

## NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

IN RE: REQUEST FOR DECLARATORY	)	
RULING BY AFFORDABLE CARE, INC.;	)	
AMERICAN DENTAL PARTNERS, INC.;	)	<b>SECOND AMENDED</b>
AMERICAN DENTAL PARTNERS OF	)	<b>DECLARATORY RULING</b>
NORTH CAROLINA, INC.; DENTAL CARE	)	
PARTNERS, INC.; AND DENTAL HEALTH	)	
MANAGEMENT, INC.	)	

### *Introduction*

This Second Amended Declaratory Ruling addresses the position of the N.C. State Board of Dental Examiners (“the Board”) regarding enforcement of the Dental Practice Act (“the Act”) and the Management Arrangements Rule (“the MAR”) with regard to dental practice management arrangements. It amends the Board’s prior Declaratory Ruling on this subject dated March 22, 2002.

### *Background*

On March 22, 2002, in response to a Request for a Declaratory Ruling by several dental practice management companies, the Board issued a Declaratory Ruling addressing certain aspects of the Management Arrangements Rule (“the MAR”) codified at 21 N.C. Admin. Code 16X .0101. The March 22, 2002 Declaratory Ruling was binding only on the parties requesting the Ruling and the Board, and the Board is legally entitled to amend or revise the Declaratory Ruling prospectively. N.C. Gen. Stat. § 150B-4. This Second Amended Declaratory Ruling shall apply to the parties who originally requested the Declaratory Ruling and to the Board in the context of its interaction with those entities.

The March 22, 2002 Declaratory Ruling addressed, *inter alia*, concerns raised by the parties requesting the Ruling that the MAR created an undue risk of Board enforcement in connection with management agreements already in effect between management companies and licensees as of April 1, 2001, the effective date of the MAR. Specifically, the requestors argued that “[a]s a result of the adoption of the Rule, the Companies now face substantial new practical burdens in carrying out their lawful business activities in North Carolina. . . the Rule contains no time limit within which the Board must conduct its review and fails to clarify whether the parties may put a contract into effect pending such a review,” placing the Companies’ agreements “in a regulatory limbo which can stretch for an unspecified period of weeks or months.” Request for Declaratory Ruling, pp. 2-3. The requestors also expressed concern over whether the Board “would enforce the Rule against previously legal contracts in effect prior to April 1, 2001, rendering such contracts ‘illegal.’” *Id.* at p. 20.

In response, the Board stated in its March 22, 2002 Declaratory Ruling that

The Board does not require the parties to terminate their contractual relationship or modify its terms while their agreement is under review by the Board. Moreover, a licensee is not subject to disciplinary sanction for continuing to operate under the terms of the agreement while the Board reviews that agreement. The Board will enforce the

Dental Practice Act in appropriate actions against a dentist and management company if the parties refuse to modify the terms of the agreement the Board has reviewed and determined is in violation of the Dental Practice Act.

March 22, 2002 Declaratory Ruling, pp. 3-4.

That statement by the Board was made in response to the specific concerns raised by the requestors of the March 22, 2002 Declaratory Ruling that the MAR could be applied to make contracts in effect prior to April 1, 2001 illegal. The Board's statement of its enforcement intentions recognized the potential impact that immediate enforcement of the MAR could have on contracts which had been in existence for some period of time on the date the MAR became effective. The Dental Practice Act had statutory and rule prohibitions on the direct or indirect ownership, management, supervision or control of a dental practice by a non-licensed individual or entity, which were in effect for many years before the MAR's effective date, but were further defined by the MAR. When the March 22, 2002 Declaratory Ruling was issued, the Board was aware the potential existed that there were possibly management contracts containing provisions that violated the MAR, which contracts had been executed at a time when the parties could not have foreseen the adoption of the MAR. In deference to the possibility that parties may not have anticipated the full effect of the MAR, the Board issued its March 22, 2002 Declaratory Ruling in an attempt to deal with the issue of management agreements which were in effect on or before April 1, 2001 and therefore potentially could be impacted by the rule if it were applied retroactively.

The language in the March 22, 2002 Declaratory Ruling shows the Board was focused on management agreements already in effect as of April 1, 2001. In addition to addressing the timing of enforcement under the MAR, the Board also stated that "[t]hese substantive requirements [of the MAR] are not binding as to an agreement effective *prior to April 1, 2001*, and a licensee is not subject to disciplinary action for violation of the Rule if the licensee has an agreement with a management company *which was effective prior to April 1, 2001*" (emphasis added). *Id.* at p. 4. The Board further stated in the March 22, 2002 Declaratory Ruling that "[t]he procedural requirements of the Rule, *see* 21 N.C.A.C. 16X .0101(b)(1), likewise are not applicable to an agreement *that was effective prior to April 1, 2001*" (emphasis added). *Id.* at pp. 4-5.

It is clear from these provisions, and a reading of the March 22, 2002 Declaratory Ruling as a whole, that the Board was focused on addressing the impact of the MAR on management contracts which may have been in effect for some period of time, perhaps even before the first public notice of the MAR via publication of a proposed rule in the *North Carolina Register*. It is equally clear that the Board resolved this issue in its March 22, 2002 Declaratory Ruling by focusing on contracts which were *already in effect on or prior to April 1, 2001*, the effective date of the MAR, to articulate its position with respect to short-term *enforcement* of the new MAR and applicability of both the substantive and procedural requirements of the MAR *for contracts in effect on or prior to April 1, 2001*.



Since the Board's focus in its March 22, 2002 Declaratory Ruling was on pre-existing contracts, the ruling obviously was not intended as a final policy or position statement by the Board that would definitively and exhaustively define its enforcement policy on these issues. Likewise, the provision in the Declaratory Ruling for review of those management agreements by the Board before it took action, was an attempt to balance the concerns that were raised by the Declaratory Ruling Requestors about contracts in existence on the MAR's effective date, with the Board's enforcement obligations under the Dental Practice Act and the MAR. Viewed in context, the Declaratory Ruling clearly was not intended to limit the Board's latitude in enforcing the prohibitions in the Dental Practice Act or the MAR against agreements adopted after the MAR became effective.

### *The Present Context*

The Board has a statutory obligation to enforce the Dental Practice Act and the MAR, which implements parts of the Act. Under the MAR, any contract between a management company and a licensed N.C. dentist must be submitted to the Board for review. This review includes any contract being entered into for the first time and any existing contracts that are extended for an additional term beginning on or after April 1, 2001 (the effective date of the MAR) whether or not the extension requires action by the parties or occurs automatically.

The factors which led the Board to address its enforcement intentions in the March 22, 2002 Declaratory Ruling no longer exist. The vast majority of management agreements the Board has reviewed since the MAR's effective date have included contract terms of seven years or less. Thus, most, if not all, of the management agreements in effect on the April 1, 2001 effective date of the MAR have come to the end of their terms. So, it appears that the initial term of most, if not all, management agreements in effect on the MAR's effective date has by now long since expired. Dentists and management companies currently operating under management agreements must have either entered a new agreement which became effective after April 1, 2001 or have entered or allowed an automatic renewal of an agreement. In either case, they have executed the new agreement, or extended the existing one, in a period when all licensed North Carolina dentists, and the management companies seeking to contract with them, have had several years notice of the MAR's provisions.

Declining to enforce the MAR indefinitely against licensees and management companies that have entered noncompliant contracts, or have continued to operate under noncompliant contracts, frustrates the purpose of both the Act and the MAR. In the years since the MAR became effective, the Board has seen management companies attempt to take advantage of the enforcement position stated in its March 22, 2002 Declaratory Ruling by repeatedly submitting substantially similar, or virtually identical, versions of a management agreement which the Board already has found noncompliant. The management companies then assert that they have not refused to modify the contracts and, therefore, the Board may not enforce the MAR against the successive non-compliant agreements under the terms of its March 22, 2002 Declaratory Ruling. The Board determined that if it continued to acquiesce in this, it would be abdicating its statutory responsibility to enforce the Dental Practice Act and protect the citizens of this State.

Therefore, through an Amended Declaratory Ruling issued by the Board on December 7, 2010 (“the Amended Declaratory Ruling”), the Board prospectively amended its position regarding enforcement of the Dental Practice Act and MAR with regard to dental practice management agreements, and declared that it will prospectively enforce the provisions of the Dental Practice Act and the MAR against any licensee or management company that, prior to completion of the Board’s review process, enters into, renews, or continues to operate under any management agreement that violates the Dental Practice Act or MAR (“Amended Enforcement Policy”). In the Amended Declaratory Ruling, the Board declared that this Amended Enforcement Policy shall apply to all management agreements that are entered into, actively renewed, or allowed to continue past their terms (hereinafter collectively, “effectuate”) subsequent to the issuance of the Amended Declaratory Ruling.

Following the issuance of the Amended Declaratory Ruling, several management companies sought judicial review of the Amended Declaratory Ruling. The contentions raised in the judicial review proceeding included questions regarding the Amended Declaratory Ruling’s incorporation by reference of the Board’s November 22, 2010 Position Statement on Management Agreements with Dental Practices.

After careful consideration, the Board has concluded it should prospectively change the Amended Declaratory Ruling to narrow its focus to the Amended Enforcement Policy regarding dental practice management agreements. Therefore, as of the date of issuance set forth below, this Second Amended Declaratory Ruling shall supersede and replace in its entirety the Amended Declaratory Ruling, which will be contemporaneously withdrawn by the Board. The Board’s Amended Enforcement Policy regarding dental practice management agreements which took effect with the issuance of the Amended Declaratory Ruling, will remain in continuous effect with the issuance of this superseding Second Amended Declaratory Ruling.

***Enforcement of the Dental Practice Act and Management Arrangements  
Rule Pending Review of a Management Agreement by the Board***

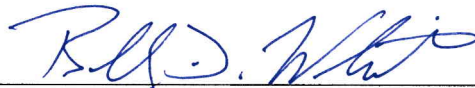
A management agreement that grants to a management company or other unlicensed individual or entity improper ownership, management, supervision or control of a dental practice violates the Dental Practice Act, including N.C. Gen. Stat. §§ 90-29(a), 90-29(b)(11), 90-40 and 90-41(a)(6) and (13). The Board has a statutory duty to enforce these provisions of the Dental Practice Act.

In light of that responsibility, and for the reasons further described in this Second Amended Declaratory Ruling, the Board hereby states that it will continue to enforce the provisions of the Dental Practice Act and the MAR against any licensee or management company that, prior to completion of the Board’s review process, enters into, renews, or continues to operate under any management agreement that violates the Dental Practice Act or MAR. This Amended Enforcement Policy shall continue to apply to all management agreements that are entered into, actively renewed, or allowed to continue past their terms (hereafter collectively “effectuate”) subsequent to December 7, 2010, when the Amended Enforcement Policy was initially declared in the Amended Declaratory Ruling and first took effect. The Board’s Amended Enforcement Policy regarding dental practice management agreements will remain in continuous effect with the issuance of this superseding Second Amended Declaratory



Ruling. Thus, licensed dentists who effectuate any management agreement, before the Board has completed its review process, do so at risk of disciplinary action pursuant to N.C. Gen. Stat. § 90-41, if the Board subsequently determines that the management agreement violates the Dental Practice Act and MAR. Likewise, management companies who effectuate any management agreement, prior to completion of the Board's review process, may be subject to the Board's authority under N.C. Gen. Stat. § 90-40.1 to enjoin unlawful acts, or other injunctive relief as may be granted by a court of competent jurisdiction within the state of North Carolina, if the Board subsequently determines that the management agreement violates the Dental Practice Act and MAR. With this Second Amended Declaratory Ruling, the Board is removing from the Amended Declaratory Ruling any reference to, or incorporation by reference of, the Position Statement.

Issued this the 19<sup>th</sup> day of August, 2011.



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Bobby D. White  
Chief Operations Officer  
North Carolina State Board of Dental Examiners

### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Second Amended Declaratory Ruling has been served upon the following parties by certified mail, return receipt requested, first-class postage pre-paid at the addresses shown below, which are the last known addresses for each party:

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Raleigh, NC 27603

American Dental Partners, Inc.  
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Registered Agent  
Corporation Trust Center  
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Dental Care Partners, Inc.  
c/o Corporation Service Company,  
Registered Agent  
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Raleigh, NC 27603

American Dental Partners of North  
Carolina, LLC  
c/o CT Corporation System  
Registered Agent  
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Dental Health Management, Inc.  
CompBenefits Corporation, Successor  
c/o Corporation Service Company  
Registered Agent  
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**With Courtesy Copies sent by certified mail, return receipt requested, first class postage pre-paid to:**

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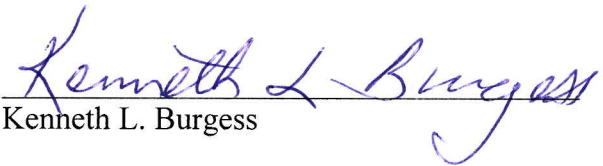
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This the 19th day of August, 2011.

  
Kenneth L. Burgess