue from 8-12 cease-and-desist orders annually. Most boards indicated they dealt with 2-3 anti-trust issues annually. However, the Legislature should be aware that some of the boards may not have a keen understanding on what types of decisions may have anti-trust implications. This is where the mandatory training would be beneficial as there may be many more situations in play than most board members realize.

This leads to the final recommendation of the Task Force regarding active supervision. Specifically, the Legislature should explore the possibility of implementing a system that would provide for state-action immunity but still act efficiently without undue delay. This should be a cornerstone of any system because, in certain situations, a lengthy review process could cause health and safety concerns for the general public. Due to the end goal of state-action immunity, it is recommended that this system be placed in statute. The Task Force believes that the best system would utilize a three member panel that would be available to actively supervise decisions of the respective boards that they feel are anti-competitive in nature. For boards under the purview of the Louisiana Department of Health, the panel could consist of one designee from the LDH, one designee from the Attorney General, and one designee from the Boards and Commissions. This review panel would have the ability to approve, disapprove or modify any decision or policy that was placed before them for anti-trust review. They would review the decision to ensure that it comported with the respective board's legislative mandate and help to ensure that the decision was not driven by some personal issue of board members who are active market participants. If the decision were to be approved, this action would more than likely be considered "state-action" pursuant to the holding in the North Carolina case. It is the opinion of the task force that the statute creating this review panel would be very specific regarding time frames by which they must review potential anti-competitive decisions. This is of particular importance where the health and safety of the general public is potentially at issue.

The last issue that was discussed relative to this approach was whether all decisions of the board would need to go before this panel or just the ones the board felt implicated anti-trust concerns. The Task Force did conclude that if a decision were brought before a panel as described above, that decision should be considered state action for immunity purposes.

Subsection 1.8 – Summary

The Legislature must first determine if it wishes to extend state action immunity to all decisions made by professional boards. The boards consider the decision in *North Carolina v. F.T.C.* to have an impact on only a small part of the boards' activities—namely decisions involving scope of practice, prohibitions of non-licensed practitioners, and to a lesser extent the revocation of licenses. The Task Force members rejected the idea of modifying board membership and composition to allow for a controlling number of non-market participants because the best subject matter experts are the market participants of various professions and are in the best position to protect the health and safety of consumers. In order to provide for active supervision of boards' decisions involving anti-competitive issues, the Task Force recommends providing all boards with statutory authority to seek injunctions and to issue cease-and-desist orders and to statutorily establish a three-member oversight panel to review decisions on issues that are anti-competitive in nature. The Task Force also recommends the legislature review the implications

of the Open Meetings Law and Public Records Act as it relates to the three member review panel and consider exceptions thereto.

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