# Occupational License Laws May Hurt Health Care Competition

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Occupational licensing — regulations requiring a license to practice a given profession — can help ensure that members of a profession maintain a certain standard of quality and expertise, which can benefit consumers. However, these regulations can also increase barriers to entry — thereby lowering supply, reducing competition and increasing prices — which can harm consumers.

This topic is particularly relevant in health care. Quality of care is clearly in the public interest; yet, the U.S. is experiencing high and rising health care costs and shortages of providers, problems that may be worsened by overly restrictive occupational licensing, particularly in the form of scope-of-practice, or SOP, laws that govern which services can be performed by which health care providers.[1]

Occupational licensing, particularly in the health care sector, has been a topic of renewed interest in courts, regulatory agencies and state legislatures. In the context of this renewed interest, recent academic research papers may inform the debate by shedding new light on the economic impact of occupational licensing and SOP laws.

## Recent and Ongoing Cases

A number of recent cases have addressed occupational licensing and SOP laws in the health care sector, many of them focusing on the conflicts of interest that arise when state licensing boards enact rules that favor their own profession.

Recent momentum came principally on the heels of the U.S. Supreme Court's decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission.[2] In 2010, the FTC issued an administrative complaint against the North Carolina Dental Board, alleging that it had unlawfully restrained trade and competed unfairly. At issue were "cease and desist" letters sent by the dental board to nondentists who offered teeth whitening services; an administrative law judge and the U.S. Court of Appeals for the Fourth Circuit concluded that the primary (and intended) effect was to reduce competition faced by dentists for teeth-whitening services.[3]

The dental board argued that, as a state agency, it was immune from antitrust scrutiny under the state-action doctrine, which gives state and local authorities immunity from federal antitrust lawsuits to the extent that any anticompetitive effects stem from a clearly articulated state policy.[4] Under the state-action doctrine, nonstate actors are also immune from federal antitrust laws if, in addition to the conduct in question stemming from a clearly articulated state policy, the actors are actively supervised by the state.

The Supreme Court upheld the lower courts' rulings, holding that because the board was dominated by active market participants who had strong private interests to restrain trade and was not actively supervised by the state, it was not immune from federal antitrust lawsuits.[5] The ruling in N.C. Dental Board opened up regulatory boards — particularly those whose members were active in the marketplace — to antitrust scrutiny in many states.[6]

More recent cases bear similarities to N.C. Dental Board. For example, Henry v. North Carolina Acupuncture Licensing Board[7] involved the North Carolina Acupuncture Licensing Board and the North Carolina Board of Physical Therapy Examiners. In the complaint filed by physical therapists, the plaintiffs alleged that the acupuncture board attempted to prevent physical therapists from performing "dry needling,"[8] even though the physical therapy board had determined that dry needling was part of physical therapists' scope of practice.

According to the complaint, the acupuncture board took a public stance against physical therapists' practice of dry needling, sent "cease and desist" letters to physical therapists, and sued the physical therapy board[9]; plaintiffs argued that the acupuncture board used its power as a licensing board to exclude physical therapists from the market for dry needling — and that these actions deterred entry, reduced price competition and reduced consumer choice in the market.[10] The parties settled during mediation following the decision in a related case, in which the state supreme court affirmed that dry needling constitutes physical therapy.[11]

Another recent case was Teladoc Inc. v. Texas Medical Board,[12] which related to SOP for telehealth providers in Texas. The plaintiffs — telehealth company Teladoc and the physicians it employs — alleged that the Texas Medical Board violated antitrust law by passing rules restricting video consultations and requiring providers to have face-to-face contact with a patient before writing a prescription.

Supporting Teladoc in a joint amicus brief, the U.S. Department of Justice and FTC took the position that "[t]here is no evidence that any disinterested state official reviewed the TMB rules at issue to determine whether they promote state regulatory policy rather than TMB doctors' private interests in excluding telehealth — and its lower prices — from the Texas market."[13] The FTC also began its own investigation, but the case and the investigation were dropped after the Texas state legislature passed a law in 2017 that removed the restrictions at issue.[14]

## Regulatory and Legislative Interests

In the wake of the Supreme Court decision in N.C. Dental Board, the FTC and DOJ have both continued their scrutiny of occupational licensing. In early 2017, Maureen Ohlhausen, then the FTC Acting Chairman, stated her goal to "challenge unnecessary occupational licensing" and announced the creation of an "Economic Liberty Task Force to advance economic liberty issues, with a particular focus on occupational licensing regulations."[15]

For its part, the DOJ has expressed the view that health care continues to be an area of focus. The department has engaged in advocacy work to encourage "federal, state, and local governments to consider the competitive impact of various health care related legislative and regulatory proposals," with a particular focus on occupational licensing and professional certifications.[16]

Some regulatory agencies have taken steps to loosen occupational licensing and SOP restrictions. In late 2016, for example, the Department of Veterans Affairs granted full practice authority to three classes of advanced practice registered nurses, citing improvements in access as a key motivation for the change.[17] In 2018, the U.S. Department of Labor announced that it would allocate $7.5 million to review and streamline occupational licensing requirements.[18]

Several state legislatures have begun to tackle the issue, introducing bills related to occupational licensing and SOP. For example, the Pennsylvania legislature is considering new legislation to expand qualified nurses' SOP. The FTC has expressed its support for the bill, taking the view that the bill could be expected to benefit competition and health care consumers.[19] Other states, such as Indiana, South Dakota and Nebraska, have introduced broader bills that will remove or reduce licensing requirements for certain professions and increase scrutiny of licensing rules established by state professional boards.[20]

## Academic Economic Research

Recent academic research by economists speaks directly to the trade-off that is inherent to occupational licensing: ensuring high standards of quality versus restricting competition. Three recent health economics publications have made important contributions in this regard.

A 2017 article by Kathleen Markowitz and coauthors published in the Journal of Health Economics studies the effect of stricter SOP laws for certified nurse midwifes.[21] The authors find that less stringent SOP restrictions for certified nurse midwifes, in the form of relaxed physician oversight and greater authority to prescribe medications, do not affect negatively (or positively) infant health outcomes (as measured by birthweight, premature births or injuries) or maternal health behaviors during pregnancy (as measured by alcohol and tobacco consumption, adequate weight gain and access to maternal care). The authors also find that less stringent SOP restrictions lead to lower rates of C-sections and induced labor, even though certified nurse midwifes do not themselves perform C-sections. The authors interpret the lower C-section and induced labor rates as a reflection of obstetricians' response to increased competition from CNMs.

These results suggest that allowing CNMs to practice more broadly may not result in lower quality care for mothers and infants. The authors conclude that restrictive SOP laws do not benefit infants and mothers and constitute artificial barriers to care that may harm competition and the efficiency of health care delivery.

In another recent study, published in The Journal of Law and Economics, Allison Kleiner and coauthors provide additional evidence that SOP laws may restrict competition and increase prices in the health care sector without improving quality of care.[22] The study focuses on SOP restrictions for nurse practitioners and finds no evidence that giving more independence to nurse practitioners negatively affects health outcomes, as measured by infant mortality and medical malpractice insurance premiums — the latter should reflect any increased risk of adverse health outcomes.

Further, more stringent SOP laws may increase health care prices: the study finds that well-child visits are more expensive (by 3-16%) in states where nurse practitioners' prescribing privileges are more limited. The study also looks at the effect of SOP laws on hourly wages for nurse practitioners and physicians and finds that relaxing SOP restrictions for nurse practitioners increases nurse practitioners' wages while reducing physicians' wages. These findings lead the authors to conclude that nurse practitioners are substitutes for physicians for some health care services.

A third study, published in the Journal of Health Economics by Jeffrey Traczynski and Victoria Udalova, focuses on the effects of greater nurse practitioner independence on primary care utilization, quality and emergency room use.[23] The study finds that greater nurse practitioner independence increases primary care utilization, particularly for medically underserved populations. The authors find that as a result of greater nurse practitioner independence, access to care improves — for example, convenient appointments are easier to obtain — and patients are more likely to have a regular health care provider. Patients also report greater subjective quality of care.

The study also finds a decreased use of emergency care, which may reflect improvements in primary care access and quality. These findings are consistent with other recent studies that have found that relaxing SOP laws for nurse practitioners increases access to care — especially for rural, vulnerable and other populations in areas with low supply of health care providers.[24]

As few academic studies have looked in such detail at the impacts of SOP restrictions on health outcomes, these articles provide valuable examples of the economic issues that can arise around occupational licensing, especially in the health care sector. The articles suggest that in certain health care contexts, removing SOP barriers may increase competition and reduce health care costs without negatively affecting quality.

Two important caveats are necessary to bear in mind. First, measuring quality of care and health outcomes reliably can be a thorny issue. Second, these studies only scratch the surface of understanding the trade-off between quality and competition in the broader context of occupational licensing. More studies are needed to determine in which settings occupational licensing laws improve quality and in which settings they unnecessarily restrict competition. The answer will surely depend on nuances of the specific profession and practices in question, which means that in the context of antitrust enforcement, the issues surrounding occupational licensing will likely continue to be analyzed on a case-by-case basis.

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## Endnotes

1 Christian, S., "Scope of Practice Laws in Health Care: Exploring New Approaches for California," March 7, 2008, California Health Care Foundation, available at http://www.chcf.org/publications/2008/03/scope-of-practice-laws-in-health-care-exploring-new-approaches-for-california.

2 North Carolina State Board of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

3 Rosch, T., "In the Matter of the North Carolina Board of Dental Examiners Docket No. 9343 Opinion of the Commission," available at https://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf.

4 See, e.g., Cornell Law School Legal Information Institute, State Action Antitrust Immunity, available at https://www.law.cornell.edu/wex/state_action_antitrust_immunity.

5 North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015), Decided on February 25, 2015.

6 Goldfarb, C., "NC Dental Leaves State Boards with Little to Smile About," March 11, 2015, Law360, available at https://www.law360.com/articles/629645/nc-dental-leaves-state-boards-with-little-to-smile-about.

7 Henry v. N.C. Acupuncture Licensing Bd., No. 1:15CV831, 2017 U.S. Dist. LEXIS 12204 (M.D.N.C. Jan. 30, 2017),

8 According to Plaintiffs, dry needling is "[a] commonly used intervention for treating myofascial trigger point pain," and a popular alternative to Ashi point needling, during which "physical therapists insert needles into trigger points (taut bands in the muscles) to relieve patients' pain or dysfunction." See Pls.' Am. Compl. ¶¶ 30-31, 56, Henry v. N.C. Acupuncture Licensing Bd., No. 1:15CV831, 2017 U.S. Dist. LEXIS 12204 (M.D.N.C. Jan. 30, 2017).

9 Henry v. N.C. Acupuncture Licensing Bd., No. 1:15CV831, 2017 U.S. Dist. LEXIS 12204, at *2-3 (M.D.N.C. Jan. 30, 2017).

10 Henry v. N.C. Acupuncture Licensing Bd., No. 1:15CV831, 2017 U.S. Dist. LEXIS 12204 (M.D.N.C. Jan. 30, 2017).

11 The Henry case had been stayed pending a decision by the Supreme Court of North Carolina on the appeal of the August 25, 2017, decision by the North Carolina Business Court in N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs, 808 S.E.2d 440 (NC 2018). On December 7, 2018, the Supreme Court of North Carolina affirmed the Business Court's decision, which upheld a declaratory ruling by the physical therapy board that dry needling constitutes physical therapy. On January 4, 2019, the parties in Henry filed a joint status report stating that they agreed to mediate by March 15, 2019, and on February 28, 2019, the case was reported settled at mediation.

12 Teladoc, Inc. v. Tex. Med. Bd., No. 1:15-CV-343-RP, 2016 U.S. Dist. LEXIS 107443 (W.D. Tex. Aug. 15, 2016).

13 Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellees, Teladoc, Inc. v. Tex. Med. Bd., No. 1:15-CV-343-RP, 2016 U.S. Dist. LEXIS 107443 (W.D. Tex. Aug. 15, 2016).

14 Perlman, M., "Teladoc Drops Antitrust Suit Against Texas Med Board," November 30, 2017, Law360, available at https://www.law360.com/articles/989922/teladoc-drops-antitrust-suit-against-texas-med-board. Kroh, E., "State Professional Board Antitrust Issues to Watch," August 04, 2017, Law 360, available at https://www.law360.com/articles/951405/state-professional-board-antitrust-issues-to-watch.

15 Ohlhausen, M. L., "Advancing Economic Liberty," February 23, 2017, George Mason Law Review's 20th Annual Antitrust Symposium, available at https://www.ftc.gov/system/files/documents/public_statements/1098513/ohlhausen_-_advancing_economic_liberty_2-23-17.pdf.

16 https://www.law360.com/articles/1044896/doj-deputy-says-health-care-remains-antitrustpriority

17 U.S. Department of Veterans Affairs, "VA Grants Full Practice Authority to Advanced Practice Registered Nurses," December 14, 2016, available at https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2847.

18 U.S. Department of Labor, "U.S. Department of Labor Announces Grants to Help Reform Licensing Requirements and Increase Portability," April 12, 2018, available at https://www.dol.gov/newsroom/releases/osec/osec20180412.

19 Koslov, T.I, M.G. Vita, and D.B. Hoffman, "FTC Staff Comment to PA State House," January 3, 2018, available at https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-staff-comment-pennsylvania-state-house-representatives-regarding-likely/v180002_ftc_staff_comment_to_pa_state_house_re_house_bill_100_and_aprn-cnps.pdf. Kennedy, J., "FTC Says Letting Nurses Work Independently May Benefit Pa.," January 5, 2018, Law 360, available at https://www.law360.com/competition/articles/999229/ftc-says-letting-nurses-work-independently-may-benefit-pa-.

20 Indiana Senate Bill 399, introduced in January 2018, available at https://iga.in.gov/legislative/2018/bills/senate/399. Adams, B. "South Dakota Gov. Dennis Daugaard Moves to Ease Professional Licensure Requirements," January 9, 2018, Washington Examiner, available at http://www.washingtonexaminer.com/south-dakota-gov-dennis-daugaard-moves-to-ease-professional-licensure-requirements/article/2645465. Nebraska LB299, introduced in January 2017, available at https://nebraskalegislature.gov/FloorDocs/105/PDF/Intro/LB299.pdf, Office of Governor Pete Ricketts, "Gov. Ricketts, Senators Unveil Occupational Licensing Reforms," January 10, 2017, available at https://governor.nebraska.gov/press/gov-ricketts-senators-unveil-occupational-licensing-reforms, and Federal Trade Commission, "FTC Staff Issues Comment on Proposed Occupational Licensing Reform in Nebraska," January 18, 2018, available at https://www.ftc.gov/news-events/press-releases/2018/01/ftc-staff-issues-comment-proposed-occupational-licensing-reform.

21 Markowiz, S., E. Kathleen Adams, Mary Jane Lewitt, and Anne L. Dunlop, "Competitive Effects of Scope of Practice Restrictions: Public Health or Public Harm?," Journal of Health Economics 2017, Vol. 55: 201-218.

22 Kleiner, M., Allison Marier, Kyoung Won Park, Coady Wing, "Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service," Journal of Law and Economics 2016, Vol. 59: 261-291.

23 Traczynski, J., and Victoria Udalova, "Nurse Practitioner Independence, Health Care Utilization, and Health Outcomes," Journal of Health Economics 2018, Vol.58: 59-109.

24 See, e.g., Xue, Y., Y. Zhiqiu, C. Brewer, and J. Spetz, "Impact of State Nurse Practitioner Scope-Of-Practice Regulation on Health Care Delivery: Systematic Review," Nursing Outlook 2016, Vol. 64(1):71-85 and McMichael, B.J., "Beyond Physicians: The Effect of Licensing and Liability Laws on the Supply of Nurse Practitioners and Physician Assistants," Journal of Empirical Legal Studies 2018, Vol.15(4): 732-771.