

Another Setback for State Regulatory Boards: Federal Court Denies Texas Medical Board’s Motion to Dismiss Teladoc’s Antitrust Lawsuit

Friday, January 8, 2016

On December 14, 2015, the U.S. District Court for the Western District of Texas denied the Texas Medical Board’s (“TMB”) motion to dismiss an antitrust lawsuit brought by **Teladoc**, one of the nation’s largest providers of telehealth services.^[1]

Teladoc sued the TMB in April 2015, challenging a rule requiring a face-to-face visit before a physician can issue a prescription to a patient. Following two recent Supreme Court cases stringently applying the state action doctrine, this case demonstrates the latest of the continued trend where state-sanctioned boards of market participants face increased judicial scrutiny with respect to the state action doctrine.

The Board Rule at Issue - “New Rule 190.8”

In April 2015 the TMB adopted revisions to various chapters of the Texas Administrative Code governing the practice of medicine. Specifically, Section 190.8(1)(L) (“New Rule 190.8”) sets forth practices the TMB deems to be violations of the Texas Medical Practices Act and prohibits prescription of any “dangerous drug or controlled substance” without first establishing a “proper professional relationship.” A “physician-patient relationship” is defined to require, among other things, a physical examination that must be performed by “either a face-to-face visit or in-person evaluation” (defined elsewhere to require that the patient and physician be in the same physical location).

Teladoc filed a lawsuit, alleging that New Rule 190.8 violated Section 1 of the Sherman Act, prohibiting anticompetitive agreements among competitors to restrain trade (the TMB is a group comprised of competing physicians). Teladoc then obtained a preliminary injunction in May 2015, preventing the TMB from “taking any action to implement, enact and enforce” New Rule 190.8 until Teladoc’s claims are resolved. In issuing the injunction, the court found that Teladoc demonstrated a substantial likelihood of success on the merits of its antitrust claims, a substantial threat of irreparable injury, that the threatened injury outweighed any damage that the injunction might cause the TMB, and that the injunction would not disserve the public interest. The TMB then moved to dismiss, claiming, among other things, entitlement to state action antitrust immunity.

State Action Antitrust Immunity

State action antitrust immunity for professional board regulatory actions has two requirements: the actions must be conducted under “active state supervision,” and they must follow a “clearly articulated state policy” to displace competition. The court held that the TMB could not claim state action immunity because the state did not exercise sufficient control over it. The court did not address the second requirement.

The court’s order devotes significant attention to rejecting the TMB’s state action defense. In *North Carolina*



Article By
[Patricia M. Wagner](#)
[Epstein Becker & Green, P.C.](#)
[Health Law Advisor](#)
[Antitrust & Trade Regulation](#)
[Communications, Media & Internet](#)
[Health Law & Managed Care](#)
[Litigation / Trial Practice](#)
[Texas](#)

State Board of Dental Examiners v. FTC, which we previously [covered](#), the Supreme Court reaffirmed that the state action exemption would not insulate the activities of state boards or regulatory agencies comprised of market participants absent active state supervision of the entity’s challenged conduct.

Both Teladoc and the TMB agreed that active state supervision is a state action requirement, but disagreed as to whether it existed. The district court followed *North Carolina State Board of Dental Examiners*, noting that in order to constitute active supervision, “the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.”

The TMB argued that it is indeed subject to active state supervision since its decisions are subject to judicial review by the courts of Texas, the Texas legislature, and the State Office of Administrative Hearings. The court found these purported review mechanisms to be focused on the mere validity/invalidity of rules—not allowing for an evaluation of the *policies* underlying the rules or bestowing the state with power to *modify* particular Texas Medical Board decisions to accord with state policy. The court also rejected the TMB’s argument that state supervision exists by way of the Texas legislature’s “sunset review” process (where the legislature votes on whether there is a public need for continuation of a state agency) because the legislature has no authority to veto or modify any TMB rules.

Implications

Rules promulgated by state-sanctioned boards comprised of market participants are going to continue facing increased antitrust scrutiny when challenged in court. These rulings continue to show that significant and meaningful state oversight mechanisms are a vital and scrutinized element for agencies seeking state action antitrust immunity. However, this case is far from over, and the TMB thus remains enjoined from implementing, enacting, or enforcing New Rule 190.8 until Teladoc’s claims are resolved. While the Texas Medical Board has announced plans for appeal to the U.S. Court of Appeals for the Fifth Circuit, such a reversal would be highly unlikely at this point—meaning that the case can be expected to proceed into discovery and perhaps trial.

[1] *Teladoc, Inc. v. Texas Medical Board*, 1-15-CV-343 RP (W.D. Tex. Dec. 14, 2015) (order denying motion to dismiss).

© 2019 Epstein Becker & Green, P.C. All rights reserved.

Source URL: <https://www.natlawreview.com/article/another-setback-state-regulatory-boards-federal-court-denies-texas-medical-board-s>