ADA
American Dental Association
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July 13, 2007

VIA Federal Express

Mr. Donald S. Clark
Secretary, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H 135
Washington, DC 20580

Re: Docket No. 9311

Dear Mr. Clark:

Enclosed are the original and two copies of the comments of the American Dental Association on the Consent Decree in Docket 9311, In Re: South Carolina State Board of Dentistry.

Please confirm your receipt of these comments.

Sincerely,

Tamra S. Kempf

Tamra S. Kempf
Chief Legal Counsel
Division of Legal Affairs

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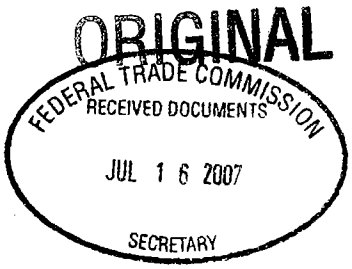

July 13, 2007

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: In re South Carolina State Board of Dentistry, Docket No. 9311

Dear Secretary:

The consent decree in this Docket was based on a temporary rule of the South Carolina State Board of Dentistry which required school children in South Carolina to be examined by a licensed dentist before they could receive prophylactic care from a dental hygienist – and on a proposal by the Board of Dentistry to make that rule permanent. Significantly, however, the temporary rule had expired more than eighteen months before the Complaint in this action was filed, and the South Carolina legislature has, through duly enacted legislation, rejected and repudiated efforts to make the rule permanent. Thus, there is no realistic likelihood that the rule which is the subject of the consent decree would ever take effect – even in the absence of the decree.

In these circumstances, the American Dental Association ("ADA") respectfully urges the Federal Trade Commission to withdraw its acceptance of the consent decree in this Docket. That decree constitutes an order against an agency of a sovereign state where there is absolutely no need for such an order and where the state's procedures have already proven more than adequate to address the Commission's concerns about the Board of Dentistry's rule. Moreover, the decree injects the Commission into an area, i.e. balancing access and quality considerations in dentistry, that is far better handled by the state legislature than by a federal antitrust agency. In this comment, we will explain in greater detail why the ADA believes that finalization of the consent decree would be an abuse of the Commission's discretion.

A. FEDERALISM CONSIDERATIONS

The "state action doctrine" in antitrust law reflects a strong presumption against application of the federal antitrust laws against states and their agencies. The doctrine is based on the recognition that, under our "dual system of government," the "states are sovereign, save only as Congress may constitutionally subtract for their authority." Parker v. Brown, 317 U.S. 341, 353 (1943). Thus, the federal antitrust laws do not extend to actions of state agencies when such agencies are implementing a regulatory program clearly articulated by the state legislature. If the legislature's intent to establish a regulatory program that displaces unfettered competition is clear, the fact that the

legislature did not describe the program in detail does not subject the program to the restraints of the federal antitrust laws. See, e.g., Earles v. State Board of Certified Public Accountants, 139 F3d 1033 (5th Cir. 1998).

Of course, as the analysis of the consent decree in this Docket points out, the rule of the Board of Dentistry that led to imposition of the decree was expressly disavowed both by the South Carolina legislature and by a state administrative law judge. In these circumstances, the Board of Dentistry cannot be said to have been implementing a regulatory program clearly articulated by the legislature. But the fact that the decree is not barred by law does not mean that the Commission acted within the scope of its rightful discretion when it saw fit to seek an order. States are still sovereign governments within our system of federalism. Moreover, regulation of the professions that are concerned with health is "a vital part of the state's police power." Barsky v. Board of Regents, 347 U.S. 442, 449 (1959). See Zahl v. Harper, 282 F3d 204, 211 (3d Cir. 2002) ("[r]egulating matters of health is among the historic police powers of a state.").

In light of the federalism concerns that are implicated, an order should not be imposed against a state agency – particularly one responsible for regulating a health care profession – unless there is a compelling reason to do so. Here, there is no reason whatsoever to require a consent decree from the Board of Dentistry – let alone a compelling reason. On the contrary, the processes of the State of South Carolina have proven themselves more than adequate to address the concerns underlying the Commission's Order – and to prevent any recurrence of the conduct that gave rise to those concerns.

Specifically, as required by South Carolina law, the Board of Dentistry submitted to a state administrative law judge its proposed regulation requiring examination by a dentist before school children could receive prophylactic care from a hygienist. Compl. ¶ 31; Public Hr'g. Report of the ALJ, In re Proposed Regulation, Dkt. No 2644, Dkt. No. 01-ALJ-11-0348-RH, at 17-18 (Feb. 11, 2002). The ALJ concluded that the proposed regulation contravened the policy of the state legislature "to increase access to preventive oral health care for low-income children." Compl. ¶ 32-33; ALJ Report at 17-18. Even more importantly, the legislature amended the Dental Practice Act to make clear that no pre-examination requirement applies in the public health setting. See S.C. Code Ann. §§ 40-15-102,110 (2003). In response to these actions, the Board withdrew its proposed regulation and issued a statement that pre-examination of a patient is not required as a precondition to a dental hygienist's providing prophylactic care in the public health setting – and that the Board would not seek any change to the legislature's policy.

Any suggestion that the order is necessary to prevent the Board of Dentistry from trying to reimplement its discredited rule is belied by three facts. First, the Board itself

has stated that it has no intention to do so. Second, and more importantly, the South Carolina legislature has exercised its sovereign authority by amending the Dental Practice Act to prevent reimposition of the Board's rule. And third, the South Carolina procedure for issuance of regulations – requiring review by an ALJ and affirmance by the legislature – provides further assurance that there is essentially no likelihood of readoption of the challenged regulation in the absence of the decree.

To put the point another way, the fact that the state legislature has repudiated the Board's rule may make the state action doctrine inapplicable. But that very same fact, coupled with additional procedural safeguards under state law, makes the decision to require a consent decree from the Board of Dentistry an abuse of discretion. That decision represents an unnecessary application of the federal antitrust laws to a state government.

B. ADDITIONAL CONSIDERATIONS

The substantive policy issue underlying this Docket is the extent to which patients should have access to the services of dental hygienists without the benefit of the clinical expertise of a dentist. Thoughtful resolution of this question requires (a) an understanding of the differences in education and training as between dentists and hygienists, (b) an assessment of the risks and benefits to patients from receiving hygienist services without an examination by a qualified dentist, and (c) a judgment regarding the situations in which the benefits outweigh the risks. This balancing of access and quality considerations has traditionally been the responsibility of state legislatures because it is best performed by state legislatures.

The state legislature – with its fact-gathering mechanisms, broad representation, and access to dental expertise – is far better able to make judgments about the respective roles of dentists and dental hygienists in providing care for patients than is a federal antitrust agency whose sole focus is supposed to be competitive effect. Certainly, an antitrust enforcement agency in Washington, D.C. is not as well equipped as the South Carolina legislature to form a judgment regarding what policy choices best serve the citizens of South Carolina.

There could be no better proof of this consideration than what occurred here. The state legislature reviewed the issue, considered the findings of the ALJ assigned to advise it, and concluded that the school children of South Carolina are better served by giving them access to dental hygienists without prior examination by a dentist. The legislature was able to take into account access and quality considerations – not just competitive considerations. It was able to seek and receive input from all stakeholders – not just parties to the FTC proceeding. And if the legislature were to balance the relevant

considerations in a manner unacceptable to a substantial segment of South Carolinians, the accountability of the legislators to the electorate provides a democratic method for modification of that balance.

CONCLUSION

The facts of this case demonstrate why finalization of a decree – with its invasion of the sovereignty of a state – would be an abuse of the Commission's discretion. Specifically, South Carolina's administrative processes proved themselves more than adequate to address the concerns that animated the Commission. There is no substantial basis for thinking that the decree is necessary to vindicate those concerns. And there is every reason to believe that the South Carolina legislature is better suited to make policy judgments about balancing access and quality considerations in dentistry for the people of South Carolina than is the Federal Trade Commission.

For all these reasons, the Commission should withdraw the consent decree in this Docket.

Respectfully submitted,

Tamra S. Kempf

Tamra S. Kempf
Chief Legal Counsel

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