

*In the Matter of South Carolina State Board of Dentistry  
Docket No. 9311*

**ANALYSIS TO AID PUBLIC COMMENT ON PROPOSED CONSENT ORDER**

The Federal Trade Commission has accepted for public comment an agreement to a proposed consent order with the South Carolina State Board of Dentistry. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. The proposed consent order has been placed on the public record for 30 days to receive comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by the Respondent that it violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

**The Challenged Conduct**

The Commission's complaint, issued September 12, 2003, charges the South Carolina State Board of Dentistry with unlawfully restraining competition in the provision of preventive dental care services in South Carolina, in violation of Section 5 of the Federal Trade Commission Act. The Board is a state regulatory agency that licenses and regulates dentists and dental hygienists. The nine-member Board includes seven practicing dentists, six of whom are elected by the dentists in their local area.

The complaint alleges that the Board illegally restricted the ability of dental hygienists to provide preventive dental services (cleanings, topical fluoride treatments, and application of dental sealants) in school settings. The South Carolina legislature in 2000 eliminated a statutory requirement that a dentist examine each child before a hygienist may perform preventive care in schools, in order to address concerns that many schoolchildren, particularly those in low-income families, were receiving no preventive dental services. In July 2001, however, the Board adopted an emergency regulation that re-imposed the dentist examination requirement that the legislature had eliminated. As a result of the Board's action, a hygienist-owned company known as Health Promotion Services, which had begun sending hygienists to schools to provide preventive services under written protocols from a supervising dentist, had to change its business model and was able to serve far fewer patients.

By operation of South Carolina law, the emergency regulation expired after six months, in January 2002. By that time, the Board had published a proposal to adopt the dentist examination requirement as a permanent regulation. However, after a state administrative law

judge concluded that the Board's proposed regulation was unreasonable and contravened state policy, the Board did not proceed with the permanent regulation.

The South Carolina legislature subsequently enacted legislation in May 2003 that expressly provides that dentist examination requirements applicable in some settings do not apply to dental hygienists' provision of preventive care services delivered in public health settings under the direction of the state health department. The new statute also added a provision stating that a dentist billing for services provided by a dental hygienist under such an arrangement was "clinically responsible" for the delivery of those services. Because in South Carolina dental hygienists cannot bill the state Medicaid program directly, this new provision would plainly apply to school-based preventive dental care programs. Aside from the general concern that the Board might once again defy a legislative change, there was evidence in Board minutes suggesting that the Board might interpret the "clinically responsible" language in the new statute to require that a licensed dentist examine a patient and provide a treatment plan in all settings, whether private dental offices or public health locations.

### **Post-Complaint Proceedings**

Shortly after the complaint issued, the Board moved to dismiss the case, asserting that its actions were exempt from the antitrust laws by virtue of the state action doctrine. That doctrine, first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), rests on the Court's holding that the Sherman Act was not intended to "restrain a state or its officers or agents from activities directed by its legislature." The Board also argued that the 2003 statute made it legally impossible for it to resume its challenged conduct and therefore rendered the case moot.

In a July 2004 opinion, the Commission rejected the Board's state action arguments.<sup>1</sup> As the Commission's opinion explains, the Board's claim to automatic state action protection by virtue of its status as a state agency is contrary to well-established Supreme Court precedent.<sup>2</sup> Furthermore, the Board failed to establish an essential element of the state action defense, because it was unable to show that its challenged conduct was undertaken pursuant to a clearly articulated policy of the legislature to displace competition with regard to the delivery of preventive dental care in schools. Neither the Board's general authority to regulate, nor its claims about the meaning of the state legislature's 2000 statutory revisions, demonstrated the requisite clear articulation to bring the challenged conduct within the protection afforded by the state action doctrine. On the contrary, the policy expressed by the legislature's elimination in 2000 of the statutory requirement for a dentist examination before dental hygienists could

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<sup>1</sup> In the Matter of South Carolina State Board of Dentistry, 138 F.T.C. 229, 230 (2004), available at <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf> and <http://www.ftc.gov/os/decisions/docs/Volume138.pdf>.

<sup>2</sup> See, e.g., *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, at 57, 60-61 (1985).

provide preventive services in schools was one favoring such competition, in order to increase access to critically important oral health care. Finally, because the Board failed to make a threshold showing of a legislative policy to displace the type of competition that it is charged with suppressing, its final argument, that any conflict with the 2000 statute was merely an error of state law and of no federal antitrust significance, failed as well.

The Board filed an appeal with the United States Court of Appeals for the Fourth Circuit seeking an interlocutory review of the Commission's state action ruling. The Commission moved to dismiss the appeal, arguing that the ruling did not fall within the narrow class of "collateral orders" that fall outside the general rule that interlocutory orders are not immediately appealable. The court of appeals agreed and dismissed the appeal for lack of jurisdiction. In its May 2006 decision in *South Carolina State Board of Dentistry v. F.T.C.*, 455 F.3d 436 (4<sup>th</sup> Cir. 2006), the court of appeals rejected the position of some other circuits, which have upheld interlocutory appeals from the denial of a claim of state action protection on the theory that the state action exemption is an immunity from suit:

[W]e cannot conclude that *Parker* creates an immunity from suit. The *Parker* doctrine did not arise from any concerns about special harms that would result from trial. Instead, *Parker* speaks only about the proper interpretation of the Sherman Act.

455 F.3d at 444.

With respect to the Board's arguments that the 2003 statute made it impossible for the Board to resume the challenged conduct, the Commission's July 2004 ruling rejected the Board's claim that the statute compelled dismissal of the complaint as a matter of law. Instead, it held the Board's motion to dismiss in abeyance pending discovery on factual issues relating to the risk of recurrence of the challenged conduct.<sup>3</sup> As noted in the Commission's decision, the very premise of the alleged violation in this case is that the Board flouted a statutory directive designed to promote competition and increase access to preventive dental services. Moreover, the complaint also alleges particular facts with regard to the Board's interpretation of language added by the 2003 statute that raise a significant risk of recurrence.

During the pendency of the Board's appeal on state action, the Commission stayed discovery in the case. The stay expired in January 2007, after the Supreme Court denied the Board's petition for certiorari seeking review of the appellate court's dismissal of the appeal,

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<sup>3</sup> Administrative agencies are not subject to the constitutional requirement of a "case or controversy" that limits the jurisdiction of Article III courts, but instead exercise discretion in deciding whether to hear cases that might be considered moot. *See, e.g.*, *R.T. Communications, Inc. v. FCC*, 201 F.3d 1264, 1276 (10<sup>th</sup> Cir. 2001); *Tenn. Gas Pipeline Co. v. Fed. Power Comm'n*, 606 F.2d 1373, 1380 (D.C. Cir 1979).

thereby clearing the way for discovery on the issues delegated to an FTC administrative law judge.

## **The Proposed Order**

The proposed order has two central features:

- First, to eliminate the alleged anticompetitive effects of the challenged conduct, the proposed order requires the Board to affirm and publicize its support for the state legislative policy, now embodied in the 2003 amendments to the Dental Practice Act, that prevents the Board from requiring a dentist examination as a condition of dental hygienists providing preventive dental care in public health settings.
- Second, to prevent similar anticompetitive restraints in the future, the proposed order requires the Board to give the Commission advance notice before adopting rules or taking other actions that relate to dental hygienists' provision of preventive dental services in a public health setting.

The Board announcement is set forth in Appendix A of the proposed order. That announcement: (1) expresses the Board's view that the 2003 statute prevents it from requiring a dentist examination when patients receive preventive services from dental hygienists working under arrangements with the state health department; and (2) states that the Board fully supports this legislative policy.

In addition to publication on the Board's website and in its newsletter, Paragraph III of the proposed order requires the Board to distribute this announcement, along with a copy of the Commission's complaint and order, to every dentist and dental hygienist holding a license to practice in South Carolina (and, for a period of three years, to new licensees), and to the superintendent of every school district in South Carolina. Widespread publication of this announcement is designed to remedy potentially significant chilling effects from the Board's past conduct on market participants who might otherwise be interested in participating in public health preventive dental care programs involving dental hygienists.

The proposed order's prior notice provision is contained in Paragraph II. It requires the Board to give the Commission written notice 30 days in advance of adopting proposed or final rules, policies, disciplinary and other actions, that relate to the provision by dental hygienists of preventive dental services in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), a provision that governs dental hygienist practice in public health settings. The scope of the notice provision includes actions that concern dentists' authorizing, supervising, or billing for the provision by dental hygienists of preventive dental services in a public health setting. This prior notice requirement, which extends beyond the re-institution of the restraint contained in the Board's 2001 emergency regulation, will enhance the Commission's ability to monitor the Board's future conduct and take prompt action where warranted.

The Commission has determined that it is not necessary to include a “cease and desist” provision that directly prohibits the Board from resuming the conduct challenged in the complaint. This conclusion rests on various factors particular to this case. A key factor is the experience in South Carolina since the 2003 changes to the South Carolina Dental Practice Act. The new statutory scheme has now been in place for nearly four years. Throughout this period, dental hygienists have been providing preventive services in schools under an agreement with the health department – without an initial examination by a dentist – and the Board has not reimposed its previous dentist examination requirement. Thus, although the 2003 amendments have not eliminated the need for relief in this case, they are a relevant consideration in determining the nature and scope of that relief.

Accordingly, the proposed order takes the statutory change into account. First, requiring the Board to distribute the announcement set forth in Appendix A to all dentists, dental hygienists, and school districts will ensure that interested parties know that the Board has formally acknowledged that it is legally barred from resuming the conduct challenged in the Commission’s complaint. Second, the notice requirement of Paragraph II addresses the possibility that the Board might attempt to restrain competition in the provision of dental hygienist services in public health settings in ways not addressed by the 2003 amendments. This notice provision will increase the Commission’s ability to monitor the Board’s future conduct and is likely to help deter the Board from imposing restraints on public health preventive dental care that are not grounded in the policies articulated by the South Carolina legislature.

As is standard in Commission orders, the proposed order contains certain reporting and other provisions that are designed to assist the Commission in monitoring compliance with the order.

The proposed order would expire in ten years.