

HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
JONATHAN WARREY, CHAIRMAN
MARCH 11, 2025

TESTIMONY OF ELIN ALM
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2375

Mr. Chairman, members of the Committee.

I am Elin Alm, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office, and I appear on behalf of the Attorney General to provide neutral testimony regarding Senate Bill 2375.

The conduct authorized by Senate Bill 2375 is by its nature anticompetitive, which means that without this legislation the conduct may violate state and federal antitrust law. Therefore, this bill is intended to grant dental providers immunity from antitrust liability that may otherwise result from the authorized conduct. To effectively grant such immunity, commonly referred to as state action immunity, the legislation must pass a two prong test: (1) the legislation must articulate a "clear ... policy to allow the anticompetitive conduct," and (2) the legislation "must provide active supervision of [the] anticompetitive conduct."¹

The requirement that the policy be clearly articulated is generally met where the displacement of competition is the inherent, logical, or ordinary result of the conduct authorized by the legislature. It is understood that the legislature will consider, foresee, and

¹ *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 506, 135 S. Ct. 1101, 1109, 191 L.Ed.2d 35 (2015); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L.Ed.2d 233; *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)

endorse any potential anticompetitive effects of the legislation that are consistent with its policy goals. It is important, though, when considering the policy advanced through Senate Bill 2375, to also consider the long-established policy that lies behind state and federal antitrust law. Antitrust law seeks to preserve rather than interfere with a free competitive market. The widely accepted purpose of antitrust law is to promote healthy market competition, which benefits both consumers and competitors in a market. Competition is generally known to bring important benefits to the economy, including lower prices, higher quality, more innovation and research, more consumer choice, and easy entry to the market by new market participants.

This bill is designed to increase market power for dental providers when negotiating with insurance carriers. There is a third group that would likely be affected by such negotiations, namely consumers or employers who purchase insurance coverage. Therefore, something to consider is whether the bill will consequently reduce or eliminate consumer or buyer power, which ordinarily shapes demand, trends, products, and services in a market and is an important driver of competition. Some questions to ask is: (1) What is the likelihood that this legislation will result in higher prices or lower quality for consumers? (2) Could this legislation result in the reduction of the number of insurance carriers or discourage the entry of new carriers in the market, thereby reducing consumer choice and effectively maintaining and increasing the market power of the carriers currently in the market and enhancing the problem that motivates this bill? (3) What are the potential effects on the competitive balance between the different dental providers within a geographic market?

The active supervision requirement stems from the recognition that where private parties are engaging in anticompetitive activity, there is a danger that they are acting to further their own interests, rather than the policy and interest of the state.² Any immunity should only shelter conduct that further this legislature's enacted policies. Therefore, to effectively grant immunity, the state must exercise active control over the allowed conduct to ensure that the authorized conduct promotes the state law policy and not private interests.

To ensure that this legislation complies with the requirement of active supervision, the committee may want to consider whether specific factors or guidelines should be included (1) to assure that the authorized coordinated conduct will focus on promoting only certain goals and purposes and (2) to specify what the government oversight function should or is required to consider.

To provide appropriate government oversight, the Attorney General recommends that the Attorney General, and not the Office of Administrative Hearings (OAH), should provide the oversight required by Senate Bill 2375, if enacted. This is largely consistent with how government oversight has been exercised in states with similar legislation. The Attorney General, as the enforcer of state and federal antitrust law, has the antitrust experience and knowledge required to effectively provide this government oversight. Therefore, the Attorney General recommend that the committee consider replacing OAH with the Attorney General in Senate Bill 2375.

Thank you for your time and consideration and I will stand for any questions.

² F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 634, 112 S. Ct. 2169, 119 L.Ed.2d 410 (1992)