

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour

In the Matter of)
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SOUTH CAROLINA STATE BOARD OF DENTISTRY.) **Docket No. 9311**
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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the South Carolina State Board of Dentistry violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

STATEMENT OF THE CASE

1. Respondent South Carolina State Board of Dentistry (“the Board”), which consists almost entirely of practicing dentists, restrained competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists. Although the South Carolina General Assembly passed legislation in 2000 eliminating a statutory requirement that a dentist examine each child before a hygienist may perform cleanings or apply sealants in school settings, the Board in 2001 re-imposed the very examination requirement that the legislature had eliminated, and extended it to the application of topical fluoride in school settings as well. The effect of the Board’s action was to deprive thousands of school children—particularly economically disadvantaged children—of the benefits of preventive oral health care services. The Board’s anticompetitive action, undertaken by self-interested industry participants with economic interests at stake, was contrary to state policy and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers.

RESPONDENT

2. The Board is organized, exists, and transacts business under and by virtue of the laws of South Carolina, with its principal office at Synergy Business Park, Kingstree Building, 110 Centerview Dr., Columbia, South Carolina 29210.
3. The Board was created by the South Carolina legislature to supervise the practice of dentistry and dental hygiene.
4. By virtue of the Board's make-up, the licensed dentists of South Carolina regulate both themselves and dental hygienists.
5. The Board is composed of seven dentists, one dental hygienist, and one public member. The licensed dentists in South Carolina elect six of the dentist members for approval by the governor, and the dental-hygienist member is elected by licensed dental hygienists in South Carolina for approval by the governor. The governor of South Carolina appoints one of the dentist members and the public member.
6. While serving their membership terms, dentist members of the Board may, and do, continue to engage in the business of providing dental services for a fee. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, licensed dentists in South Carolina compete with each other and with dentist members of the Board.
7. The Board is the sole licensing authority for dentists and dental hygienists in South Carolina. It is generally unlawful for an individual to practice or to offer to practice dentistry or dental hygiene in South Carolina unless he or she holds a current license to practice.
8. The Board is authorized by South Carolina law to take disciplinary action against any licensee who violates any rule or regulation promulgated by the Board. Disciplinary action by the Board may include the suspension or revocation of a license, or other limitations or restrictions on a licensee.

JURISDICTION

9. The Board is a state regulatory body and is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.
10. Substantial sums of money flow into South Carolina from the federal government and other out-of-state payers for the purchase of preventive dental care services. The acts and practices of the Board, including the acts and practices alleged herein, have been or are in or affecting "commerce" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PREVENTIVE DENTAL SERVICES IN SOUTH CAROLINA

11. Dental hygienists are licensed health care professionals who specialize in providing preventive oral health services. Such services include cleaning teeth, taking x-rays, providing nutrition and dietary counseling, providing fluoride treatments, and applying dental sealants. Dental hygienists are also trained to detect signs of oral disease and to educate patients on maintaining optimal oral health.

12. There are over 2,200 dental hygienists licensed to practice in South Carolina. Dental hygienists in South Carolina practice in collaboration with a supervising dentist or under the direction of the South Carolina Department of Health and Environmental Control's public health dentist.

13. Firms owned by dental hygienists working in collaboration with a dentist (either supervised by a private dentist or working at the direction of South Carolina's public health dentist) can compete with dentists for the provision of preventive dental care services.

14. Many children in South Carolina suffer from oral health problems because they do not receive preventive dental care, particularly children in low-income families. Over 400,000 children – more than 40 percent of children in South Carolina – are Medicaid-eligible. In the early 1990s, only 12 percent of Medicaid-eligible children received preventive dental care services.

15. In 1988, the South Carolina General Assembly enacted a law specifically authorizing dental hygienists to provide preventive services in schools. That law, however, required that hygienists could provide cleanings and apply dental sealants only if a dentist had examined the child's teeth within the previous 45 days. The 1988 law did not significantly increase the delivery of dental hygienists' services in school settings.

16. In 2000, South Carolina substantially increased Medicaid reimbursement for dental services. With federal matching funds, about \$79 million became available annually for Medicaid-eligible dental services.

17. After Medicaid payment levels for dental care services increased, the number of South Carolina dentists participating in South Carolina's Medicaid-Dental program increased about one-third. More than 900 of the over 1,500 licensed dentists licensed in South Carolina now participate in the state's Medicaid-Dental program.

SOUTH CAROLINA GENERAL ASSEMBLY REMOVES A BARRIER TO THE PROVISION OF PREVENTIVE DENTAL CARE IN SCHOOLS

18. In 2000, the South Carolina General Assembly amended its statutes to make it easier for dental hygienists to deliver preventive dental care services in school settings. Prior to the 2000 amendments, South Carolina statutes provided that a dental hygienist could provide cleanings and sealants in a school setting only if:

- (1) a supervising dentist examined the patient no more than 45 days before the treatment;
- (2) a supervising dentist provided written authorization for the procedures;
- (3) the patient was not an active patient of another dentist; and
- (4) the patient's parents provided written permission for the treatment.

19. The 2000 amendments removed these requirements, except the requirement for parental consent. The 2000 amendments provided instead that a dental hygienist could apply topical fluoride and perform the application of sealants and oral prophylaxis "under general supervision." S.C. Acts § 40-15-80(B) (2000). General supervision "means that a licensed dentist or the South Carolina Department of Health and Environmental Control's public health dentist has authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed." S.C. Acts § 40-15-85 (2000). By virtue of the 2000 amendments, the Board could not require a dentist examination as a condition of a dental hygienist's providing preventive services in a school setting.

20. Upon signing the 2000 amendments, South Carolina's governor announced: "This new law removes a regulation that hindered access to dental care."

21. The 2000 amendments embodied a policy to remove artificial barriers to the provision of oral preventive health care by dental hygienists to school children.

22. Health Promotion Specialists ("HPS") is a firm owned by a dental hygienist that provides preventive dental services to South Carolina children. HPS employs dental hygienists to provide those services and contracts with dentists to supervise the hygienists.

23. In January 2001, HPS began providing cleanings, sealants, topical fluoride treatments, and other preventive dental services on-site to children in South Carolina schools. By July 2001, HPS had screened over 19,000 children, and provided preventive services (cleanings, sealants, and topical fluoride treatments) to over 4,000 children, including nearly 3,000 Medicaid-eligible children. Because HPS's services were provided in schools, they were more convenient for the families of the children served. Dentists in traditional office practices risked losing patients to HPS.

24. Because a tremendous unmet need for preventive dental care remained, HPS expected to treat more than twice as many students in the fall semester of 2001 as it had in the spring semester. Relying on this forecast, HPS more than doubled the number of hygienists it employed.

BOARD CONDUCT

25. The Board has restrained competition in the provision of preventive dental care services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the ability of dental hygienists to deliver preventive services in school settings. In particular, on July 12, 2001, the Board adopted an emergency regulation governing dental hygienist practice in school settings that re-imposed the same examination requirement that the General Assembly removed in 2000: that a supervising dentist had to examine the patient no more than 45 days prior to treatment.

26. For the regulation to become effective, it required the approval only of the Board, a majority of which consists of practicing dentists elected by the licensed dentists of South Carolina. No financially disinterested state actor approved the regulation before or while it was in effect. Under state law, the regulation terminated after 180 days.

27. The emergency regulation conflicted directly with the policy articulated by the General Assembly, by re-imposing the precise barriers to dental hygienists' providing preventive services to school children that the legislature had just removed.

28. The effect of the emergency regulation was to reduce substantially the number of children (particularly economically disadvantaged children) who received preventive dental care. During the latter half of 2001, the period when the emergency regulation was in effect, HPS screened fewer than 6,000 children, about 13,000 fewer than it had screened during the first half of 2001. The emergency regulation also limited HPS's ability to provide preventive dental care; as a result, the regulation deprived thousands of South Carolina children of preventive dental care.

29. The Board's requirement that a dentist examine each child before a dental hygienist provides a cleaning, sealant, or fluoride treatment in school settings was not reasonably related to any efficiencies or other benefits sufficient to justify its harmful effect on competition and consumers.

STATE ADMINISTRATIVE REVIEW FINDS IMPOSITION OF THE DENTIST PRE-EXAMINATION REQUIREMENT IN SCHOOL SETTINGS CONTRARY TO THE 2000 AMENDMENTS

30. In August 2001, the Board published a proposed permanent regulation substantially identical to the emergency regulation, which by law would lapse in January 2002.

31. Pursuant to South Carolina law, an administrative law judge was required, after a public hearing, to determine whether the proposed permanent regulation was a reasonable exercise of the Board's authority. The administrative law judge's report, along with the proposed regulation, had to be forwarded to the General Assembly for review in order for the permanent regulation to become effective.

32. In February 2002, the presiding administrative law judge issued a report that concluded that the Board's proposed permanent regulation was unreasonable and contravened state policy to the extent it reinstated the dentist pre-examination requirement that the legislature had eliminated in 2000.

33. The administrative law judge found that deletion of the statutory pre-examination requirement reflected a state policy adopted by the South Carolina legislature during its 2000 session to increase access to preventive oral health care for low-income children. The administrative law judge recommended that the Board delete the pre-examination requirement from its proposal before forwarding it to the legislature.

34. After issuance of the administrative law judge's report, the Board did not submit its proposed permanent regulation to the General Assembly for review. As a result, the proposed regulation did not take effect.

THE CURRENT THREAT TO THE DELIVERY OF PREVENTIVE DENTAL SERVICES IN SOUTH CAROLINA

35. After the emergency regulation lapsed, at least three firms, including HPS, provided preventive dental care in schools pursuant to contracts with the Department of Health and Environmental Control. Under the contracts, these firms provided cleanings, fluoride treatments, and sealants, under standing orders, without a mandatory pre-examination by a dentist.

36. During the latter part of 2002, HPS provided preventive dental care treatments to nearly 10,700 school children, 6,000 more than during the same period in 2001, when the Board's emergency regulation was in effect.

37. In May 2003, the South Carolina General Assembly enacted legislation that expressly provides that dentist examination requirements applicable in some settings do not apply to dental hygienists' provision of preventive oral health care services, including cleanings,

sealants and topical fluoride, when they are working in public health settings under the direction of the Department of Health and Environmental Control.

38. Nonetheless, when the Board in March 2003 considered the statutory revisions that the General Assembly later enacted, it maintained that in all settings where a dental hygienist provides treatment – whether public health or private practice – a licensed dentist has to see the patient and provide a treatment plan.

ANTICOMPETITIVE EFFECTS

39. The Board's acts and practices have had the effect of restraining competition unreasonably and injuring consumers in the following ways, among others:

- A. hindering competition in the delivery of cleaning, sealant, topical fluoride, and other preventive dental services to school-aged children in South Carolina; and
- B. depriving thousands of school children—particularly economically disadvantaged school children—of the benefits of preventive oral health care.

VIOLATION

40. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

NOTICE

Notice is hereby given to the Respondent that the fourteenth day of January, 2004, at 10:00 a.m., or such later date as determined by the Commission or by an Administrative Law Judge of the Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the Complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. Pursuant to § 3.12 of those Rules, the Commission hereby allows you until 30 days from the date of service of this Complaint upon you to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the Complaint are contested shall contain a concise

statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint and, together with the Complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under §3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The Commission or the Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after an answer is filed by Respondent. Unless otherwise directed by the Commission or the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in an adjudicative proceeding in this matter that the Board is in violation of Section 5 of the Federal Trade Commission Act, as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to, an order that requires the following:

1. The Board shall cease and desist from, either directly or indirectly, requiring that a dentist conduct an examination of a patient as a condition of a dental hygienist who is working in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), or any recodification thereof, performing oral prophylaxis or applying sealants or topical fluoride to that patient,

unless the examination requirement is adopted by the South Carolina General Assembly after the date that the order becomes final.

2. The Board shall mail a copy of the Complaint, order, and an explanatory notice to each Board member; each officer, director, representative, agent, and employee of the Board; each person licensed to practice dentistry or dental hygiene in South Carolina; and the superintendent of each school district in South Carolina.

3. The Board shall take such other measures that are appropriate to correct or remedy, or prevent the recurrence of, the anticompetitive practices in which it engaged.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of September, 2003, issues its Complaint against Respondent South Carolina State Board of Dentistry.

By the Commission.

Donald S. Clark
Secretary

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