FTC’s First Test of Supreme Court’s North Carolina Dental Precedent in New Case against Real Estate Appraisal Board

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Even with a reduced lineup of only two commissioners — the Republican Acting Chair and one Democratic Commissioner — the Federal Trade Commission (the “FTC” or “Commission”) filed an administrative complaint this week against the Louisiana Real Estate Appraisers Board (the “Louisiana Board”) alleging that the Louisiana Board unreasonably restrains competition in violation of Section 5 of the FTC Act by limiting the freedom of individual appraisers and their customers to engage in negotiations to set fees for real estate appraisals. In the Matter of Louisiana Real Estate Appraisers Board, FTC Docket No. 9374 (May 30, 2017). This is the first FTC complaint attempting to apply its win in North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015), where the Supreme Court affirmed the FTC’s position that a state agency may not give private market participants unsupervised authority to suppress competition. According to the FTC, the Louisiana Board — which is majority comprised of licensed appraisers — commissions surveys to identify median appraisal fees in the state and then effectively requires that appraisers are paid at or above those median rates.

The outcome of this case will be of interest to businesses involved in, or subject to, quasi-regulatory boards and commissions made up of market participants, regardless of industry.

North Carolina Dental

In North Carolina Dental, the Supreme Court examined the boundaries of “state action” antitrust immunity, considering whether state regulatory bodies comprised of market participants are considered private actors, thus requiring active state supervision before receiving antitrust immunity. Ultimately, the Fourth Circuit and then the Supreme Court upheld the FTC’s finding that the North Carolina State Board of Dental Examiners did not qualify for antitrust immunity after excluding non-dentists from providing teeth-whitening services. In its opinion, the Supreme Court stated that “[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.” See our prior alert on the Supreme Court’s decision here.

The Louisiana Board’s Actions

In response to the FTC’s complaint, the Louisiana Board’s executive director claimed that the actions at issue here are the Louisiana Board’s good faith efforts to comply with the 2010 Dodd-Frank Act. The Dodd-Frank Act was passed by Congress in part to ensure that real estate appraisers could act independently, without the undue pressure from lenders that was a perceived cause of the 2007-2008 financial crisis and housing bubble. Under Dodd-Frank, contacts between lenders and appraisers that might influence an appraiser’s independent judgment are prohibited. As a result, lenders increasingly turned to appraisal management companies (“AMCs”). Dodd-Frank also required appraisers to be compensated “at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised.” Rules promulgated under Dodd-Frank provide that any state that regulates AMCs must maintain an AMC licensing program, but do not require states to impose standards for meeting the “customary and reasonable” fee requirement. Dodd-Frank also included an antitrust savings clause that provides that the act should not be construed to impair or supersede antitrust laws.

Prior to the passage of Dodd-Frank, the Louisiana legislature passed a law in 2009 subjecting AMCs to oversight by the Louisiana Board (the “AMC Law”), requiring AMCs to obtain a license from the Louisiana Board, and empowering the Louisiana Board to investigate, censure, and discipline AMCs. After Dodd-Frank, the Louisiana legislature amended the AMC Law to require AMCs to “compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the presumptions of compliance under federal law.” According to the FTC, the Louisiana Board, which consists of eight licensed appraisers and two lender representatives, was “driven by [ ] apparent dissatisfaction with the free market” and adopted Rule 31101 to specify how AMCs must comply with the “customary and reasonable” fee requirement of the AMC Law.

Rule 31101 requires AMCs to pay fees set pursuant to one of three methods: (1) an AMC may rely on third-party fee schedules, studies, or surveys of fees paid by lenders; (2) an AMC may rely on a fee schedule adopted by the Louisiana Board; or (3) an AMC may rely on rates recently paid in the relevant geographic market. In 2013, the Louisiana Board commissioned a survey of recent fees paid by lenders, resulting in a report identifying median appraisal fees for various categories of real estate. According to the FTC, the Louisiana Board views median fees identified in the survey report as setting a floor for appraisal fees, citing the Louisiana Board’s executive director who reportedly stated that the survey “sets our expectations regardless of what presumption might be used, regardless of what analytics and magic formulas an AMC might have, this is our expectation.” The FTC’s complaint cites several instances of AMCs being investigated and censured by the Louisiana Board for violating the “customary and reasonable” fee requirement when the AMC offered fees below the median levels identified in the survey report.
FTC’s Allegations

The FTC alleged that the conduct of the Louisiana Board constitutes concerted action among the Louisiana Board and its members, and that because Rule 31101 specifies three methods as the exclusive way for arriving at “customary and reasonable” fees, it precludes AMCs from arriving at appraisal fees through operation of the free market and thus unlawfully restrains competition on its face. The FTC further alleged that through its enforcement actions, the Louisiana Board also restrained price competition by effectively requiring payment of appraisal fees at least as high as the median fees listed in the fee surveys commissioned by the Louisiana Board.

In line with North Carolina Dental, the FTC’s complaint specifically alleged that neither Congress nor the Louisiana legislature required the Louisiana Board to set “customary and reasonable” fees, the AMC Law does not clearly articulate an intent to displace competition, a controlling number of the Louisiana Board’s members are active market participants, and the Louisiana Board’s actions have not been supervised by independent state officials.

The Acting Director of the FTC’s Bureau of Competition stated that the Commission “is committed to the judicious exercise of its enforcement discretion as mapped out by the Supreme Court in [North Carolina Dental]...” The Supreme Court’s North Carolina Dental opinion gave the FTC additional ammunition for its advocacy and enforcement activities aimed at opening services to lower cost providers; this new case will be closely watched as a barometer for the breadth of applicability of North Carolina Dental. These efforts are continuing with apparent bi-partisan support.

The case is scheduled to go before an administrative law judge in January 2018.