STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 16-01

TO: The Honorable Lee Heider
Idaho State Senator
Statehouse
VIA HAND DELIVERY

The Honorable Fred Wood
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Per Request for Attorney General's Opinion

You have asked this office for an answer to the following two questions:

QUESTIONS PRESENTED

1. Based upon the Supreme Court's decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, __ U.S. __, 135 S.Ct. 1101 (2015), how must the State actively supervise Idaho's boards and commissions to preserve their immunity from antitrust liability under the State Action Doctrine?

2. What steps should the Legislature take to assist Idaho's boards and commissions in order to protect them from antitrust liability and litigation?

CONCLUSION

1. Under North Carolina Dental Exam'rs v. F.T.C., — U.S. —, 135 S. Ct. 1101, 191 L.Ed.2d 35 (2015), the actions of certain of Idaho's boards and commissions must be overseen by a State official who is not a participant of the market the board or commission is regulating. The State official must have the authority, substantively, to review board and commission actions and veto or modify them when necessary to accord with State policy

2. It is recommended that the Legislature inquire as to the membership and control of the State's boards and commissions and determine which of those entities are "controlled" by "participants" of the market the specific entity regulates. For such "market-participant controlled" entities, the Legislature should consider providing substantive, independent State oversight of the entities' regulatory actions.

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ANALYSIS

I.

BACKGROUND TO UNDERSTANDING APPLICATION OF IMMUNITIES UNDER FEDERAL AND STATE ANTITRUST LAW

Recently, in North Carolina Dental, the U.S. Supreme Court articulated a new standard for determining whether certain state boards and commissions are entitled to immunity from antitrust actions under what is called the "State Action Doctrine." This immunity is important because it shields these boards and commissions from adverse judgments, and the expense and burden of antitrust litigation. Where the State Action Doctrine applies, it deters lawsuits from being filed. Even where a suit is filed, however, the state can promptly move to dismiss it, often before expensive and time-consuming discovery (the norm in antitrust litigation) commences. This saves the state, its boards or commissions, and their members the burden of defending such lawsuits. The State Action Doctrine is important because it allows state boards, commissions, their members, and employees to exercise their discretion over their required duties under the law without the interference of the threat of antitrust litigation.

Before North Carolina Dental, many understood that state licensing boards were afforded a broader or easier to obtain protection from antitrust suits under the State Action Doctrine's immunity. North Carolina Dental narrowed that protection by looking specifically at the composition of the boards with market participants and the actions of those boards to protect their respective markets. This means that Idaho will need to examine the composition, statutory framework and operations of its licensing boards and commissions to determine whether their activities can withstand scrutiny under North Carolina Dental.

A. Overview of Antitrust Law[1]

The federal Sherman, Clayton, and Federal Trade Commission Acts operate in concert to outlaw monopolies and other practices resulting in the unreasonable restraints of trade. They form the core of federal antitrust law. The purpose of these antitrust laws, and Idaho's Competition Act, is to promote competition in the market place. The premise for these laws is that they protect consumers from the harmful effects of monopolies and various unreasonable restraints in trade, such as price fixing, promote robust innovation, and ensure the best possible consumer choice and service. The antitrust laws work to keep the free-enterprise system functioning properly. As the Legislature has stated in the Idaho Competition Act:

> The Idaho legislature finds that fair competition is fundamental to the free market system. The unrestrained interaction of competitive forces will yield the best allocation of Idaho's economic resources, the lowest prices, the highest quality,

[1] Because the Idaho Competition Act is to be interpreted in harmony with interpretations of federal antitrust law, Idaho Code § 48-102(3), and the Act provides that activities exempt under federal antitrust laws are also exempt under Idaho's Act, Idaho Code § 48-107(1)(a), the analysis herein regarding the State Action Doctrine is the same under both federal and state antitrust law. *Accord* Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775, 782 n.5 (9th Cir 2015).

> and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.

Idaho Code § 48-102(1).

B. State Agencies Are Subject to Antitrust Law

Under principles of federalism, "States possess a significant measure of sovereignty . . . ." North Carolina Dental, 135 S. Ct. at 1110 (citations omitted). In enacting the antitrust laws, Congress has not intended to preclude states from limiting or restricting competition in order to promote other policies of import to the state. Thus, the Supreme Court has ruled that the federal antitrust laws do not reach anticompetitive conduct engaged in by a state that is acting in its sovereign capacity. Parker v. Brown, 317 U.S. 341, 351-52, 63 S. Ct. 307, 313-14, 87 L. Ed. 315 (1943). The effect of this is that the state may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." North Carolina Dental, 135 S. Ct. at 1109.

But this principle of federalism does not does not automatically confer immunity from antitrust law on every state agency or commission and its members for all of its actions and decisions. How and when this immunity attaches, then, is the result of a number of U.S. Supreme Court cases, and these decisions have come to formulate what is known as the "State Action Doctrine" or "State Action Immunity."

C. State Action Immunity

In Parker v. Brown, the U.S. Supreme Court first recognized antitrust immunity for anticompetitive conduct by states, so long as the state was acting in its sovereign capacity. As the North Carolina Dental Court states, while

> [t]he Sherman Act . . . serves to promote robust competition[,] . . . . [t]he States . . . need not adhere in all contexts to a model of unfettered competition. . . . [T]hey [the States] impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every . . . state law or policy were required to conform to . . . the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. [Citations omitted.]
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> For these reasons, . . . *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. [Citation omitted.] [*Parker*] recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." [Citation omitted.]

135 S. Ct. at 1109-10 (citations omitted).

The State Action Doctrine or State Action Immunity was first known as "Parker Immunity." Since Parker, the Supreme Court has extended and fleshed out the application of this immunity. There are three general groups or entities that qualify (some under specific enumerated conditions) for State Action Immunity: (1) the state acting as sovereign; (2) subordinate state-created governmental entities and municipalities; and (3) subordinate state-created governmental entities in which private parties serve on the entity's board or commission.

1. Actions by the State as a Sovereign

Actions taken directly by the state in its sovereign capacity (i.e., the legislative, judicial, or executive branch) are automatically exempted from antitrust liability. Hoover v. Ronwin, 466 U.S. 558, 574, 579-80, 104 S. Ct. 1989, 1998, 2001, 80 L.Ed.2d 590 (1984). The sovereign's State Action Immunity is broad and complete. It is not affected by whether the state's action in question was illegal or the result of bribery. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 378, 111 S. Ct. 1344, 1353, 113 L.Ed.2d 382 (1991). Nor will this antitrust immunity be defeated because the state officials have conspired with private parties. *Id.* at 374. With the possible exception of instances where the state itself is acting as a market participant, *any* action of the state in its sovereign capacity qualifies for State Action Immunity and is *per se* exempt from the scope of the antitrust laws.

2. Actions by Subordinate Government Entities and Municipalities Without Private Participants on the Entities' Board or Commission

"State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." North Carolina Dental, 135 S. Ct. at 1111. Subordinate state governmental entities and municipalities have State Action Immunity, but only so long as they are acting pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition," the details of which are discussed below. If the subordinate state governmental entity includes private parties on the entity's board or commission, however, then there is an additional requirement to be satisfied before immunity will attach, discussed next.

3. Actions by Subordinate Government Entities and Municipalities With Private Participants on the Entities' Board or Commission

A subordinate state government entity that includes private parties serving on its board or commission can qualify for State Action Immunity only if the anticompetitive conduct at issue satisfies two separate tests. First, as is true for subordinate state governmental entities in general, the action must be pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition. The second requirement is that the action at issue must also be "actively supervised by the State itself." Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 940, 63 L.Ed.2d 233 (1980). These two tests are discussed in detail below.

Prior to North Carolina Dental, many assumed that state licensing boards and commissions fit within the second group of subordinate state entities and that to obtain State Action Immunity all the regulatory board or commission needed to do was establish

that its contested action was pursuant to the "clearly articulated and affirmatively expressed state policy" test mentioned above. North Carolina Dental invalidates that assumption, at least with respect to those entities where the board or commission is "controlled" by market participants.

a. Market-Participant-Controlled-State Agencies

It is first necessary to define a market-participant-controlled-state agency. According to the Federal Trade Commission (F.T.C.),[2] a market participant is a person who (i) is licensed by the board or commission engaged in the alleged anticompetitive conduct or who (ii) provides any service that is subject to the regulatory authority of the board. Thus, a doctor on a medical board would be a market participant. A shampooer on a cosmetology board that not only regulates cosmetologists but shampooers would be a market participant, too. *F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, p. 7 (October 2015).

The F.T.C. has stated that a person who "temporarily suspends" his or her active participation in an occupation "for the purpose of serving on a board or commission that regulates his or her former (and intended future) occupation" will still be considered a market participant. *Id.*[3]

If a state board or commission has market participants serving on them, then the inquiry focuses on whether these persons "control" the regulating entity. The F.T.C. has also discussed what constitutes "control" of boards or commissions by market participants:

> Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market *(e.g.,* through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 8 (October 2015).

The sum of this is that those entities in which market participants constitute a majority of the board or commission will meet the test of an entity controlled by market participants. The mere lack of a majority of market participants on a board or commission will not be definitive of whether the entity is controlled by market participants. Rather, there will need to be additional scrutiny, on a fact-specific basis, of whether the entity is nonetheless controlled by market participants through veto power, tradition, or practice. And, it is fair to say that there will be instances in which a board or commission is deemed

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[2] The F.T.C. and the U.S. Department of Justice are the two federal agencies with authority to enforce federal antitrust laws.

[3] The F.T.C.'s language suggests that a person who has retired and does not plan to return to his or her occupation will not be considered a market participant, but the F.T.C. did not explicitly state this and there is no further guidance at this time on this point.

controlled by market participants even when the majority of the board or commission is made up of non-market participants.

State entities that are "controlled" by "market participants," then, will need to satisfy the two tests mentioned above and discussed in detail below to obtain State Action Immunity. It is to these two tests we now turn.

b. The Clear Articulation Test

The clear articulation test requires the anticompetitive action under review to be a foreseeable result of the action authorized by the state. An express statement that the state intends the action to have anticompetitive effects is ideal, but not necessary. Generalized grants of power, on the other hand, are insufficient to express a state policy to displace competition.

With respect to the clear articulation test, if the statutory provision or rule plainly shows that the state contemplated the sort of activity which is challenged, the "clear articulation" requirement is satisfied. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44, 105 S. Ct. 1713, 1719, 85 L.Ed.2d 24 (1985). In S. Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 64-65, 105 S. Ct. 1721, 1730-31, 85 L.Ed.2d 36 (1985) (citations omitted), the Court held that "a state policy that expressly *permits*, but does not compel, anticompetitive behavior may be 'clearly articulated . . .'" *Id.* at 61, (footnote omitted). The most recent Supreme Court case to address the clear articulation test is F.T.C. v. Phoebe Putney Health Sys., Inc., — U.S. —, 133 S. Ct. 1003, 185 L.Ed.2d 43 (2013). In that case, the Court stated that the clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.* at 1013.

As noted above, the State's clear articulation of the intent to displace competition is not alone sufficient to trigger State Action Immunity for those regulatory licensing boards and commissions controlled by market participants. The reason for this, according to the U.S. Supreme Court, is that a legislature's clearly-articulated delegation of authority to such a state regulatory entity to displace competition may be "defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." The concern for such boards or commissions, then, is that the delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the state's policy goals. North Carolina Dental, 135 S. Ct. at 1112. Accordingly, the Supreme Court has also required that the conduct at issue of such market-participant-controlled boards or commissions be actively supervised by the state.

c. The Active Supervision Test

With respect to the active supervision test, in order to meet this requirement, it must be shown that the state "'exercise[s] ultimate control over the challenged anticompetitive conduct.'" F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 634, 112 S. Ct. 2169, 2177, 119 L.Ed.2d 410 (1992) *quoting* Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 1663, 100

L.Ed.2d 83 (1988). The test 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.'" *Id.* In other words, the inquiry is "whether private parties or public authorities made the operative decisions regarding the challenged anticompetitive conduct." Mun. Utilities Bd. v. Ala. Power Co., 934 F.2d 1493, 1503 (11th Cir. 1991).

Active supervision does not require the state to micromanage a board or commission or even be involved on a daily basis. On the other hand, it is clear that rubber-stamped approval will be inadequate. Active supervision lies somewhere between these two positions. There must be enough state involvement and oversight to make the actions of the agency those of the state and not a hidden advancement of private interests.

The North Carolina Dental Court provided three benchmarks for active state supervision:

> (1) The supervisor (who could be a legislative board or other disinterested state official) must review the substance of the anticompetitive decision, not merely the procedures;
> (2) The supervisor must have the power to veto or modify decisions to accord with the clearly articulated policy of the State; and
> (3) The supervisor cannot be a market participant.

See North Carolina Dental, 135 S. Ct. at 1116.

Other than these requirements, active supervision is a circumstantial determination. The guiding principal is this: The state's review mechanism must provide a realistic assurance that the anticompetitive conduct that has been undertaken promotes state policy rather than private interests.

D. North Carolina Dental Should Not Cause Concern In Many Routine Situations

A few additional observations are warranted as regards to State Action Immunity. First, if the challenged conduct is the enactment of an Idaho statute or the adoption of a rule, both should be immune from challenge as a result of the Legislature's action of enacting the statute at question or, annually, expressly approving the rule at issue. This action by the Legislature is action by the sovereign and is immune from liability.

Second, if the antitrust challenge involves the literal application or interpretation of a rule or statute, the revocation of a license due to a materially false statement about one's qualifications in an application, for example, it is probably not necessary for there to be active supervision of such denial or revocation. The *F.T.C. Staff Guidance* provides the following example:

> A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an

> unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 6 (October 2015).

Third, the fact that State Action Immunity may not apply or cover a specific state agency or commission, or its members, does not mean that the entity will necessarily be liable under the antitrust laws. There are other immunities that may apply. For example, in general, a regulatory agency can initiate and prosecute a lawsuit. Such petitioning of the court, so long as it is not a sham, is conduct protected by a separate antitrust exemption. Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 113 S. Ct. 1920, 123 L.Ed.2d 611 (1993).

Further, even where there is no applicable exemption, not all restraints of trade violate the antitrust laws. For starters, the antitrust laws only prohibit unreasonable restraints of trade. Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Thus, for example, a regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without creating antitrust liability; such action is not an unreasonable restraint of trade. Indeed, it is a reasonable one. Likewise, a regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 119 S. Ct. 1604, 143 L.Ed.2d 935 (1999).

II.

NECESSARY STATE LAWS AND PRACTICES TO ENSURE APPLICATION OF STATE ACTION IMMUNITY TO ACTIONS OF MARKET-PARTICIPANT-CONTROLLED-STATE BOARDS AND COMMISSIONS AND THEIR MEMBERS

A. Current Makeup of Idaho Boards and Commissions

Fundamentally, qualification for State Action Immunity turns on the makeup and structure of Idaho's boards and commissions. This will be challenging, because Idaho's boards and commissions are structured in a variety of ways. The Department of Self-Governing Agencies has within it the Division of Building Safety, the Idaho Commission on Hispanic Affairs, the Idaho State Historical Society, the Idaho Commission for Libraries, the Idaho State Lottery, the State Appellate Public Defender, the Real Estate Commission and the Division of Veterans Services. While most of these agencies do not license occupations and are not populated by market participants, there are a few that do—health related boards, the Real Estate Commission, and the Division of Building Safety contain boards that are so populated.

Also within the Department of Self Governing Agencies is the statutorily-created Bureau of Occupational Licensing. *See* Idaho Code § 67-2601, *et seq.* The Bureau is authorized to provide "administrative or other services as provided by law," Idaho Code § 67-2602(1) to more than 30 agencies, many of which license and regulate various

professions and whose boards or commissions are populated by a controlling number of market participants.[4]

Where an Idaho board or commission is located, or how their members are appointed, however, is irrelevant for purposes of State Action Immunity, because in no instance, except the Idaho State Bar and (as noted above) the Legislature's review and oversight over agency rulemakings, is any Idaho market-participant-controlled board or commission at present overseen by an independent state official with the authority to approve, veto, or modify decisions of the respective board or commission, as consistent with state policies.[5]

The Department of Self Governing Agencies is a department in name only; there is presently no director to oversee the boards and commissions within the Department and there is no state official with the authority to approve, veto or modify their decisions, again to ensure that state policies are being upheld. For those entities located within the Bureau of Occupational Licensing, there is, again, no statutory authority granted the Chief of the Bureau authority to approve, veto, or modify decisions of the Bureau's respective boards or commissions.

This present lack of active state supervision of the state's market-participant-controlled boards and commissions is fatal to the application of State Action Immunity for such state entities. There are a couple of ways to address this, however, should the Legislature wish to obtain State Action Immunity for its boards and commissions.[6] These options are discussed below.

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[4] Under Idaho Code § 67-2602(1), agencies serviced by the Bureau of Occupational Licensing include: Board of Acupuncture, Board of Architectural Examiners, Athletic Commission, Board of Barber Examiners, Certified Shorthand Reporters Board, Board of Chiropractic Physicians, Idaho Contractors Board, Board of Cosmetology, Licensing Board of Professional Counselors and Marriage and Family Therapists, State Board of Denturitry, Drinking Water and Wastewater Professionals, State Driving Businesses Licensure Board, Idaho Board of Massage Therapy, Idaho Board of Registration for Professional Geologists, Speech and Hearing Services Licensure Board, Physical Therapy Licensure Board, Board of Landscape Architects, Liquefied Petroleum Gas Safety Board, Board of Morticians, Board of Naturopathic Medical Examiners, Board of Examiners of Nursing Home Administrators, Occupational Therapy Licensure Board, Board of Optometry, Board of Podiatry, Board of Psychologist Examiners, Real Estate Appraiser Board, Board of Examiners of Residential Care Facility Administrators, Board of Social Work Examiners, Board of Midwifery, and "such other professional and occupational licensing boards or commodity commissions as may request such services."

[5] The Idaho State Bar is a market-participant-controlled board. However, the rule making authority of the Board is subject to the approval of the Idaho Supreme Court. Idaho Code § 3-408. Likewise, the Board investigates and recommends disciplinary action it believes warranted to the Idaho Supreme Court, which then enters judgments in the matter "as it deems proper." *Id.* Such licensing decisions by the Court should be deemed decisions of the sovereign and thus entitled to blanket State Action Immunity. *Compare* Hoover, 466 U.S. at 567-68 (State Supreme Court acts in a legislative capacity in adopting rules and as such is undertaking action of the State and thus exempt from the antitrust laws).

[6] This would not be the first time the Legislature has enacted legislation to ensure State Action Immunity for Idaho governmental entities. In Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189, 1191 (9th Cir. 2001) (Snake River I) the plaintiff sued an electric utility over how it was providing electric transmission services. The utility, joined by the State of Idaho, argued that the utility's actions, under state law, were protected by State Action Immunity. The district court agreed, but that decision was reversed by the Ninth Circuit Court of Appeals in Snake River I. The Ninth Circuit agreed that the State of Idaho had clearly articulated and affirmatively expressed a state policy of restraining competition in electric transmission services. *Id.* at p. 1193. The Ninth Circuit held, however, that the State of Idaho did not actively supervise these policies.

B. Potential Solutions for Increasing State Supervision of Market-Participant-Controlled State Boards and Commissions

1. Increase Non-Market Participant (Public) Membership on Boards

The first course of action would be to provide that for market-participant-controlled boards and commissions there be an increase in public (non-market participant) members serving thereon, such that the market participants do not control the board. Equally available would be a provision decreasing the number of market participants such that there is no longer a market participant control issue. This alternative must strike an appropriate balance between the need for subject area expertise within the board with a check on the ability of the board to control market access. Many no doubt share the view 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, transcript of oral argument, Tr. p. 31 (Oct. 14, 2014), available online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/l 3-534_16hl.pdf. This means that care will need to be taken to preserve a balance of expertise with a balance of active engaged non-market participant board members.

2. Assign an Independent State Official the Authority to Approve, Reject, or Modify Market-Participant-Controlled Board Decisions

The second option would be to provide that the decisions of market-participant-controlled boards and commissions shall be subject to review by an independent state official with the authority to approve, veto or modify their decisions, as consistent with state policies. This could be done in a variety of ways, but the requirements would be straightforward: for each market-participant-controlled Idaho board and commission, decisions regarding licensees would be advisory in nature and, before becoming effectual, must be reviewed by an independent state official with authority to approve, veto or modify such decisions. The F.T.C. has endorsed this approach:

> Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

Id. at p. 1195. The Court stated, however, the following: "It should be clear that Idaho's situation . . . could be addressed by legislative action providing for supervision." *Id.*

The Legislature responded to the Ninth Circuit's invitation. On December 8, 2000, just two months after the Ninth Circuit's initial decision, the Governor convened the Legislature in an Extraordinary Session to deal exclusively with this issue and as a result enacted House Bill No. 1. 2001 Idaho Sess. Laws 1. Back in court, the district court ruled that the changes enacted established active state supervision such that State Action Immunity would now be applicable under the facts of the case. That decision was again appealed and the Ninth Circuit, this time, ruled in support of State Action Immunity. *See* Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042, 1050 (9th Cir. 2004).

> In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.,* the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, p. 12 (October 2015).

3. The Necessity of Boards and Commissions Should Be Evaluated

North Carolina Dental provides the Legislature with the opportunity to evaluate the propagation of its boards and commissions to determine their necessity. This office takes no position on any board or commission, but recognizes that with the antitrust issues related to market participant controlled boards, it may make more legal sense to limit such boards and commissions to only those that the Governor and Legislature find absolutely necessary in order to carry out state policies.

CONCLUSION

North Carolina Dental has forced states to evaluate anew their various board and commission makeup and oversight, to the degree they wish for State Action Immunity to continue to apply to the actions and decisions of such boards and commissions. Specifically, the case requires states to consider the makeup of those boards and commissions that are controlled by market participants and how to actively supervise them. Active state supervision will be satisfied when a non-market-participant state official has and exercises power to substantively review such entities' decisions and determine whether the action at issue effectuates the state's regulatory policies. Where the action does effectuate state policies, the state official will need to have the authority to, and in fact, approve the action. Where the action does not effectuate state policies, the state official will need to have the authority, and in fact, utilize it to modify or veto such actions.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 3-408.
§ 48-102(1).
§ 48-102(3).
§ 48-107(1)(a).
§ 67-2601, et seq.

§ 67-2602(1).

2. Session Laws:

2001 Idaho Sess. Laws 1.

3. United States Supreme Court Cases:

Cal. Dental Ass'n v. FTC, 526 U.S. 756, 119 S. Ct. 1604, 143 L.Ed.2d 935 (1999).

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed.2d 233 (1980).

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L.Ed.2d 382 (1991).

F.T.C. v. Phoebe Putney Health Sys., Inc., — U.S. —, 133 S. Ct. 1003, 185 L.Ed.2d 43 (2013).

F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 112 S. Ct. 2169, 119 L.Ed.2d 410 (1992).

Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 80 L.Ed.2d 590 (1984).

North Carolina Dental Exam'rs v. F.T.C., — U.S. —, 135 S. Ct. 1101, 191 L.Ed.2d 35 (2015).

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658, 100 L.Ed.2d 83 (1988).

Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 113 S. Ct. 1920, 123 L.Ed.2d 611 (1993).

S. Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 105 S. Ct. 1721, 85 L.Ed.2d 36 (1985).

Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L.Ed.2d 24 (1985).

4. Other Cases:

Mun. Utilities Bd. v. Ala. Power Co., 934 F.2d 1493 (11th Cir. 1991).

Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775 (9th Cir 2015).

Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189 (9th Cir. 2001).

Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042 (9th Cir. 2004).

5. Other Authorities:

F.T.C. Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (October 2015).

Dated this 13th day of January, 2016.

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