

# NEW HAMPSHIRE UNION LEADER

## Another View -- Maynard F. Thomson: Without licensing reform, board members are at risk

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Every state uses occupational licensing boards to protect consumers from the risks to health and safety that can arise when services are rendered by unqualified practitioners.

New Hampshire has more than three dozen occupational licensing boards, overseeing tattooists, physicians, nurses, embalmers, lawyers, family counselors, hairdressers, barbers and many more.

Most of our boards act through men and women who are themselves active in the trade. They're knowledgeable volunteers who take their duty to protect the public seriously. We're lucky to have them.

Unfortunately, thanks to a recent U.S. Supreme Court decision, *North Carolina Board of Dental Examiners v. Federal Trade Commission*, these dedicated public servants are in an untenable position.

If they don't act to protect the public from real risks to health and safety, they're derelict in their duty.

However, if they do act, they're likely to find that courts won't enforce their edicts, they may well find themselves the subject of a federal investigation, and it's possible individual board members will become defendants in private antitrust actions.

I spent years as an antitrust lawyer, with the Federal Trade Commission and in private practice. Were I still practicing, my advice to every licensing board member currently active in the licensed occupation would be:

Quit! Today. New Hampshire law offers you no immunity from federal antitrust claims. Any action your board takes may well result in your spending vast amounts of money and time in a legal process that makes root canal work a day at the beach.

Our boards and their members are in this crippling situation because North Carolina Dental held that state licensing boards and their members will be subject to federal antitrust laws, which make it illegal for competitors to agree to restrict competition unless state laws governing the boards meet certain conditions. Those conditions are intended to ensure that the boards are acting to advance the state's interest in protecting the public from real risks to health and safety and aren't simply vehicles for protecting the private, financial interests of existing practitioners by impeding competition.

To enjoy antitrust immunity, each board must be "actively supervised" by state actors, separate from the board, who themselves have no personal financial interest in the occupation in question and who are authorized to veto or amend the board's actions.

New Hampshire's laws do not establish the required "active state supervision" for board, which has been spelled out by court decisions and the Federal Trade Commission.

Until New Hampshire revises its occupational licensing laws, for purposes of federal antitrust laws, board members could be inviting targets for the FTC and for opportunistic private antitrust lawyers.

HB 1685, scheduled for consideration today in the New Hampshire Senate (it's passed the House,) establishes a mechanism for active state supervision of our licensing boards.

This would restore the ability of board members to act in the public interest without courting personal bankruptcy.

HB 1685 doesn't eliminate licensing boards, nor reduce their power to take whatever actions their members deem essential to protect health and safety. It merely ensures that licensing board members rely on real evidence to identify real risks, then limit their regulatory response to that which will eliminate or minimize that risk at the least cost to competitive vigor—thereby ensuring that licensing board actions aren't furthering the members' natural human desire to lessen the competition they face.

A final virtue of HB 1685: it may mark a historically unique moment in that it reflects the urgings of both the Obama and Trump administrations to reform state occupational licensing laws in the interest of promoting economic growth, improving opportunities for the young and the poor, and stimulating innovation.

This bill cries out for bipartisan support.

The status quo isn't an option — not if New Hampshire is to protect consumers and its dedicated licensing board members.

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