



NCSBN

National Council of State Boards of Nursing

State Board Shake-Up

Legislative Action in the Wake of North Carolina State Board of Dental Examiners v. Federal Trade Commission

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Antitrust in the U.S.

- Federal antitrust laws were enacted to prevent anticompetitive market behaviors
- Goals are to give consumers:
 - lower prices
 - higher quality products and services
 - more choices
 - greater innovation

Enforcement

- Federal Trade Commission is charged with enforcing the antitrust laws
- Who do they enforce against?
 - Monopolies
 - Mergers
 - Price fixers
 - Group boycotts
 - Exclusive dealing contracts
 - Regulatory boards???

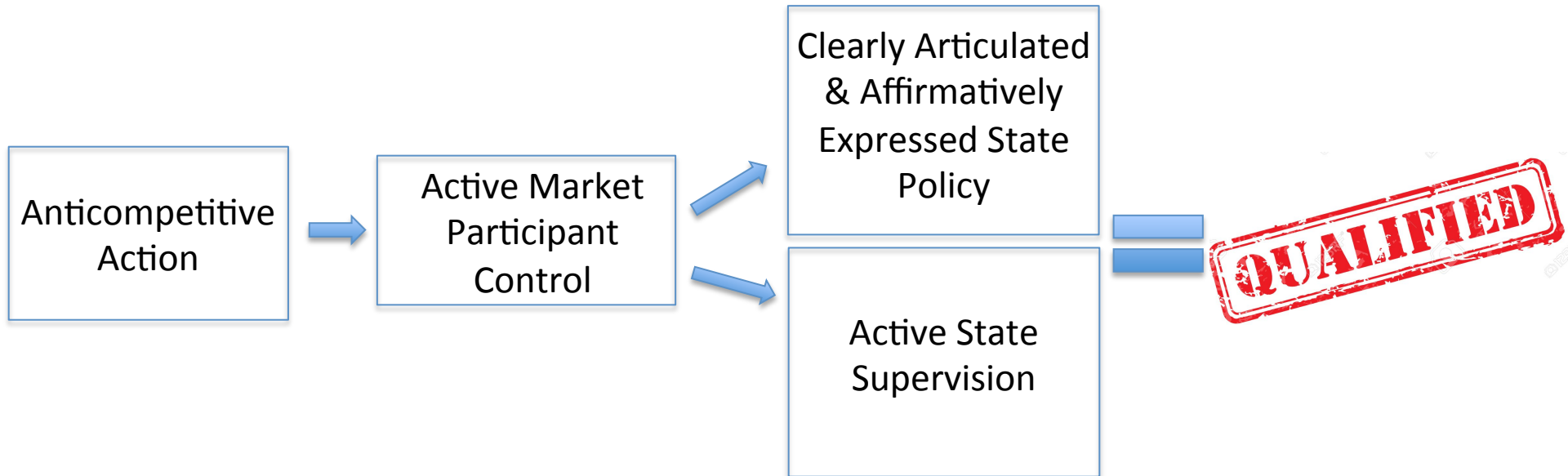


North Carolina Board of Dental Examiners v. FTC

- Before: assumption was that regulatory boards were protected from antitrust laws by State Action Doctrine
- After: regulatory boards controlled by active market participants do not enjoy State Action Doctrine immunity



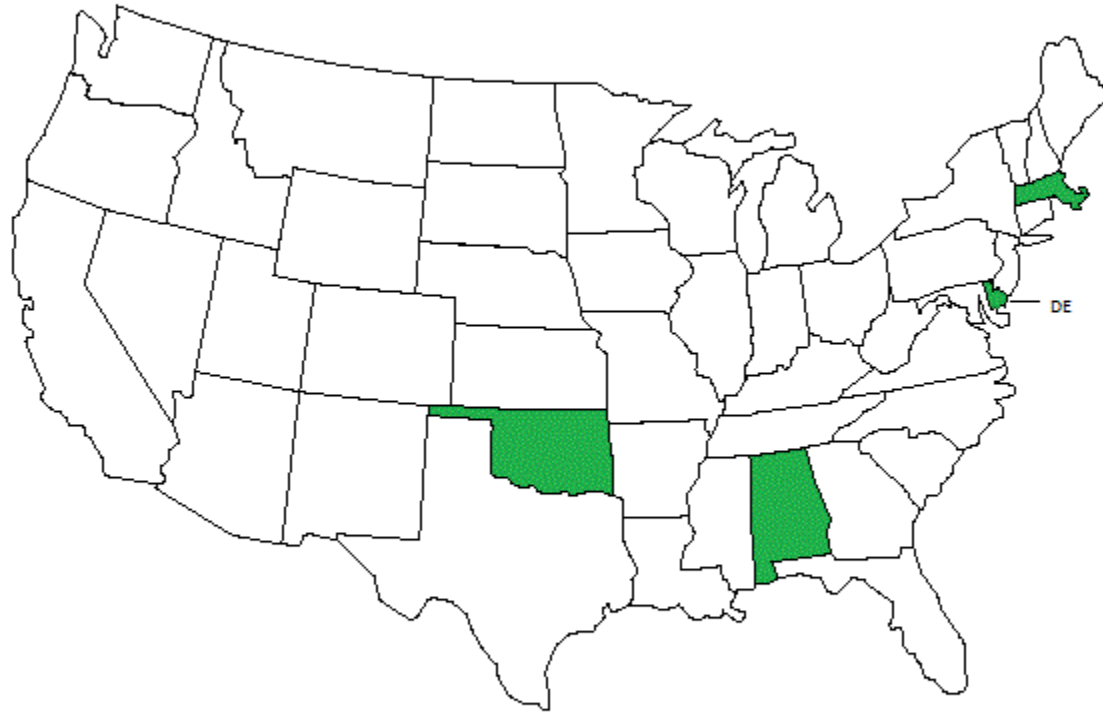
Midcal Test



Clearly Articulated and Affirmatively Expressed State Policy

“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.” *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013)

State Board Shake-Up: Executive Action



*updated as of 6/2/16

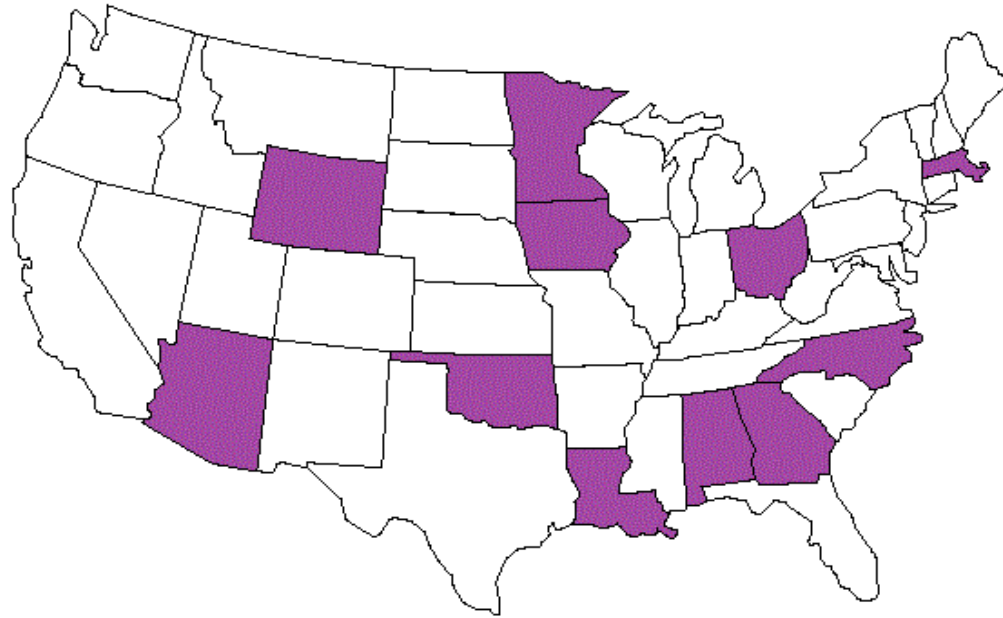
State Board Shake-Up: Executive Action

- Alabama
 - [Executive Order #7](#) was signed in June, 2015. This order creates the AL Office for Regulatory Oversight of Boards and Commissions. The office may veto or modify actions **voluntarily** brought to them by active market participant controlled boards and commissions.
- Delaware
 - Signed in April 2016, [Executive Order No. 60](#) creates the DE Professional Licensing Review Committee. The committee will recommend standards and best practices that 1) encourage public safety and 2) ensure that DE residents are able to enter professions and occupations without unnecessary regulatory/administrative burdens. The committee members include the heads of various executive department, legislative leaders, and governor appointees.

State Board Shake-Up: Executive Action

- Massachusetts
 - [Executive Order No. 567](#) , signed in March 2016, requires the Dir. of Professional and the Com. of Public Health to review board actions to determine anticompetitive effect. If yes, they will determine whether it furthers an important state goal. If not, the policy will be vetoed. Covered actions include scope of practice, licensure requirements, price regulations, advertising and soliciting restrictions, competitive bidding restrictions, market participation restrictions (on non-licensees), and territorial allocations.
- Oklahoma
 - [Executive Order 2015-33](#) was signed in July, 2015. The order requires active market participant controlled boards and commissions to implement supervision procedures. The OKAG is charged with reviewing, vetoing, and modifying board and commission licensure and prohibition actions, and issuing a written opinion explaining the decision. Only non-rulemaking actions proposed by the boards and commissions are required to be submitted the Attorney General.

State Board Shake-Up: 2016 Legislative Session



*updated as of 6/2/16

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Enacted 2016 Legislation



- **Alabama**
 - SB 80
 - Legislative Reference Service determination
 - Joint Committee on Regulation Review determination
 - Hearing and comment
 - Agenda priority
 - Retroactive review
- **Georgia**
 - HB 952
 - Governor/appointee duty to actively supervise actions
 - Governor to approve, remand, modify, or reverse action
 - 90 days
- **Louisiana (Adopted)**
 - SCR 65: Task Force on Meaningful Oversight
 - Review and develop structure for licensing board laws to minimize exposure to antitrust
 - Review and develop ideas for board composition to diversify membership



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Pending 2016 Legislation



- **Iowa (adjourned)**

- HB 2426 / SB 2167:

- American Legislative Exchange Council (ALEC) Model Act “Occupational Board Reform Act”
- Active supervision by Office of Supervision of Occupational Boards
- Least restrictive regulation

- **North Carolina**

- HB 1007:

- Boards must adopt rules for complaints, disciplinary and enforcement actions, against both licensees and non-licensees
- Creates procedure by which boards may investigate unlicensed activities, and provides language to be used in notification process

Pending 2016 Legislation



- **Massachusetts**
 - HB 4188
 - The Governor finds that the current statutory scheme governing independent licensing boards in the state does not provide adequate supervision as is required by the Supreme Court.
 - The bill moves the Board of Medicine under the Department of Health, where the BON is currently located. The bill gives the Commissioner of Public Health the authority to approve or disapprove, or to rescind in part or in full, any act, rule, regulation, or policy proposed or implemented by any board under the commissioner's supervision.
- **Ohio**
 - HB 503/SB 303:
 - Create procedure to ensure rulemaking is used for certain decisions statutorily requiring rulemaking instead of board policy
 - Mandate rules be proposed where statutorily required and inaction has occurred
- **Oklahoma (adjourned)**
 - SB 1540: Creates the State Department of Health Professional Licensure
 - Brings 17 health licensing boards under the department, along with employees, equipment, assets, records, fund balances, etc.

Failed 2016 Legislation



- **Alabama**

- HB 81: Board of Medicine Immunity

- Immunizes the Board of Medicine, along with the Medical Licensure Commission, from liability under antitrust laws

- **Arizona**

- HB 2501: Two Part

- Underlying Bill- bringing boards under Dept. of Health
- Amendment- creates a supervisory role for Director of DOH

Failed 2016 Legislation



- **Minnesota**

- SF 3311: Components of ALEC

- Governor to ensure all licensing rules/policies consistent with existing state policy goals for licensing
- Legislative Coordinating Commission to study economic impact of regs. on underprivileged classes and racial minorities

- **Wyoming**

- SB 55

- Assigns the Attorney General to actively supervise active market participant controlled boards
- Must supervise actions dealing with scope of practice and issuance, revocation, denial, or suspension of licensure

What's Next?

- 2016 Session Wrap-Up
 - Further enactments and failures
 - Implementation of enacted bills
 - Implementation of Executive Orders
- 2017 Legislative Session
 - States are policy laboratories
 - Expect copy-cat legislation
 - Expect further ALEC Model Act introductions
 - Expect overreaction and deceptive packaging



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