Pepper Hamilton LLP
Attorneys at Law

Texas Medical Board Loses Bid for State Action Immunity

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Jan P. Levine | levinej@pepperlaw.com
Melissa Hatch O'Donnell | odonnellm@pepperlaw.com

THE TELADOC DECISION REINFORCES THAT STATE BOARDS THAT ARE COMPOSED OF MARKET PARTICIPANTS NEED TO REASSESS HOW THEY ARE SUPERVISED IF THEY SEEK SHELTER FROM ANTITRUST SCRUTINY UNDER THE STATE ACTION DOCTRINE.

Judge Robert Pitman of the U.S. District Court for the Western District of Texas recently rejected an invocation of the state action antitrust immunity, adding his opinion to a pair of U.S. Supreme Court decisions limiting the immunity's scope. In his December 14, 2015 opinion, Judge Pitman refused to dismiss an antitrust claim filed by Teladoc, a telemedicine provider, against members of the Texas Medical Board (TMB). By denying state action protection, this case stands as another warning that state medical boards must take heed of the "active supervision" requirement.

This Client Alert analyzes the Western District of Texas opinion and follows up on our prior Client Alerts (available at http://www.pepperlaw.com/publications/the-state-action-doctrine-active-supervision-reigns-supreme-2015-02-26/) regarding state action antitrust immunity.

Background

To enjoy state action immunity to the antitrust laws, a "nonsovereign actor controlled by active market participants" must satisfy a two-pronged test: "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." *N.C. State Bd. of Dental Exam'rs v. FTC,* 135 S. Ct. 1101, 1110 (2015) (internal quotations omitted). In 2013, the Supreme Court addressed the first prong of this immunity in *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013). The Court held that state action immunity applies only when the state legislature has "clearly articulated and affirmatively expressed" a policy displacing competition and a state's grant of general corporate powers is not enough to meet the "clear articulation" standard. *Id.* at 1007.

In *Board of Dental Examiners*, the Supreme Court addressed the second prong of the state action immunity. It held that the North Carolina Board of Dental Examiners' actions were not immune because the board — which was almost entirely composed of "market participants" (*i.e.*, active dentists) — did not receive active supervision by the state when it issued cease-and-desist letters to nondentist teeth whiteners. *Bd. of Dental Exam'rs*, 135 S. Ct. at 1110. The board did not argue that the state had, in fact, actively supervised its conduct; rather, it argued (unsuccessfully) that entities that had been designated as "agencies" by the state were exempt from this requirement. Nonetheless, the Court observed that the "inquiry regarding active supervision is flexible and context-dependent." *Id.* at 1116. "[T]he question is whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Id.* The Court noted that a state supervisor, which may not be an active market participant, must review the substance of anticompetitive decisions and "have the power to veto or modify particular decisions to ensure they accord with state policy." *Id.* at 1116–17. Also, the Court emphasized that the "mere potential for state supervision is not . . . adequate." *Id.* at 1116.

The *Teladoc* Decision

Teladoc alleged that the TMB adopted rules requiring that a physician conduct an in-person examination before treating a patient, which stifled competition by prohibiting Teladoc from offering phone-based treatment. Judge Pitman's decision that state action immunity cannot shield the TMB keeps Teladoc's antitrust claim alive, allowing it to continue its bid to permanently enjoin enforcement of the TMB's new rules. *See Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343, 2015 U.S. Dist. LEXIS 166754 (W.D. Tex. Dec. 14, 2015).

To qualify for state action immunity, the TMB had to show that it received active state supervision because — like the North Carolina Board of Dental Examiners — it was composed largely of market participants. Therefore, Judge Pitman's decision picked up where *Board of Dental Examiners* left off: If "active supervision" is needed, what does that require?

Judge Pitman held that the supervision mechanisms cited by the TMB — potential judicial review and review by the Texas legislature — did not satisfy the active supervision requirement as articulated in *Board of Dental Examiners.* First, the available avenues for judicial review of the TMB's decisions did not fulfill the Supreme Court's requirement that the supervisor "have the power to veto or modify particular decisions to ensure they accord with state policy" because they did not permit a court to evaluate the policy underlying the TMB's actions or to modify (rather than invalidate) a TMB decision. Second, the Texas legislature's oversight authority was limited to a "sunset review" process, which allowed the legislature to vote on whether to continue the agency, and a provision requiring the legislature to be notified of proposed rule changes. Judge Pitman held that neither of these oversight mechanisms allowed the legislature to veto or modify a TMB rule and that the sunset review process was not effective because the last sunset review of the TMB took place in 2005.

Closing his analysis of the active supervision requirement, Judge Pitman emphasized the Supreme Court's holding in the 1988 case *Patrick v. Burget* that the "mere presence of some state involvement or monitoring does not suffice." 486 U.S. 94, 101 (1988). His opinion implicitly rejected the TMB's proposal that a system of supervision provides "realistic assurance" that market participants' regulations do not subordinate state policy to self-interest when "the agency is on notice that all of its rules, policies, actions, and

interpretations are subject to thorough scrutiny." (TMB Opening Brief at 19.) Likewise, he was not persuaded by the TMB's argument that it needed less active supervision than the North Carolina Board of Dental Examiners because, for example, (1) its members were all appointed by the governor and confirmed by the state senate rather than elected by market participants; (2) none of the physician members of the TMB, all specialists, were in direct competition with the Teladoc physicians; (3) the TMB was subject to several obligations and limitations (like the state "open records" act) that applied only to governmental bodies; and (4) the contested rules paralleled some state and federal statutes.

In some ways, Judge Pitman's decision does not break substantial new ground. Neither of the parties cited any case in which the potential for judicial review was found to constitute active state supervision, and Teladoc cited several cases from the late 1980s that held the opposite. Likewise, neither party cited any case in which a sunset provision or a legislative notice provision satisfied the active supervision requirement. On the other hand, in the wake of *Phoebe Putney* and *Board of Dental Examiners*, it is abundantly clear that state medical boards are subject to more scrutiny than ever before, and practices that previously would not have been challenged are prompting serious antitrust exposure. *Teladoc* reinforces that state boards that are composed of market participants need to reassess how they are supervised if they seek shelter from antitrust scrutiny under the state action doctrine.