Public Comment For Next Meeting

Date: November 13, 2015

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To: California Board of Podiatric Medicine <BPM@dca.ca.gov>

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There is a critical problem with certain regulations the board has adopted. Due to that problem, board members have no immunity from federal antitrust statutes. Anyone who violates federal antitrust statutes and who does not have immunity can be sued for **triple damages**.

Earlier this year the U.S. Supreme Court said:

> "A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "**first** that `the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and **second** that `the policy . . . be actively supervised by the State.'" *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980)).

North Carolina Board of Dental Examiners v. Federal Trade Commission, 113 S.Ct. 1101 (2015) (emphasis added)

Focus on the **first** requirement. This requirements applies equally to all boards irrespective of whether or not a board is controlled by active market participants. See for example the U.S. Supreme Court decision in ***New Motor Vehicle Board of California*** *v. Orrin W. Fox Co.*, 439 U. S. 96 (1978).[1]

If a board acts contrary to "clearly articulated and affirmatively expressed" state policy does the board have *Parker* immunity from federal antitrust litigation? No! As shown in this public comment, most boards in California, including yours, lack immunity from federal antitrust litigation and claims for triple damages since the boards fail the **first** part of the test.

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[1] For an in-depth analysis see Report of the State Action Task Force, Sept 2003. Office of Policy Planning, Federal Trade Commission. https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf

Your board adopted regulations that (1) directly conflict with state law and which (2) violate the delegation of authority doctrine. As a result, your board is not following policies "clearly articulated and affirmatively expressed" by the legislature and thus lacks immunity from federal antitrust litigation.

The great mystery here is why did the state attorneys that advise your board allow you to dig such a very deep hole for yourself?

In the following two statutes the legislature has "clearly articulated and affirmatively expressed" the policy that (1) the amount of any administrative fine is to be decided by the board itself and (2) in making that decision the board itself is required to consider certain factors.

> (a) Except with respect to persons regulated under Chapter 11 (commencing with Section 7500), any board, bureau, or commission within the department, the board created by the Chiropractic Initiative Act, and the Osteopathic Medical Board of California, may establish, by regulation, a system for the issuance to a **licensee** of a citation which may contain an order of abatement **or** an order to pay an **administrative fine assessed by the board, bureau, or commission** where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto.
> (b) The system **shall** contain the following provisions:
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> > (1) Citations shall be in writing and shall describe with particularity the nature of the violation, including specific reference to the provision of law determined to have been violated.
> > (2) Whenever appropriate, the citation shall contain an order of abatement fixing a reasonable time for abatement of the violation.
> > (3) In no event shall the **administrative fine assessed by the board, bureau, or commission** exceed five thousand dollars ($5,000) for each inspection or each investigation made with respect to the violation, or five thousand dollars ($5,000) for each violation or count if the violation involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare. **In assessing a fine, the board, bureau, or commission shall** give due consideration to the appropriateness of the amount of the fine with respect to **factors** such as the gravity of the violation, the good faith of the licensee, and the history of previous violations. ...

Business and Professions Code (BPC) § 125.9.

> Any board, bureau, or commission within the department may, in addition to the administrative citation system authorized by Section 125.9, also establish, by regulation, a **similar system** for the issuance of an administrative citation to an **unlicensed** person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. The administrative citation system authorized by this section **shall meet the requirements of Section 125.9** and may not be applied to an unlicensed person who is otherwise exempted from the provisions of the applicable licensing act. The establishment of an administrative citation system for unlicensed activity does not

> preclude the use of other enforcement statutes for unlicensed activities at the discretion of the board, bureau, or commission.

BPC § 148.

> Considering the factors listed in § 125.9 and deciding the amount of a fine is a task that requires the exercise of **judgment and discretion**. It is not a ministerial task.

Your board has adopted administrative rule 1399.696 purporting to delegate to the board's executive officer the power to consider the statutory factors and decide the amount of a fine.

Q: Is that rule lawful?
A: No. Pursuant to the delegation of authority doctrine the board had no power to adopt that rule.

What is the delegation of authority doctrine?

All of the various things that the board might do in order to discharge its duties can be divided into two categories.

1. Ministerial tasks.
2. Non-ministerial tasks. These tasks require the board to exercise its **judgment and discretion**.

Pursuant to the delegation of authority doctrine, it is unlawful for the board to adopt an administrative rule that would delegate any of the board's **judgment and discretion** to the board's executive officer, or to anyone else, unless there is a statute with language that **expressly** allows that delegation.

This doctrine was stated in a 2011 California Attorney General opinion as follows:

> As a general rule, powers conferred upon public agencies and officers which involve the exercise of **judgment or discretion** are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. [Citations.]" California Sch. Employees Assn. v. Personnel Commn., 3 Cal. 3d 139, 144 (1970); see Thompson Pac. Const. Inc. v. City of Sunnyvale, 155 Cal. App. 4th 525, 539 (2007).

https://oag.ca.gov/system/files/opinions/pdfs/09-902.pdf, page 6, footnote 24.

Additional California cases that have stated this rule regarding delegation of authority include:

> It is also clear that the superintendent of banks may not **by the adoption of any rule** of policy or procedure so circumscribe or curtail the exercise of his discretion under the statute as to prevent the free and untrammeled exercise thereof in every case, for an attempt to do so would be for him to arrogate to himself a legislative function.

Bank of Italy v. Johnson (1926) 200 Cal. 1

> In the case of Stowe v. Maxey, 84 Cal.App. 532 [258 P. 717], this court had occasion to go extensively into the subject of delegation of powers by boards of supervisors, and we need only to refer to that case as authority to the point that power vested in a board of supervisors to perform certain acts cannot be delegated.
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> .....
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> We do not very well see how the want of legislative authority can thus be supplied or a constitutional section amended by **long-continued violations**.

First Nat. Bank v. Ball (1928) 90 Cal. App. 709, 266 Pac. 604

See also:

> *Schecter v. County of Los Angeles* (1968) 258 Cal. App.2d 391, 65 Cal Rptr 739 (referring to "**express** statutory authorization")
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> *San Francisco Firefighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896
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> *American Federation of Teachers v. Board of Education of Pasadena Unified School District*, 107 Cal. App. 3d 829, 166 Cal. Rptr. 89 (Cal.App.Dist.2 06/30/1980) (referring to "**express** statutory authorization")
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> *Civil Service Association v. Redevelopment Agency* (1985) 166 Cal. App. 3d 1222, 213 Cal. Rptr. 1

This delegation of authority doctrine is universal. For example, see this opinion from the Kansas attorney general.
http://ksag.washburnlaw.edu/opinions/1980/1980-219.pdf

And here is an opinion from the Washington State attorney general.
http://www.atg.wa.gov/ago-opinions/delegation-authority-executive-director

Q: Has the California legislature adopted a statute with **express language** authorizing your board to delegate the task to (1) consider the factors listed in BPC § 125.9 and (2) decide the amount of a fine?

A: No.

Statutes § 125.9 and § 148 are merely a **general** grant of power to the boards to adopt a system for issuance of citations. Any such system must meet all of the requirements listed in § 125.9. Some requirements are mandatory and some are optional. However, there simply is no **express** language in § 125.9 or § 148 allowing any board to delegate any of its judgment and discretion to its staff. In fact the legislature was so intent on setting the policy that the amount of any fine was to be decided by the collective judgment and discretion of the **boards** themselves that this requirement is stated in § 125.9 **three times**.

Your board is not the only one that has adopted unlawful regulations as described above. Here is a report I complied that lists many California boards and bureaus that have adopted similar

administrative regulations purporting to delegate **judgment and discretion** to their executive officer or chief to make crucial enforcement decisions.
http://www.propertylinemaps.com/p/California_lawsuit/trade_restraint/Citations_from_CA_boards_are_void_ab_initio.pdf

There is one thing that completely baffles me about all this.

Whenever it was that your board adopted the rule discussed in this public comment, there were state attorneys advising your board. Those attorneys were experts in administrative law. The delegation of authority doctrine is a fundamental building block in that field of law. When that public rule was being adopted, why did those attorneys fail to speak up and tell your board that it did not have the power to delegate the exercise of its judgment and discretion as proposed in that rule?

Bottom line

As long as your board members continue to **refuse to do their duty** under BPC § 125.9 and § 148 to exercise their own collective judgment and discretion for the purpose of (1) considering the statutory factors and (2) deciding the amount of any fine, your board members are acting in violation of policies "clearly articulated and affirmatively expressed" by the legislature and therefore your board members do not have any immunity from federal antitrust litigation and claims for **triple damages**.

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