STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
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CALIFORNIA BOARD OF PODIATRIC MEDICINE
NOVEMBER 13, 2015

SUBJECT: ***N.C. State Board of Dental Examiners v. FTC*, 574 U.S. ___ (2015)**

ACTION: **RECEIVE AND FILE**

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RECOMMENDATION

Review the attached Attorney General's opinion regarding the U.S. Supreme Court Case of North Carolina State Board of Dental Examiners v. Federal Trade Commission, which provides an analysis of what constitutes "active state supervision" of licensing boards to preserve state action immunity and discusses the measures to consider to taking to protect against liability for board members.

ISSUES

Discussion of potential application of federal anti-trust law to state licensing and regulatory boards.

BACKGROUND

On February 25, 2015, the U.S. Supreme Court rendered a decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission that is causing licensing board across the nation and across disciplines to evaluate their structure and how they make policy decisions effecting market participants. This is an anti-trust case about the scope of the "state-action" doctrine. The North Carolina Board of Dental Examiners is comprised of a majority of practicing dentists. The dental board aggressively pursued non-dentist teeth whiteners by sending warning letters and cease-and-desist letters claiming that they were engaged in the unauthorized practice of dentistry. Ultimately, non-dentist teeth whiteners stopped offering these services in North Carolina.

The Federal Trade Commission (FTC) determined that the dental board's actions violated federal anti-trust law and sued the board. The dental board argued that its actions did not violate the law, because it is a state agency and is therefore immune from antitrust law. The case progressed all the way to the U.S. Supreme Court, which held that a state board on which a controlling number of decisions makers are active

market participants in the occupation the board regulated must satisfy "active supervision" requirements to get antitrust state-action immunity.

For board consisting of a controlling number of market participants, the defensibility of their actions is going to turn on whether the state's review mechanisms provide "realistic assurance" that the boards' anticompetitive conduct promotes state policy, rather than merely the market participants' individual interests. The Court identified a few constant requirements of active supervision: 1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; 2) The supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; 3) The mere potential for state supervision is not an adequate substitute for a decision by the state; and 4) the state supervisor may not itself be an active market participant.

The Court further held that the inquiry regarding active state supervision is flexible and is context dependent; it is not meant to require daily involvement in a board's operations or micromanagement of its every decision. Thus, the result in this Supreme Court case is unlikely to impact the Board's licensing or typical enforcement decisions. Nonetheless, it is expected that this decision will lead to future litigation against similarly-comprised boards across the county.

ATTORNEY GENERAL'S OPINION

The case prompted California Senator Jerry Hill to request an opinion from the Attorney General (AG) as to what constitutes "active state supervision" of state licensing boards, and how to guard against antitrust liability for board members.

Overview of Conclusions

In short, the AG's opinion stated the following:

"Active state supervision" requires a state official to review the substance of a regulatory decision made by a state licensing board, in order to determine whether the decision actually furthers a clearly articulated state policy to displace competition in regulation in a particular market. The official reviewing the decision must not be an active member of the market being regulated, and must have and exercise the power to approve, modify, or disapprove the decision.

AG Opinion No. 15-402m at p, 1,

The AG's opinion identified some broad areas of operation where board members can act with reasonable confidence of preserving their state action immunity:

1. Promulgation of regulations, in light of the public notice, written justification, Director review, and review by the Office of Administrative Law pursuant to the Administrative

Procedure Act. PLEASE note that market-sensitive regulations will require more active supervision than others.

2. Disciplinary decisions, in light of the due process procedures in place; participation of state actors, such as board executive officers, investigators, prosecutors, and administrative law judges; and the availability of administrative mandamus review.
3. Carrying out the actions required by a detailed anticompetitive statutory scheme, because, "detailed legislation leaves nothing for the state to supervise, and thus it may be said that the legislation itself satisfies the supervision requirement."
4. The adoption of safety standards that are based on objective expert judgments, because they have been found by the courts to be pro-competitive, rather than anit-competitive.

Id., at pp. 8-9

Board Composition

The AG found that changing the composition of the boards to decrease the number of market-participant board members would not necessarily shield board members from antitrust liability. The AG pointed out that the U.S. Supreme Court did not use the term "majority," it used "controlling number." There are several unresolved questions regarding how changing the board composition would impact antitrust liability. As long as these questions remain unresolved, radical changes to the board make-up would likely create new challenges, with no promise of bolstering state-action immunity. Id., at pp. 10-11.

Increasing Active State Supervision

With regard to options for increasing state supervision of board actions, the AG suggested the powers of the Director of the Department of Consumer Affairs could be expanded to make review of anti-competitive board decisions mandatory, or to make the Director's review available upon the request of a board. Moreover, statutory changes would need to be considered to prevent the Director's disapproval from being overridden by the board pursuant to Business and Professions Code section 313.1(e)(3), because such an override would nullify the "active supervision" and the benefit of state-action immunity gained by the Director's review. Id., at p. 14.

Legislation Granting Immunity to Board Members

The AG pointed out that a state cannot grant blanket immunity for anticompetitive activity; there would probably still have to do active supervision to give effect to the intended immunity. Id., at p. 15.

Indemnification of Board Members

Board members are generally entitled to have the state provide for the defense of any civil action stemming from an act or omission in the scope of employment. While the state does not have to provide a defense in cases where the board member acted due to actual fraud, corruption, or actual malice, there is no exception to the duty to defend for antitrust violations. Id., at p. 16.

In general, the government is liable for injuries caused by an act within the scope of employment, but is not liable for punitive damages. If an antitrust violation is proven, an award of treble damages is automatic. There isa question as to whether treble damages equates to punitive damages that would not be paid by the state, but by the individual or individuals who were found to have taken the anti-competitive action. The AG opined that treble damages are not the same as punitive damages, and should be paid by the state, if awarded. Id., pp. 16-17.

Training

Finally, the AG advised that the potential for board member liability may be significantly reduced by providing training on antitrust concepts so that there is a shared awareness of the sensitivity of certain kinds of actions. Such training will prepare board members to be able to harness the evidence and articulate the reasons for their decisions in market-sensitive areas. Id., at p. 18.

FTC Staff Guidance

In October the FTC issued staff guidance on active supervision of state regulatory boards controlled by market participants. The guidance is in line with the opinions offered by the AG's and additionally notes that a board's action in making disciplinary decisions and licensing decisions are the performance of acts required by legislation, and as a result would likely satisfy the state action requirement.

ATTACHMENTS

A. California Attorney General Opinion No. 15-402 (Sept. 10, 2015)

Prepared by: Dianne Dobbs, Esq.

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CALIFORNIA ATTORNEY GENERAL

OPINION 15-402

September 10, 2015

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 15-402
of	:	September 10, 2015
KAMALA D. HARRIS Attorney General	:	
SUSAN DUNCAN LEE Deputy Attorney General	:	

THE HONORABLE JERRY HILL, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

What constitutes "active state supervision" of a state licensing board for purposes of the state action immunity doctrine in antitrust actions, and what measures might be taken to guard against antitrust liability for board members?

CONCLUSIONS

"Active state supervision" requires a state official to review the substance of a regulatory decision made by a state licensing board, in order to determine whether the decision actually furthers a clearly articulated state policy to displace competition with regulation in a particular market. The official reviewing the decision must not be an active member of the market being regulated, and must have and exercise the power to approve, modify, or disapprove the decision.

Measures that might be taken to guard against antitrust liability for board members include changing the composition of boards, adding lines of supervision by state officials, and providing board members with legal indemnification and antitrust training.

ANALYSIS

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[1] the Supreme Court of the United States established a new standard for determining whether a state licensing board is entitled to immunity from antitrust actions.

Immunity is important to state actors not only because it shields them from adverse judgments, but because it shields them from having to go through litigation. When immunity is well established, most people are deterred from filing a suit at all. If a suit is filed, the state can move for summary disposition of the case, often before the discovery process begins. This saves the state a great deal of time and money, and it relieves employees (such as board members) of the stresses and burdens that inevitably go along with being sued. This freedom from suit clears a safe space for government officials and employees to perform their duties and to exercise their discretion without constant fear of litigation. Indeed, allowing government actors freedom to exercise discretion is one of the fundamental justifications underlying immunity doctrines.[2]

Before *North Carolina Dental* was decided, most state licensing boards operated under the assumption that they were protected from antitrust suits under the state action immunity doctrine. In light of the decision, many states—including California—are reassessing the structures and operations of their state licensing boards with a view to determining whether changes should be made to reduce the risk of antitrust claims. This opinion examines the legal requirements for state supervision under the *North Carolina Dental* decision, and identifies a variety of measures that the state Legislature might consider taking in response to the decision.

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[1] *North Carolina State Bd. of Dental Examiners v. F. T. C.* (2015) ___ U.S. ___, 135 S. Ct. 1101 (*North Carolina Dental*).

[2] See *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

I. *North Carolina Dental* Established a New Immunity Standard for State Licensing Boards

A. The *North Carolina Dental* Decision

The North Carolina Board of Dental Examiners was established under North Carolina law and charged with administering a licensing system for dentists. A majority of the members of the board are themselves practicing dentists. North Carolina statutes delegated authority to the dental board to regulate the practice of dentistry, but did not expressly provide that teeth-whitening was within the scope of the practice of dentistry.

Following complaints by dentists that non-dentists were performing teeth-whitening services for low prices, the dental board conducted an investigation. The board subsequently issued cease-and-desist letters to dozens of teeth-whitening outfits, as well as to some owners of shopping malls where teeth-whiteners operated. The effect on the teeth-whitening market in North Carolina was dramatic, and the Federal Trade Commission took action.

In defense to antitrust charges, the dental board argued that, as a state agency, it was immune from liability under the federal antitrust laws. The Supreme Court rejected that argument, holding that a state board on which a controlling number of decision makers are active market participants must show that it is subject to "active supervision" in order to claim immunity.[3]

B. State Action Immunity Doctrine Before *North Carolina Dental*

The Sherman Antitrust Act of 1890[4] was enacted to prevent anticompetitive economic practices such as the creation of monopolies or restraints of trade. The terms of the Sherman Act are broad, and do not expressly exempt government entities, but the Supreme Court has long since ruled that federal principles of dual sovereignty imply that federal antitrust laws do not apply to the actions of states, even if those actions are anticompetitive.[5]

This immunity of states from federal antitrust lawsuits is known as the "state action doctrine."[6] The state action doctrine, which was developed by the Supreme Court

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[3] *North Carolina Dental, supra*, 135 S.Ct. at p. 1114.

[4] 15 U.S.C. §§ 1, 2.

[5] *Parker v. Brown* (1943) 317 U.S. 341, 350-351.

[6] It is important to note that the phrase "state action" in this context means something

in *Parker v. Brown*,[7] establishes three tiers of decision makers, with different thresholds for immunity in each tier.

In the top tier, with the greatest immunity, is the state itself: the sovereign acts of state governments are absolutely immune from antitrust challenge.[8] Absolute immunity extends, at a minimum, to the state Legislature, the Governor, and the state's Supreme Court.

In the second tier are subordinate state agencies,[9] such as executive departments and administrative agencies with statewide jurisdiction. State agencies are immune from antitrust challenge if their conduct is undertaken pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition.[10] A state policy is sufficiently clear when displacement of competition is the "inherent, logical, or ordinary result" of the authority delegated by the state legislature.[11]

The third tier includes private parties acting on behalf of a state, such as the members of a state-created professional licensing board. Private parties may enjoy state action immunity when two conditions are met: (1) their conduct is undertaken pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition, and (2) their conduct is "actively supervised" by the state.[12] The

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very different from "state action" for purposes of analysis of a civil rights violation under section 1983 of title 42 of the United States Code. Under section 1983, *liability* attaches to "state action," which may cover even the inadvertent or unilateral act of a state official not acting pursuant to state policy. In the antitrust context, a conclusion that a policy or action amounts to "state action" results in *immunity* from suit.

[7] *Parker v. Brown, supra*, 317 U.S. 341.

[8] *Hoover v. Ronwin* (1984) 466 U.S. 558, 574, 579-580.

[9] Distinguishing the state itself from subordinate state agencies has sometimes proven difficult. Compare the majority opinion in *Hoover v. Ronwin, supra*, 466 U.S. at p. 581 with dissenting opinion of Stevens, J., at pp. 588-589. (See *Costco v. Maleng* (9th Cir. 2008) 522 F.3d 874, 887, subseq. hrg. 538 F.3d 1128; *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.* (9th Cir. 1987) 810 F.2d 869, 875.)

[10] See *Town of Hallie v. City of Eau Claire* (1985) 471 U.S. 34, 39.

[11] *F.T.C. v. Phoebe Putney Health Systems, Inc.* (2013) ___ U.S. ___, 133 S.Ct. 1003, 1013; see also *Southern Motor Carriers Rate Conference, Inc. v. U.S.* (1985) 471 U.S. 48, 57 (state policy need not compel specific anticompetitive effect).

[12] *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, 105 (*Midcal*).

fundamental purpose of the supervision requirement is to shelter only those private anticompetitive acts that the state approves as actually furthering its regulatory policies.[13] To that end, the mere possibility of supervision—such as the existence of a regulatory structure that is not operative, or not resorted to—is not enough. "The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[14]

C. State Action Immunity Doctrine After *North Carolina Dental*

Until the Supreme Court decided *North Carolina Dental*, it was widely believed that most professional licensing boards would fall within the second tier of state action immunity, requiring a clear and affirmative policy, but not active state supervision of every anticompetitive decision. In California in particular, there were good arguments that professional licensing boards[15] were subordinate agencies of the state: they are formal, ongoing bodies created pursuant to state law; they are housed within the Department of Consumer Affairs and operate under the Consumer Affairs Director's broad powers of investigation and control; they are subject to periodic sunset review by the Legislature, to rule-making review under the Administrative Procedure Act, and to administrative and judicial review of disciplinary decisions; their members are appointed by state officials, and include increasingly large numbers of public (non-professional) members; their meetings and records are subject to open-government laws and to strong prohibitions on conflicts of interest; and their enabling statutes generally provide well-guided discretion to make decisions affecting the professional markets that the boards regulate.[16]

Those arguments are now foreclosed, however, by *North Carolina Dental*. There, the Court squarely held, for the first time, that "a state board on which a controlling

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[13] *Patrick v. Burget* (1988) 486 U.S. 94, 100-101.

[14] *Ibid.*

[15] California's Department of Consumer Affairs includes some 25 professional regulatory boards that establish minimum qualifications and levels of competency for licensure in various professions, including accountancy, acupuncture, architecture, medicine, nursing, structural pest control, and veterinary medicine—to name just a few. (See http://www.dca.gov/about_ca/entities.shtml.)

[16] Cf. 1A Areeda & Hovenkamp, *supra*, ¶ 227, p. 208 (what matters is not what the body is called, but its structure, membership, authority, openness to the public, exposure to ongoing review, etc.).

number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity."[17] The effect of *North Carolina Dental* is to put professional licensing boards "on which a controlling number of decision makers are active market participants" in the third tier of state-action immunity. That is, they are immune from antitrust actions as long as they act pursuant to clearly articulated state policy to replace competition with regulation of the profession, *and* their decisions are actively supervised by the state.

Thus arises the question presented here: What constitutes "active state supervision"?[18]

D. Legal Standards for Active State Supervision

The active supervision requirement arises from the concern that, when active market participants are involved in regulating their own field, "there is a real danger" that they will act to further their own interests, rather than those of consumers or of the state.[19] The purpose of the requirement is to ensure that state action immunity is afforded to private parties only when their actions actually further the state's policies.[20]

There is no bright-line test for determining what constitutes active supervision of a professional licensing board: the standard is "flexible and context-dependent."[21] Sufficient supervision "need not entail day-to-day involvement" in the board's operations or "micromanagement of its every decision."[22] Instead, the question is whether the review mechanisms that are in place "provide 'realistic assurance'" that the anticompetitive effects of a board's actions promote state policy, rather than the board members' private interests.[23]

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[17] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1114; *Midcal*, *supra*, 445 U.S at p. 105.

[18] Questions about whether the State's anticompetitive policies are adequately articulated are beyond the scope of this Opinion.

[19] *Patrick v. Burget*, *supra*, 486 U.S. at p. 100, citing *Town of Hallie v. City of Eau Claire*, *supra*, 471 U.S. at p. 47; see *id.* at p. 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf").

[20] *Patrick v. Burget*, *supra*, 486 U.S. at pp. 100-101.

[21] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1116.

[22] *Ibid.*

[23] *Ibid.*

The *North Carolina Dental* opinion and pre-existing authorities allow us to identify "a few constant requirements of active supervision":[24]

- The state supervisor who reviews a decision must have the power to reverse or modify the decision.[25]
- The "mere potential" for supervision is not an adequate substitute for supervision.[26]
- When a state supervisor reviews a decision, he or she must review the substance of the decision, not just the procedures followed to reach it.[27]
- The state supervisor must not be an active market participant.[28]

Keeping these requirements in mind may help readers evaluate whether California law already provides adequate supervision for professional licensing boards, or whether new or stronger measures are desirable.

II. Threshold Considerations for Assessing Potential Responses to *North Carolina Dental*

There are a number of different measures that the Legislature might consider in response to the *North Carolina Dental* decision. We will describe a variety of these, along with some of their potential advantages or disadvantages. Before moving on to those options, however, we should put the question of immunity into proper perspective.

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[24] *Id. at* pp. 1116-1117.

[25] *Ibid.*

[26] *Id.* at p. 1116, citing *F.T.C. v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 638. For example, a passive or negative-option review process, in which an action is considered approved as long as the state supervisor raises no objection to it, may be considered inadequate in some circumstances. (*Ibid.*)

[27] *Ibid.*, citing *Patrick v. Burget, supra*, 486 U.S. at pp. 102-103. In most cases, there should be some evidence that the state supervisor considered the particular circumstances of the action before making a decision. Ideally, there should be a factual record and a written decision showing that there has been an assessment of the action's potential impact on the market, and whether the action furthers state policy. (See *In the Matter of Indiana Household Moves and Warehousemen, Inc.* (2008) 135 F.T.C. 535, 555-557; see also Federal Trade Commission, Report of the State Action Task Force (2003) at p. 54.)

[28] *North Carolina Dental, supra*, 135 S.Ct. at pp. 1116-1117.

There are two important things keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they compete in, many—if not most—of their actions do not implicate the federal antitrust laws.

In the context of regulating professions, "market-sensitive" decisions (that is, the kinds of decisions that are most likely to be open to antitrust scrutiny) are those that create barriers to market participation, such as rules or enforcement actions regulating the scope of unlicensed practice; licensing requirements imposing heavy burdens on applicants; marketing programs; restrictions on advertising; restrictions on competitive bidding; restrictions on commercial dealings with suppliers and other third parties; and price regulation, including restrictions on discounts.

On the other hand, we believe that there are broad areas of operation where board members can act with reasonable confidence—especially once they and their state-official contacts have been taught to recognize actual antitrust issues, and to treat those issues specially. Broadly speaking, promulgation of regulations is a fairly safe area for board members, because of the public notice, written justification, Director review, and review by the Office of Administrative Law as required by the Administrative Procedure Act. Also, broadly speaking, disciplinary decisions are another fairly safe area because of due process procedures; participation of state actors such as board executive officers, investigators, prosecutors, and administrative law judges; and availability of administrative mandamus review.

We are not saying that the procedures that attend these quasi-legislative and quasi-judicial functions make the licensing boards altogether immune from antitrust claims. Nor are we saying that rule-making and disciplinary actions are per se immune from antitrust laws. What we are saying is that, assuming a board identifies its market-sensitive decisions and gets active state supervision for those, then ordinary rule-making and discipline (faithfully carried out under the applicable rules) may be regarded as relatively safe harbors for board members to operate in. It may require some education and experience for board members to understand the difference between market-sensitive and "ordinary" actions, but a few examples may bring in some light.

North Carolina Dental presents a perfect example of a market-sensitive action. There, the dental board decided to, and actually succeeded in, driving non-dentist teeth-whitening service providers out of the market, even though nothing in North Carolina's laws specified that teeth-whitening constituted the illegal practice of dentistry. Counter-examples—instances where no antitrust violation occurs—are far more plentiful. For example, a regulatory board may legitimately make rules or impose discipline to prohibit license-holders from engaging in fraudulent business practices (such as untruthful or

deceptive advertising) without violating antitrust laws.[29] As well, suspending the license of an individual license-holder for violating the standards of the profession is a reasonable restraint and has virtually no effect on a large market, and therefore would not violate antitrust laws.[30]

Another area where board members can feel safe is in carrying out the actions required by a detailed anticompetitive statutory scheme.[31] For example, a state law prohibiting certain kinds of advertising or requiring certain fees may be enforced without need for substantial judgment or deliberation by the board. Such detailed legislation leaves nothing for the state to supervise, and thus it may be said that the legislation itself satisfies the supervision requirement.[32]

Finally, some actions will not be antitrust violations because their effects are, in fact, pro-competitive rather than anti-competitive. For instance, the adoption of safety standards that are based on objective expert judgments have been found to be pro-competitive.[33] Efficiency measures taken for the benefit of consumers, such as making information available to the purchasers of competing products, or spreading development costs to reduce per-unit prices, have been held to be pro-competitive because they are pro-consumer.[34]

III. Potential Measures for Preserving State Action Immunity

A. Changes to the Composition of Boards

The *North Carolina Dental* decision turns on the principle that a state board is a group of private actors, not a subordinate state agency, when "a controlling number of decisionmakers are active market participants in the occupation the board regulates."[35]

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[29] See generally *California Dental Assn. v. F.T.C.* (1999) 526 U.S. 756.

[30] See *Oksanen v. Page Memorial Hospital* (4th Cir. 1999) 945 F.2d 696 (*en banc*).

[31] See *324 Liquor Corp. v. Duffy* (1987) 479 U.S. 335, 344, fn. 6.

[32] 1A Areeda & Hovenkamp, Antitrust Law, *supra*, ¶ 221, at p. 66; ¶ 222, at pp. 67, 76.

[33] See *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (1988) 486 U.S. 492, 500-501.

[34] *Broadcom Corp. v. Qualcomm Inc.* (3rd Cir. 2007) 501 F.3d 297, 308-309; see generally Bus. & Prof. Code, § 301.

[35] 135 S.Ct. at p. 1114.

This ruling brings the composition of boards into the spotlight. While many boards in California currently require a majority of public members, it is still the norm for professional members to outnumber public members on boards that regulate healing-arts professions. In addition, delays in identifying suitable public-member candidates and in filling public seats can result in de facto market-participant majorities.

In the wake of *North Carolina Dental*, many observers' first impulse was to assume that reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution.[36]

Even if the Legislature were inclined to decrease the number of market-participant board members, the current state of the law does not allow us to project accurately how many market-participant members is too many. This is a question that was not resolved by the *North Carolina Dental* decision, as the dissenting opinion points out:

> What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?[37]

Some observers believe it is safe to assume that the *North Carolina Dental* standard would be satisfied if public members constituted a majority of a board. The

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[36] Most observers believe that there are real advantages in staffing boards with professionals in the field. The combination of technical expertise, practiced judgment, and orientation to prevailing ethical norms is probably impossible to replicate on a board composed entirely of public members. Public confidence must also be considered. Many consumers would no doubt share the sentiments expressed by Justice Breyer during oral argument in the *North Carolina Dental* case: "[W]hat the State says is: We would like this group of brain surgeons to decide who can practice brain surgery in this State. I don't want a group of bureaucrats deciding that. I would like brain surgeons to decide that." (*North Carolina Dental*, *supra*, transcript of oral argument p. 31, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_l6h1.pdf (hereafter, Transcript).)

[37] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J).

obvious rejoinder to that argument is that the Court pointedly did not use the term "majority;" it used "controlling number." More cautious observers have suggested that "controlling number" should be taken to mean the majority of a quorum, at least until the courts give more guidance on the matter.

North Carolina Dental leaves open other questions about board composition as well. One of these is: Who is an "active market participant"?[38] Would a retired member of the profession no longer be a participant of the market? Would withdrawal from practice during a board member's term of service suffice? These questions were discussed at oral argument,[39] but were not resolved. Also left open is the scope of the market in which a member may not participate while serving on the board.[40]

Over the past four decades, California has moved decisively to expand public membership on licensing boards.[41] The change is generally agreed to be a salutary one for consumers, and for underserved communities in particular.[42] There are many good reasons to consider continuing the trend to increase public membership on licensing boards—but we believe a desire to ensure immunity for board members should not be the decisive factor. As long as the legal questions raised by *North Carolina Dental* remain unresolved, radical changes to board composition are likely to create a whole new set of policy and practical challenges, with no guarantee of resolving the immunity problem.

B. Some Mechanisms for Increasing State Supervision

Observers have proposed a variety of mechanisms for building more state oversight into licensing boards' decision-making processes. In considering these alternatives, it may be helpful to bear in mind that licensing boards perform a variety of

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[38] *Ibid.*

[39] Transcript, *supra*, at p. 31.

[40] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J). Some observers have suggested that professionals from one practice area might be appointed to serve on the board regulating another practice area, in order to bring their professional expertise to bear in markets where they are not actively competing.

[41] See Center for Public Interest Law, A Guide to California's Health Care Licensing Boards (July 2009) at pp. 1-2; Shimberg, Occupational Licensing: A Public Perspective (1982) at pp. 163-165.

[42] See Center for Public Interest Law, *supra*, at pp. 15-17; Shimberg, *supra*, at pp. 175-179.

distinct functions, and that different supervisory structures may be appropriate for different functions.

For example, boards may develop and enforce standards for licensure; receive, track, and assess trends in consumer complaints; perform investigations and support administrative and criminal prosecutions; adjudicate complaints and enforce disciplinary measures; propose regulations and shepherd them through the regulatory process; perform consumer education; and more. Some of these functions are administrative in nature, some are quasi-judicial, and some are quasi-legislative. Boards' quasi-judicial and quasi-legislative functions, in particular, are already well supported by due process safeguards and other forms of state supervision (such as vertical prosecutions, administrative mandamus procedures, and public notice and scrutiny through the Administrative Procedure Act). Further, some functions are less likely to have antitrust implications than others: decisions affecting only a single license or licensee in a large market will rarely have an anticompetitive effect within the meaning of the Sherman Act. For these reasons, it is worth considering whether it is less urgent, or not necessary at all, to impose additional levels of supervision with respect to certain functions.

Ideas for providing state oversight include the concept of a superagency, such as a stand-alone office, or a committee within a larger agency, which has full responsibility for reviewing board actions de novo. Under such a system, the boards could be permitted to carry on with their business as usual, except that they would be required to refer each of their decisions (or some subset of decisions) to the superagency for its review. The superagency could review each action file submitted by the board, review the record and decision in light of the state's articulated regulatory policies, and then issue its own decision approving, modifying, or vetoing the board's action.

Another concept is to modify the powers of the boards themselves, so that all of their functions (or some subset of functions) would be advisory only. Under such a system, the boards would not take formal actions, but would produce a record and a recommendation for action, perhaps with proposed findings and conclusions. The recommendation file would then be submitted to a supervising state agency for its further consideration and formal action, if any.

Depending on the particular powers and procedures of each system, either could be tailored to encourage the development of written records to demonstrate executive discretion; access to administrative mandamus procedures for appeal of decisions; and the development of expertise and collaboration among reviewers, as well as between the reviewers and the boards that they review. Under any system, care should be taken to structure review functions so as to avoid unnecessary duplication or conflicts with other agencies and departments, and to minimize the development of super-policies not

adequately tailored to individual professions and markets. To prevent the development of "rubber-stamp" decisions, any acceptable system must be designed and sufficiently staffed to enable plenary review of board actions or recommendations at the individual transactional level.

As it stands, California is in a relatively advantageous position to create these kinds of mechanisms for active supervision of licensing boards. With the boards centrally housed within the Department of Consumer Affairs (an "umbrella agency"), there already exists an organization with good knowledge and experience of board operations, and with working lines of communication and accountability. It is worth exploring whether existing resources and minimal adjustments to procedures and outlooks might be converted to lines of active supervision, at least for the boards' most market-sensitive actions.

Moreover, the Business and Professions Code already demonstrates an intention that the Department of Consumer Affairs will protect consumer interests as a means of promoting "the fair and efficient functioning of the free enterprise market economy" by educating consumers, suppressing deceptive and fraudulent practices, fostering competition, and representing consumer interests at all levels of government.[43] The free-market and consumer-oriented principles underlying *North Carolina Dental* are nothing new to California, and no bureaucratic paradigms need to be radically shifted as a result.

The Business and Professions Code also gives broad powers to the Director of Consumer Affairs (and his or her designees)[44] to protect the interests of consumers at every level.[45] The Director has power to investigate the work of the boards and to obtain their data and records;[46] to investigate alleged misconduct in licensing examinations and qualifications reviews;[47] to require reports;[48] to receive consumer complaints[49] and to initiate audits and reviews of disciplinary cases and complaints about licensees.[50]

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[43] Bus. & Prof. Code, § 301.

[44] Bus. & Prof. Code, §§ 10, 305.

[45] See Bus. & Prof. Code, § 310.

[46] Bus. & Prof. Code, § 153.

[47] Bus. & Prof. Code, § 109.

[48] Bus. & Prof. Code, § 127.

[49] Bus. & Prof. Code, § 325.

[50] Bus. & Prof. Code, § 116.

In addition, the Director must be provided a full opportunity to review all proposed rules and regulations (except those relating to examinations and licensure qualifications) before they are filed with the Office of Administrative Law, and the Director may disapprove any proposed regulation on the ground that it is injurious to the public.[51] Whenever the Director (or his or her designee) actually exercises one of these powers to reach a substantive conclusion as to whether a board's action furthers an affirmative state policy, then it is safe to say that the active supervision requirement has been met.[52]

It is worth considering whether the Director's powers should be amended to make review of certain board decisions mandatory as a matter of course, or to make the Director's review available upon the request of a board. It is also worth considering whether certain existing limitations on the Director's powers should be removed or modified. For example, the Director may investigate allegations of misconduct in examinations or qualification reviews, but the Director currently does not appear to have power to review board decisions in those areas, or to review proposed rules in those areas.[53] In addition, the Director's power to initiate audits and reviews appears to be limited to disciplinary cases and complaints about licensees.[54] If the Director's initiative is in fact so limited, it is worth considering whether that limitation continues to make sense. Finally, while the Director must be given a full opportunity to review most proposed regulations, the Director's disapproval may be overridden by a unanimous vote of the board.[55] It is worth considering whether the provision for an override maintains its utility, given that such an override would nullify any "active supervision" and concomitant immunity that would have been gained by the Director's review.[56]

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[51] Bus. & Prof. Code, § 313.1.

[52] Although a written statement of decision is not specifically required by existing legal standards, developing a practice of creating an evidentiary record and statement of decision would be valuable for many reasons, not the least of which would be the ability to proffer the documents to a court in support of a motion asserting state action immunity.

[53] Bus. & Prof. Code, §§ 109, 313.1.

[54] Bus. & Prof. Code, § 116.

[55] Bus. & Prof. Code, § 313.1.

[56] Even with an override, proposed regulations are still subject to review by the Office of Administrative Law.

C. Legislation Granting Immunity

From time to time, states have enacted laws expressly granting immunity from antitrust laws to political subdivisions, usually with respect to a specific market.[57] However, a statute purporting to grant immunity to private persons, such as licensing board members, would be of doubtful validity. Such a statute might be regarded as providing adequate authorization for anticompetitive activity, but active state supervision would probably still be required to give effect to the intended immunity. What is quite clear is that a state cannot grant blanket immunity by fiat. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."[58]

IV. Indemnification of Board Members

So far we have focused entirely on the concept of immunity, and how to preserve it. But immunity is not the only way to protect state employees from the costs of suit, or to provide the reassurance necessary to secure their willingness and ability to perform their duties. Indemnification can also go a long way toward providing board members the protection they need to do their jobs. It is important for policy makers to keep this in mind in weighing the costs of creating supervision structures adequate to ensure blanket state action immunity for board members. If the costs of implementing a given supervisory structure are especially high, it makes sense to consider whether immunity is an absolute necessity, or whether indemnification (with or without additional risk-management measures such as training or reporting) is an adequate alternative.

As the law currently stands, the state has a duty to defend and indemnify members of licensing boards against antitrust litigation to the same extent, and subject to the same exceptions, that it defends and indemnifies state officers and employees in general civil litigation. The duty to defend and indemnify is governed by the Government Claims Act.[59] For purposes of the Act, the term "employee" includes officers and uncompensated servants.[60] We have repeatedly determined that members of a board,

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[57] See 1A Areeda & Hovenkamp, Antitrust Law, *supra*, 225, at pp. 135-137; e.g. *A1 Ambulance Service, Inc. v. County of Monterey* (9th Cir. 1996) 90 F.3d 333, 335 (discussing Health & Saf. Code, § 1797.6).

[58] *Parker v. Brown*, *supra*, 317 U.S. at 351.

[59] Gov. Code, §§ 810-996.6.

[60] See Gov. Code § 810.2.

commission, or similar body established by statute are employees entitled to defense and indemnification.[61]

A. Duty to Defend

Public employees are generally entitled to have their employer provide for the defense of any civil action "on account of an act or omission in the scope" of employment.[62] A public entity may refuse to provide a defense in specified circumstances, including where the employee acted due to "actual fraud, corruption, or actual malice."[63] The duty to defend contains no exception for antitrust violations.[64] Further, violations of antitrust laws do not inherently entail the sort of egregious behavior that would amount to fraud, corruption, or actual malice under state law. There would therefore be no basis to refuse to defend an employee on the bare allegation that he or she violated antitrust laws.

B. Duty to Indemnify

The Government Claims Act provides that when a public employee properly requests the employer to defend a claim, and reasonably cooperates in the defense, "the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed."[65] In general, the government is liable for an injury proximately caused by an act within the scope of employment,[66] but is not liable for punitive damages.[67]

One of the possible remedies for an antitrust violation is an award of treble damages to a person whose business or property has been injured by the violation.[68] This raises a question whether a treble damages award equates to an award of punitive damages within the meaning of the Government Claims Act. Although the answer is not

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[61] E.g., 81 Ops.Cal.Atty.Gen. 199, 200 (1998); 57 Ops.Cal.Atty.Gen. 358, 361 (1974).

[62] Gov. Code, § 995.

[63] Gov. Code, § 995.2, subd. (a).

[64] Cf. *Mt. Hawley Insurance Co. v. Lopez* (2013) 215 Cal.App.4th 1385 (discussing Ins. Code, § 533.5).

[65] Gov. Code, § 825, subd. (a).

[66] Gov. Code, § 815.2.

[67] Gov. Code, § 818.

[68] 15 U.S.C. § 15(a).

entirely certain, we believe that antitrust treble damages do *not* equate to punitive damages.

The purposes of treble damage awards are to deter anticompetitive behavior and to encourage private enforcement of antitrust laws.[69] And, an award of treble damages is automatic once an antitrust violation is proved.[70] In contrast, punitive damages are "uniquely justified by and proportioned to the actor's particular reprehensible conduct as well as that person or entity's net worth . . . in order to adequately make the award 'sting' . . . ."[71] Also, punitive damages in California must be premised on a specific finding of malice, fraud, or oppression.[72] In our view, the lack of a malice or fraud element in an antitrust claim, and the immateriality of a defendant's particular conduct or net worth to the treble damage calculation, puts antitrust treble damages outside the Government Claims Act's definition of punitive damages.[73]

C. Possible Improvements to Indemnification Scheme

As set out above, state law provides for the defense and indemnification of board members to the same extent as other state employees. This should go a long way toward reassuring board members and potential board members that they will not be exposed to undue risk if they act reasonably and in good faith. This reassurance cannot be complete, however, as long as board members face significant uncertainty about how much litigation they may have to face, or about the status of treble damage awards.

Uncertainty about the legal status of treble damage awards could be reduced significantly by amending state law to specify that treble damage antitrust awards are not punitive damages within the meaning of the Government Claims Act. This would put them on the same footing as general damages awards, and thereby remove any uncertainty as to whether the state would provide indemnification for them.[74]

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[69] *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 783-784 (individual right to treble damages is "incidental and subordinate" to purposes of deterrence and vigorous enforcement).

[70] 15 U.S.C. § 15(a).

[71] *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 981-982.

[72] Civ. Code, §§ 818, 3294.

[73] If treble damages awards were construed as constituting punitive damages, the state would still have the option of paying them under Government Code section 825.

[74] Ideally, treble damages should not be available at all against public entities and public officials. Since properly articulated and supervised anticompetitive behavior is

As a complement to indemnification, the potential for board member liability may be greatly reduced by introducing antitrust concepts to the required training and orientation programs that the Department of Consumer Affairs provides to new board members.[75] When board members share an awareness of the sensitivity of certain kinds of actions, they will be in a much better position to seek advice and review (that is, active supervision) from appropriate officials. They will also be far better prepared to assemble evidence and to articulate reasons for the decisions they make in market-sensitive areas. With training and practice, boards can be expected to become as proficient in making and demonstrating sound market decisions, and ensuring proper review of those decisions, as they are now in making and defending sound regulatory and disciplinary decisions.

V. Conclusions

North Carolina Dental has brought both the composition of licensing boards and the concept of active state supervision into the public spotlight, but the standard it imposes is flexible and context-specific. This leaves the state with many variables to consider in deciding how to respond.

Whatever the chosen response may be, the state can be assured that *North Carolina Dental*'s "active state supervision" requirement is satisfied when a non-market-

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permitted to the state and its agents, the deterrent purpose of treble damages does not hold in the public arena. Further, when a state indemnifies board members, treble damages go not against the board members but against public coffers. "It is a grave act to make governmental units potentially liable for massive treble damages when, however 'proprietary' some of their activities may seem, they have fundamental responsibilities to their citizens for the provision of life-sustaining services such as police and fire protection." (*City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 442 (dis. opn. of Blackmun, J.).)

In response to concerns about the possibility of treble damage awards against municipalities, Congress passed the Local Government Antitrust Act (15 U.S.C. §§ 34-36), which provides that local governments and their officers and employees cannot be held liable for treble damages, compensatory damages, or attorney's fees. (See H.R. Rep. No. 965, 2nd Sess., p. 11 (1984).) For an argument that punitive sanctions should never be levied against public bodies and officers under the Sherman Act, see 1A Areeda & Hovenkamp, *supra,* ¶ 228, at pp. 214-226. Unfortunately, because treble damages are a product of federal statute, this problem is not susceptible of a solution by state legislation.

[75] Bus. & Prof. Code, § 453.

participant state official has and exercises the power to substantively review a board's action and determines whether the action effectuates the state's regulatory policies.

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