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Heightened Antitrust Scrutiny of State Regulatory Boards in Wake of N.C. State Bd. Of Dental Exam'rs v. FTC

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Notable antitrust litigation has arisen over the past year challenging actions by state licensing boards comprised of members of the respective professions that the boards regulate. In February 2015, the U.S. Supreme Court ruled that a dental state licensing board consisting of a majority of practicing dentists may not prohibit non-dentists from selling teeth whitening services or products. In the case, *N.C. State Bd. Of Dental Exam'rs v. FTC*, the state board sought to invoke a "state action defense," an argument that governmental agencies acting as sovereign entities

should be exempt from antitrust scrutiny.¹ The Supreme Court rejected the board's argument, determining instead that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may enjoy the state action defense only if the board action is expressed as clearly articulated state policy and is actively supervised by a state official or agency that does not participate in the regulated market.²

Given the multitude of state regulatory boards which have a majority of board members who practice the same profession the boards regulate, the Supreme Court's decision drew considerable attention. In response to numerous questions posed by state officials, in October 2015 the Federal Trade Commission (FTC) published guidance on how it determines whether active supervision of state regulatory boards controlled by market participants exists for purposes of antitrust scrutiny.³ While the FTC explained that it will evaluate instances of active supervision in a flexible and context-dependent fashion, it stated that "the purpose of the active supervision inquiry ... is to determine whether the State has exercised sufficient independent judgment and control' such that the details of the regulatory scheme 'have been established as a product of deliberate state intervention' and not simply by agreement among the members of the state board" ("FTC Staff Guidance" quoting *FTC v. Ticor Title Ins. Co.*).⁴ The factors considered by the FTC in determining whether the active supervision requirement has been satisfied include: (1) ensuring that the supervisor properly assesses the recommended board action; (2) adequately evaluating the substantive reasons for the proposed action; and (3) issuing a written decision explaining the supervisor's rationale for approving, modifying, or disapproving the action.⁵

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Teladoc, Inc. et al. v. Texas Medical Board, et al.

Shortly after the Supreme Court's ruling in *N.C. State Bd. Of Dental Exam'rs*, yet another antitrust challenge arose in response to state regulatory board rulemaking. In May 2015, a U.S. district court granted Teladoc, Inc. a temporary restraining order and preliminary injunction on the Texas Medical Board's (TMB) new rule prohibiting physicians from using telemedicine to diagnose and treat patients without first seeing patients in person for an initial consultation.⁶ How the physician-patient relationship can be appropriately established has been a significantly debated policy issue addressed by many states recently, including Alaska, where FTC Staff sent a comment to the state legislature in March 2016.⁷ Teladoc, a national provider of telehealth services, claimed that the new rule violated the Sherman Act by stifling competition.⁸ TMB did not assert a state action defense at this stage of the litigation but instead offered as its sole justification for the new rule that the rule was designed to protect patient safety. The court rejected TMB's claims, and instead agreed with what it considered considerable evidence of anti-competitive effects of the novel regulation, including increased prices, reduced choice, reduced access, reduced innovation, and a reduced overall supply of physician services.⁹

In June, TMB countered by filing a motion to dismiss, asserting that in adopting the challenged rule it "was acting as the sovereign with multiple layers of oversight" and thus "active oversight immunizes the TMB from federal antitrust law."¹⁰ In its motion, TMB sought to distinguish itself from the facts that generated the Supreme Court's ruling in *N.C. State Bd. Of Dental Exam'rs*. TMB argued that while its board too is made up of a majority of market participants, the state actively supervises TMB through its review of proposed rules. TMB also argued that the practices of TMB physician board members, who are all specialists, have no direct competition with the Teladoc physicians who limit their telemedicine consultations to general and family medicine services.

In December 2015, the district court denied TMB's amended motion to dismiss. In response, on January 8, 2016 TMB appealed that order to the Fifth Circuit Court of Appeals,¹¹ and on January 14 the court ordered all proceedings to be stayed while TMB's appeal is pending. Final adjudication of the *Teladoc* case will have weighty implications on antitrust scrutiny of regulatory boards since this is the first case to be considered by the appellate courts since the *North Carolina* decision. It will likely be many months before a decision is handed down by the Fifth Circuit.

Other Cases Challenging Professional Regulatory Board Action

Additional cases in other professions challenging the compliance of regulatory boards with antitrust laws have followed *N.C. State Bd. of Dental Exam'rs* and *Teladoc*. In *Robb v. Connecticut Board of Veterinary Medicine, et al.*, veterinarian John Robb sued Connecticut's veterinary board for alleged violations stemming from the board's disciplinary action against him over his vaccination procedures.¹² Specifically, Robb's rabies vaccination protocol differed from instructed protocols as prescribed by the state board. Robb argued that no clear policy regarding canine rabies vaccination exists, and that the board's disciplinary action against him constituted a violation of the Sherman Act by conspiring to restrain competition in and to monopolize the practice of veterinary medicine. Additionally, Robb alleged that the board, which included a majority of market participants without any supervisory state official who could change, modify or reverse its decision, violates antitrust laws. The defendant filed a motion to dismiss, which the U.S. district court granted in January 2016 because Robb's allegations were held to be insufficient to state an antitrust conspiracy claim under Section 1 of the Sherman Act.¹³ Specifically, the court held that Robb failed to allege interdependent conduct by the board sufficient to support an inference of antitrust conspiracy.¹⁴

Another recently filed case, *Acess Medical Clinic, Inc. et al. v. Mississippi State Board of Medical Licensure et al.*, provides yet another example similar to *Teladoc* of antitrust litigation against a medical board seeking to prevent the "unauthorized practice of medicine."¹⁵ In this case, Access claimed that the state board violated antitrust law by promulgating and enacting regulations excluding non-physicians from owning a pain management medical practice. Further, Access alleged that the board suppressed competition by enforcing non-existent rules before granting certification to practice pain management and promulgating regulations that create special education and certification requirements for a pain management medical practice as arbitrarily defined by the board. Access submitted, without further explanation, a voluntary Stipulation of Dismissal of all claims asserted against the Board in August, 2015.¹⁶

Yet another case challenging state regulatory action was brought by a group of licensed physical therapists and patients against the North Carolina Acupuncture Licensing Board after receiving cease-and-desist orders for offering dry needling services (*Henry et al. v. North Carolina Acupuncture Licensing Board et al.*).¹⁷ The complaint argued that dry needling, an established physical therapy practice, differs from acupuncture, a claim supported by the North Carolina Attorney General's Office in 2011.¹⁸ While the plaintiffs alleged that the board's efforts violate federal antitrust law, it did not address state action immunity. In December 2015, the Acupuncture Licensing Board filed a motion to dismiss for the alleged failure to sufficiently state a plausible claim for Sherman Act violations. The court has yet to rule on the motion.

Antitrust scrutiny of state regulatory boards has not been confined solely to the medical field. In 2015, LegalZoom.com Inc. filed a \$14 million federal lawsuit against the North Carolina State Bar for allegedly violating the Sherman Act by illegally and unreasonably prohibiting LegalZoom from offering its prepaid legal services in North Carolina.¹⁹ LegalZoom's complaint relied on the *N.C. State Bd. of Dental Exam'rs* case, claiming that the Supreme Court's decision allows state agencies to make decisions regarding who can practice regulated professions free from potential antitrust liability only if a clearly articulated state policy regulating the activity has been established and a state

official maintains oversight. In October 2015, the two parties reached an agreement to settle the dispute, allowing LegalZoom to operate in North Carolina for the next two years.

The Beginning of a Trend?

The aforementioned cases provide notable examples of heightened antitrust scrutiny facing state regulatory boards nationwide that have arisen in the wake of *N.C. State Bd. of Dental Exam'rs*. Considering the marked rise in such litigation, state boards (and their legislatures) seeking immunity from antitrust suits using a State Action defense must ensure that they meet the required standards for invoking the defense. Failure to take appropriate measures may lead to costly litigation and overturned State Action.

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1 *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015).

2 *Id.* at 1106.

3 FTC Bureau of Competition, *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participation* (Oct. 2015), available at https://webcache.googleusercontent.com/search?q=cache:ORsh02n6lXcJ:https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf+&cd=1&hl=en&ct=clnk&gl=us.

4 *Federal Trade Commission v. Ticor Title Insurance Company, et al.*, 112 S.Ct. 2169 (1992).

5 The FTC has not taken any action against professional boards for alleged violations of antitrust laws since the publishing of its FTC Staff Guidance.

6 *Teladoc, Inc. et al. v. Texas Medical Board, et al.*, No. 1:15-cv-00343 (W.D. Tex. 2015).

7 FTC Office of Policy Planning, Bureau of Economics, and Bureau of Competition, *Letter to Alaska State Legislature* (March 25, 2016), available at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-alaska-state-legislature-regarding-telehealth-provisions-senate-bill-74-which/160328alaskatelehealthcomment.pdf.

8 The Sherman Act outlaws activities that restrict interstate commerce and competition in the marketplace.

9 *Teladoc, Inc. et al. v. Texas Medical Board, et al.*, No. 1:15-cv-00343 (W.D. Tex. 2015).

10 *Id.*

11 *Teladoc, Inc. et al. v. Texas Medical Board, et al.*, No. 16-50017 (5th Cir. 2016).

12 *Robb v. Connecticut Board of Veterinary Medicine et al.*, No. 3:15-cv-00906 (D. Conn. 2016).

13 *Id.*

14 *Id.*

15 *Acess Medical Clinic, Inc. et al. v. Mississippi State Board of Medical Licensure et al.*, 3:15-cv-00307 (S.D. Miss. 2015).

16 *Acess Medical Clinic, Inc. et al. v. Mississippi State Board of Medical Licensure et al.*, Stipulation of Dismissal, 3:15-cv-00307 (S.D. Miss. 2015). While it is not known why the voluntary dismissal was filed, the non-physician owner of the

clinic has now been charged in federal court for criminal activity: <http://theadvocate.com/news/15003401-123/longtime-david-duke-associate-accused-of-running-pill-mill-out-of-new-orleans-east-pain-clinic>.

17 *Henry et al. v. North Carolina Acupuncture Licensing Board et al.*, No. 1:15-cv-00831, (M.D.N.C. 2015).

18 See State of North Carolina Department of Justice, *Advisory Opinion: Dry Needling* (Dec. 1, 2011), available at https://www.apta.org/uploadedFiles/APTAorg/Advocacy/State/Issues/Dry_Needling/NCBPTEStatement_DryNeedling.pdf.

19 *LegalZoom.com, Inc. v. North Carolina State Bar, et al.*, No. 1:15-cv-00439 (M.D.N.C. 2015).



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