

MEMORANDUM

To: State Society CEOs, Deputy CEOs, and Government Affairs staff

From: Mat Young, AICPA Vice President, State Regulatory and Legislative Affairs

Re: The *NC Dental* Supreme Court decision - Impact on the Profession and Recommendations for State Society Action

Date: August 8, 2016

Request for action

Until lower courts begin to rule on the questions that the U.S. Supreme Court case, *North Carolina Dental Examiners*, left unanswered, the AICPA recommends that state CPA societies consider advocating for legislation that:

1. Grants state regulatory boards and members immunity from personal liability for actions taken in good faith in carrying out board duties; and
2. Indemnifies state boards and members from any damages or litigation fees related to claims against them to which the immunity applies.

Because the NC Dental decision impacts many professions, some state CPA societies might benefit from working with larger professional coalitions to adopt indemnity and immunity language. Other states may choose to pursue such legislation in their state's accountancy statutes.

Unless state CPA societies and boards of accountancy proactively initiate discussions about solutions with policymakers, other groups or public policy officials may take action in ways that do not benefit the regulation of the profession. In some instances, policymakers have already stripped boards of some discretion to act independently, before state CPA societies or boards of accountancy could fully engage on the issue.

Overview and importance of *NC Dental*

On February 25, 2015, the U.S. Supreme Court issued a 6-3 ruling in [*North Carolina State Board of Dental Examiners v. F.T.C.*](#) (*NC Dental*) effectively limiting the conditions under which members of a state regulatory board with “market

participants” – such as accountancy boards – may claim immunity from antitrust laws. While the details of the case are particular to dentists, the ramifications apply equally to many state regulatory boards, and exposes state board members to greater personal liability risk.

Private plaintiffs have already increased challenges to state boards and agencies because of the relaxed antitrust exception arising out of *NC Dental*. Successful antitrust plaintiffs are entitled to treble damages and attorneys’ fees, and antitrust litigation can be long, costly, and impose a significant burden on individual defendants. Consequently, the decision may have a chilling effect on the willingness of individuals to serve on boards if they are subject to increased risks of being sued.

States, seeking to limit their own litigation risk, may increase regulatory oversight laws and heighten review of boards’ regulatory activity in an effort to comply with the Court decision. Such new operating requirements could result in an undue burden on board efficiency and effectiveness.

As states explore their own solutions to the matters raised in *NC Dental*, state CPA societies should be prepared to discuss how the profession and its regulators can best comply with the decision and ensure the protection of the public through an effective state regulatory regime. This memo provides background on the decision, reviews recent state activity in response to the decision, and discusses potential state action to address the immediate concerns to board members. In addition, the memo references potential state and federal proposals of which state CPA societies should be aware, though they are not yet primed for in-depth analysis.

***NC Dental* findings and ramifications**

Until the *NC Dental* decision, state regulatory boards and their members relied on an exception to federal antitrust law known as “*Parker* immunity,” which generally insulated board decisions from antitrust scrutiny. In *NC Dental*, the Supreme Court ruled that state-action immunity for actions that limit competition extends to actions of a state regulatory board “controlled by active market participants” *only if* the state articulates a clear policy to displace competition and *actively supervises* the board’s actions. The Court declined to define controlling number, active participants, or active supervision, stating, “It suffices to note that the inquiry regarding active supervision is flexible and context-dependent.” Given the largely self-regulatory model that many state boards of accountancy follow, this decision could expose board members to increased risks for lawsuits based on decisions made in their official capacities.

While there is no evidence that a state board of accountancy has been sued under *NC Dental* theories as of yet, there have been over 25 lawsuits brought against other regulatory bodies as a result of the decision.

In light of multiple requests for clarification, in October 2015, the Federal Trade Commission issued guidance on how state regulatory boards can regulate their professions without running afoul *NC Dental*. The guidance broadly defined which members of a state board qualify as “active market participants” and under what circumstances they “control” the state board. As there has been limited court review of this guidance as applied by states, it is difficult to conclude, at this point, how states should specifically comply with the Supreme Court’s ruling.

State activity highlights

In 2015-2016, fourteen states considered legislation in reaction to the *NC Dental* case and five - Alabama, Connecticut, Georgia, Idaho, and West Virginia – enacted legislation. The new laws establish enhanced state supervision of regulatory board activity ranging from review of all board activity by additional state authorities (Alabama, Connecticut, and Georgia), changes in the board appointment process (Idaho), and provision of indemnification to board members and staff (West Virginia).

Additionally, in states such as California, Florida, Massachusetts, Nebraska and Oklahoma, governors and attorneys general have issued orders providing for increased oversight of state regulatory boards. In total, since the Court’s ruling in 2015, almost one-third of states have issued remedies seeking to address the issues raised by the Court, a result that will rise in the coming 2017 legislative cycle.

Recommended State Action: State-Level Immunity and Indemnification

State CPA societies should consider supporting immunity (exempting individuals from lawsuits for certain actions) and indemnification (offering to cover legal costs for lawsuits) legislation for boards of accountancy and their members.

Since board members are volunteering their professional insights and judgment, states should be willing to make clear that members are not subject to personal liability as a result of their service on the board. The state should also indemnify boards and members for actions taken in their official capacities. Indemnification provides assurance to current and potential board members that they will not bear the costs of potential antitrust liability, and fosters the likelihood of continued interest in service on state boards, providing the state with the expertise required to regulate licensed professionals.

Indeed, the Uniform Accountancy Act (UAA) already contains a model immunity and indemnification provision (Section 4(g)(2)).

In looking at the states, Massachusetts and Rhode Island already expressly provide immunity and indemnification to their boards of accountancy and members with statutory language similar to UAA Section 4(g)(2). West Virginia also provides indemnification to its accountancy board and members, while at least six other states (Illinois, Michigan, New Jersey, New York, Oklahoma, and Texas) have indemnification statutes that reach state employees, or members of specific state agencies, boards, or institutions, but are silent on whether indemnification extends to other professional board members.

A model statute that provides Board members both immunity and indemnification should incorporate these five elements:

1. Specifically include professional boards, their members (consider including former board members), and board agents (which would likely include board employees);
2. Provide that board members and board agents may not be subject to liability in their personal or official capacities as a result of their service on the board;
3. Provide indemnification for claims arising from, or relating to, board members' and agents' actions or omissions while acting pursuant to their official responsibilities;
4. Cover costs and attorneys' fees, including advancement of legal fees or a provision for the state to undertake the individual's defense directly, to make clear the statute covers the costs of defense and not simply payment of adverse judgments; and
5. Make immunity and indemnification automatic, not a matter within the attorney general or another state actor's discretion.

States may be hesitant to enact automatic indemnification provisions that apply regardless of the type of claim and may seek certain limitations. For example, Rhode Island's statute limits coverage to actions that board members take "in good faith", while others with general indemnification provisions give the state the option not to indemnify – or limit paying punitive damages – in cases involving "gross negligence" or "intentional wrongdoing". While limitations could result in added costs and uncertainty related to litigating whether an exception applies, a good-faith type limit may increase the political acceptability of a strong indemnification regime.

The following model language for all state boards incorporates the five elements discussed above – but does not include a good-faith limit:

1. Any member or agent of a state professional or occupational board, including any former member or agent, is immune from liability in his or her personal or official capacity for any action taken or omission in the discharge of the board's responsibilities.
2. The state shall indemnify the board and those members and agents for, and hold them harmless from, any and all costs, damages, and reasonable attorneys' fees arising from, or related in any way to, claims or actions against them as to matters to which the immunity applies. The state shall undertake a member or agent's defense, or advance legal fees to the member or agent.

State CPA societies should also consider the best avenue for incorporating indemnity and immunity language into their statutes. Because the NC Dental decision impacts many professions, some state CPA societies might benefit from working with larger professional coalitions to adopt model language such as that listed above that would protect members of all state regulatory boards. On the other hand, if a state's accountancy statute is already open for revision, state CPA societies may find it easier to include the UAA language in with other proposed changes.

If indemnification is not politically viable, and where states do not already authorize it, legislation authorizing (or mandating) professional boards to carry insurance to cover the costs of judgments and defending board members in litigation could be supported as an alternative. Georgia, for example, authorizes state agencies and boards "to purchase policies of liability insurance or contracts of indemnity or to formulate sound programs of self-insurance" to cover officers and employees "to the extent that they are not immune from liability against personal liability for damages arising out of the performance of their duties or in any way therewith." As insurance coverage could be a significant cost to states and require regular state action to purchase, the preference would be to promote solutions such as immunity that limit additional state time or expense.

Potential alternative solutions

Active State Supervision

If enacting or expanding an indemnification and immunity statute to professional boards is politically unfeasible, states should consider increasing their supervision of professional boards as a means of potentially avoiding subjecting board members to antitrust liability. While rigorous supervision does not provide the clear protection of an effective indemnification and immunity statute, it will provide some legal support for board activities while courts navigate what actions are subject to successful anti-trust challenges.

As there remain considerable uncertainties surrounding the specific requirements of “active supervision,” we recommend not pursuing discussions with policymakers until a thorough analysis of your state’s current oversight structure has been conducted and potential solutions have been considered. The AICPA can assist you with the review and analysis should the need arise.

National Solution

NASBA, along with other national regulatory associations, is part of a coalition encouraging Congress to consider a comprehensive national solution to the liability concerns created by *NC Dental*. The AICPA supports this effort and has offered grassroots support.

Any national effort, however, requires extensive time to educate lawmakers, build support, and promote legislation. With the short legislative window remaining this year, any national effort will face a steep uphill battle. As such, state CPA societies are encouraged to continue to focus their efforts on educating their state legislatures, governors, and attorneys general and seeking an equitable state-level solution to *NC Dental*.

Conclusion

State CPA societies will need to remain vigilant in monitoring and participating in the development of proposals resulting from the *NC Dental* decision. As a result, societies should consider beginning – if they haven’t done so already – a dialogue with their state boards and policymakers about immunity, indemnification and/or insurance as potential steps toward preserving state boards of accountancy and their members’ ability to operate effectively and without fear of costly and unwarranted litigation.

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