


## MEMORANDUM

<b>DATE</b>	July 20, 2018
<b>TO</b>	Board of Psychology
<b>FROM</b>	 Jason Glasspiegel Central Services Coordinator
<b>SUBJECT</b>	Agenda Item #22(b)(1)(B) – AB 2483 (Voepel) Indemnification of Public Officers and Employees: Antitrust Awards

**Background:**

This bill would expand the Government Claims Act to require a public entity to pay a judgment or settlement for treble damage antitrust awards against a member of a regulatory board within the Department of Consumer Affairs (DCA) for an act or omission occurring within the scope of the member's official capacity as a member of the regulatory board. The bill would also specify that treble damages awarded pursuant to and for violation of specified federal laws are not punitive or exemplary damages for purposes of the act.

**Location:** Senate Committee on Judiciary

**Status:** 6/26/18 – In committee. Hearing canceled at the request of the author

**Votes:** 5/03/18 – Assembly Floor (71-0-7)  
4/25/18 – Assembly Appropriations (17-0-0)  
4/03/18 – Assembly Business and Professions (16-0-0)

**Action Requested:**

Staff recommends the Policy and Advocacy Committee **Support** AB 2483 as this bill would provide indemnification for an act or omission of a Board member when that act falls within the scope of their official capacity as a member of a regulatory board. This bill provides the legal certainty and protection our Board members need to make necessary regulatory decisions to protect the public without fear of being personally sued for those decisions.

Attachment A: Analysis of AB 2483 (Voepel)

Attachment B: AB 2483 (Voepel) Text

## 2018 Bill Analysis

<b>Author:</b> Voepel	<b>Bill Number:</b> AB 2483	<b>Related Bills:</b>
<b>Sponsor:</b> Author	<b>Version:</b> Amended 4/9/208	
<b>Subject:</b> Indemnification of public officers and employees: antitrust awards.		

### SUMMARY

This bill expands the Government Claims Act to require a public entity to pay a judgment or settlement for treble damage antitrust awards against a member of a regulatory board within the Department of Consumer Affairs (DCA) for an act or omission occurring within the scope of the member's official capacity as a member of the regulatory board. The bill also specifies that treble damages awarded pursuant to and for violation of specified federal laws are not punitive or exemplary damages for purposes of the act.

### RECOMMENDATION

**SUPPORT** - Staff recommends the Policy and Advocacy Committee **Support** AB 2483 as this bill would provide indemnification for an act or omission of a Board member when that act falls within the scope of their official capacity as a member of a regulatory board. This bill provides the legal certainty and protection our Board members need to make necessary regulatory decisions to protect the public without fear of being personally sued for those decisions.

### REASON FOR THE BILL

Per the author, the current problem is that members of the community are discouraged from being members of DCA Boards due to concerns of possibly being sued while serving on the board.

Other Boards/Departments that may be affected:	
<input type="checkbox"/> Change in Fee(s) <input type="checkbox"/> Affects Licensing Processes <input type="checkbox"/> Affects Enforcement Processes	
<input type="checkbox"/> Urgency Clause <input type="checkbox"/> Regulations Required <input type="checkbox"/> Legislative Reporting <input type="checkbox"/> New Appointment Required	
<b>Policy &amp; Advocacy Committee Position:</b>	<b>Full Board Position:</b>
<input type="checkbox"/> Support <input type="checkbox"/> Support if Amended <input type="checkbox"/> Oppose <input type="checkbox"/> Oppose Unless Amended <input type="checkbox"/> Neutral <input type="checkbox"/> Watch	<input type="checkbox"/> Support <input type="checkbox"/> Support if Amended <input type="checkbox"/> Oppose <input type="checkbox"/> Oppose Unless Amended <input type="checkbox"/> Neutral <input type="checkbox"/> Watch
Date: _____	Date: _____
Vote: _____	Vote: _____

**ANALYSIS**

On February 25, 2015, a decision was issued by the Supreme Court in “United States in North Carolina State Board of Dental Examiners v. Federal Trade Commission (NC Dental).” The case involved actions taken by North Carolina’s dental board to stop shopping mall kiosks and other retail settings from offering teeth whitening services, which the board alleged constituted the unlicensed practice of dentistry. The Federal Trade Commission (FTC), noting in court filings that the majority of the state’s dental board was comprised of active dentists with a financial incentive to reduce competition in a lucrative market, brought antitrust charges against the board.

Prior to “NC Dental,” the common presumption was that licensing board members were subordinate agency actors who needed only to further a state policy for their actions to be immunized from antitrust charges. However, in the Court’s decision, it was ruled that “a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates” must meet the requirement for active state supervision to receive immunity. In effect, “NC Dental” called into question whether certain regulatory schemes were vulnerable to litigation alleging deliberate anticompetitive behavior.

Concerned that boards under DCA may be at risk of antitrust litigation similar to the charges filed in “NC Dental,” Senator Jerry Hill requested an Attorney General (AG) opinion regarding “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.”

Included in the AG’s opinion were a small number of recommendations to improve California’s case for board member immunity under the state action doctrine. The opinion outlines how the Government Claims Act allows a public employee to request its agency to pay the amount of a judgment secured against official conduct. However, the Government Claims Act does not apply to punitive damages, and it is unclear whether treble damages authorized in antitrust litigation fit either category. The AG’s opinion stated that board members’ “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 bill seeks to enact the AG’s recommendation.

This bill would provide indemnification for an act or omission of a Board member when that act falls within the scope of their official capacity as a member of a regulatory board. This bill provides the legal certainty and protection our Board members need to make necessary regulatory decisions to protect the public without fear of being personally sued for those decisions.

**LEGISLATIVE HISTORY**

SB 1194 (Hill), of the 2015-16 Legislative Session, based on the AG’s opinion, would have substantially increased the powers and responsibilities of the Director of DCA to

review no ministerial market-sensitive actions by regulatory boards to determine whether the action furthers a clearly articulated and affirmatively expressed state policy. The bill would have also clarified the applicability of treble damage antitrust awards against a regulatory board member for purposes of the Government Claims Act. The bill failed passage in the Assembly Business and Professions Committee.

**OTHER STATES' INFORMATION**

Not Applicable

**PROGRAM BACKGROUND**

The Board advances quality psychological services for Californians by ensuring ethical and legal practice and supporting the evolution of the practice. To accomplish this, the Board regulates licensed psychologists, psychological assistants, and registered psychologists.

**FISCAL IMPACT**

Not Applicable

**ECONOMIC IMPACT**

Not Applicable

**LEGAL IMPACT**

Per above this bill seeks to enact the recommendation of the Office of the Attorney General due to a Supreme Court decision issued in in "United States in North Carolina State Board of Dental Examiners v. Federal Trade Commission (NC Dental)."

**APPOINTMENTS**

Not Applicable

**SUPPORT/OPPOSITION****Support:**

Board for Professional Engineers, Land Surveyors, and Geologists  
Board of Registered Nursing  
California Board of Accountancy  
Contractors State License Board  
Medical Board of California

**Opposition:**

CALPIRG  
Responsive Law  
University of San Diego, Center for Public Interest Law


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**AB-2483 Indemnification of public officers and employees: antitrust awards.** (2017-2018)

**SECTION 1.** *Section 825 of the Government Code is amended to read:*

**825.** (a) Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, 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.

If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, 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. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:

- (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
- (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
- (3) Payment of the claim or judgment would be in the best interests of the public entity.

As used in this subdivision with respect to an entity of state government, "a decision of the governing body" means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim. The provisions of subdivision (a) of Section 965.6 shall apply to the payment of any claim pursuant to this subdivision.

The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division ~~4 of Title 1.~~ 4, the memorandum of understanding shall be controlling without further legislative action, except that if

those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division ~~4 of Title 1~~, 4, or pursuant to any other law or authority.

(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 of Title 42 of the United States Code.

(f) (1) Except as provided in paragraph (2), a public entity shall not pay a judgment, compromise, or settlement arising from a claim or action against an elected official, if the claim or action is based on conduct by the elected official by way of tortiously intervening or attempting to intervene in, or by way of tortiously influencing or attempting to influence the outcome of, any judicial action or proceeding for the benefit of a particular party by contacting the trial judge or any commissioner, court-appointed arbitrator, court-appointed mediator, or court-appointed special referee assigned to the matter, or the court clerk, bailiff, or marshal after an action has been filed, unless he or she was counsel of record acting lawfully within the scope of his or her employment on behalf of that party. Notwithstanding Section 825.6, if a public entity conducted the defense of an elected official against such a claim or action and the elected official is found liable by the trier of fact, the court shall order the elected official to pay to the public entity the cost of that defense.

(2) If an elected official is held liable for monetary damages in the action, the plaintiff shall first seek recovery of the judgment against the assets of the elected official. If the elected official's assets are insufficient to satisfy the total judgment, as determined by the court, the public entity may pay the deficiency if the public entity is authorized by law to pay that judgment.

(3) To the extent the public entity pays any portion of the judgment or is entitled to reimbursement of defense costs pursuant to paragraph (1), the public entity shall pursue all available creditor's remedies against the elected official, including garnishment, until that party has fully reimbursed the public entity.

(4) This subdivision shall not apply to any criminal or civil enforcement action brought in the name of the people of the State of California by an elected district attorney, city attorney, or attorney general.

*(g) Notwithstanding subdivision (a), a public entity shall pay for a judgment or settlement for treble damage antitrust awards against a member of a regulatory board within the Department of Consumer Affairs for an act or omission occurring within the scope of the member's official capacity as a member of that regulatory board.*

*(h) For purposes of this section, treble damages awarded pursuant to the federal Clayton Act (Sections 12 to 27, inclusive, of Title 15 of, and Sections 52 and 53 of Title 29 of, the United States Code) for a violation of the federal Sherman Act (Sections 1 to 7, inclusive, of Title 15 of the United States Code) are not punitive or exemplary damages under this division.*