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Article

Brother, may I?: the challenge of competitor control over market entry

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ABSTRACT

Those concerned with restrictions on innovative technologies and business models often decry the stultifying effects of a 'Mother, May I?' approach, whereby the innovator needs government permission to enter a market. These are worthy concerns that regulators ought to take seriously. This article focuses on a related issue, which the authors call the 'Brother, May I?' problem or the challenge of competitor control over market entry. This problem arises when would-be entrants are effectively required to obtain permission from incumbent competitors to enter or expand within a particular market. Whether it is due to a law or regulation, the decision of a financially-interested state board, or conduct by a monopolist looking to maintain its market power, new entrants to a market generally should not have to get their competitors' permission to compete. That such permission is effectively required in an increasing number of situations is inconsistent with the free-market principles that ought to guide our economic policies. Three recent appellate victories by the Federal Trade Commission—in *North Carolina Dental*, *Phoebe Putney*, and *McWane*—all in some way involved the need to seek the permission of competitors to enter a market, and this article addresses each case in turn.

KEYWORDS: Federal Trade Commission, antitrust, state action immunity, certificate-of-need laws, exclusive dealing

JEL CLASSIFICATIONS: K21, K42, L41, L42, L44

I. INTRODUCTION

Those concerned with restrictions on innovative technologies and business models often decry the stultifying effects of a 'Mother, May I?' approach, where the innovator needs government permission to enter a market. These are worthy concerns and, in recognition of them, one of the authors has repeatedly advocated for what

* Commissioner, US Federal Trade Commission, Washington, DC. Email: mohlhausen@ftc.gov. This article is based on a speech presented by Commissioner Ohlhausen at the 29 May 2015, Global Antitrust Economics Conference at George Mason University School of Law. The views expressed in this article are solely those of the authors and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

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she calls regulatory humility, advising regulators to wait to see if consumer harm occurs before enacting new legal obligations.[1]

This article focuses on a related issue, which we call the 'Brother, May I?' problem or the challenge of competitor control over market entry. This problem arises when would-be entrants are effectively required to obtain permission from incumbent competitors to enter or expand within a particular market. Whether it is due to a law or regulation, the decision of a financially-interested state board, or conduct by a monopolist looking to maintain its market power, new entrants to a market generally should not have to get their competitors' permission to compete. That such permission is effectively required in an increasing number of situations is inconsistent with the free-market principles that ought to guide our economic policies.

Public choice theory of course has long recognized the problem of an industry capturing its regulators.[2] The 'Brother, May I?' scenario may be even more troubling as in some cases it is effectively 'regulatory replacement' rather than regulatory capture, with competitors acting directly as a regulator.

A few explanatory notes may help to provide context for this article. The authors believe strongly in the concepts of a free-market economy and economic liberty for individuals. We also view sound antitrust enforcement—that is, enforcement efforts aimed at protecting consumer welfare, while minimizing burdens on otherwise efficient conduct—as a necessary part of a well-functioning free market. Competition is the first line of defence for consumers. Thus, targeted antitrust enforcement is good for the market because it makes other regulation less necessary.[3]

In addition, the authors have been strong supporters of the Federal Trade Commission's (FTC) engagement in competition advocacy.[4] Such advocacy is necessary in many instances to combat proposed regulatory barriers to entry supported by incumbent interests. Thus, our long history with competition advocacy also shapes our views on these important policy issues.

Finally, to be clear, this article does not advocate for requiring firms to assist their competitors. The courts, in *Trinko*[5] and other cases, have appropriately limited the general duty of firms to help their competitors compete. Similarly, one of the authors has argued against reliance on the essential facilities doctrine—particularly in the

1 See eg Maureen K Ohlhausen, 'Regulatory Humility in Practice' Remarks before the American Enterprise Institute (1 April 2015) <https://www.ftc.gov/system/files/documents/public_statements/635811/150401aeihumilitypractice.pdf> accessed 27 July 2015; Maureen K Ohlhausen, 'The Procrustean Problem with Prescriptive Regulation' (2014) 23 Comm Law Conspectus 1 <https://www.ftc.gov/system/files/documents/public_statements/606381/141222commlaw.pdf> accessed 27 July 2015.

2 See eg George J Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell J Econ & Manag Sci 3 ('A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.').

3 See eg Timothy J Muris, 'Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy' (2003) Colum Bus L Rev 359, 364 ('Effective antitrust enforcement may preclude direct, command-and-control regulation of sectors of the economy, avoiding the significant inefficiencies such regulation entails.').

4 Commissioner Ohlhausen served as Director of the FTC's Office of Policy Planning (OPP) from 2004 to 2008, while Greg Luib served as Assistant Director of OPP from 2006 to 2009.

5 See *Verizon Commc'ns Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

intellectual property area—by foreign antitrust agencies.[6] Rather, this article argues that firms should not have to obtain their competitors' permission to compete and that the FTC's enforcement and advocacy efforts should seek to eliminate such anti-competitive market distortions. Interestingly, three recent victories by the FTC in the courts—*North Carolina Dental*,[7] *Phoebe Putney*,[8] and *McWane*[9]—all in some way involved the need to seek the permission of competitors to enter a market, and this article addresses each case in turn.

This article proceeds as follows. Section II addresses the Supreme Court's recent decision in *North Carolina Dental* and its potential impact on state licensing boards, including in particular those comprised of active participants in the markets regulated by such boards, as well as the licensing of professionals more generally. Section III discusses the Court's 2013 decision in *Phoebe Putney* and argues for the elimination of state certificate-of-need (CON) laws, which, among other things, prevented the Commission from obtaining a complete remedy in the *Phoebe Putney* merger matter. Section IV explores the recent Eleventh Circuit decision in the FTC's monopolization case against McWane Inc and its implications for exclusive dealing by monopolists. Section V concludes this article.

II. *NORTH CAROLINA DENTAL* AND STATE LICENSING BOARDS

One of the clearest examples of the 'Brother, May I?' challenge arises in the state licensing of professionals. Here, our—and the Commission's—concern has been the artificial and unjustified barriers to entry erected by some State licensing boards, including, in particular, those comprised of active participants in the very markets they regulate. This issue came to a head in the Commission's successful Sherman Act section 1 case against the North Carolina Board of Dental Examiners (the Board).

The North Carolina Dental *case*

In *North Carolina Dental*, the FTC filed an administrative complaint, alleging that the Board—through its dentist-members—was 'colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services'.[10] After deciding that whitening teeth constitutes the practice of dentistry, the Board issued letters to non-dentist providers, stating they were illegally practicing dentistry

6 See eg Maureen K Ohlhausen, Commissioner, US Federal Trade Commission, Testimony on 'The Foreign Investment Climate in China' before the US-China Economic and Security Review Commission (28 January 2015) 5–6 (expressing concern that decisions by US antitrust enforcers are being interpreted in China as endorsing the essential facilities doctrine, a result that would devalue intellectual property rights around the world) <https://www.ftc.gov/system/files/documents/public_statements/621411/150128chinatestimony.pdf> accessed 27 July 2015.

7 *NC State Bd of Dental Exam'rs v FTC* 135 S Ct 1101 (2015) (*North Carolina Dental*).

8 *FTC v Phoebe Putney Health Sys Inc* 133 S Ct 1003 (2013) (*Phoebe Putney*).

9 *McWane Inc v FTC* No 14-11363 2015 WL 1652200 (11th Cir 15 April 2015).

10 *In re NC Bd of Dental Exam'rs* Dkt No 9343 Complaint at 1 (17 June 2010) <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf> accessed 27 July 2015. The Board consists of six licensed dentists, one licensed hygienist, and one 'consumer member,' who is neither a dentist nor a hygienist. ibid ¶ 2.

without a license and ordering them to cease and desist.[11] The Board also issued letters to several third parties with interests in shopping malls, stating that teeth whitening services offered at mall kiosks are illegal.[12]

The Commission alleged that the Board's activities constituted an unlawful restraint of trade under the standards governing section 1 of the Sherman Act and thus an unfair method of competition under the FTC Act.[13] The result of this concerted effort, as alleged in the complaint, was to deprive consumers of the benefits of price competition and increased choice provided by non-dentist teeth whiteners.[14]

Prior to the administrative trial in this matter, the Board filed a motion to dismiss, arguing that its conduct was protected by the state action doctrine. In a unanimous opinion written by then-Commissioner William Kovacic, the Commission held that 'a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine'.[15] That is, to benefit from state action immunity, the Board must show not only that the state of North Carolina has 'clearly articulated and affirmatively expressed' a state policy in favour of regulation and against competition with respect to teeth whitening services, but that the Board's activities—like those of private parties—are '"actively supervised" by the State itself'.[16] The Commission further found that the Board failed to demonstrate that 'its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board's conduct into conduct of the state of North Carolina'.[17]

Following that ruling, as well as a trial on the merits, the administrative law judge found the Board had violated the FTC Act,[18] a decision subsequently affirmed by the full Commission.[19] In May 2013, the Fourth Circuit Court of Appeals denied the Board's petition for review of the Commission's order, affirming both the state action ruling and the finding of liability.[20] The case ended up at the Supreme Court, which ruled in the Commission's favour in February 2015, holding that 'a state board on

11 ibid ¶ 20.

12 ibid ¶ 22.

13 The FTC enforces s 1 of the Sherman Act through the FTC Act. See eg *Cal Dental Ass'n v FTC* 526 US 756, 762 n 3 (1999) ('The FTC Act's prohibition of unfair competition ... overlaps the scope of § 1 of the Sherman Act ....') (citation omitted).

14 *NC Dental* Complaint (n 10) ¶ 25.

15 *In re NC Bd of Dental Exam'rs* Docket No 9343 Opinion of the Commission at 13 (8 February 2011) <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110208commopinion.pdf> accessed 27 July 2015. That motion to dismiss was addressed by the Commission in the first instance, based on 2009 changes to the rules governing its administrative litigation. See ibid 3.

16 *Cal Retail Liquor Dealers Ass'n Midcal Aluminum Inc* 445 US 97, 105 (1980).

17 *In re NC Bd of Dental Exam'rs* Docket No 9343 Opinion of the Commission at 17 (8 February 2011).

18 See *In re* NC Bd of Dental Exam'rs Docket No 9343 Initial Decision of the Administrative Law Judge (14 July 2011) <https://www.ftc.gov/sites/default/files/documents/cases/2011/07/110719ncb-decision.pdf> accessed 27 July 2015.

19 See *In re NC Bd of Dental Exam'rs* Docket No 9343 Opinion of the Commission (7 December 2011) <https://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf> accessed 27 July 2015.

20 See *NC State Bd of Dental Exam'rs v FTC* 717 F3d 359 (4th Cir 2013).

which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity'.[21]

A few aspects of the Court's opinion stand out. First, the Court reiterated the crucial role that antitrust plays in our economy, noting that '[f]ederal antitrust law is a central safeguard for the Nation's free market structures'.[22] And, citing its recent decision in *Phoebe Putney* (another Commission victory in the state action area), the Court explained that, 'given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication'.[23]

The Court also focused on the important issue of political accountability. As a threshold matter, the Court rejected the idea that State agencies, such as the Board, are sovereign actors that automatically qualify for State action immunity, as the State itself. The Court in *Parker v Brown*,[24] in establishing the state action doctrine, recognized the importance of our federal system of government, including the sovereignty of the states. Thus, anticompetitive conduct is immunized only when it legitimately represents the State acting in its sovereign capacity. However, immunity for state agencies, the Court explained, 'requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control'.[25] In other words, '*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own'.[26]

The Court next contrasted state agencies with municipalities, which it has held are not obligated to meet the active supervision prong to benefit from state action immunity. In particular, the Court noted that 'municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market'.[27] Furthermore, municipalities tend to address issues 'across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field'.[28] State agencies controlled by market participants, the Court noted, are 'more similar to private trade associations vested by States with regulatory authority' than to municipalities.[29]

In ruling for the FTC, the Court also rejected concerns raised by the Board and several of its amici that allowing the Commission's order to stand will discourage otherwise qualified citizens from serving on state regulatory agencies. As the Court explained, 'Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches

21 *NC State Bd* 135 S Ct (n 7) 1114. Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.
22 ibid 1109.
23 ibid 1110 (citing *Phoebe Putney Health Sys* (n 8) 1010).
24 317 US 341 (1943).
25 *NC State Bd* 135 S Ct (n 7) 1111.
26 ibid.
27 ibid 1112 (citing *Town of Hallie v City of Eau Claire* 471 US 34, 45 n.9 (1985)).
28 ibid 1113.
29 ibid 1114.

back at least to the Hippocratic Oath'.[30] The Court further noted that, to the extent agency officials are concerned about antitrust damage claims, states may defend and indemnify those officials in the event of litigation.[31] Moreover, states can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active supervision. Those two requirements and their underlying rationale, the Court found, should apply to the Board, just as they were held to apply to the medical peer review board in *Patrick v Burget*,[32] where the Court directed to the legislative branch any challenges to the wisdom of applying the antitrust laws to the sphere of medical care.[33] That is, any objections to the application of antitrust to the medical professions should be taken up with Congress, not than the courts.

Finally, the Court briefly addressed the issue of active supervision and how the Board, or any other agency controlled by market participants, can meet this prong of the *Midcal* test. Because the Board did not argue before the Court that North Carolina exercised active supervision over its conduct regarding non-dentist teeth whiteners, the Court was not reviewing any particular supervisory system. The Court, however, made clear that the supervision inquiry is 'flexible and context-dependent'.[34] The state's 'supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision'.[35] Rather, the critical inquiry is 'whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests"'.[36] The Court went on to identify 'a few constant requirements of active supervision', including: (1) 'review [of] the substance of the anticompetitive decision, not merely the procedures followed to produce it'; (2) supervisory 'power to veto or modify particular decisions to ensure they accord with state policy'; (3) the 'mere potential for state supervision' is insufficient; and (4) 'the state supervisor may not itself be an active market participant'.[37]

Unlike the Commission's victory in *Phoebe Putney*, the decision in *North Carolina Dental* was not unanimous. Justice Alito, with Justices Scalia and Thomas joining, dissented. Among other things, the dissent argued that *Parker* immunizes state agencies, the Board is a state agency, 'and that is the end of the matter'.[38] The fact that the Board 'was serving the interests of dentists and not the public' did not sway the dissenting Justices, who argued: 'that is not what *Parker* immunity is about'.[39] The dissenters' reading of *Parker* was clearly different from that of the majority. They noted that the regulation of the practice of medicine and dentistry has fallen 'squarely within the States' sovereign police power' since before the Sherman Act

30 ibid 1115.
31 ibid.
32 486 US 94 (1988).
33 See *NC State Bd* 135 S Ct (n 7) 1115–16.
34 ibid 1116.
35 ibid.
36 ibid (quoting *Patrick*, 486 US at 100-1).
37 ibid 1116–17.
38 ibid 1117–18 (Alito, J, dissenting).
39 ibid 1118.

was passed in 1890.[40] Thus, the State statutes that created, and conferred regulatory authority on, the Board 'represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize'.[41]

The dissent also took issue with the practical problems that the majority opinion may create for state regulatory regimes, maintaining that it is unclear what changes to state boards will be necessary in light of the Court's decision. The dissent further identified several questions left unanswered by the decision, including: (i) 'What is a "controlling number" [of decision makers]?'; (ii) 'Who is an "active market participant"?'; and (iii) 'What is the scope of the market in which a member may not participate while serving on the board?'[42] Finally, the dissent noted that regulatory capture of a state agency can occur in many ways and asked why the inquiry should be limited to the question of whether an agency includes active market participants.[43]

Implications for State boards

The *North Carolina Dental* decision was a crucial victory for competition and consumers. Under our federal system, individual States can do a lot to meddle with the free market; that is their choice to make. However, States need to be politically accountable for whatever market distortions they impose on consumers.[44] Of course, with a nod to George Stigler's insights from the 1970s, the North Carolina Dental Board's conduct can be easily explained as rent-seeking behaviour by incumbents to fend off a new source of competition.[45] Where there is a benefit concentrated in the hands of a relatively small number of incumbent providers, in this case dentists, and the competitive harm is dispersed across all consumers of health care services, public choice theory predicts such incumbent exploitation of State licensing laws and regulations.[46] The adverse competitive results of such behaviour are manifest.[47] Now, some

40 ibid 1119.

41 ibid.

42 ibid 1123.

43 ibid.

44 See eg *FTC v Ticor Title Ins Co* 504 US 621, 636 (1992) ('Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends.').

45 See eg Stigler (n 2) 5 ('We propose the general hypothesis: every industry or occupation that has enough political power to utilize the state will seek to control entry.').

46 See eg Steven Menashi and Douglas H Ginsburg, 'Rational Basis with Economic Bite' (2014) 8 NYU JL & Liberty 1055, 1087–88 ('By now, "[a]ll reasonably sophisticated persons know that a well-knit special interest group is likely to prevail over an amorphous "public" whose members are dispersed and, as individuals, are not in sharp conflict with the organized interest." The occupational licensing laws recently invalidated under rational basis review are just this type of special-interest legislation.') (quoting Walter Gellhorn, 'The Abuse of Occupational Licensing' (1976) 44 U Chi L Rev 6, 16); Timothy Sandefur, 'A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry' (2014) 24 Geo Mason U CR LJ 159, 176 ('Public choice theory predicts that where the government can redistribute wealth or opportunities between private groups, those groups will invest their resources in obtaining favorable legislation that will benefit them or handicap their rivals. Entry restrictions like occupational licenses or [certificate-of-need] laws are made-to-order examples.').

47 See eg Daniel J Gilman and Julie Fairman, 'Antitrust and the Future of Nursing: Federal Competition Policy and the Scope of Practice' (2014) 24 Health Matrix 143, 165 (2014) ('[L]icensure may be used by incumbent professionals to insulate themselves from competition. By restricting the entry of competitors,

have described this type of situation as an example of regulatory capture.[48] But, it is more than regulatory capture; it is the regulated replacing and acting as the regulators.

There is no question that the Court's decision has implications for state agencies throughout the country. Many licensing boards are controlled by active participants in the markets they regulate. A recent study, for example, found that active market participants have a majority on 90 per cent of boards in Florida and on 93 per cent of boards in Tennessee.[49] It is also understandable why States would prefer—and consumers might benefit from—having active market participants serve on state regulatory boards. They can offer valuable and potentially unique medical and other expertise in making important regulatory decisions. In an amicus brief filed with the Court in *North Carolina Dental*, several States raised concerns that subjecting regulatory board members to the antitrust laws would deter qualified professionals from serving on State boards.[50] The States also raised concerns that a decision in favour of the FTC could 'subject *every* decision made by regulatory boards staffed by active professionals—including routine licensing decisions—to direct oversight and approval by full-time state employees'.[51]

Although the authors appreciate these concerns, we believe state boards have several viable options for avoiding both antitrust liability for, and excessive oversight of, their conduct. These options should not be terribly onerous to implement and should help states retain individuals with sufficient relevant expertise on their regulatory boards. First, simply being more cognizant of, and hopefully minimizing, the competitive effects of a board's regulatory decisions would go a long way towards eliminating any antitrust exposure. This may be a bit of an oversimplification, but if a board is not engaging in conduct that is a violation of the antitrust laws, it need not even address the issue of active supervision. Second, although citizens may benefit from the expertise of actual practitioners, state boards need not be controlled by active market participants.[52] Those individuals could comprise less than a majority of the board—or perhaps abstain from matters in which they have a financial interest. This option would also avoid the need to demonstrate active supervision of the board. Third, even if a State prefers a particular board to be controlled by market participants, there are many options for actively supervising the actions of that board. In fact, as the FTC argued before the Court, most States have established schemes to supervise some or all of the conduct of self-interested dental boards.[53] Under

licensure can restrict supply, which can increase the income of incumbents (at consumer expense) or decrease the pressure on incumbents to improve non-price aspects of their services, such as quality or convenience.') (footnote omitted).

48 See eg Herbert Hovenkamp, 'Rediscovering Capture: Antitrust Federalism and the North Carolina Dental Case' (April 2015) CPI Antitrust Chronicle 15–6.

49 See Aaron Edlin and Rebecca Haw, 'Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?' (2014) 162 U Pa L Rev 1093, 1103, 1157–64.

50 See Brief of Amici Curiae State of West Virginia and 21 Other States in Support of Petitioner at 11, *NC State Bd of Dental Exam'rs v FTC* No 13-534 (US 30 May 2014).

51 ibid 15.

52 See eg Brief of Amici Curiae Pacific Legal Foundation and Cato Institute in Support of Respondent at 23, *NC State Bd of Dental Exam'rs v FTC*, No 13-534 (US 6 August 2014) ('Agencies could be made up of retired members of the profession, or could include existing members without their making up the majority of the board.').

53 See Brief for the Respondent at 54–55, *NC State Bd of Dental Exam'rs v FTC* No 13-534 (US 30 July 2014); Brief of Amicus Curiae Neil Averitt in Support of Respondent at 4–7, *NC State Bd of Dental*

those schemes, which could be and are applied to other types of boards, ultimate regulatory decisions are made by legislative committees, umbrella state agencies, such as rules review commissions, or other disinterested state officials. And, of course, not every action of a regulatory board will need to be actively supervised; only those that potentially raise antitrust issues would require such attention. As a last resort, States can opt to indemnify individual board members in the event that antitrust damages are imposed on them.[54]

Looking at *North Carolina Dental* and *Phoebe Putney*, which is discussed in the next section, the state action area is one of the best examples of the Commission using its unique institutional features to guide the courts and others in the development of competition law towards better outcomes for competition and consumers.[55] Looking ahead, the Commission should continue to focus both its enforcement and competition advocacy efforts on anticompetitive licensing activities within the States. Nonetheless, the Commission ought to give the States some breathing room to respond to the changed legal landscape that they now face. It will take the States some time to evaluate and modify, if necessary, their licensing boards. In the meantime, as Chairwoman Ramirez announced at the ABA Spring Meeting in April 2015, the Commission has begun an effort to provide guidance to States seeking to satisfy the active supervision prong of the state action doctrine. The authors have had discussions with representatives from state attorneys general offices, and we hope to continue that dialogue in the future.

Implications for occupational licensing more generally

More generally, the authors are hopeful that the States, while assessing the sufficiency of their supervision over licensing decisions, will also re-evaluate some of the excessive occupational licensing requirements they have adopted over the years. That is, as the States reconsider the composition and oversight of their regulatory boards, the authors recommend that they also take a very hard look at their occupational licensing regimes to see if they are on balance helping or harming their citizens.

Among the professions subject to state licensure requirements today are florists, interior designers, tour guides, barbers, hair braiders, and even 'shampoo specialists'.[56] In fact, roughly 30 per cent of US workers are now required to obtain a

Exam'rs v FTC No 13-534 (US 5 August 2014) (identifying several forms of supervision currently employed by the states).

54 See eg *NC State Bd* 135 S Ct (n 7) 1115 (2015); Edlin and Haw (n 49) 1152–53.

55 For a discussion of the FTC's efforts in the state action area, see Maureen K Ohlhausen, 'Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity' Remarks before the Heritage Foundation (31March 2015) 7–13 <https://www.ftc.gov/public-statements/2015/03/reflections-supreme-courts-north-carolina-dental-decision-ftcs-campaign> accessed 27 July 2015.

56 See Stephanie Simon, 'A License to Shampoo: Jobs Needing State Approval Rise' Wall St J (7 February 2011) <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> accessed on 27 July 2015; Melissa S Kearney and others, 'Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices' Brookings Institution Up-Front Blog (27 January 2015 11:00 AM) <http:// www.brookings.edu/blogs/up-front/posts/2015/01/26-time-to-examine-occupational-licensing-practices-kearney-hershbein-boddy> accessed 27 July 2015. For a comprehensive review of state licensing requirements, see Institute for Justice,

license to pursue their occupation.[57] Multiple studies have found that prices increase—by as much as 33 per cent—as a result of occupational licensing.[58] That might be tolerable if those price increases reflected improved quality; however, 'economic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than where it has improved the quality and safety of services'.[59] Overall, the drag on the economy of excessive occupational licensing is counted in hundreds of billions of dollars annually.[60] Moreover, the increased costs of excessive occupational licensing falls most heavily on those least able to afford them.[61]

A particular concern is that the 'Brother, May I?' aspect of occupational licensing can create unnecessary barriers to entry for entrepreneurs seeking to take their first step on the economic ladder. This is especially true for occupations that draw individuals who are just beginning a professional career. Licensing requirements, which often include educational components, can prevent lower-income workers, who may not be able to pay for additional education, from entering certain fields—even at the lowest rungs of the economic ladder.[62] A recently published study by the Goldwater Institute assessed the relationship between occupational licensing and entrepreneurship rates, including in particular rates for lower-income people, across the States.[63]

'License to Work: A National Study of Burdens from Occupational Licensing' (May 2012) (hereinafter IJ, 'License to Work') <https://www.ij.org/licensetowork> accessed 27 July 2015.

57 See Morris M Kleiner and Alan B Krueger, 'Analyzing the Extent and Influence of Occupational Licensing on the Labor Market' (2013) 31 J of Labor Economics 175–76 (findings based on 2008 survey conducted as part of Princeton Data Improvement Initiative).

58 See eg Morris M Kleiner, 'Reforming Occupational Licensing Policies' (2015) The Hamilton Project 17–22 (hereinafter Kleiner, 'Reforming Occupational Licensing'), <http://www.hamiltonproject.org/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf> accessed 27 July 2015 (collecting studies). See also Executive Office of the President, 'Occupational Licensing: A Framework for Policymakers' (2015) 14 <https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf> accessed 31 July 2015 ('[T]he evidence on licensing's effects on prices is unequivocal: many studies find that more restrictive licensing laws lead to higher prices for consumers.').

59 Kleiner, 'Reforming Occupational Licensing' (n 58) 6. See also ibid 12–13 (collecting studies); Executive Office of the President, (n 58) 58 ('Most empirical evidence does not find that stricter licensing requirements improve quality, public safety or health.'); Edlin and Haw, (n 49) 1111–12 ('The work of Kleiner and his contemporaries reveals a consensus in the academy: a licensing restriction can only be justified where it leads to better quality professional services—and for many restrictions, proof of that enhanced quality is lacking.').

60 See Kleiner, 'Reforming Occupational Licensing' (n 58) 6.

61 See eg ibid 16 ('The net effects [of licensing] can be regressive, as lower-income consumers—who now have to pay higher prices and may have less access to services ranging from haircuts to dental exams—pay more to the regulated practitioners, some of whom are well compensated.'); Steven Horwitz, 'Breaking Down the Barriers: Three Ways State and Local Governments Can Improve the Lives of the Poor' (2015) Mercatus Research Paper 8, <http://mercatus.org/sites/default/files/Horwitz-Breaking-Down-Barriers.pdf> accessed 27 July 2015 ('Because many licensed occupations offer products or services that are bought by the poor, licensing laws hit the poor twice—once in the form of limiting job opportunities and then again in the form of higher prices.').

62 See eg IJ, 'License to Work' (n 56) 4 ('The 102 occupational licenses studied require of aspiring workers, on average, $209 in fees, one exam and about nine months of education and training.').

63 See Stephen Slivinski, 'Bootstraps Tangled in Red Tape: How State Occupational Licensing Hinders Low-Income Entrepreneurship' (23 February 2015) Goldwater Institute Policy Report No 272 <http://www.goldwaterinstitute.org/en/work/topics/free-enterprise/entrepreneurship/bootstraps-tangled-in-red-tape/> accessed 27 July 2015.

Among other things, the study found that 'the states that license more than 50 per cent of the low-income occupations had an average entrepreneurship rate 11 per cent lower than the average for all states, and the states [that] licensed less than a third had an average entrepreneurship rate about 11 percent higher'.[64] Even after adjusting for various factors, such as the age and unemployment rate of the population, the study found that 'the presence of widespread occupational licensing in a state has a statistically significant negative effect on the rate of entrepreneurship in a state'.[65]

The Commission has wisely devoted significant resources over the past 40 years opposing state laws and regulations—including many in the occupational licensing area—that, in its view, unnecessarily restrict competition. As the Commission explained in testimony in 2014 before the House of Representatives Committee on Small Business:

> We have seen many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits. In these situations, regulations may lead to higher prices, lower quality services and products, and less convenience for consumers. In the long term, they can cause lasting damage to competition and the competitive process by rendering markets less responsive to consumer demand and by dampening incentives for innovation in products, services, and business models.[66]

Since the 1970s, the Commission has issued hundreds of comments and amicus briefs to State and self-regulatory entities addressing professional licensure and other restrictions across a wide range of industries.[67] Our expectation is that the Commission will continue to pursue this important competition advocacy.

III. *PHOEBE PUTNEY* AND CERTIFICATE-OF-NEED LAWS

Another example of needing to obtain permission from one's competitors to enter the market is found in CON, laws that remain on the books in over two-thirds of the States.[68] Under these laws, would-be suppliers of a host of health care services, from acute care hospitals to nursing homes to rehabilitation centres, must seek approval from a state entity to enter the market. The real issue in a typical CON determination is not, however, one of ensuring patient safety or the proper qualifications of the applicant—there are other laws and regulations that typically address those issues

64 ibid 14.

65 ibid 15. The Goldwater Institute study relied in significant part on data on state occupational licensing gathered by the Institute for Justice in connection with its 'License to Work' study. See ibid 12–15 (discussing use of data from IJ, 'License to Work', (n 56).

66 Prepared Statement of the Federal Trade Commission, 'Competition and the Potential Costs and Benefits of Professional Licensure' before the US House of Representatives Committee on Small Business, (16 July 2014) 1 <https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf> accessed 27 July 2015.

67 ibid 9–13.

68 See National Conference of State Legislatures, 'Certificate of Need: State Health Laws and Programs' <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx> accessed 27 July 2015 (indicating that 36 States retain some type of CON programme as of 2014).

more directly—but rather the 'need' for a new entrant into the market at issue, as determined by the state regulatory entity.[69] As discussed below, CON laws have outlived their intended use and now effectively serve primarily, if not solely, to assist incumbents in fending off competition from new entrants. The Commission and the public were reminded of the anticompetitive effects of those laws most recently in the *Phoebe Putney* matter.

The FTC's case against Phoebe Putney

In *Phoebe Putney*, the FTC challenged a merger involving a local hospital authority in Albany, Georgia. The parties arranged to have the local hospital authority acquire Palmyra Park Hospital (Palmyra) from HCA Inc and then transfer all management control of the hospital to Phoebe Putney Health System, Inc. (Phoebe Putney) under a long-term lease. The Commission filed its complaint in April 2011. However, based on the form of the transaction and the role of the hospital authority therein, the federal district court granted the defendants' motion to dismiss, holding that the state action doctrine immunized the transaction from federal antitrust scrutiny.[70] On appeal, the Eleventh Circuit Court of Appeals acknowledged that the transaction represented a virtual merger-to-monopoly, yet affirmed the district court's dismissal on state action grounds.[71] Following its ruling, the Eleventh Circuit dissolved the injunction pending appeal that had prevented the parties from merging, allowing them to consummate the transaction.

The Commission next turned to the Supreme Court, which ultimately sided with the agency on the state action issue in its unanimous 2013 decision.[72] To be immune from the antitrust laws under the state action doctrine, private and other non-sovereign entities must demonstrate that the state 'clearly articulated and affirmatively expressed' a policy displacing competition and thus allowing the otherwise anticompetitive conduct at issue.[73] The Court held that a general grant of corporate powers to a sub-state entity, such as a hospital authority, is insufficient by itself to satisfy the clear articulation prong of *Midcal*.[74] The challenged transaction, thus, was not immune from antitrust scrutiny, and the case was remanded for further proceedings.

69 See eg Sandefur (n 46) 160 ('Unlike occupational licensing laws, CON requirements do not purport to determine whether a person is educated, trained, or skilled before going into business. Instead, they are expressly aimed at preventing competition against established companies, regardless of quality or skill.'); Roy Cordato, 'Certificate-of-Need Laws: It's Time for Repeal' (2005) 1 John Locke Found., Nathaniel Macon Research Paper 27 ('Economist Friedrich Hayek in his Nobel Laureate lecture, "The Pretense of Knowledge", argued that central planners, like those charged with determining who should and should not get to provide medical services, can only "pretend" to have the information necessary to make the kinds of decisions they claim to be making. At best, any determination of "need" by such planners will be arbitrary and will not reflect actual market conditions. At worst, these planners can become witting or unwitting tools of entrenched interests who wish to keep competition out of the market.').

70 See *FTC v Phoebe Putney Health Sys Inc* 793 F Supp 2d 1356, 1381 (MD Ga 2011).

71 See *FTC v Phoebe Putney Health Sys Inc* 663 F 3d 1369, 1375 (11th Cir 2011) (noting that 'on the facts alleged, the joint operation of [Phoebe] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly').

72 See *Phoebe Putney Health Sys* (n 8).

73 See ibid 1010 (citing *Cal Retail Liquor Dealers Ass'n v Midcal Aluminum Inc* 445 US 97, 105 (1980)).

74 See ibid 1012.

So far, so good for patients in Albany. The FTC complaint counsel resumed the administrative litigation that had been stayed pending the federal court proceedings. It did not take very long, however, before the agency recognized a potentially insurmountable hurdle to a successful resolution of this case: the Georgia CON laws. That is, even if the Commission could have established liability—and that seemed fairly likely, given the facts—the state CON laws would have prevented a divestiture of any hospital assets.

Now, the case took an admittedly circuitous route during its final 18 months. At first, the Commission issued a proposed consent that imposed on Phoebe Putney certain behavioural restrictions related to CON applications in the relevant geographic market, but no divestiture requirement.[75] The Commission later became aware of certain information in connection with the public comments on the proposed consent order, however, that made it second-guess its initial assessment of the CON laws' preclusion of structural relief. During this time, a newly formed health care entity, North Albany Medical Center, LLC (North Albany), filed a request for determination with the Georgia Department of Community Health (DCH), asking whether its potential acquisition of divested hospital assets would be permitted under the CON laws. North Albany obtained a favourable initial determination by DCH staff in June 2014. Thereafter, the Commission withdrew its proposed consent and sent the case back to administrative litigation.[76]

Unfortunately for consumers of hospital services in the Albany area, a state hearing officer subsequently ruled that the CON laws would apply to any divestiture that might take place in this matter.[77] The fact that the Albany region is deemed 'overbedded' made it unlikely that any divestiture buyer could obtain the necessary CON approval to operate an independent hospital. After the DCH Commissioner made public comments supporting that finding, North Albany opted not to pursue an appeal and effectively dropped its bid to acquire any divested assets.[78] Thus, last March, the Commission reluctantly finalized its consent agreement with Phoebe Putney without a divestiture.[79]

Implications of Phoebe Putney

What, then, are the takeaways from the *Phoebe Putney* matter? First, although it is of little solace to consumers in Albany, the Supreme Court decision narrowing the state action doctrine is a significant victory for competition principles and consumer welfare going forward. That decision, along with *North Carolina Dental*, represents the culmination of a decades-long effort by the Commission to narrow state action immunity from the antitrust laws—an effort in which one of the authors was proud to

75 See *In re Phoebe Putney Health Sys Inc Dkt No* 9348 Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, at 4–6 (22 August 2013) <https://www.ftc.gov/sites/default/files/documents/cases/2013/08/130822phoebeputneyanal.pdf> accessed 28 July 2015.

76 See *In re Phoebe Putney Health Sys Inc Dkt* No 9348, Statement of the Federal Trade Commission, at 2 (31 March 2015) <https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf> accessed 28 July 2015.

77 See ibid 3.

78 See ibid.

79 See ibid.

participate in several roles.[80] Second, *Phoebe* demonstrates the importance of obtaining preliminary relief when challenging hospital mergers in CON states. By maintaining the status quo, injunctive relief prevents the possibility of competitive harm—sometimes, as in *Phoebe*, irremediable harm—from occurring during the Commission's administrative proceedings and any appeals. Similarly, the outcome in *Phoebe* should give the Commission pause in challenging consummated hospital acquisitions in states with CON laws. Finally, this case is a stark reminder of the anticompetitive nature of laws that effectively give competitors veto power over new market entry.

The Commission—both on its own and jointly with the Department of Justice Antitrust Division (DOJ)—has long advocated that states consider the costs that CON laws may impose on health care consumers.[81] More specifically, the Commission has argued that CON laws 'impede the efficient performance of health care markets', 'create barriers to entry and expansion to the detriment of health care competition and consumers', and 'weaken markets' ability to contain health care costs'.[82] As a result, the Commission and its staff have expressed support for the repeal or narrowing of such laws.[83]

The antitrust agencies have put forth strong arguments against CON laws. First, the original reason for the adoption of state CON laws during the 1970s is simply no longer valid. Many of those laws trace their origin to a since-repealed federal mandate, the National Health Planning and Resources Development Act of 1974, which offered incentives for States to implement CON programmes. At the time, the

80 Commissioner Ohlhausen was a member of the State Action Task Force, which issued a report in 2003 recommending several means for the Commission to narrow the state action doctrine (see Federal Trade Commission, Office of Policy Planning, 'Report of the State Action Task Force' (September 2003) <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> accessed 28 July 2015), testified before the Antitrust Modernization Commission on the doctrine (see Prepared Statement of Maureen K Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission, before the Antitrust Modernization Commission on the State Action Doctrine (29 September 2005) <https://www.ftc.gov/public-statements/2005/09/ftc-staff-testimony-antitrust-modernization-commission-concerning-state> accessed 28 July 2015), and participated in several competition advocacy efforts at narrowing the scope of the doctrine.

81 See eg Letter from FTC Staff to the Honourable Marilyn W Avila, 'North Carolina House of Representatives' (10 July 2015) (hereinafter 'North Carolina CON Advocacy') <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2015/07/ftc-staff-comment-concurring-comment-commissioner> accessed 28 July 2015; Joint Statement of the Antitrust Division of the US Department of Justice and the Federal Trade Commission before the Illinois Task Force on Health Planning Reform (15 September 2008) (hereinafter 'DOJ-FTC Illinois Testimony') <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/09/ftc-and-department-justice-written-testimony-illinois> accessed 28 July 2015; Letter from Janet M Grady, Regional Director, Federal Trade Commission, to the Honorable Mary George, Hawaii State Senate (13 March 1987) <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1987/03/ftc-staff-comment-governor-mary-george-concerning> accessed 28 July 2015.

82 DOJ-FTC Illinois Testimony, ibid 1–2.

83 See eg North Carolina CON Advocacy (n 81) 1; DOJ-FTC Illinois Testimony (n 81) 2; Federal Trade Commission and US Department of Justice, 'Improving Health Care: A Dose of Competition' (July 2004) ch 8, at 6 <https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice> accessed 28 July 2015. ('[T]he Agencies urge states with CON programs to reconsider whether they are best serving their citizens' health care needs by allowing these programs to continue.').

federal government and private insurance reimbursed health care charges primarily on a 'cost-plus' basis, which provided incentives for over-investment. CON laws were designed to address this skewed incentive. However, reimbursement methodologies that may in theory have justified CON laws have changed significantly, essentially eliminating the original justification for those laws.[84]

Second, CON laws appear to have generally failed in their intended purpose of containing health care costs. The agencies' advocacies have been grounded in large part on empirical studies of the impact of CON laws conducted by FTC economists.[85] Those studies have found that, rather than keeping health care costs down, CON laws and regulations lead to higher prices and expenditures.[86] For example, one study showed that if states substantially relaxed their CON programmes to subject fewer hospitals to review, annual hospital expenditures would decrease by 1.4 per cent, or approximately $1.3 billion.[87] Studies conducted by several independent commissions appointed by state legislatures to evaluate the impact of CON laws have reached similar conclusions.[88] These results, of course, are rather easily predicted by economic theory. Like any barrier to entry, CON laws prevent or limit the entry of firms that could otherwise provide higher-quality and/or lower-priced services than those offered by incumbents. In other words, output restrictions lead to higher, not lower, costs; they also result in higher profits for incumbent firms.

Another fairly predictable result of CON regimes is the rent-seeking behaviour pursued by incumbents who are able to exploit the regulatory system to their advantage. Using the 'Brother, May I?' aspects of the CON process, incumbent hospitals and other health care providers can impose substantial delays on, or thwart altogether, potential entrants into their markets, thus protecting their own supra-competitive revenues.[89] Returning to public choice theory, it readily predicts such

84 See DOJ-FTC Illinois Testimony (n 81) 4–5.

85 The CON area is just one example of empirical work conducted by FTC economists lending support to, and thus increasing the effectiveness of, the Commission's competition advocacy efforts.

86 See eg DOJ-FTC Illinois Testimony (n 81) 5 n.16 (collecting studies).

87 See Daniel Sherman, Bureau of Economics, Federal Trade Commission, 'The Effect of State Certificate-of-Need Laws on Hospital Costs: An Economic Policy Analysis' (January 1988) vi <https://www.ftc.gov/reports/effect-state-certificate-need-laws-hospital-costs-economic-policy-analysis> accessed 28 July 2015; ibid iv ('The study thus finds no evidence that CON programs have led to the resource savings they were designed to promote, but rather indicates that reliance on CON review may raise hospital costs.').

88 See eg The Lewin Group, 'An Evaluation of Illinois' Certificate of Need Program: Prepared for State of Illinois Commission on Government Forecasting and Accountability' (February 2007) 16 ('A review of the evidence indicates that CONs rarely reduce health care costs, and on occasion, increase cost in some states.'); William S Custer and others, 'Report of Data Analyses to the Georgia Commission on the Efficacy of the CON Program' (November 2006) 8 ('CON regulation is associated with higher private inpatient costs. The effect is robust with respect to model specification, measures of CON rigor, and diagnoses.').

89 See eg North Carolina CON Advocacy (n 81) 3; DOJ-FTC Illinois Testimony (n 81) 7; Federal Trade Commission and US Department of Justice (n 83) Exec Summ at 22. Incumbent providers have also entered into anticompetitive agreements that were outside of, but nonetheless facilitated by, the CON laws. See eg DOJ-FTC Illinois Testimony (n 81) 7–8 (discussing DOJ investigations of market allocation by hospitals and home health agencies).

incumbent exploitation of CON laws,[90] as well as incumbent efforts to keep such laws on the books.[91]

We next address what appears to be the primary argument that states make in support of retaining CON laws: the ability to cross-subsidize care provided to uninsured or underinsured patients.[92] The argument is that, without CON laws, new entrants will engage in cream-skimming by taking the most profitable patients, thus depriving incumbent providers of revenue that is used to provide care to otherwise under-served or unserved patients—particularly at community or safety-net hospitals. The public-policy goal of ensuring access to adequate health care services for patients who cannot afford them is certainly a laudable one. Using the blunt and anticompetitive tool of CON laws, however, is not the answer. Such a use of CON laws flies in the face of any notion of free-market competition.[93]

Clearly, there are a host of difficult issues relating to the payment and provision of health care in this country that go far beyond CON laws and that may not have easy answers. The commission established to study the efficacy of the Georgia CON programme in the mid-2000s, for example, was unable to reach consensus with regard to the best policy to address the difficult issue of cross-subsidization of indigent care.[94] As that commission recognized, 'When viewed in a vacuum, analysis has shown a relatively weak effect of CON, but the CON program is being used as a regulatory device in an environment involving much stronger forces'.[95] Nonetheless, using CON laws as an indirect tax for funding indigent care imposes costs—in terms of price, quality, and innovation—across all consumers of health care services.[96] There are less competitively-restrictive and more politically-transparent means for

90 See eg Sandefur (n 46) 176 ('Public choice theory would predict that under a CON regime, existing firms will engage in rent-seeking behavior such as spending resources on policing rivals instead of improving service and lowering costs, or seeking to make [c]ertificates more difficult or expensive to obtain.').

91 See eg ibid 173 ('Public choice theory would also predict that as economic and technological circumstances change, CON laws would nevertheless remain on the books—vigorously defended by incumbent firms—long after the economic rationales on which they were based were rendered obsolete, even on their own terms.').

92 See eg Commission on the Efficacy of the Certificate of Need Programme, 'An Analysis and Evaluation of Certificate of Need Regulations in Georgia: Final Report to the Georgia General Assembly and Governor Perdue' (December 2006) xii–xiii (hereinafter 'Georgia Commission Report') ('Hospital leaders are concerned that if they lose their ability to cross-subsidize from [the highest-margin] services, they will no longer be able to cover the fixed losses associated with inpatient Medicaid services and care of the uninsured. For this reason, hospitals, whether nonprofit or proprietary, urban or rural, have wanted to see CON rules maintained or tightened in order to maintain regulatory control over the provision of these services in non-hospital-based settings.').

93 See eg Sandefur (n 46) 170 ('Whatever the merits of the "cream-skimming" and incentives rationales, they apply only to public utilities, or perhaps to markets that feature some kind of monopoly characteristics. They do not apply to private markets with healthy competition. In these markets, "cream-skimming" is simply the ordinary competitive process on which the economy depends for innovation and growth, and encouraging investment where market demand is lacking is rightly seen as foolhardy.').

94 See Georgia Commission Report (n 92) xiii.

95 ibid.

96 See eg Cordato (n 69) 18 ('If CON laws are being used to hide this tax from the electorate, then not only are they inconsistent with sound economics, they are also inconsistent with an open and democratic political process.').

pursuing the goal of indigent care. In fact, there is some evidence that CON laws do not actually advance the goal of increasing the level of indigent care.[97] Finally, as the antitrust agencies have noted in their advocacies in this area, CON laws were not adopted as a means of cross-subsidizing health care in the first instance.[98] That is an ex post rationale identified by CON proponents that is inconsistent with free-market principles. More, not less, competition is needed in the health care space to improve quality, control prices, and spur innovation.[99]

With the *Noerr-Pennington*[100] doctrine rightly protecting incumbents' petitioning activity related to CON applications, however, there is little, if any, room for law enforcement action in this area. It is crucial that the Commission engage with state legislatures on the issue of CON laws. Prior to Commission staff's July 2015 letter to a state representative in North Carolina,[101] however, the Commission had not addressed this issue in its competition advocacy since 2008. The Commission ought to continue seeking out opportunities to weigh in on the adverse impact of CON laws on consumer welfare.[102] The Commission has been on a bit of a winning streak in challenging anticompetitive hospital mergers.[103] It would be unfortunate if any more of those victories for health care consumers were jeopardized by CON laws that preclude any meaningful remedy in those cases.

97 See eg Thomas Stratmann and Jacob W Russ, 'Do Certificate-of-Need Laws Increase Indigent Care?' (2014) Mercatus Ctr, Working Paper No 14-20 at 3 <http://mercatus.org/publication/do-certificate-need-laws-increase-indigent-care> accessed 28 July 2015 ('We do not find evidence associating CON programs with an increase of indigent care. The effect of CON programs on indigent care shows no clear pattern using either direct or indirect measures of indigent care. However, consistent with the existing literature, our results suggest that CON programs restrict entry and limit the provision of regulated medical services.'); DOJ-FTC Illinois Testimony (n 81) 9–10 (collecting studies); The Lewin Group (n 88) ii, 26–28 ('Through our research and analysis we could find no evidence that safety-net hospitals are financially stronger in CON states than other states.') (finding margins for safety-net hospitals in CON states 'considerably lower' than margins for safety-net hospitals in non-CON states).

98 See DOJ-FTC Illinois Testimony (n 81) 4.

99 See Federal Trade Commission and US Department of Justice (n 83) Executive Summary at 4 ('Vigorous competition, both price and non-price, can have important benefits in health care as well. Price competition generally results in lower prices and, thus, broader access to health care products and services. Non-price competition can promote higher quality and encourage innovation.').

100 See *ERR Presidents Conference v Noerr Motor Freight Inc* 365 US 127 (1961); *United Mine Workers of Am v Pennington* 381 US 657 (1965).

101 See North Carolina CON Advocacy (n 81).

102 Of course, competition advocacy does not always persuade state legislators to make more competition-friendly policy decisions. In fact, the DOJ Antitrust Division testified before the special committee evaluating the Georgia CON law, making many of the points that this article makes. See Mark J Botti, US Department of Justice, Antitrust Division, 'Competition in Healthcare and Certificates of Need' before a Joint Session of the Health & Human Services Committee of the State Senate and the CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia (23 February 2007) <http://www.justice.gov/atr/public/comments/223754.htm> accessed 28 July 2015. Nonetheless, that committee recommended that the Georgia legislature maintain the CON law in that state.

103 See eg *St Alphonsus Med Ctr-Nampa Inc v St Luke's Health Sys Ltd* 778 F 3d 775 (9th Cir 2015); *ProMedica Health Sys Inc v FTC* 749 F 3d 559 (6th Cir 2014); *FTC v OSF Healthcare Sys* 852 F Supp 2d 1069 (ND Ill 2012).

IV. *MCWANE* AND EXCLUSIONARY CONDUCT BY MONOPOLISTS

The remainder of this article addresses a third 'Brother, May I?' situation in which a would-be entrant must effectively rely on its competitor's permission before entering or expanding its business. This one involves not state regulation but rather private conduct by a monopolist that is exclusionary and thus maintains its monopoly and is not justified by a cognizable efficiency. The end result is that a firm looking to enter the market or expand its sales is at the whims of its monopolist-competitor to succeed in such entry or expansion.

The FTC's case against McWane

The Commission recently encountered this in its Sherman Act section 2 action against McWane, Inc.[104] In that case, the Commission issued a seven-count administrative complaint against McWane in January 2012.[105] Ultimately, the Commission dismissed six of the seven counts, finding liability solely on the section 2 exclusive dealing count.[106] In particular, the Commission found that McWane had used an exclusive dealing policy to prevent its sole rival, Star Pipe Products, Ltd (Star), from meaningfully competing and thus maintained the monopoly that McWane enjoyed in the market for domestically-manufactured ductile iron pipe fittings.[107] (Although perhaps not the sexiest of markets the Commission has pursued of late, pipe fittings are used by municipal and regional water authorities in crucial waterworks projects.)

The thrust of the case was that McWane, with over 90 per cent market share, had imposed a policy—the Full Support Program—on distributors that required them to purchase all of their domestic fittings from McWane; otherwise, they would lose their rebates and be cut off altogether.[108] There were two exceptions to the Full Support Program under which customers were permitted to purchase competing domestic fittings: (i) where McWane products were not readily available, and (ii) where the customer bought domestic fittings and accessories along with another manufacturer's ductile iron pipe.[109] The Commission found that, to the extent that Star was able to gain sales, it did so primarily under these limited exceptions, and those sales were insufficient to have a competitive impact.[110]

In finding liability on the exclusive dealing count, the Commission determined that McWane had monopoly power in the domestic fittings market,[111] that the Full

104 See *In re McWane Inc* Dkt No 9351 Opinion of the Commission (6 February 2014) (hereinafter '*McWane* Commission Opinion') <https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf> accessed 28 July 2015.

105 See *In re McWane Inc* Dkt No 9351,Administrative Complaint (4 January 2012) <https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120104ccwanestaradmincmpt.pdf> accessed 28 July 2015 (alleging conspiracy, information exchange, invitation to collude, restraint of trade based on distribution agreement, conspiracy to monopolize, monopolization, and attempted monopolization). Commissioner Ohlhausen was not at the Commission when it filed its administrative complaint in *McWane*.

106 See *McWane* Commission Opinion (n 104) 2 and n.1.

107 See ibid 20. See also ibid 26 ('Impairing its rivals' ability to threaten McWane's monopoly was the Full Support Program's core objective.').

108 See ibid 9, 16.

109 See ibid 9.

110 See ibid 28–29.

111 See ibid 16–18.

Support Program constituted an exclusive dealing arrangement that substantially foreclosed its rivals' access to the most efficient sales channel,[112] and that this resulted in harm to competition and consumers in the domestic fittings market.[113] As the Commission opinion concluded:

> [T]he evidence that McWane's exclusive dealing policy significantly impaired the access of McWane's only rival, Star, to the main channel of distribution, thereby increasing its costs and keeping it below the critical level necessary to pose a real competitive threat, is plainly sufficient to meet the standard of harm to competition set forth in the prevailing case law.[114]

At the same time, the Commission rejected the two efficiency justifications proffered by McWane. First, McWane argued that it engaged in exclusive dealing to generate sufficient sales to operate its last domestic foundry. The Commission did not view this to be 'a cognizable procompetitive justification for antitrust purposes'.[115] More specifically, McWane's increased sales volume did not result from actions, such as a price reduction, that typically promote consumer welfare by increasing overall market output or lowering prices; rather, the increased sales would have come from anticompetitive reductions in Star's output.

The second justification offered by McWane was that the Full Support Program prevented customers from cherry-picking the highest-selling items from Star and forced them to purchase McWane's full line of domestic fittings. That is, if distributors were able to source from multiple suppliers, they would buy the common fittings from the limited supplier (at lower prices) and turn to the full-line supplier for less common products only, which supposedly could lead to the collapse of the full-line seller. The Commission was not convinced that this is a cognizable efficiency under the antitrust laws. To begin with, McWane never explained why it could not compete to sell the more common products by lowering its prices for them and raising its prices for the less common products, thereby reducing an implicit cross-subsidy. In any event, the Commission noted that '[e]ven if selective entry by the full-line supplier's rivals led to the collapse of the full-line seller, that itself would not constitute a harm to the market (as opposed to a single firm)'.[116]

112 See ibid 20–25.

113 See ibid 25–29.

114 See ibid 26.

115 See ibid 30.

116 ibid 32. Commissioner Wright dissented from the Commission's opinion in *McWane*. See *In re McWane Inc* Dkt No 9351 Dissenting Statement of Commissioner Joshua D Wright (6 February 2014) <https://www.ftc.gov/system/files/documents/public_statements/202211/140206mcwanestatement.pdf> accessed 28 July 2015. The scope of the disagreement between the majority and the dissent was largely limited to the narrow, but obviously crucial issue of whether harm to competition from McWane's exclusive dealing had been demonstrated. See eg ibid 7, n.14 (assuming monopoly power); ibid 27–28 and n.38 (agreeing that Full Support Programme amounted to exclusive dealing); ibid 33 n.40 (agreeing that 'distributors are a key distribution channel'); ibid 4 (noting the 'ample record evidence demonstrating that the Full Support Program harmed McWane's rival Star'); Leon B Greenfield, 'Afterword: Lorain Journal and the Antitrust Legacy of Robert Bork' (2014) 79 Antitrust LJ 1047, 1062 ('The division among the FTC commissioners in the recent *McWane* matter illustrates the narrowed scope of today's debates surrounding unilateral exclusion enforcement.').

The Eleventh Circuit's McWane *decision*

In April 2015, the Court of Appeals for the Eleventh Circuit upheld the Commission's decision, affirming its determinations regarding market definition, McWane's monopoly power, and harm to competition.[117] The court endorsed the approach taken by the DC Circuit and several other courts in determining whether a monopolist's conduct has harmed competition, noting, among other things, that substantial foreclosure is just one of several factors in the analysis and that harm to one or more competitors is insufficient for purposes of section 2.[118] The Eleventh Circuit also endorsed the DC Circuit's causation standard for assessing exclusive dealing claims.[119]

The Eleventh Circuit identified the pricing evidence in the record as the 'most powerful evidence of anticompetitive harm'.[120] More specifically, the court observed that by keeping Star from becoming a more efficient competitor, McWane's exclusivity policy preserved its ability to charge supracompetitive prices; in fact, McWane was able to raise prices and increase its gross profits, notwithstanding Star's (limited) entry.[121] Finally, much like the Commission, the Eleventh Circuit was not persuaded by McWane's efficiency arguments.[122]

Concluding thoughts on exclusive dealing

A few points regarding exclusive dealing more generally are in order here. First, there is no question that vertical business arrangements, including exclusive dealing, are much more likely to be procompetitive than anticompetitive. Exclusive dealing can enhance competition in a number of well-documented ways, including by eliminating inter-brand free-riding, reducing the costs associated with demand and supply uncertainty, and intensifying competition for distribution.[123] Exclusive distribution arrangements can be particularly procompetitive where a manufacturer provides dealer support, discounts, or other consideration for the exclusivity, or where there is competition to be the exclusive distributor of a particular product.

In short, the economic literature clearly supports the proposition that exclusive dealing is likely to be procompetitive.[124] Exclusive dealing thus should not be a

117 See *McWane Inc v FTC* No 14-11363 2015 WL 1652200 at 9-12, 19-21 (11th Cir 15 April 2015).

118 ibid 16 (citing *United States v Microsoft Corp* 253 F 3d 34, 58 (DC Cir 2001) (en banc)).

119 See ibid 18 ('We agree with the Commission and our sister circuits that in these circumstances the government must show that the defendant engaged in anticompetitive conduct that reasonably appears to significantly contribute to maintaining monopoly power.').

120 ibid 19.

121 ibid.

122 ibid 21–22.

123 See eg Benjamin Klein and Kevin M. Murphy, 'Exclusive Dealing Intensifies Competition for Distribution' (2008) 75 Antitrust LJ 433 (explaining how exclusivity restrictions intensify competition by manufacturers for retail distribution); Jonathan M Jacobson, 'Exclusive Dealing, "Foreclosure," and Consumer Harm' (2002) 70 Antitrust LJ 311, 357–60 (identifying various pro-competitive justifications for exclusive dealing arrangements).

124 See eg Alden F Abbott and Joshua D Wright, 'Antitrust Analysis of Tying Arrangements and Exclusive Dealing' in Keith N Hylton (ed), *Antitrust Law and Economics* (2nd edn, Edward Elgar Publishing Ltd. 2010) 183, 200–01 ('[T]he potential efficiencies associated with both tying and exclusive dealing . . . lead most commentators to believe that they are generally procompetitive and should be analyzed under some form of rule of reason analysis.'); James C Cooper and others, 'Vertical Antitrust

significant focus of the Commission's competition enforcement programme. Nonetheless, there are some situations—particularly in monopolized markets—in which exclusive dealing can be anticompetitive and serve to maintain a firm's monopoly power.[125] That may very well be the case where a monopolist opts to impose exclusivity on its dealers, rather than luring them with lower prices or increased support, any sales by the monopolists' rivals are limited to whatever the monopolist allows them to achieve, such that the rivals are unable to achieve efficient scale, and prices actually increase during the period of the exclusivity.[126] In such a situation, assuming the Commission is able to identify substantial harm to competition that is not outweighed by cognizable efficiencies, it ought to pursue such conduct under the antitrust laws.

Second, as mentioned in the Introduction, this article should not be read as an endorsement of either the essential facilities doctrine or a general duty to assist one's competitors (beyond that which may exist in the case law). More specifically, opposition to a requirement to obtain permission from one's competitor to enter and compete in a market should not be confused with support for forced sharing of even a monopolist's intellectual property, operational facility, distribution system, or any other assets. The Supreme Court in *Trinko* was justifiably concerned about 'the uncertain virtue of forced sharing' and refusal-to-deal theories under section 2 of the Sherman Act more generally.[127] Pursuing an exclusive dealing case against a firm with monopoly power whose conduct has been exclusionary and harmful to competition should not raise the same concerns about incentives to innovate and compete as would a section 2 case against a monopolist for refusing to allow a competitor access to its facilities or to sell to a competitor a product that the monopolist is not otherwise selling on the open market.[128]

Finally, to return to the cross-subsidization point: whether one refers to it as cream-skimming or cherry-picking, this rationale is unconvincing as a justification for either certificate-of-need laws or exclusive dealing by a monopolist. While cream-skimming may be a legitimate concern in very limited circumstances, such as a

Policy as a Problem of Inference' (2005) 23 Int'l J Industrial Organ 639, 658 ('Most studies find evidence that vertical restraints/vertical integration are procompetitive[.]').

125 See *Eastman Kodak Co v Image Tech Servs Inc* 504 US 451, 488 (1992) (Scalia, J, dissenting) ('Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.').

126 See eg Dennis W Carlton and Ken Heyer, 'Appropriate Antitrust Policy Towards Single-Firm Conduct: Extraction vs. Extension' (2008) 22 Antitrust 50, 53 ('Where scale economies matter, conduct that deprives rivals of scale may weaken competitive constraints and thereby (but not necessarily) harm competition. In addition, input monopolization may raise rivals' costs and thereby relax competitive constraints with a resulting harm to competition.'); Dennis W Carlton, 'A General Analysis of Exclusionary Conduct and Refusal to Deal—Why *Aspen* and *Kodak* are Misguided' (2001) 68 Antitrust LJ 659, 663, 665 n.15 (explaining how exclusive dealing can impair the competitive effectiveness of a rival and thus harm competition).

127 See *Verizon Commc'ns Inc v Law Offices of Curtis V Trinko LLP* 540 US 398, 408 (2004).

128 In *Trinko*, the Court distinguished the case before it from both *Aspen Skiing* and *Otter Tail* based in significant part on the fact that the defendants in those two cases had refused to sell a product to a competitor that it already sold at retail. See ibid 409–10 (distinguishing *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985) and *Otter Tail Power Co v United States* 410 US 366 (1973)).

rate-regulated market with high fixed costs,[129] the authors have not seen any evidence that would justify either a CON regime or exclusive dealing by a monopolist as a procompetitive response to cream-skimming by competitors. At a more general level, it is antithetical to free-market principles to allow firms to cordon off significant portions of the market from would-be competitors that may provide lower-priced, higher-quality, and more innovative products and services. Rather, as policy makers, we should be doing everything we can to oppose such government- or competitor-imposed market restrictions and to facilitate entry by new and innovative competitors.

This issue arises with increasing frequency in the transportation area, where innovators like Uber, Lyft, Sidecar, and others are disrupting an age-old way of doing business and in the process providing consumers with expanded options, greater convenience, and often lower prices. In short, they are injecting much-needed competition into the market. For that reason, FTC staff has filed several advocacy comments to local authorities recommending that any restrictions on competition from these new transportation providers be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.[130] Implicit in these advocacies is a rejection of the cream-skimming argument made by some taxi competitors[131] and regulators[132] in justifying opposition to Uber and others seeking to enter transportation markets throughout the country. These new firms ought to be treated the same as incumbents, in terms of applying existing regulations; however, they should not be locked out of the market because they are skimming cream or picking cherries. What they are really doing is competing.

V. CONCLUSION

Firms looking to enter a market should not have to ask their competitors: 'Brother, may I please compete?' Whether the result of financially-interested state boards

129 See eg Sandefur (n 46).

130 See eg Federal Trade Commission Staff Letter to Alderman Brendan Reilly, Chicago City Council regarding Proposed Ordinance O2014-1367 (15 April 2014) <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/04/ftc-staff-comment-honorable-brendan-reilly-concerning> accessed 28 July 2015; Federal Trade Commission Staff Letter to Jacques P Lerner, General Counsel, District of Columbia Taxicab Commission regarding Second Proposed Rulemakings regarding Chapters 12, 14, and 16 of Title 31 (7 June 2013) <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/06/ftc-staff-comments-district-columbia-taxicab> accessed 28 July 2015; Federal Trade Commission Staff Letter to Colorado Public Utilities Commission regarding Docket No 13R-0009TR (6 March 2013) <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/03/ftc-staff-comment-colorado-public-utilities> accessed 28 July 2015.

131 See eg Andrew Zaleski, 'Welcome to the Uber Wars' (2 September 2014) Politico Magazine <http://www.politico.com/magazine/story/2014/09/welcome-to-the-uber-wars-110498.html#.VWcQHrHD83E> accessed 28 July 2015 ('"Skimming the cream" is the way [a taxi company executive] describes what Uber does to taxi competitors.').

132 See eg Who's Driving You? 'Community-wide Taxi Service Endangered by "Ridesharing,"' (30 June 2014) <http://www.whosdrivingyou.org/wp-content/uploads/2015/06/community-wide-access-fact-sheet.pdf> accessed 28 July 2015 ('"Uber, Lyft and Sidecar simply do not serve all areas of a community at all hours of the day. By stealing more lucrative fares, they will ultimately leave transportation deserts in underprivileged neighborhoods where people rely on taxicabs for daily errands."—Robert Werth, President of the Taxicab, Limousine & Paratransit Association.').

making licensing decisions that favour incumbent professionals, government regulations that competitors can easily manipulate to fend off new competition, or anti-competitive actions by monopolists looking to maintain their dominant market positions, such situations are anathema to free-market competition. The goal of this article is to shed some light on the problems that these situations present and demonstrate how targeted antitrust enforcement and advocacy, supported by sound economic analysis, can help limit the resulting adverse impact on consumer welfare.

Three recent, significant appellate victories for the FTC demonstrate both the various ways in which incumbents can fend off entry by new firms looking to inject competition into the marketplace and the various tools that the Commission can and should use to address such market distortions. The *Phoebe Putney* decision is a significant step in reining in antitrust immunity under the state action doctrine, to the ultimate benefit of consumers, and should cause states to reconsider their certificate-of-need laws. The *McWane* decision represents a meaningful, albeit relatively narrow, check on exclusionary conduct by a monopolist.

However, of the three cases discussed in this article, it is the *North Carolina Dental* decision that is likely to have the most immediate and positive impact on competition and consumer welfare. Given the extensive reach of state licensing regimes and boards composed of active participants in the markets they regulate, this decision may have far-reaching implications for wide swaths of our economy. Competition and competitive markets, supplemented by sound antitrust enforcement, where necessary—not excessive licensing—will promote entrepreneurship and provide the best platform for our citizens, including the least advantaged in our economy, to prosper. We hope the States will take this opportunity to re-evaluate their licensing regimes to ensure that they are truly serving their citizens' best interests.