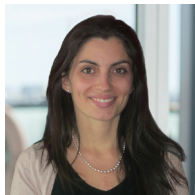

Occupational Licensing in Healthcare and Beyond: Recent Developments in Case Law, Enforcement, Legislation and Research

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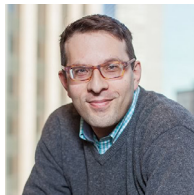
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Background on Occupational Licenses

In the United States, almost 30 percent of jobs require a professional license.¹ As one would expect, jobs in medical fields are tightly regulated, and lengthy training is needed before one is allowed to practice as a nurse, a physical therapist, or a doctor. Many other jobs also require more or less costly licenses, including lawyers (who typically must go to law school and take the bar exam), actuaries, accountants, taxi drivers, manicurists, and barbers. On the one hand, occupational licenses may ensure a standard of quality and expertise in a given field, thereby benefiting consumers. On the other hand, onerous occupational licenses limit entry into a field, restraining competition, decreasing supply, and increasing prices, thereby harming consumers. For workers, licensing may limit job opportunities.

This tradeoff between higher quality and lessened competition is at the crux of the antitrust questions surrounding occupational licenses and related regulations. Finding the level of regulation that most benefits consumers is a complex balancing exercise and very much depends on the degrees to which, in practice, licensing regulations improve quality and reduce competition. If regulations tighten supply and increase prices while only providing marginal impact on quality, then relaxing those regulations would

increase competition and could therefore increase overall consumer welfare (even if quality is slightly degraded).

While this balancing exercise is complicated, occupational licensing becomes particularly problematic when the incentives of the licensing authorities may not fully align with those of consumers. In particular, when a licensing board is staffed by members of its own profession, conflicts of interest may arise, as the board and the members it represents may benefit from stricter standards that limit competition, whether or not there is a discernible effect on quality. As the board's interests may not be aligned with those of the public, it becomes unclear whether the regulations it supports are enacted to protect the public or merely to reduce competition to benefit the board and other members of the profession. In the latter case, competition may be stifled without a corresponding benefit in the form of higher quality.

Two factors have contributed to a renewed focus on the topic of occupational licensing from courts, antitrust agencies, and state legislatures. The first is a change in the legal environment, stemming from the U.S. Supreme Court's pivotal decision in *North Carolina State Board of Dental Exam'rs v. Federal Trade Commission* ("N.C. Dental Board"),² in which the Court ruled that state professional boards were not immune from antitrust laws. The second factor is technological: with the development of new technologies, new entrants have been able to avoid or circumvent professional licensing regulations, leading to frictions with incumbents. For instance, many industries are being disrupted by new entrants with online platforms or apps—think Uber, Airbnb, or Redfin—and existing professional licenses and regulations may become, depending on one's point of view, outdated or easier to bypass.

This article briefly summarizes *N.C. Dental Board* and other recent cases related to occupational licensing; summarizes recent activity from the Federal Trade Commission ("FTC"), the U.S. Department of Justice Antitrust Division ("DOJ"), and state legislatures; and discusses recent economic research that can help inform antitrust issues surrounding occupational licenses.

N.C. Dental Board and Recent Cases

N.C. Dental Board addressed antitrust issues arising from state regulatory boards' power to reduce competition in their fields in favor of members of their own profession. After the North Carolina State Board of Dental Examiners sent cease and desist letters to non-dentists who were offering teeth whitening services (and to their suppliers), the FTC filed an administrative complaint, alleging that the dental board had unlawfully restrained trade and competed unfairly. In response, the dental board claimed antitrust immunity under the state-action doctrine.³ However, an administrative law judge and the Fourth Circuit disagreed, finding that the dental board had indeed violated antitrust laws and was not immune from federal antitrust laws. The Supreme Court upheld the lower courts' rulings, agreeing with the FTC's contention that, because the dental board was controlled by market participants who would benefit from restraining trade and was not actively supervised by the state, it was not immune from antitrust laws under the state-action doctrine.⁴

Two recent cases in the healthcare field—*Teladoc, Inc. v. Texas Medical Board*,⁵ and *Henry v. N.C. Acupuncture Licensing Board*⁶—bear important similarities to *N.C. Dental Board*. Both deal with different types of healthcare providers competing to offer comparable health services, and both raise the question of the ability and incentives of state boards to limit the scope of practice of their potential competitors. *Teladoc* relates to the Texas Medical Board’s regulations restricting video consultations and preventing telehealth providers from prescribing pharmaceuticals during video consultations. Telehealth company Teladoc and its employed physicians sued the medical board, alleging that those restrictions violated antitrust laws. The DOJ and the FTC sided with Teladoc, and the FTC then initiated its own investigation.⁷ After the state legislature passed a law in 2017 forcing the removal of the restrictions at issue, the case and the investigations were dropped.⁸ *Henry* relates to acupuncture licensing in North Carolina, particularly the board’s attempts to prevent non-members—specifically physical therapists—from performing “dry needling.”⁹ In that case, physical therapists and consumers of dry needling initiated the litigation, alleging that the board suppressed competition from physical therapists.¹⁰ The case is currently pending before the state supreme court.

These types of disputes are not restricted to the healthcare field. In particular, as noted above, the introduction of new technologies and platforms with potential to enable entrants to bypass entry-detering regulations and to challenge incumbents has further spurred disputes that are forcing courts to contend with the procompetitive and anticompetitive effects of licensing boards. While these disputes may not differ substantively from those discussed above, they are of particular interest because the emergence of new platforms has the potential to disrupt a market and displace incumbents more quickly and substantially than other forms of market entry.¹¹

The legal industry has seen a number of challenges to state or municipal bar associations following the emergence of new online platforms. For instance, in *LegalZoom.com, Inc. v. North Carolina State Bar*,¹² LegalZoom, an online legal technology company that helps its customers create an array of legal documents, sued the North Carolina State Bar for antitrust injury. Relying on *N.C. Dental Board*, it argued that the bar was illegally and unreasonably restraining trade by preventing LegalZoom from offering prepaid legal services plans in North Carolina.¹³ The case settled in 2015. Another settled matter involves Zlien, an online mechanics’ lien payment platform, in *Express Lien Inc et al v. Cleveland Metropolitan Bar Association et al*.¹⁴ After it was unsuccessfully sued by the Cleveland Metropolitan Bar Association for alleged unauthorized practice of law, Zlien responded by suing the Ohio State Bar in federal court, citing *N.C. Dental Board* as a basis for arguing that the state bar was restricting competition. A third and ongoing matter, *TIKD Servs. LLC v. Fla. Bar*,¹⁵ involves TIKD, a startup that matches drivers to independent lawyers who will fight their traffic tickets. In 2017, TIKD brought an antitrust suit against the Florida Bar and a law firm doing business as The Traffic Ticket, claiming that the defendants launched a “coordinated attack [...] to drive [TIKD] out of business and to prevent lawyers from representing TIKD’s customers,” thereby reducing competition, increasing prices, and causing economic harm.¹⁶

A number of cases have also emerged from the disruption of the taxi industry brought about by ridesharing apps and startups such as Uber and Lyft.¹⁷ A series of

related disputes between Uber and its drivers on the one hand and the St. Louis Metro Taxicab Commission and taxi drivers on the other is illustrative.

In 2016, following the St. Louis Metropolitan Taxicab Commission (“MTC”)’s attempt to block Uber from operating its UberX services in St. Louis, Uber and several of its drivers sued the MTC in *Wallen v. St. Louis Metro. Taxicab Comm’n*,¹⁸ alleging that the MTC had violated antitrust law. Citing *N.C. Dental Board*, plaintiffs argued that several of the commissioners of the MTC were active market participants trying to hinder competition.¹⁹ The MTC’s claims to antitrust immunity under the state-action doctrine were rejected by the court.²⁰ This first dispute prompted the MTC to fire back at Uber in a second case, *St. Louis Metropolitan Taxicab Commission v. Uber Inc. et al*,²¹ suing the ridesharing app in federal court for allegedly circumventing local licensing regulations. However, the MTC’s efforts were unsuccessful.²² In a third case, a class of taxi drivers in St. Louis also sued Uber, claiming that Uber’s entry in St. Louis was unlawful and negatively affected taxicab revenue and passenger calls.²³ The district court judge dismissed the case, but plaintiffs appealed and the case is set for argument in April 2018.

Regulatory and Legislative Interests

N.C. Dental Board not only spawned a slew of challenges to other state boards, it also revived regulatory and legislative interest in occupational licensing.

FTC and DOJ

The FTC has had a longstanding interest in tackling antitrust exemptions and immunities, and *N.C. Dental Board* spurred the agency to intensify its scrutiny of occupational licensing. The agency has taken a two-pronged approach, through both enforcement and advocacy. On the enforcement front, the FTC has intervened in certain circumstances by filing administrative complaints or initiating investigations into occupational licensing regulations that may unreasonably restrain competition. Its enforcement strategy is exemplified in its investigation of the conduct alleged in the *Teladoc* case.²⁴ Likewise, *In the Matter of Louisiana Real Estate Appraisers Board*, the FTC has filed a complaint against the Louisiana Real Estate Appraisers Board, alleging that the board’s pricing regulations reduced price competition and led to higher fees charged by appraisers in violation of federal antitrust laws.²⁵ The case is ongoing.

On the advocacy front, the FTC has been active in evaluating and commenting on proposed federal and state regulations or state legislative proposals, filing amicus briefs in litigation (as in the *Teladoc* case, where it co-authored a brief with the DOJ), as well as supporting and collaborating with state officials to reform occupational licensing.²⁶ The FTC also announced in 2017 that it would target unnecessary occupational licensing and create an “Economic Liberty Task Force to advance economic liberty issues, with a particular focus on occupational licensing regulations.”²⁷ In announcing that initiative, then-Acting Chairman Maureen Ohlhausen stated that the FTC would advocate on a state basis and partner with state actors to promote competition, in particular, fighting against regulatory capture by narrow interest groups that impose costly regulations on potential new entrants.²⁸

The DOJ has also been active in this regard, commenting on state legislative proposals, sometimes jointly with the FTC.²⁹ For instance, in March 2018, the DOJ filed a statement of interest on behalf of the federal government in *TIKD Servs. LLC v. Fla. Bar*, arguing that under *N.C. Dental Board*, the Florida Bar was not automatically immune from antitrust liability.³⁰

State Actions

State legislators have reacted in various ways. Some states have directly responded to *N.C. Dental Board* by increasing oversight and requirements on boards, to preserve their ability to regulate entry while better protecting them from antitrust suits. Some states, such as West Virginia and North Carolina, have mandated antitrust and state-action immunity training for certain boards.³¹ Others, such as Maryland, Montana, Tennessee, and Ohio, have enacted laws to promote active state supervision and increase scrutiny for all or a subset of boards.³²

Some state governors and legislatures have also recently taken steps to reform licensing requirements, generally to make licensing requirements less onerous and restrictive. For instance, in 2017, Nebraska Governor Pete Ricketts, along with a group of state senators, unveiled a legislative package aimed at “removing occupational licensing burdens.”³³ The FTC supported the goals of the bill.³⁴ Over the last two years, four other states, Arizona, Delaware, Indiana, and Wisconsin, have also considered licensing reforms to various degrees.³⁵ Adopting a different approach, South Dakota Governor Dennis Daugaard, jointly with U.S. Secretary of Labor Alexander Acosta, has been advocating for a multi-state approach to reduce frictions due to the local nature of occupational licenses.³⁶ Indeed, as occupational licenses are generally state-dependent, it may be burdensome for professionals of one state to move to another state and practice there. To reduce this burden, South Dakota introduced legislation that would allow participating states to recognize each other’s occupational licenses and grant temporary licenses to licensed professionals moving from one state to another.³⁷ As Daugaard put it, “[T]he idea is simple. If already licensed in one state, a professional can move to another member state and practice for 18 months, enough time to earn a license in that state if one chooses to do so.”³⁸ Although some argue that standardizing licensing requirements across states does not address the anticompetitive issues associated with occupational licensing, the idea of reducing barriers to interstate migration is consistent with recent academic literature that analyzes the effect of occupational licensing on migration and other labor market outcomes.³⁹

Academic Economic Research

Efforts to curtail the degree to which licensing boards can deter entry may benefit from recent research in the academic sphere, particularly as it relates to scope of practice (“SOP”) laws in healthcare. SOP laws define the types of services that certain providers can perform and the level of independence with which they can do so. Three recent studies focus on SOP regulations for certain types of advanced practice registered nurses. The first, by Kleiner et al., finds that giving nurse practitioners (“NPs”) more

independence does not lead to negative effects on patients' health outcomes, while likely lowering healthcare prices and increasing NPs' wages.⁴⁰ The second study, by Traczynski and Udalova, finds that greater NP independence improves access to and utilization of primary care and decreases emergency care utilization.⁴¹ A third study, by Markowitz et al., finds that reducing SOP restrictions for certified nurse midwives does not affect infant or maternal health outcomes.⁴² All three of these studies point to a similar conclusion: relaxing SOP restrictions, at least for certain types of nurses, can increase competition and lower healthcare costs without any adverse effect on quality of care.

The results of these studies may be helpful for policymakers to consider when dealing with licensing issues. For markets with low supply (e.g., primary care doctors in rural areas), policymakers may consider easing occupational licensing restrictions to encourage entry into the market, while still mitigating any impact on quality. More broadly, policymakers may want to consider the distributional effects of existing or future licensing regulations on the labor market—i.e., how licenses may benefit some workers at the detriment of others.

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Endnotes

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- 2 135 S. Ct. 1101 (2015), Decided on February 25, 2015.
- 3 The state-action doctrine gives state and municipal authorities immunity from federal antitrust lawsuits as long as any anticompetitive effects stem from a clearly articulated state policy. By extension of the state-action doctrine, non-state actors are also immune from federal antitrust laws if, in addition to being a clearly articulated state policy, the actors are actively supervised by the state. See, e.g., Cornell Law School Legal Information Institute, *State Action Antitrust Immunity*, available at https://www.law.cornell.edu/wex/state_action_antitrust_immunity.
- 4 *N.C. Dental Board*, 135 S. Ct. at 1110.
- 5 No. 1:15-CV-343-RP, 2016 U.S. Dist. LEXIS 107443 (W.D. Tex. Aug. 15, 2016).
- 6 No. 1:15-CV-831, 2017 U.S. Dist. LEXIS 12204 (M.D.N.C. Jan. 30, 2017).
- 7 See Brief for the United States and Federal Trade Commission as Amici Curiae at 2 n.1, *Teladoc*, No. 16-50017 (5th Cir. Sept. 9, 2016), available at https://www.ftc.gov/system/files/documents/amicus_briefs/teladoc-incorporated-et-al-v-texas-medical-board-et-al/teladoc_doj-ftc_amicus_brief.pdf.

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- 9 According to Plaintiffs, dry needling is “[a] commonly used intervention for treating myofascial trigger point pain” during which “physical therapists insert needles into trigger points (taut bands in the muscles) to relieve patients’ pain or dysfunction.” See Plaintiff’s Amended Complaint at 30-31, 56, *Henry*, No. 1:15-CV-831 (M.D.N.C. Feb. 03, 2016). In December 2010, the board regulating physical therapists in North Carolina had determined that dry needling was part of physical therapists’ scope of practice. Consequently, the Acupuncture Board sued the Physical Therapists Board in the North Carolina Business Court. See *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam’rs*, 808 S.E.2d 440 (N.C. 2018). After the court ruled in favor of the Physical Therapist Board, the Acupuncture Board appealed to the Supreme Court of North Carolina.
- 10 See *Henry*, 2017 U.S. Dist. LEXIS 12204, at *2-3; Plaintiff’s Amended Complaint, *supra* note 9, at 30-31, 56.
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- 12 2012 NCBC 47 (N.C. Super. Ct. 2012).
- 13 Complaint for Damages and Injunctive Relief at 3-4, 6, 17-18, *LegalZoom.com, Inc. v. North Carolina State Bar*, 2012 NCBC 47 (N.C. Super. Ct. 2012).
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- 15 No. 17-24103-CIV-COOKE/GOODMAN, 2017 U.S. Dist. LEXIS 210494 (S.D. Fla. Dec. 12, 2017).
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- 19 Complaint for Injunctive and Other Relief at 7, *Wallen v. St. Louis Metro. Taxicab Comm’n*, No. 4:15cv1432 HEA, 2016 U.S. Dist. LEXIS 138988 (E.D. Mo. Oct. 6, 2016).
- 20 No. 4:15cv1432 HEA, 2016 U.S. Dist. LEXIS 138988 (E.D. Mo. Oct. 6, 2016) at *5 (“Mere state-law authorization to act is insufficient to establish state action immunity...”).
- 21 No. 4:15cv1562 (E.D. Mo. Aug. 8, 2016) (dismissed).
- 22 The case was remanded to state court in August 2016, and the state court granted the plaintiff’s motion to dismiss the case in January 2018. See, *Metropolitan Taxicab Commission v. Uber Inc. et al*, No. 15SL-CC03416-01 (Mo. Ct. App. Jan. 2, 2018). It is also worth noting that after new legislation established statewide regulations for ridesharing companies in 2017, the MTC eased regulations on taxis—including lowering mandatory insurance thresholds and fees paid to the MTC—to help them compete with Uber and Lyft. See Jacob Kirn, *Taxi Commission Eases Regulations to Help Cabs Compete with Uber, Lyft* ST. LOUIS BUSINESS JOURNAL, May 31, 2017, <https://www.bizjournals.com/stlouis/news/2017/05/31/taxi-commission-eases-regulations-to-help-cabs.html>.
- 23 *Vilcek v. Uber USA, LLC*, No. 4:15CV1900 HEA, 2016 U.S. Dist. LEXIS 140178 (E.D. Mo. July 21, 2017, Sept. 30, 2016) (dismissed), appeal docketed, No. 17-2724 (8th Cir. Aug. 9, 2017) (“Uber’s entry into the taxicab business in St. Louis City and County was unlawful and in violation of the MTC’s rules and the Taxi Code. Since Uber’s unlawful entry into the St. Louis City and County taxicab market, plaintiffs and members of the putative Class have experienced decreases in revenue of 30-40% compared to the comparable time period in 2014 resulting from a decrease in passenger calls.”).
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- 27 See Maureen K. Ohlhausen, *Advancing Economic Liberty* in George Mason Law Review’s 20th Annual Antitrust Symposium (Feb. 23, 2017) at 6, available at <https://www.ftc.gov/public-statements/2017/02/advancing-economic-liberty>.
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- 39 Two recent academic papers focus on the impact of occupational licensing on labor market outcomes. The first paper finds that licensed workers have higher pay, better benefits (in the form of employer-provided health insurance), and are more likely to be employed. See Maury Gittleman, Mark Klee, and Morris Kleiner, *Analyzing the Labor Market Outcomes of Occupational Licensing*, 57 INDUSTRIAL RELATIONS, 57, 57-100 (2018). The second paper, related to the Daugaard-Acosta initiative, analyzes the impact of state-specific occupational licenses on migration across states. Focusing on the interstate migration of two dozen licensed occupations, the authors find that state-specific licensing reduces migration by 36 percent. They also find that reciprocity agreements between licensing agencies in different states may increase interstate migration, as they reduce the cost of migrating. Together, these studies reveal a tradeoff underlying occupational licensing in the labor market. On the one hand, occupational licensing can improve opportunities for licensed workers. On the other hand, occupational licensing may create frictions that reduce overall efficiency of the labor market—and even create barriers to economic opportunity for non-licensed or out-of-state workers. See, Janna E. Johnson and Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?*, NBER WORKING PAPER (2017), available at <https://minneapolisfed.org/research/sr/sr561.pdf>.
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