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	)	
SOUTH CAROLINA STATE BOARD OF DENTISTRY.	)	**Docket No. 9311**

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

LYNNE W. ROGERS
General Counsel
South Carolina Department of Labor, Licensing & Regulation
Office of General Counsel
Post Office Box 11329
Columbia, South Carolina 29211-1329
Phone: (803) 896-4470
Fax: (803) 896-4471

DAVIDSON, MORRISON AND LINDEMANN, P.A.

WILLIAM H. DAVIDSON, II
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, South Carolina 29202
TEL: (803) 806-8222
FAX: (803) 806-8855

TABLE OF CONTENTS

Table of Authorities

Federal Cases:

State Cases

Federal Statutes

State Statutes

Other Authorities

INTRODUCTION

This action was filed on September 12, 2003, by the Commission, alleging violations of Section 5 of the FTC Act, 15 U.S.C. § 45, by Respondent, the South Carolina State Board of Dentistry ("Board"). As permitted by the Complaint, Respondent has moved to dismiss this action; the motion is based on mootness and state action immunity.

As will be shown herein, this matter is moot. The substantive relief sought in the Complaint is already in effect as a result of the 2003 amendments to the pertinent state statutes. In addition, contrary to suggestions in the Complaint in this case, the Board's understanding of what state law requires is in accord with the relief sought in this case, as shown by the Board's recent adoption of a resolution so indicating. As a result, there is no reasonable likelihood that the complained-of conduct can recur, and there is accordingly no need for an order of the Commission directed to the Respondent in this matter.

Even if the 2003 amendments to the state statutes had not rendered this matter moot, however, the Board actions complained of were subject to state action immunity under principles first set forth in Parker v. Brown, 317 U.S. 341 (1943). The Board's actions were those of a state agency acting well within its authority under state law; such issues of state law authority are required to receive highly deferential review by federal antitrust tribunals. In addition, the Board's actions were consistent with a clear articulation of state policy authorizing the Board to regulate dentists and dental hygienists.

FACTS

The primary issue in this case involves the extent to which state law requires certain actions by dentists before dental hygienists may apply sealants and perform oral prophylaxis in school or public health settings.[1] The Board submits that at present the only relevant issue of state law concerns the requirements of state law after the dental practice statutes were amended in 2003. As will be seen, those 2003 amendments permit hygienists to apply sealants and perform oral prophylaxis in public health settings without an examination by a dentist. As will also be seen, hygienists in public health settings are now applying sealants and performing oral prophylaxis without prior examinations by dentists, and in some instances have been doing so ever since the 2001 emergency regulation expired in January 2002. Exhibit 1, attached, Par. 2 (Affidavit of Dr. Raymond F. Lala).

Although the Board contends that the only relevant state statutory provisions are the ones currently in effect, i.e., the statute as it exists after the 2003 amendments, the following statement of facts begins with a discussion of state law as it existed several years earlier, both for context and in the event the Commission finds it necessary to address the issue of state action immunity.

A. The Dental Practice Act Prior To The 2000 Amendments.

Prior to 2000, it was unquestioned that the state statute pertaining to dental hygienists required that whenever a privately-employed dental hygienist applied sealants or performed oral prophylaxis in school settings, several conditions had to be met. One of these conditions was that the authorizing dentist had to be physically present on the

[1] As used herein, the terms "applying sealants and performing oral prophylaxis" should be read to include the procedure of applying topical fluorides.

school premises. This statutory requirement was derived from the language of former and present § 40-15-85(A), S.C. CODE ANN, which has provided at all pertinent times that "direct supervision" includes the concept that the dentist be physically present on the premises (dentist "must be on the premises actually involved in supervision and control"). Former Sections 40-15-80 (B) and -80 (D) contained several very limited exceptions to the general rule requiring the dentist's physical presence on the premises. These exceptions permitted hygienists in certain settings, including school settings, to perform oral screening, provide various forms of instruction and counseling, and apply topical fluoride, all "without the presence of a dentist on the premises." §§ 40-15-80 (B) and -80(D). However, the statute made no mention of an exception to the physical presence requirement when the acts to be performed by the hygienist included sealants or oral prophylaxis.

In addition, before a hygienist could apply sealants or perform oral prophylaxis, the hygienist was expressly required to receive authorization from "a licensed dentist who is either [the hygienist's] employer or supervising dentist. . . ." Former §40-15-80(C)(2). The same statute also expressly provided that the authorizing dentist was required to conduct a preexamination of each student. Former §40-15-80(C)(3).[2]

[2] The full text of former section 40-15-80 prior to the 2000 amendments is set forth below:

> (C) In school settings, application of sealants and oral prophylaxis are subject to the following restrictions:
>
> (1) A student with unmet oral needs may have a sealant applied or a prophylaxis performed upon written permission of the student's parent or guardian.
>
> (2) A licensed dental hygienist must receive authorization from a licensed dentist who is either his employer or supervising dentist before placement of sealants or prophylaxis is provided.
>
> (3) A preexamination and written authorization by the authorizing dentist, to occur no more than forty-five days before

B. The 2000 Amendments.

In 2000, the South Carolina General Assembly amended the statutes pertaining to dental hygienists. The amending statute was Act No. 298 of 2000, Exhibit 2. The title to the legislation provided that the bill was intended "to further define certain dental procedures and conditions under which they may be administered." The primary provision relating to dental hygienists, S.C. CODE ANN. § 40-15-80, was amended in pertinent part to add the following provision:

> § 40-15-80. Conditions under which person is considered to be practicing dental hygiene.
>
> * * *
>
> (B) In school settings, licensed dental hygienists may . . . perform the application of sealants and oral prophylaxis under general supervision. . . .

When the term "general supervision" was added to the above-quoted section in 2000, another section was added that defined the term for the first time in the dental statutes. The definitional amendment is contained in § 40-15-85(B), which provided after the 2000 amendments as follows:

> (B) The term "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. . . .[3]

> treatment is administered, is required before any student receives sealant application or oral prophylaxis, or both. Treatment cannot be authorized for a student who is an active patient of another dentist.

[3] The same amendments made it clear that the term "general supervision" was one that applied only outside the setting of the dentist's own office; the last sentence of § 40-15-85(B) provides that "[g]eneral supervision is not applicable to the practice of dental hygiene in a private dental office."

(Emphasis added.) These amendments therefore removed the physical presence requirement in school settings, but retained the requirement that sealants and oral prophylaxis performed by dental hygienists in schools must be "authorized" by dentists. § 40-15-85(B), supra. The 2000 amendments also removed the language of former § 40-1580(C)(3) that had made express reference to requiring prior examinations by dentists before hygienists could apply sealants or perform oral prophylaxis, but as will be shown below, that requirement was nevertheless retained by the addition of new language adding the requirement of "general supervision."

The statute was silent on what acts were necessary to constitute "authorization." However, the term "General Supervision" is a term of art in the dental profession. It has been defined by the American Dental Association as follows:

> *General Supervision.* A type of supervision in which a dentist is not required to be in the dental office or treatment facility when procedures are provided, but has personally diagnosed the condition to be treated, has personally authorized the procedures, and will evaluate the performance of the dental auxiliary.

Exhibit 3 (Ex. C to Affidavit of H. Rion Alvey dated August 9, 2001)(emphasis added).

Dental hygienists in South Carolina have always constituted an auxiliary profession to the practice of dentistry. This means that hygienists have never been able to operate on a stand-alone basis, i.e., without being part of the practice of a licensed dentist. This aspect of dental hygiene practice was made clear in another part of the 2000 amendments, newly-added §40-15-80(F), which provides that "[t]his section is not intended to establish independent dental hygiene practice."

In the process of enacting the 2000 amendments, the General Assembly received the views of dentists and dental hygienists, among others. While the legislative history is slender, it contains no suggestion by anyone prior to the enactment of the amendments that there was an intent to dispense with the requirement of prior examination by a dentist. Statements made shortly after the passage of the amendments likewise made no reference to elimination of the pre-examination requirement. To the extent that they were specific at all, such statements indicated only that the intent of the amendments was simply to remove the physical presence requirement. A brochure by Health Promotion Services, Inc., undated but presumably issued not long after the passage of the 2000 amendments, contains no suggestion that those amendments did anything other than remove the requirement of the dentist's physical presence:

> [E]ffective May 26, 2000, legislation was signed into law that allows registered dental hygienists to deliver preventive services in school settings, nursing homes, and numerous other settings <u>without the physical presence of a dentist</u>.

Exhibit 4 (Ex. 2 to Affidavit of Tammi O. Byrd dated August 9, 2001)(emphasis added). A press release by the Governor's Office when he signed the 2000 amendments is silent on the issue of examinations by dentists, stating only that some form of dental care will be available outside the physical confines of dentists' offices ("parents won't have to pull their children out of school to go to the dentist. . . .") Exhibit 4 (Ex. 7 to Affidavit of Tammi O. Byrd dated August 9, 2002).

Another strong indication that the 2000 amendments were regarded as only removing the physical presence requirement is found on the website of the South Carolina Dental Hygiene Association. As visited on May 16, 2001, before the

controversy about the meaning of the 2000 amendments was fully developed, that site contained an overview of the 2000 amendments. Exhibit 5 (Web page of South Carolina Dental Hygiene Association on legislation, 5/16/01).[4] The first statement on the website is that "general supervision" was defined in the amendments, and that the definition of the term was that "Licensed dentist authorizes procedures but does not have to be present when procedures are performed." Further down on the page, in a question-and-answer format, the following is found:

> *What is general supervision?*
>
> General supervision allows a registered dental hygienist to perform dental hygiene without the physical presence of a licensed dentist in the facility.

Exhibit 5 (emphasis added). There is no suggestion anywhere on the page that an examination by a dentist was no longer necessary.

C. Events Following The Enactment Of The 2000 Amendments.

Following the enactment of the 2000 amendments, at least one corporate entity, Health Promotion Services, Inc. ("HPS"), undertook to provide dental hygiene services in schools. At first, as indicated above, there appears to have been no suggestion by HPS or anyone else that the application of sealants and the performance of oral prophylaxis could be done by hygienists without a prior examination by a dentist. However, approximately six months after the amendments had been in effect, the supervising dentist of the HPS operation, Dr. Bobby McBride, asked the Dental Board about the meaning of the term "authorization" in the new statute. He was informed by the Board that in the Board's

[4] This language on the site was the same as of a visit on October 21, 2003. The URL is http://www.scdha.org/legislation.htm.

view, an examination by a dentist was still a prerequisite to the hygienist applying sealants or performing prophylaxis. Dr. McBride wrote to the Board on December 11, 2000, noting and acquiescing in the Board's position ("we will certainly abide by this requirement"). Exhibit A to Exhibit 3.

Not long after this statement that he would "certainly abide by [the] requirement" that a dentist must first see a patient, Dr. McBride reversed course. In March 2001, the Board received reports that students in a school setting were receiving treatment by dental hygienists without an initial examination by a dentist. Exhibit 3, Par. 3. (Affidavit of H. Rion Alvey dated August 9, 2001). In a letter dated April 18, 2001, Dr. McBride did not deny that HPS hygienists were performing these procedures without a prior examination by a dentist. Instead, he contended that "this requirement for a pre-examination by the dentist was removed from law on May 23, 2000." Exhibit 6.

As a result of the reports that hygienists were acting without examinations by dentists, the Board began the process of drafting a permanent, i.e., non-emergency, regulation to clarify the term "authorized" as used in Section 40-15-85(B), but which was not expressly defined. Exhibit 3, Par. 4. However, in early July 2001, before the permanent regulation had been filed, the Board received complaints of professional misconduct and alleged substandard patient care. Specifically, the Board received two complaints alleging actual patient injury that may have occurred because of the absence of appropriate involvement by the supervising dentist. Exhibit 7 (Letter of Charles B. Maxwell, President, South Carolina Board of Dentistry, July 13, 2001).

D. The 2001 Emergency Regulation.

1. Promulgation of the regulation.

Because of this evidence of possible actual physical harm to schoolchildren, the Board determined in July 2001 that a regulation should be promulgated immediately, in order to make it clear that the concept of authorization in the 2000 amendments included a requirement that a dentist must first examine each patient. Accordingly, effective on July 13, 2001, Regulation 39-18 was promulgated. Exhibit B to Ex. 3. That regulation provided in pertinent part that "[I]n order for a licensed dentist to authorize a procedure to be performed by a dental hygienist under general supervision, the supervising dentist must have clinically examined the patient and actually determined the need for any specific treatment."

The regulation was promulgated as an emergency regulation under § 1-23-130, S.C. CODE ANN. A permanent, non-emergency, regulation takes effect either upon express approval by the legislature, or after it has been before the legislature for at least 120 days without being disapproved. §1-23-120(D). The South Carolina General Assembly is in session from early January through early June of every year, which meant in this case that if the regulation had been promulgated as a permanent, non-emergency regulation, it might not have taken effect until almost a year later. In contrast, an emergency regulation takes effect immediately, but such an emergency regulation can remain in effect no longer than two successive ninety-day periods. §1-23-130(C). At some point during the period of 90 to 180 days, it must be promulgated as a permanent regulation subject to legislative approval if it is eventually to become permanent.

2. State court challenge to the regulation.

Several weeks after the effective date of the emergency regulation, HPS filed a civil action in the state court of general jurisdiction (Court of Common Pleas), contending the emergency regulation was contrary to the 2000 amendments. Health Promotion Specialists, et al. v. South Carolina Board of Dentistry, et al. (No. 01-CP-40-3148, Richland County Court of Common Pleas, filed July 31, 2001). HPS also asked the state court for a temporary injunction enjoining enforcement of the regulation. A hearing was held on August 9, 2001, and on August 21, 2001, the court denied the injunction request in a written order. Exhibit 8. The court held first that HPS had failed to exhaust the applicable administrative remedies available to one challenging the authority of a state agency to promulgate a particular regulation. Exhibit 8, pp. 2-3.[5] In addition, as part of its review to determine whether a preliminary injunction should issue, the court inquired into HPS's likelihood of success on the merits and concluded that there was no such likelihood. The court determined that the Board had the authority to promulgate the emergency regulation and that the regulation was reasonably related to the purposes of the 2000 amendments. Exhibit 8, pp. 3-7.[6]

[5] Those remedies consist of petitioning the agency for a declaratory ruling, with appeal to the state court of general jurisdiction on the issue of whether the regulation "exceeds the authority of the agency." §§ 1-23-150(a), -(b).

[6] HPS never sought any kind of stay or supersedeas of this order denying injunctive relief, instead simply filing an appeal that was heard in the ordinary course of proceeding. The order denying relief was eventually affirmed by the South Carolina Court of Appeals on March 26, 2003. The affirmance was based on HPS's failure to exhaust administrative remedies. The appellate court found it unnecessary to reach the issue of the reasonableness of the regulation. Exhibit 9. The case is still pending as a damage action, the defendants have filed a motion for summary judgment based on various state law immunities, and a hearing on that motion is anticipated to occur soon.

3. State ALJ proceedings on the regulation.

State law, §§ 1-23-110 and 1-23-111, provides for a public hearing by an Administrative Law Judge to consider the "need and reasonableness" of the proposed permanent regulation, which was virtually identical to the emergency regulation. A hearing was accordingly held on October 10, 2001. Four months after the hearing on the regulation, and one month after the 180-day period of the regulation's effectiveness expired, the ALJ issued a report in which he concluded that the regulation was "unreasonable" in light of the 2000 amendments. Exhibit 10. This conclusion by the ALJ did not mention that a state court had already expressly concluded just the opposite. Instead, the ALJ placed heavy reliance on post hoc statements of two individual legislators made more than a year after the statute's enactment.[7] In so doing, the ALJ gave credit to "evidence" which is inadmissible or weightless under both state and federal law. Kennedy v. South Carolina Retirement System, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001)("[u]nder South Carolina law, neither a drafter nor a legislator can testify as to legislative intent"); Tallevast v. Kaminski, 146 S.C 225, 143 S.E. 796 (1928); American Constitutional Party v. Munro, 650 F.2d 184, 188 (9th Cir. 1981)(statement of individual legislator "might be entitled to some weight if it had been made contemporaneously with the passage of the legislation. Coming one year later, it is entitled to no weight and cannot be relied on as indicative of legislative motivation or intent").

The pertinent statute, § 1-23-111, gave the ALJ authority only to render an advisory opinion with recommendations as to how the regulation might be amended to

[7] The ALJ also purported to know the intent of a deceased legislator, Ex. 10, p. 17, although there was no evidence whatsoever in the record about that legislator's intent other than the fact that he was one of the sponsors of the legislation.

comply with his suggestions. The ALJ's Public Hearing Report in this case was therefore a nonbinding recommendation for review by the Board and the General Assembly.

E. The 2003 Statutory Amendments.

Although the Board was not precluded by statute or by the ALJ report from submitting the regulation to the General Assembly for approval without change, the Board at its March 2, 2002 meeting voted to reactivate its Legislative Committee and to meet with all interested parties and entities "to come up with a proposal concerning general supervision and authorization of dental hygienists that will be agreeable to all." Exhibit 11 (Minutes of the South Carolina State Board of Dentistry, meeting of March 2, 2002., p. 2). By this time the emergency regulation had expired. Some hygienists began to apply sealants and perform oral prophylaxis in schools without a prior examination by a dentist, and the Board made no effort to stop this practice once the emergency regulation had expired. Exhibit 1, Par. 2 (Lala Affidavit).

By the time of the Board's determination to seek changes or clarifications in the legislation, it was already a relatively late date in the 2002 session of the General Assembly for the introduction of new legislation. In the following (2003) session, however, a statute was introduced and enacted, taking effect upon signature by the Governor on June 2, 2003. Act No. 45 of 2003, Exhibit 12.

The 2003 legislation added or amended a number of provisions. The effect of these changes was to eliminate, in the public health setting, the requirement that a dentist examine the patient before sealants could be applied or oral prophylaxis performed. Other changes made it clear that in other settings, an examination by a dentist was still required. The pertinent provisions are as follows:

§40-15-102 (D) [NEW] A dentist authorizing treatment by a dental hygienist in school settings or nursing home settings is subject to the general supervision restrictions provided for in this section unless the dentist or dental hygienist is working in a public health setting with the Department of Health and Environmental Control, as provided for in Section 40-15-110.

§ 40-15-102 (E) [NEW] A dentist billing for services for treatment provided by a dental hygienist in a public health setting with the Department of Health and Environmental Control as provided for in Section 40-15-110, is the provider of services and is clinically responsible for the care and treatment of the patient.

Section 40-15-110. Further regulations and exemptions:

(A) Nothing in the chapter may be construed to prevent:

* * *

(10) a licensed dental hygienist employed within or contracted through the public health system from providing education and primary preventive care that is reversible. Primary preventive care and education are defined as promotion and protection of health to avoid the occurrence of disease through community, school, and individual measures or improvements in lifestyle. These services are to be performed under the direction of the Department of Health and Environmental Control State Dental Coordinator or the department's designee but do not require that the director or a licensed dentist be present when any public health dental program services are provided. Public health dental program services include oral screenings using a Department of Health and Environmental Control approved screening system, oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants.[8]

[8] The changes in § 40-15-110 (A)(10) from prior law are set forth below:

(10) a ~~l~~licensed dental hygienist~~s~~ employed within or contracted through the public health system from providing

From these amendments, the following conclusions can be reached:

1. Public health dental program services include the application of dental sealants and topical fluorides and performing oral prophylaxis. § 40-15-110 (A)(10).

2. In a public health dental program, these services (application of dental sealants and topical fluorides and oral prophylaxis) can be provided by dental hygienists under the direction of the DHEC Dental Coordinator. Id.

3. Where a hygienist is working in a public health dental program, the general supervision requirements, and therefore the preexamination requirements, found in prior law do not apply because § 40-15-102 (D) provides that *"[a] dentist authorizing treatment by a dental hygienist in school settings or nursing home settings is subject to the general supervision restrictions provided for in this section unless the dentist or dental hygienist is working in a public health setting with the Department of Health and Environmental Control, as provided for in Section 40-15-110 ."* (emphasis added).

4. The absence of the general supervision requirements in the public health setting means that in that setting (i.e., the DHEC program), a dentist is not required to examine the patient before sealants can be applied or oral prophylaxis can be performed.

5. Nevertheless, because dental hygienists are an auxiliary profession and not independent practitioners, it was not anticipated that hygienists in public health settings would act so independently as to report and bill their services directly to the paying authority. Instead, even in a public health

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education and primary preventive care that is reversible and noninvasive. Primary preventive care and education are defined as promotion and protection of health to avoid the occurrence of disease through community~~wide~~, school, and individual measures or improvements in lifestyle. These services are to be performed under the direction of the ~~State Director of Public Health Dentistry~~ Department of Health and Environmental Control State Dental Coordinator or the department's designee but do not require that the director or a licensed dentist be present when ~~authorized~~ any public health dental program services are provided. Public health dental program services include oral screenings using a Department of Health and Environmental Control approved screening system, oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants.

setting, only a dentist can bill for the services of a hygienist, and that dentist retains ultimate clinical responsibility for each patient examined by a dental hygienist. Section 40-15-102(E) provides that *"[a] dentist billing for services for treatment provided by a dental hygienist in a public health setting with the Department of Health and Environmental Control as provided for in Section 40-15-110, is the provider of services and is clinically responsible for the care and treatment of the patient."*

This requirement that a hygienist bill through a dentist does not, however, mean that the dentist must examine each patient (unless the dentist chooses to do so), because that requirement is no longer in the statute in the public health setting.

6. At the same time, the 2003 amendments clearly require examination by a dentist in non-public-health settings. New Section 15-40-102 (C)(1) requires a dentist in a private office setting to clinically examine the patient before general supervision of a hygienist can occur, and new Section 40-15-102 (D) extends the same requirement to dentists and hygienists in school settings unless the dentist is working in a public health setting.

As already noted, not long after the expiration of the emergency regulation in January 2002, some hygienists began to apply sealants and perform oral prophylaxis in schools, without a prior examination by a dentist. The Board did not attempt to stop this practice. Exhibit 1, Par. 2 (Lala Affidavit). Other dentists continued to conduct pre-examinations before the hygienists under their supervision performed these procedures in schools. The result was that during the 2002-2003 school year, over 22,000 children in schools received oral prophylaxis services from dental hygienists, and over 10,000 children in schools had sealants applied by dental hygienists. Exhibit 1, Par. 2 (Lala Affidavit).

With the enactment of the 2003 amendments, hygienists in public health settings may perform the referenced procedures without prior examinations by dentists, if the dentists choose to permit hygienists under their supervision to do so. As a result of this

change in the law in 2003, South Carolina's director of oral health in the public health setting anticipates that the number of children so served in public health settings will increase substantially in the present (2003-2004) school year. Exhibit 1, Par. 2.

F. The Board's Response To The 2003 Amendments.

When this action was filed by the Commission, Paragraph 38 of the Complaint contained an allegation that came as a surprise to the Board. That paragraph alleges that ". . . 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."

In order to correct what was apparently a misunderstanding by the Commission, the Board convened a called meeting by telephone on October 16, 2003. At that meeting the Board adopted a resolution making it clear that at its March 6, 2003 meeting (the minutes of which were apparently the source of the allegations of Paragraph 38), the Board was only describing its understanding of the then-current state of South Carolina law when it indicated that a pre-examination was required. Exhibit 13, Attachment A, Par. 3 (Resolution adopted October 16, 2003, attached to Affidavit of H. Rion Alvey, October 16, 2003). The resolution adopted by the Board at its October 16, 2003 called meeting also expressed the Board's understanding that the 2003 amendments prohibit the Board from requiring a pre-examination when the listed procedures are performed by a hygienist in a public health setting. Id., Par. (1). The resolution uses language practically identical to the language of Paragraph 1 of the Notice of Contemplated Relief in this matter. Id. Finally, the resolution contains an affirmation by the Board that it is "bound

by, and in full agreement with, the legislative policy set forth in the 2003 amendments as recited above and does not plan to seek any change to that policy." Id., Par. (2).

ARGUMENT

I. The 2003 Amendments Have Rendered This Matter Moot.

As a result of the 2003 amendments, dental hygienists in public health settings may apply sealants and perform oral prophylaxis without a prior examination by a dentist. This is not only apparent from an examination of the statutory language, but also from the actual practice following the enactment of the amendments and the Board's statement that it understands the amendments to so provide.

The primary, if not only, substantive relief sought in the present Complaint is therefore identical to what the statute already requires and to what the Board is already doing. Paragraph 1 of the Notice of Contemplated Relief at the end of the Complaint in this case proposes that the Commission order 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.

Complaint, p. 8. The remaining two paragraphs of the Notice of Contemplated Relief appear to be directed primarily or solely toward enforcement of the relief proposed in Paragraph 1. The 2003 amendments clearly make the issues in this matter moot. At the same time, the amendments provide the Board with clear state action immunity for any

present limitations on the ability of hygienists to practice in non-public-health settings, although no challenge has been made by the Commission to any other such limitations.

It is well settled that "[a] statutory change . . . is usually enough to render a case moot. . . ." Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994). Among the many cases so holding are Valero Terrestrial Corp. v. Paige, 211 F.3d 112 (4th Cir. 2000.)(same); Citizens for Responsible Government State Political Action Committee v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000)("the repeal of a challenged statute is one of those events that makes it 'absolutely clear that the allegedly wrongful behavior'--here, the threat of prosecution under one of the repealed sections--'could not reasonably be expected to recur,' quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000)); Esposito v. South Carolina Coastal Council, 939 F.2d 165, 171 (4th Cir. 1991), cert. denied, 505 U.S. 1219 (district court injunction had become "pointless because the enjoined statute has been superseded by a significantly amended statutory scheme and is no longer in effect").

The Commission has likewise discontinued proceedings when the policies that gave rise to the administrative complaints were removed by legislative changes. In the Matter of the City of Minneapolis, 105 F.T.C. 304 (1985)(Order withdrawing Complaint); In the Matter of the City of New Orleans, 105 F.T.C. 1 (1985)(same). In both of those cases, the legislative removal of the policies that gave rise to the complaints led the Commission to conclude that continuing those matters would not serve the public interest.

One of the few exceptions to the doctrine that a case is mooted by significant statutory changes occurs when there is some reasonable expectation that the expired law

will be revived as soon as the challenge to it is dismissed. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982)(defendant city had expressed an avowed intention to reenact the same provisions if the case were to be dismissed as moot based on repeal). However, in the present case there is no evidence that former provisions of law would be reenacted if this matter were to be dismissed. To the contrary, the Board's actions after the expiration of the emergency regulation almost two years ago and continuing through its most recent resolution on the matter indicate affirmatively that no such actions will be taken.

In the present case, accordingly, it is difficult to see how it can be argued that there is a need to enjoin the Board from attempting to require an examination by a dentist before a hygienist could apply sealants or perform oral prophylaxis in a public health setting. Indeed, it is not only highly unlikely that the Board would insist on a dentist's examination in such circumstances, it is now legally impossible as a matter of state law. For this reason alone, this action should be dismissed as moot.

II. The Expiration Of The 2001 Emergency Regulation Renders Moot Any Challenge to Board Action In Connection With That Regulation.

The Complaint contains a number of allegations relating to the 2001 emergency regulation. Complaint, Paragraphs 25-34. To the extent that these allegations can be read to state a claim for relief based on the 2001 emergency regulation, such claim is mooted not only by the 2003 amendments, but also by the expiration of the 2001 regulation itself and the absence of any reasonable likelihood that any efforts will occur to revive the regulation. See, e.g., Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1011 (9th Cir. 1994)(expiration of temporary regulation without renewal rendered challenge to

expired part of regulation moot); National Mining Assn. v. U.S. Department of Interior, 251 F.3d 1007 (D.C. Cir. 2001)(challenge to regulations mooted by adoption of new and different regulations); Relf v. Weinberger, 565 F.2d 722 (D.C. Cir. 1977)(case mooted by administrative withdrawal of the challenged regulations). As a result, any challenge to the 2001 emergency regulation is moot not only because of the 2003 legislative changes, but also because the regulation expired in early 2002 and the Board affirmatively took action to take other actions instead of reviving the regulation.

III. The Board's Subsequent Actions Provide Additional Reasons For A Finding Of Mootness.

The Board submits that the enactment of the 2003 amendments and the expiration of the 2001 emergency regulation provide ample and sufficient grounds for holding the present proceeding to be moot. If additional proof of mootness is needed, however, the Board's own acts since early 2002, culminating in its resolution of October 16, 2003, provide such proof in abundance.

In United States v. W.T. Grant & Co., 345 U.S. 629 (1953), the Supreme Court held that voluntary cessation of conduct by a defendant can support a finding of mootness "if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." 345 U.S. at 633. As indicated above, the only way the Board could ever require a pre-examination by a dentist in public health settings would be to take action that would be in direct contravention of a clear provision of state statutory law. Although it may have been a superfluous exercise for the Board to state publicly its view of a clear statute and its own practice and intent thereunder, the Board has done so at its

October 16, 2003 called meeting, in order to eliminate any suggestion that it might require pre-examinations contrary to the statute.[9]

When state officials declare an intention to discontinue conduct that is the subject of litigation, the courts accord substantial deference to such statements by state officials, as illustrated by Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), cert. denied, 495 U.S. 904 (1990). Reversing a district court injunction, the court emphasized the appropriateness of giving credence to a State's assertions that it will discontinue official conduct:

> We believe that respect for the role of the states and for the limits of the federal adjudicative function to live cases and controversies counsels against the issuance of unnecessary injunctions against state officials.

Id. at 1231. The Court further held that "we decline to indulge any presumption with respect to defendants' conduct other than one of good faith." Id. Telco Communications reflects the general presumption that government officials will abide by their decisions to discontinue challenged conduct:

> Courts are more likely to trust public defendants [as opposed to private defendants] to honor a professed commitment to changed ways. . . .

13A Wright, Miller and Cooper, FEDERAL PRACTICE AND PROCEDURE, §3533.7 at 351-353 (1984). See also, e.g., U. S. v. Jones, 136 F.3d 342, 348 (injunction vacated in light of absence of evidence of likely recurrence of conduct by state officials). The Board therefore submits that its expression of intent not to require pre-examinations in the relevant situations, which expressions are in accordance with present law, taken along

[9] As used herein, the concept of requiring pre-examinations refers to the need for such examinations before dental hygienists can apply sealants or perform oral prophylaxis in public health settings.

with the deference normally accorded such statements by state officials, provide an additional basis for a finding of mootness.

IV. No Need For Injunctive Relief Can Be Proven.

The Board submits that even if this matter could somehow be regarded as technically not moot, the Commission cannot show a present need for injunctive relief. In U.S. v. W.T. Grant, supra, the Court held that in order to obtain injunctive relief, the moving party must show that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." 345 U.S. at 633. It is the Commission staff's burden to show that an injunction is warranted in a given case. SCM Corporation v. Federal Trade Commission, 647 F.2d 807, 813 (2d Cir. 1977). In the absence of any valid cause for concern that the complained-of conduct might recur, injunctive relief by the Commission is inappropriate. Borg-Warner Corporation v. Federal Trade Commission, 746 F.2d 108 (2d Cir. 1984). The Board submits that no need for an injunction or other cease and desist remedy can currently be proven.

V. This Matter Is Barred By The Respondent's Immunity For State Actions.

A. Respondent Is Presumptively Entitled To Immunity Because It Is An Agency Of The State Of South Carolina.

Even if this action is not moot in its entirety, the case is still barred by Respondent's state action immunity. Such immunity from the federal antitrust laws was first recognized by the Supreme Court in Parker v. Brown, 317 U.S. 341 (1943). In Parker, the Court determined, based upon principles of federalism and statutory

construction, that the Sherman Act did not apply to anticompetitive restraints imposed by the states "as an act of government." 317 U.S. at 352. As the Court later noted:

> The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 374 (1991).[10]

There can be no question that the South Carolina State Board of Dentistry is an executive agency of the State of South Carolina, acting in a "governmental capacity[y] as [a] sovereign regulator[ ]." Id. The South Carolina State Board of Dentistry was created by statute. § 40-15-10, et seq., S.C. CODE ANN. Its members are appointed by the Governor and may be removed by the Governor for causes listed in the statute. § 40-15-20. The General Assembly has required it to hold regular meetings, and state law provides for what constitutes a quorum of the Board. § 40-15-30. The Board's financial affairs are directly controlled by the Director of the Department of Labor, Licensing and Regulation. § 40-1-50 (D). The Director is a cabinet-level state officer appointed by the Governor. The Department is responsible for the employment and supervision of all employees of the State Board of Dentistry, and the Department also has the authority to provide for the employees' salaries and charge those salaries to the Board. § 40-1-50 (A). Federal cases routinely hold that agencies similarly created are agencies of the State. See, e.g., Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553, 556 (5th Cir. 1988).

[10] State action immunity applies in cases brought under Section 5 of the FTC Act as well as in Sherman Act and Clayton Act cases. See, e.g., Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F.2d 502 (4th Cir. 1959).

The Board submits that its state agency status is enough in itself to trigger state action immunity. The Supreme Court has admittedly not yet had occasion to hold that state executive agencies are ipso facto entitled to state action immunity in the same way that such immunity has been extended to acts of the state legislature or the state's highest court. Hoover v. Ronwin, 466 U.S. 558, 568 n.17 (1984). However, every federal circuit that has directly addressed the issue has concluded that Parker immunity does in fact attach in that fashion to the acts of state executive agencies. Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999)(University of Massachusetts); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 875-76 (9th Cir.1987) (state department of transportation); Deak-Perera Hawaii, Inc. v. Department of Transportation, 745 F.2d 1281, 1282-83 (9th Cir.1984) (same), cert. denied, 470 U.S. 1053 (1985); Saenz v. University Interscholastic League, 487 F.2d 1026, 1027-28 (5th Cir.1973) (division of University of Texas).

In other circuits where the courts instead have proceeded to conduct a Midcal "clear articulation" analysis (California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), the courts unanimously have held that the immunity attached under that analysis. See, e.g., Earles v. State Board of Certified Public Accountants, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998); Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986); Hybud Equipment Corp. v. City of Akron, Ohio, 742 F.2d 949 (6th Cir. 1984). In other

words, state agencies have uniformly and without exception been held by the federal appellate courts to possess state action immunity.[11]

A number of district court cases have likewise found state action immunity for state agencies, based either on the ipso facto rule or the "clear articulation" rule. See, e.g., Pharmaceutical and Diagnostic Services, Inc. v. University of Utah, 801 F.Supp. 508, 514 (D. Utah 1990) ("no sound reason for distinguishing state executive agencies from their legislative and judicial counterparts. . . ."); Ehlinger & Associates v. Louisiana Architects Ass'n., 989 F.Supp. 775 (E.D.La.), aff'd., 167 F.3d 537 (5th Cir. 1998)(state agency that selected architects for state projects); Pennsylvania Coach Lines, Inc. v. Port Authority of Allegheny County, 874 F.Supp. 666 (W.D.Pa. 1994)(state agency had Parker immunity even when Eleventh Amendment immunity was absent); Tacker v. Wilson, 830 F.Supp. 422 (W.D. Tenn. 1993)(state board of funeral directors).

If there is an exception, based on lack of authority under state law, to the accepted rule in practice that a state executive agency enjoys state action immunity, the grounds for such an exception have yet to have arisen in any case since at least 1991, when the Court decided City of Columbia v. Omni Outdoor Advertising, supra. In Neo Gen Screening, supra, the court recognized that, at least in theory, an exception to the ipso facto rule might exist to enable a plaintiff "to pierce the Parker defense on the ground that the state official or agency was acting in excess of his (or its) authority under state law." 187 F.3d at 29. The court noted that such an exception, if found to exist at all, would only apply in "extreme cases" involving a "patent lack of authority." Id. The Supreme Court in

[11] As far as Respondent is aware, the only case of any kind in at least the past fifteen years holding that a state agency did not enjoy state action immunity is the unappealed FTC case, In the Matter of Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988), discussed in n. 12 below.

City of Columbia v. Omni Outdoor Advertising, supra, also recognized the theoretical possibility of such an exception, but noted that any federal review of the state-created entity's conformity with its enabling legislation would need "to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." 499 U.S. at 372.

In City of Columbia, the Court cited Stump v. Sparkman, 435 U.S. 349 (1978) as an illustration of the level of deference accorded state action by a federal reviewing court. Id. In Stump, the Court adopted a level of judicial immunity which bordered on absolute immunity, holding that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" 435 U.S. 349, 356-57, quoting Bradley v. Fisher, 13 Wall. 335, 351 (1872)(emphasis added). A comparably-high standard has been articulated by the Court in cases where individuals have sought federal injunctions against ongoing state prosecutions. The Court has held that such injunctions might be considered, but only in cases where a challenged statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it" Younger v. Harris, 401 U.S. 37, 53-54 (1971), quoting Watson v. Buck, 313 U.S. 387, 402 (1941).

Regardless of the precise words used to define the high barrier to federal review of state action in the Parker v. Brown context, it is clear that the acts of the Board do not remotely approach any such extreme. As argued in the sections below, the Board submits that it had authority under state law to promulgate Regulation 39-18. Assuming, however,

that the Board's view of state law in 2001 was in error, a point which the Board does not concede, any such error did not come close to amount to the virtual lawlessness that must be shown in order to strip a state agency of state action immunity.

B. The Board Had The Authority To Promulgate The Emergency Regulation in 2001.

The history surrounding the 2000 amendments to the Dental Practice Act has been discussed above at length in the Statement of Facts. The Board submits that this history makes it clear that there was no legislative intent in 2000 to remove the requirement of a prior examination by a dentist before hygienists could apply sealants and perform oral prophylaxis. The 2000 legislation removed the requirement that a dentist be physically present when the hygienists performed the listed procedures, and this change greatly enhanced the ability of hygienists to perform the procedures in schools. This change in the law in 2000 was significant in and of itself. It was the sole change to the law specifically mentioned in statements made shortly after enactment by interested parties, most notably Health Promotion Systems, Inc. See Exhibit 4 (Ex. 2 to Affidavit of Tammi O. Byrd dated August 9, 2001). Had those amendments changed the law even more dramatically, so that the dentist not only could leave the premises after examining the children, but also did not have to perform an examination at all, one would expect to see some mention of such a change in the statements or practices of those contending that the change was made. However, no such claim of statutory change was made until months later. McBride letter of December 11, 2000, Exhibit A to Exhibit 3.

Moreover, if the 2000 amendments had been intended to dispense with the requirement of a prior examination by a dentist, such an intent would have been inconsistent with the addition of the term of art "general supervision," a term which at all

relevant times has meant that the dentist need not be physically present when the procedures are performed, but "has personally diagnosed the condition to be treated. . . ." Exhibit C to Exhibit 3. In addition, absent a specific statutory direction permitting hygienists to perform the listed procedures without a dentist's examination, a finding of implied authorization for such a practice would contravene the newly-added § 40-15-80(F), which provides that §40-15-80 "is not intended to establish independent dental hygiene practice." Accordingly, based on both the language of the 2000 amendments and the construction given that language by interested parties immediately after its enactment, it is clear that those amendments were directed only at removing the requirement that the dentist be physically present when the procedures were performed. There is no evidence of an intent to dispense with the requirement of an examination by a dentist, and the Board acted properly in promulgating a regulation confirming that the statute still required examinations by dentists.

C. Even If The Board Erred In Its Interpretation Of State Law In Promulgating The Emergency Regulation, Such Error Would Not Strip The Board Of Its State Action Immunity.

Assuming without conceding that the Board's interpretation of the statute was incorrect, and that the emergency regulation was therefore an inappropriate exercise of the Board's authority after the 2000 amendments, the Board submits that the level of legal error it allegedly committed fell far short of the egregious level of error that must exist before state action immunity can be held to be lost.

In City of Columbia v. Omni Outdoor Advertising, supra, the Court rejected the argument that a political subdivision acts beyond its delegated authority, for state action

immunity purposes, "whenever the nature of its regulation is substantively or even procedurally defective." The Court explained its holding as follows:

> To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to reversal by superior tribunals because unauthorized. If the antitrust courts demanded unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not lightly assume that Lafayette's [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, (1978)] authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense.

499 U.S. at 371-72 (citing with approval P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶213.3b, p. 145 (Supp. 1989)). The Court therefore concluded that "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the [political subdivision's] action under state law." Id. at 372.

The result of this holding has been to place severe limits on the already-limited authority of federal antitrust tribunals to review state actions:

> Most decisions preceding Columbia (1991) and virtually all those following it have refused to deny immunity simply because an inferior government agency, subdivision, or official made an error in interpreting state law.

P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 224d4, p. 429 (2d ed. 2000).

In cases decided both before and after Columbia, the courts have generally rejected challenges in federal antitrust tribunals to state or even municipal actions based

on alleged absence of authority under state law. See, e.g., Fisichelli v. City Known as Town of Methuen, 956 F. 2d 12, 14 (1st Cir. 1992) (Breyer, C.J.)("state law 'authorizes' a municipality's action (for antitrust immunity purposes) so long as it provides the municipality with a general grant of authority to take actions of the sort in question"(emphasis in original); Interface Group, Inc. v. Mass. Port Authority, 816 F. 2d 9, 13 (1st Cir. 1987)("the fact that the activity may be (not obviously) unlawful under state law (for reasons having nothing to do with antitrust) cannot make a legal difference for the purposes of antitrust immunity"); Llewellyn v. Crothers, 765 F.2d 769, 771 (9th Cir. 1985)(fee schedule found unlawful under state APA nevertheless entitled to state action immunity); Bates v. State Bar of Arizona, 433 U.S. 350 (1977)(even constitutional invalidity of action by state entity does not remove state action immunity).[12]

In the present case, the most that can be claimed of the Board's decision to issue the emergency regulation is that it was no more than ordinary legal error on what may have been a close point of state law. As the above authorities abundantly indicate, this is not the kind of error that will remove state action immunity. The closeness of the state law point, as well as the lack of egregiousness of the alleged error by the Board, is shown by the fact that a state judge, in an order still in effect, has held the regulation to be a reasonable exercise of the Board's authority. Exhibit 8, pp. 3-7. No stay or supersedeas of that order was sought, although the order was appealed and eventually affirmed on other

[12] Cf. In the Matter of Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988), a pre-City of Columbia case. In that case, the Commission concluded that the Massachusetts Board had contravened an unambiguous Massachusetts statute declaring that any action by a state regulatory board prohibiting truthful advertising was void and against public policy. Assuming without conceding that Massachusetts Board was correctly decided, the Board nevertheless submits that the case is readily distinguishable from the present case because of the much more apparent lack of authorization in state law.

grounds. Exhibit 9. As a result, this judicial order entered in August 2001 is still a binding and effective judicial declaration on the issue of the Board's authority to promulgate the emergency regulation.[13] The Board submits that if for no other reason, its state action immunity must be held to remain intact simply because the present state of South Carolina law holds that the Board's challenged action was within its statutory authority. It would be a remarkable departure from federalism principles for a federal antitrust tribunal, reviewing state action under a standard requiring great deference to the states, to reach a holding that would have the effect of reversing a standing state court order on the same point.

Finally, this case illustrates how the federalism precepts of City of Columbia and other cases apply to provide a solution that eliminates the need for action by a federal antitrust tribunal. As Professors Areeda and Hovenkamp have stated, "the state's own judicial and regulatory system contemplates that errors will be made, and in the ordinary case it provides its own correctives." P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶224d, p. 418 (2d ed. 2000). The ALJ's review of the matter, if not the state damage action as well, caused the Board to decide to revisit the issue in the legislature. The result was a more explicit statutory delineation of the applicable rules, and one that appears to have resolved the contending claims of both the Board and the hygienists, clearing the way for the provision of additional hygienists' services to underserved populations. All of this occurred without the need for Commission action.

[13] This binding judicial declaration is in contrast to the nonbinding advisory report of ALJ Kittrell. In conducting his advisory review of the emergency regulation, ALJ Kittrell was acting not in any sort of judicial capacity, but in an executive/administrative capacity. This particular kind of review under the state APA is conducted either by the agency itself, when governed by a board or commission, or by the ALJ, when the agency has a single director, as is the case here. § 1-23-111(A).

D. The Board Promulgated the Emergency Regulation Pursuant to a Clearly Articulated State Policy to Authorize Anticompetitive Conduct.

Even if the Commission concludes that state action immunity does not exist under the standards set forth above, the Board submits that immunity is present under the analysis applied by some courts to acts by state agencies or to acts of municipalities. Under this analysis, the Board must show the "clear articulation of a state policy to authorize anticompetitive conduct" by the state agency in connection with the regulation at issue. City of Columbia, 499 U.S. at 372 (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985)). A state agency such as the Board satisfies this requirement by showing that the alleged anticompetitive conduct is the "foreseeable result" of the authorizing legislation. Id. In determining whether the alleged anticompetitive conduct is "foreseeable," it is sufficient if the conduct can reasonably be anticipated to result from the powers granted by the state; the conduct need not be one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the authorizing legislation. Federal Trade Commission v. Hospital Bd. of Directors, 38 F.3d 1184 (11th Cir. 1994). The state need not use "federally dictated" words; instead, the language and context need only "fairly indicate a state policy to displace competition." Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1, 171 F.3d 231, 236 (5th Cir. 1999) (en banc). The statutory framework in which the Board acted here satisfies this requirement of state action immunity as well.

Where the entity claiming Parker immunity is a state regulatory agency such as the South Carolina State Board of Dentistry, it is relatively simple to determine whether the "clear articulation" requirement has been met, unlike some situations in which a

private party or local government entity may assert such immunity. State law in the present case grants the Board comprehensive power to regulate both the practice of dentistry and the auxiliary practice of dental hygiene. See generally, South Carolina Dental Practice Act, §§ 40-15-10, et seq., S.C. CODE ANN. When a state regulatory board has been given comprehensive authority to regulate a profession, such broad grant of authority has been held sufficient to satisfy the "clear articulation" requirement for state action immunity. Earles v. State Board of Certified Public Accountants, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998). There the Fifth Circuit held that the Louisiana Board had been given "a broad grant of authority which includes the power to adopt rules that may have anticompetitive effects," thereby making it "the 'foreseeable result' of enacting such a statute that the Board may actually promulgate a rule that has anticompetitive results." 139 F.3d at 1043.[14]

In the present case, any claim that the Board's authority to promulgate the emergency regulation did not meet the "clear articulation" requirement is nothing more than an argument that the 2000 amendments withdrew from the Board the authority to issue that regulation. That issue has already been discussed above in Sections V (A) and V (B). The standard of review for this issue is the same highly deferential standard set forth in City of Columbia, which is itself a case decided under the "clear articulation" standard. Based on the discussion of that issue already set forth above, the Board submits that its enabling legislation contained a clear articulation of the Board's authority to promulgate regulations such as the 2001 emergency regulation and that such a regulation

[14] Like many other cases, Earles holds that the "active supervision" prong of Midcal, supra, does not apply where the entity claiming state action immunity is a state governmental entity. 139 F.3d at 1041-42. The Board submits that for the reasons set forth in Earles and the authorities cited therein, the "active supervision" rule does not apply to the Board's actions here challenged.

was a "foreseeable result" of the enabling legislation. As a result, and for the same reasons set forth in Earles, supra, the Board's actions are entitled to state action immunity even if reviewed under the "clear articulation" standard.

CONCLUSION

For the foregoing reasons, the South Carolina State Board of Dentistry respectfully submits that this action should be dismissed by the Commission in its entirety.

LYNNE W. ROGERS
General Counsel
South Carolina Department of Labor,
Licensing & Regulation
Office of General Counsel
Post Office Box 11329
Columbia, South Carolina 29211-1329
Phone: (803) 896-4470
Fax: (803) 896-4471

AND

DAVIDSON, MORRISON AND
LINDEMANN, P.A.

BY:_____
WILLIAM H. DAVIDSON, II
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, South Carolina 29202
TEL: (803) 806-8222
FAX: (803) 806-8855

E-MAIL: wdavidson@dml-law.com
alindemann@dml-law.com
kwoodington@dml-law.com

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