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### **Georgia Dental Board Faces Treble Damages in Teeth Whitening Suit**

**A** teeth whitening business and its owner can proceed with antitrust claims against the Georgia Board of Dentistry for enforcing rules that make teeth whitening by non-dentists punishable as a felony, as a Georgia court becomes the first to allow treble damages claims against a dental board to proceed (*Colindres v. Battle*, N.D. Ga., No. 1:15-CV-2843-SCJ, 6/6/16).

A state-sanctioned board of practicing dentists allegedly implemented rules barring non-dentists from competing in the teeth whitening market. While a landmark federal case turned on a similar board's claim of immunity as a state actor, the case here turned on the plaintiff's antitrust standing.

Judge Steve C. Jones held that Enlightened Expressions LLC (EELLC) can pursue its treble damages claims under the Sherman Act against the Georgia board and its members, who may end up liable for trebled antitrust damages.

Jones found EELLC had adequately alleged harm caused by the board's threats. Because the FTC didn't have to allege antitrust standing, Jones' decision breaks ground in allowing antitrust claims against state-created professional boards that would have been immune prior to the Supreme Court's holding in *North Carolina State Board of Dental Examiners v. FTC*.

The immunity question wasn't addressed here because they didn't raise it. But "inherent in the court's decision is the assumption that the board members are not immune because they are indeed active market participants capable of conspiring under Section 1 of the Sherman Act," attorney Robert M. Langer told Bloomberg BNA. A former state assistant attorney general now with Wiggin and Dana LLP in Hartford, Conn., Langer said that while "the mere absence of immunity does not necessarily trigger antitrust liability," the two are "bound together."

**Claims Pass Muster.** As in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 2014 BL 48206 (2014), the plaintiff here alleged that a board comprised of actively practicing dentists enforced rules meant to exclude rival non-dentists from competing in the teeth whitening business. Specifically, it sent "cease and desist" letters to non-dentists, but not EELLC, that threatened fines and jail time on the ground that the unlicensed practice of dentistry is a felony under Georgia's Dental Practices Act.

Jones said the plaintiff's allegations are sufficient at this stage of litigation under the Sherman Act. The injuries to both EELLC's business and to competition in the teeth whitening market at large are the kind the antitrust laws are meant to prevent, he said.

This is true even though the board has only issued threats and hasn't undertaken any legal action, Jones held. EELLC can be an efficient enforcer of the antitrust laws as a result of the board's verbal threats. It need not have closed its business or received a cease and desist letter.

"[T]he Board may not avoid scrutiny by declining to enter the rulemaking process or by failing to take any direct enforcement action" if it is threatening to prosecute people, the court said.

The board and all of its members are now subject to discovery in EELLC's suit, which will likely delve into how the board decided to include teeth whitening in its definition of dental practice and enforce its rules against non-dentists offering those services.

Heidari Power Law Group LLC of Atlanta represents Enlightened Expressions and its owner, Lisa Colindres. The Georgia Attorney General's Office is defending the Board of Dentistry.

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*Text of the court's decision is at <http://src.bna.com/fE1>.*