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May 22, 2015

The Honorable «fname» «lname»
Attorney General
«add1»
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«city» «state1» «zip»

Re: ***North Carolina State Board of Dental Examiners v. FTC***

Dear «sal» Attorney General:

The Federation of Associations of Regulatory Boards (FARB) recognizes the importance of the recent United States Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S.___, 135 S. Ct. 1101 (February 25, 2015). While the opinion has potentially significant consequences, the regulatory and political communities are urged to exercise restraint and refrain from demanding major changes to a regulatory system that for centuries has been quite successful in protecting the general public. Indeed, a May 4, 2015, letter co-authored by the Center for Public Interest Law, the Citizen Advocacy Center, and the Consumers Union and sent to the Attorneys General offices not only promotes just such an overreaction through fear mongering and a condescending tone, but also contains misinformation about the scope of the Supreme Court opinion.

FARB is an Internal Revenue Code 501(c)(3), not for profit, national organization whose Governing Members are listed on this letterhead. Each such FARB Governing Member is a not for profit association whose membership is comprised of the regulatory boards of all United States jurisdictions of the respective profession and whose mission is to provide programs and services to such member boards to assist them in regulating the profession in the interest of public protection. The FARB mission is to *promote excellence in regulation for public protection by providing expertise and innovation from a multi-professional perspective*. As part of this mission, FARB is assisting its membership to identify the appropriate response to the Supreme Court decision.

Government regulation of the professions is essential to protecting the consuming public. Statutorily created and empowered regulatory boards enforce the respective practice act and other applicable laws in the interest of public protection. Further, board members are presumed to act in the interest of the public when undertaking activities within the scope of the regulatory structure. A presumption of objectivity is critical to the enforcement of the public protection mandates free from threats of liability. Participation by licensed professionals on regulatory boards provides necessary expertise and experience regarding regulation of the profession and is essential to the development, interpretation, and enforcement of the regulatory structure.

Governmental boards and their volunteer members must be protected in carrying out these vital public protection mandates. Although the Supreme Court categorized the North Carolina State Board of Dental Examiners as "nonsovereign" and, thus, subject to meeting both the clearly articulated state policy and active state oversight prongs in order to enjoy antitrust immunity under the state action doctrine, the patently false statements contained in the May 4 letter unnecessarily paints the picture that "all" activities undertaken by regulatory boards "must" be subject to a state supervision mechanism.

The May 4 letter also references additional examples of catastrophic consequences based upon an inaccurate interpretation of the Supreme Court opinion. It jumps to certain conclusions that Attorney General oversight and rulemaking will not confer immunity. Such a conclusion is inaccurate and each Attorney General's office will undoubtedly interpret the breadth of the opinion with respect to the particular regulatory framework of that state. Many states will likely determine that no action is necessary. The letter also concludes that the "decision renders unlawful what has become the common practice across all 50 states." A conclusion that all state board action is now somehow "unlawful" based upon the judicial opinion is inaccurate. Under its most aggressive interpretation, the Supreme Court opinion imposes a two prong test to antitrust immunity under a state action doctrine defense. More likely, an interpretation must be made as to whether a board's activities arguably implicate the application of the antitrust laws and, if such a threshold is met, whether the state action doctrine provides an affirmative defense. As referenced, and based upon the current regulatory structures, many jurisdictions will conclude that the regulatory structure satisfies both prongs of the test.

In a one size fits all approach, the May 4 letter also contends that "your state (like many others) has chosen to ignore [legal precedents] and has created 'state' boards that are directly controlled by members of the very trade or profession they purport to regulate." Again, the legislatively created and empowered regulatory boards have been populated with persons knowledgeable with the profession and subject to the objectivity and ethical bounds of volunteering for public service.

Of significant concern are the contentions of the authors that "hidden influence is endemic and is also problematic where there are not proper limitations on privately-advanced contentions and secretly negotiated deals." Such inflammatory and unsubstantiated allegations serve no purpose other than to question the integrity of the entire regulatory structures and do not promote a meaningful basis for change, if determined to be necessary.

The Supreme Court decision does blur the line between sovereign government agencies and private entities. The two-part test cited by the Supreme Court holds that in order to claim immunity, non-sovereign governmental boards must (1) have a clearly articulated state policy ***and*** (2) be actively supervised by the state. While it is arguable that governmental boards should be deemed to be "sovereign actors" and, perhaps, required to meet only the first prong of the test, incorporating suggestions for sound, uniform statutory language and ensuring proper state oversight can ensure state regulatory boards are meeting both requirements.

FARB has begun the process of modifying its Generic Model Practice Act to address the two-prong test, understanding the need to operationalize any such legislative suggestions.

Governmental licensing continues to be an important vehicle in promoting the ***health, safety, and welfare*** of the consuming public. States should work to strengthen their state regulatory boards and promote uniformity across professions. Volunteer board members should be commended for the work they do in the interest of public protection.

FARB requests that your office seriously consider the impact of any potential alterations to your regulatory structure and exercise due diligence before undertaking any changes. While certain measures in certain jurisdictions may be determined to be advisable under the circumstances, a political knee jerk reaction only has the potential for ignoring the needed benefits of involved and informed board members. FARB is prepared to provide additional and more encompassing information should you so desire. Thank you for your consideration.

Sincerely,

Dale Atkinson
Executive Director