
SUPREME COURT OF MISSOURI

TAP PHARMACEUTICAL PRODUCTS)
INC., D/B/A PHARMACY SOLUTIONS,)
)
Respondent,)
)
v.) Case No. SC88318
)
STATE BOARD OF PHARMACY,)
)
Appellant.)

Transferred from the Court of Appeals, Western District

Substitute Brief of Appellant Filing as Respondent per Rule 84.05(e)

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STATEMENT OF FACTS

Appellant, Missouri Board of Pharmacy, is an agency of the state of Missouri established by § 338.110, RSMo 2000, to administer the provisions of Chapter 338, RSMo. Respondent TAP Pharmaceutical Products, Inc. ("TAP") is licensed by the Board as a pharmacy.

In December 2001, TAP pled guilty in the United States District Court for the District of Massachusetts to the felony offense of conspiracy to violate 21 U.S.C. §§ 331(t) and 333(b), by causing the sale of free drug samples, in violation of 18 U.S.C. § 371. *United States v. TAP Pharmaceutical Products, Inc.*, No. 1: 01-10354-001-WGY. (Legal File ("L.F.") 77-92).

Also in December 2001, TAP and the Director of the Medicaid Fraud Control Unit of the Office of the Attorney General of Missouri, entered into a Settlement Agreement and Release. (L.F. 145-166).

On January 7, 2004, Mr. Robert Angstead, as attorney for the Board, filed a Felony Conviction Complaint against TAP with the Board, requesting a hearing pursuant to § 338.065.1, RSMo 2000, and seeking to impose discipline on TAP's pharmacy permit. (L.F. 15-17). On January 9, 2004, the Board sent, by certified mail, a Notice of a February 4, 2004, Felony Disciplinary Hearing to H. Thomas

Watkins, President of TAP. (L.F. 18-19). The hearing was continued twice. (L.F. 20). The Board finally held the hearing on September 9, 2004. (L.F. 22).

At the hearing, Mr. Angstead represented the Board; Mr. Morgan R. Hirst and Mr. Michael Schmid represented TAP. (L.F. 24). Assistant Attorney General William Vanderpool served as a hearing advisor to the Board. (L.F. 27-28). Six members of the Board were present. (L.F. 28). TAP neither objected to the Board's jurisdiction nor moved to dismiss or otherwise objected to the disciplinary proceedings.

Mr. Angstead moved to admit certified copies of the Indictment/Information, correspondence, and Judgment from the federal guilty plea; they were received into evidence without any objections. (L.F. 25, 34). Mr. Hirst moved to admit two exhibits (TAP's Corporate Integrity Agreement and the State Settlement Agreement and Release), which were received into evidence. (L.F. 25, 43, 55). And Mr. Hirst presented two witnesses: Mr. Charles Summercorn and Mr. Mark Graves. (L.F. 25, 35-59).

The Board issued its Findings of Fact, Conclusions of Law and Disciplinary Order on February 15, 2005. (L.F. 167-170).¹ The Board placed TAP's pharmacy permit on probation for a period of three years, effective February 25, 2005. (L.F. 169).

TAP filed its Petition for Review in the Circuit Court of Cole County, Missouri, on April 14, 2005. (L.F. 5-8). On August 18, 2005, Honorable Thomas J. Brown, Judge, entered Findings of Fact, Conclusions of Law and Judgment. (L.F. 221-231). Judge Brown reversed the Board's Disciplinary Order and remanded the case back to the Board, directing the Board to file its complaint with the Administrative Hearing Commission ("AHC") to determine whether cause for discipline exists. (L.F. 231). The Board filed a notice of appeal on September 23, 2005.

¹ As noted by Respondent's counsel in TAP's brief (footnote 2), due to drafting errors, the Findings of Fact, Conclusions of Law and Disciplinary Order erroneously cites §§ 338.055 and 621.110, RSMo. Neither party disputes that the Missouri Board of Pharmacy held a disciplinary hearing and imposed discipline against TAP's pharmacy permit pursuant to § 338.065, RSMo.

ARGUMENT

I. Standard and burdens.

Standard of review. Pursuant to § 536.140, RSMo 2000,² the appellate court reviews the decision of the agency, rather than the circuit court's judgment. *Wright v. Mo. Dept. of Social Servs.*, 25 S.W.3d 525, 527 (Mo. App. W.D., 2000). Under § 536.140.2, RSMo, the appellate court determines whether the action of the agency is (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) unsupported by competent and substantial evidence upon the whole record, (4) unauthorized by law, (5) made upon unlawful procedure or without a fair trial, (6) arbitrary, capricious or unreasonable, or (7) an abuse of discretion. Judicial review of an administrative agency decision is limited to determining whether the agency's decision is unsupported by competent and substantial evidence upon the whole record, is arbitrary, capricious or unreasonable, or is an abuse of discretion. *Wright*, 25.S.W.3d at 527.

² All statutory citations refer to the 2000 Revised Statutes of Missouri unless otherwise noted.

The courts look at the entire record when reviewing an agency's decision. *Lagud v. Kansas City Board*, 136 S.W.3d 786, 791 (Mo. banc 2004). Under § 536.140.5, the reviewing court "shall not substitute its discretion for discretion legally vested in the agency."

Burden on appeal. Before addressing the two points raised by TAP, we address a question raised as a result of the recent (and not yet final) decision by the Missouri Court of Appeals, Eastern District: Who bears the burden in an appeal from a circuit court decision reversing an agency decision?

Versatile Management Group, Inc. v. Finke, No. ED88144 2007 WL 1412402 (Mo. Ct. App. E.D. May 15, 2007), was procedurally similar to this case. Versatile Management sought and was refused licenses or renewal from the Department of Insurance. Versatile Management took the denials to the Administrative Hearing Commission, which ruled for the Department. Versatile Management then prevailed in circuit court, and the Department of Insurance filed a notice of appeal. The Court of Appeals did not reach the merits; it dismissed the appeal (thus in effect affirming the circuit court's decision) because of inadequacies in the points relied on and argument in the brief filed by the Director of the Missouri Department of Insurance.

The Eastern District recognized that the question before it on appeal was not the correctness of the circuit court's decision against the agency, but of the AHC's decision in the agency's favor. 2007 WL 1412402 at *2. See, e.g., *State ex rel. Riverside Pipeline Co. v. Public Serv. Comm'n*, 165 S.W.3d 152, 155 (Mo. banc 2005) ("...in an appeal following judicial review of an administrative agency's decision ..., the appellate court review the agency's decision, rather than the circuit court's judgment."); *Missouri Coalition for the Environment v. Herrmann*, 142 S.W.3d 700, 701 (Mo. banc 2004) (same).

Normally, of course, when an appellate court considers the correctness of a decision, it is the burden of the person attacking that decision (here and in *Versatile Management*, the licensee) to demonstrate that the decision was erroneous. The opposing party, who presumably sees no error in the decision being reviewed, is not obligated to identify potential errors but now defends against them. Consistent with that burden, even the Eastern District in *Versatile Management* labels as "generally correct" (2007 WL 1412402 at *2) the rule that the respondent, as the party defending the decision being reviewed, "is not required to brief his case on appeal and may rely upon the presumption of a right

judgment in the trial court.” *Id.* at *2. See also *Mochar Sales Co. v. Meyer*, 373 S.W.2d 911, 913 (Mo. 1964).

But in *Versatile Management*, the Eastern District declared that appeals of circuit court reversals of administrative agency decisions are unique – that there the burden is reversed, and the party defending the decision at issue loses the presumption. Thus the Eastern District announced that if the party filing the respondent’s brief (in *Versatile Management* and here, the agency) does not brief the appeal in accordance with the rules for appellants’ briefs, the appeal is dismissed and the circuit court decision (*not* the AHC decision actually being reviewed) is affirmed. The Eastern District held that the agency bears: “the burden of persuading this Court either why the circuit court erred or why the prior administrative decisions were correct.” 2007 WL 1412402 at *2.

The problem with the Eastern District’s imposition of the burden and of the briefing requirements on the agency becomes evident immediately upon its first step in reviewing the adequacy of the agency’s brief: reviewing the point relied on for sufficiency. The Eastern District held that the “point” in the agency’s respondent’s brief was insufficient, first, because it “only vaguely references the decisions in dispute.” But the rule does not require identification

of “decisions in dispute.” Rather, the first part of a properly “point relied on” in an appeal of an administrative decision must “identify the administrative ruling or action the appellant challenges.” Rule 84.04(d)(2). Certainly for purposes of Rule 84.02(d)(2), the party who prevailed at the administrative tribunal cannot be the “appellant,” for that party challenges nothing in “the administrative ruling or action.” The requirement of a proper point relied can only be fairly read to impose an obligation on the party who lost at the AHC. Indeed, it is impractical, if not impossible, for the agency here (or in *Versatile Management*) to unilaterally draft a “point relied on” conforming to the Rule, for in neither instance is the agency challenging any administrative ruling or action; the private party is.

The “point relied on” formulation that imposes the burden on the party objecting to the administrative decision is consistent with the order of briefing required by Rule 84.05(e). That rule required *Versatile Management* and TAP Pharmaceuticals to “file the appellant’s brief and reply brief.” Thus the agency is allowed to wait until it sees what aspects of the decision are at issue, to defend only those portions of the decision that are challenged, and to defend only against the points being made in those challenges.

Were the Eastern District right, and the party who prevailed at the agency bore “the burden of persuading this Court either why the circuit court erred or why the prior administrative decisions were correct” (2007 WL 1412402 at *2), the procedure would have to be quite different from current practice. The party defending the agency decision would have to draft a brief in which it addressed every aspect of both the circuit court order and the administrative decision. That isn’t what the rule requires, nor can it be reconciled with the well-established principle that it is the administrative decision that is before the court. The system created by this Court’s Rules imposes the briefing burdens on the party challenging the only decision before the court: that of the administrative tribunal.

II. The procedure used by the Board of Pharmacy – holding a hearing at which it receives evidence of the felony conviction and considers what discipline is appropriate – gave TAP the process it was due. (Responds to Point I)

A. TAP was given what constitutional due process requires: notice and an opportunity to be heard.

Due process requires two things – before a person can be deprived of a property interest (here, before TAP could be deprived of its pharmacy license): notice and a meaningful opportunity to be heard. Due process – under both the constitutions of both Missouri and the United States – is thus satisfied when a licensee has notice and a hearing at which it has an effective opportunity to defend. *Artman v. State Bd. of Reg'n for the Healing Arts*, 918 S.W.2d 247, 251 (Mo. banc 1996) (citation omitted): *See also Clark v. Bd. of Dirs. of School Dist. of Kansas City*, 915 S.W.2d 766, 771 (Mo. App., W.D. 1996). TAP received both before any action was taken against its license.

Notice. The record does not establish whether TAP received the original, January 9, 2004, Notice of Felony Disciplinary Hearing. *See* TAP Brief at 9. But that hearing was continued, and TAP agrees that the Board sent an essentially identical notice of the hearing scheduled for September 9, 2004. TAP Br. at 9. The undisputed record shows that TAP's counsel actually received that notice by August 26, 2004. (L.F. 26-27).³

³ The first certificate of service for the Notice of Felony Disciplinary Hearing for September 9, 2004 was signed for by Doug Doerhoff on August 23, 2004, but the envelope containing the notice was returned to the Board office. (L.F. 26). The second certificate of

TAP does not argue that the notice it received was in any specific way insufficient. Nor does TAP argue that the notice was tardy – an argument that would be answered by pointing out that nothing in the record suggests TAP asked for a continuance or otherwise claimed prejudice by virtue of the short time between the confirmed receipt of the notice and the hearing date.

Thus TAP's first "point relied on" does not include a claim that it was deprived of the notice portion of its due process rights.

Hearing. What TAP does argue, of course, is that it was deprived of the second protection promised by due process: a sufficient hearing. But again, there is no dispute that TAP got a hearing – and that hearing met the constitutional requirements.

The record demonstrates, as TAP itself explains (TAP brief at 9-10), that on September 9, 2004, the Board in fact held a hearing on whether and how to discipline TAP's license. TAP does not and cannot argue that it was unable to

service for the Notice of Felony Disciplinary Hearing for September 9, 2004 was returned to sender on August 23, 2004. (L.F. 27). The third certificate of service for the Notice of Felony Disciplinary Hearing for September 9, 2004 was signed for by McCullough at Schreimann, Rackers, Francka & Blunt, LLC, on August 26, 2004. (L.F. 27).

appear at the hearing. In fact, it was represented by two lawyers, Michael Schmid and Morgan R. Hirst.

TAP does not and cannot suggest that its ability to develop the facts in the hearing was in any way impaired. Certainly TAP could not reasonably say that it was deprived of the opportunity to confront or cross-examine witnesses. Mr. Robert Angstead, who represented the Board at the hearing, did not present any witnesses. Nor could TAP argue that it was deprived of the opportunity to object or respond to exhibits. TAP's counsel did not object to admission of the documents proving the felony conviction. (L.F. 34). And, TAP was given an opportunity to present its own case – and it did so, presenting two witnesses and offering two exhibits, both of which were admitted into evidence. (L.F. 25).

TAP does not and cannot argue that it was deprived, at the hearing, of the chance to defend, *i.e.* to argue its position with regard to the proper action in light of the felony conviction. TAP was served with but chose not to file an answer to the Board's Felony Conviction Complaint. But at the hearing, TAP made the only arguments it suggests, even now, that it could make. And TAP presented evidence to support its only factually-based argument: it offered into evidence

the Agreement and presented Mr. Mark Graves as a witness, who testified to the contents of the Agreement. (L.F. 55-59).

TAP does not and cannot argue that the Board did anything but what it said it did: that it “fully considered all the evidence.” (L.F. 169). Instead, TAP makes a single argument in support of its claim that it was deprived of a sufficient hearing in constitutional due process terms: that the hearing before the Board was insufficient because of the manner in which the Board, its staff, and lawyers bring and address complaints. In this view, the Board was unable to hold a constitutionally sufficient hearing because it was not disinterested – because it played multiple roles. But the Board did not play multiple roles at the hearing. Mr. Angstead prosecuted the case. The Board was the judge. Mr. William Vanderpool acted as the hearing advisor.

Of course, the Board did have an indirect prosecutorial role. Like most licensing boards, the Board of Pharmacy administers a staff that considers complaints, and authorizes staff to bring complaints to the AHC or to the Board. This Court has rejected the argument that this structure violates the due process rights of licensees. “Although a neutral decisionmaker is preferable, the mere fact that the Board initiates a charge and then tries it, does not, by itself, violate

due process.” *Artman*, 918 S.W.2d at 250 (citation omitted). An administrative body may play multiple roles in the proceedings, so long as judicial review is provided. *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1983).

For all the above stated reasons, TAP’s constitutional due process rights were not violated.

B. The statutory scheme gives the Board authority to act on a basis for discipline – here, a felony conviction – already litigated in another forum without first asking the Administrative Hearing Commission to find cause to discipline.

TAP’s real complaint is not that it didn’t receive the requirements of constitutional due process – *i.e.*, notice and an opportunity to be heard. Though TAP gives its argument a due process label (due process is the only basis for error identified in the “point relied on”), it is really a jurisdictional claim: TAP asserts that the Board lacked authority to act. In TAP’s view, there was an unfulfilled prerequisite to a Board hearing and Board discipline: referral to and a finding by the AHC.

TAP derives that argument from § 621.045.1. That section grants to the AHC jurisdiction over certain matters, including disciplinary matters for the Board:

1. The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in those cases when, under the law, a license issued by any of the following agencies may be revoked or suspended or when the licensee may be placed on probation or when an agency refuses to permit an applicant to be examined upon his qualifications or refuses to issue or renew a license of an applicant who has passed an examination for licensure or who possesses the qualifications for licensure without examination:
... Board of Pharmacy

The Board does not dispute that the AHC is thus authorized to determine whether there is cause to discipline, *i.e.*, to make findings as to the facts on which discipline could be based.

The question TAP poses is whether the AHC's authority under

§ 621.045.1 is exclusive, i.e., whether it is a violation of due process for the Board to act other than following a decision by the AHC obtained pursuant to § 621.045.1. In TAP's view, the answer is "yes" – that the Board must file a complaint with and obtain a decision from the AHC in order to impose any discipline on any pharmacy permit. But § 621.045.1 certainly does not require that. It gives the AHC authority, but it does not purport to define the exclusive authority of the Board.

The question must be, then, whether the Board has authority independent of § 621.045.1 to take up the question of disciplinary action in the circumstances of this case: *i.e.*, where the basis for discipline is a felony conviction already adjudicated in another forum. Certainly due process doesn't deprive the Board of such authority; a felon has already had notice of and an opportunity to be heard on the question of its criminal liability. So the only question is whether some statute gives the Board (whose authority is necessarily defined by statute) authority to take up the question upon learning of the conviction.

There is a statute that unequivocally gives the Board such authority:

§ 338.065, RSMo. That statute does not give the Board broad authority to proceed independent of AHC involvement provided by § 621.045.1. It is limited to instances where licensees receive certain kinds of felony convictions:

1. At such time as the final trial proceedings are concluded whereby a licensee . . . has been adjudicated and found guilty, or has entered a plea of guilty or nolo contendere, in a felony prosecution . . . for any offense reasonably related to the qualifications, functions or duties of a licensee, permittee, or registrant pursuant to this chapter or any felony offense, an essential element of which is fraud, dishonesty or an act of violence, or for any felony offense involving moral turpitude, whether or not sentence is imposed, the board of pharmacy may hold a disciplinary hearing to . . . censure or place the licensee . . . on probation . . . , or may suspend, . . .or revoke the license

§ 338.065.

There is no dispute here that TAP had “entered a plea of guilty . . . in a felony prosecution.” Thus under the unambiguous terms of § 338.065, the Board

was authorized to “hold a disciplinary hearing” and to place TAP’s license on probation. Nothing in § 621.045.1 says – or even implies – the contrary.

The scheme created by the Board’s statutes are not parallel to those addressed in the case TAP relies upon, *State Board for Registration for the Healing Arts v. Finch*, 514 S.W.2d 608 (Mo. App. 1974). There, the court recognized that the statutes giving the board “the primary responsibility” for evaluating “Dr. Finch’s past conduct and ... present moral character” – the bases for disciplining his license – was once “unquestionably” within the board’s authority. *Id.* at 612. But that “situation ... changed radically with the enactment in 1965 of the Administrative Hearing Commission Act.” *Id.* In the “completely new hearing process” created by the General Assembly, the evaluation of Dr. Finch’s behavior had to be evaluated first by the AHC. *Id.* at 613.

Certainly the same change affected the 1951 laws that established the Board of Pharmacy. But here, the Board was not exercising the jurisdiction it was granted in 1951, nor any jurisdiction granted between 1951 and 1965. The source of its authority, § 338.065, was enacted 25 years after the AHC was created. It

was a change from the scheme that existed from 1965 until 1990, under which even discipline of convicted felons had to proceed first through the AHC.⁴

Again, here, the Board has specific and express statutory authority, granted by the General Assembly, to conduct disciplinary hearings outside of the disciplinary process used more generally as set out in §§ 621.045, RSMo, and 338.055.

Of course, § 338.065 gives the Board the authority to act unilaterally *only* when the prerequisites are met, *i.e.*, only when there is a certain type of final

⁴ In the court of appeals, TAP also relied on *Bodenhausen v. Mo. Bd. of Reg'n for the Healing Arts*, 900 S.W.2d 621 (Mo. banc 1995), which it does not cite here. There, the Missouri State Board of Registration for the Healing Arts relied on § 536.060, RSMo 1989, for the proposition that it did not need to file a complaint at the AHC. 900 S.W.2d at 622. But the *Bodenhausen* holding was limited to proceedings brought under §§ 621.045 and 334.100, RSMo. *Id.* at 622-23. See *Cohen v. Mo. Bd. of Pharmacy*, 967 S.W.2d 243, 247 (Mo. App., W.D. 1998). But § 334.100, like § 338.055, is different from § 338.065, RSMo. And in *Bodenhausen*, the Court did not address § 338.065, RSMo, or any similar statute.

felony adjudication. It does not purport to cover all criminal violations or criminal convictions. Section 338.055, which includes on the list bases for the Board to file a complaint with the AHC a “criminal prosecution,” gives broader authority to the Board, but requires AHC action. The existence of that broader authority does not limit the specific grant of authority in § 338.065, which is *specific* to “felony prosecution[s]” involving fraud, dishonesty and crimes involving moral turpitude. Perhaps the Board could invoke the broader authority §§ 338.055 and 621.045 when faced with a conviction of a felony involving fraud, and file a complaint in the AHC. But in light of the specific grant of authority in § 338.065, it is not required to do so.

TAP argues, to the contrary, of course. In TAP’s view, there is always a question of whether there is cause to discipline, and that question is not decided automatically by a felony conviction. To that point, TAP is right: § 338.065 does not apply to all felony convictions, so someone has to determine whether a particular felony conviction fits within the statute. But what TAP does not have is authority for the proposition that despite the unambiguous grant of authority to the Board itself in § 338.065, only the AHC can decide whether a particular felony conviction qualifies.

In the absence of pertinent authority, TAP crafts its argument from the structure of the general administrative process – *i.e.*, from the division between determining whether there is cause to discipline (generally the responsibility of the AHC) and what discipline (if any) to impose (generally the responsibility of the licensing boards). *See* TAP Brief at 19. But, nothing in § 338.065 suggests that the Board cannot address both questions – as it did here. The fact remains that the Board was authorized by statute to do precisely what it did here: to itself determine whether TAP had been convicted of a qualifying felony, and if so, decide what discipline was appropriate.⁵

⁵ TAP also argues that the Board made the determination of whether the felony qualified under § 338.065 separately, before the notice and hearing. But nothing in the facts here or in the Board’s decision supports that claim. The Board learned of the felony conviction and authorized its attorney to bring a request for discipline. Whether the felony actually fit within the statute remained undecided until the Board took up the matter after the hearing. There was nothing in the notice nor in the hearing procedure that barred TAP from arguing that the felony for which it was convicted did not qualify. Indeed, TAP’s silence as to that question, both at the agency level and on appeal, demonstrates its lack of merit.

III. The Settlement Agreement and Release did not release the Board's administrative licensure claims against TAP's pharmacy permit (Responds to Point II).

TAP's first point could not ultimately give it relief; the most it could get would be a remand with a requirement that the Board take the matter to the AHC for a determination whether TAP had been convicted of a crime for which discipline could be appropriate. TAP's second point, however, would be dispositive regardless of which administrative tribunal has authority to act.

Coincident with its felony plea, TAP entered into a settlement agreement with the state of Missouri. (L.F. 145). In TAP's view, the State Settlement Agreement and Release bars any action by the Board against TAP's license that has any connection to TAP's felonious acts. In fact, the Agreement is not nearly so broad. In fact, it specifically excludes from release "administrative liability." L.F. at 152-53.

In determining whether the Board is barred from disciplining TAP's pharmacy permit, this Court must ascertain the parties' intentions when the parties entered into the Agreement. *See Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995). To do so, the court must review the terms of the

Agreement in their entirety. *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. banc 1993). The terms of this Agreement confirm that the parties did not intend to release TAP from the possibility of discipline.

Specifically, the parties expressly agreed in Paragraph 3 that the agreement “specifically does *not*. . . release TAP. . . from any and all of the following. . . (f) except as *explicitly* stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs. . .” (L.F. 152-153 (emphasis added)).

TAP recognizes (TAP Brief at 27) that Paragraph 3 generally excludes from the release “administrative liability,” and it does not try to suggest that the discipline of its license is not an “administrative liability.” Thus TAP must find language in the Agreement that “explicitly” releases this kind of administrative liability. TAP purports to find such language in Paragraphs 2 and 4.

Paragraph 2 (L.F. 152) excludes certain kinds of administrative “claims”: “the state of Missouri on behalf of itself, its officers, agents, agencies and departments shall release and forever discharge TAP. . . from any civil and administrative claims for damages or penalties. . .” (L.F. 152). But licensure discipline does not involve “damages or penalties.” The laws governing

licensure are not penal in nature. *Yonge v. State Bd. of Reg'n for the Healing Arts*, 451 S.W.2d 346, 349 (Mo. banc 1969). The various licensing laws are remedial in nature, and enacted for the protection of the public's life and property. *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 290 (Mo. App., W.D. 1989). A release of "claims for damages or penalties" simply does not cover remedial actions.

The parties' dispute over the meaning of Paragraph 4 rests on a grammatical question. That paragraph extends the release to cover "any administrative claim or any action seeking exclusions from the state of Missouri's Medicaid program." (LF 153). In TAP's view, the paragraph covers two different things: "any administrative claim" and "any action seeking exclusions" from Medicaid. But in the context of the paragraph, that reading makes no sense. The entire paragraph is dedicated solely to participation in Medicaid. To read it as TAP demands is to say that in the middle of a paragraph about Medicaid, the parties deliberately inserted a release that in essence renders the "administrative liability" exclusion in Paragraph 3 a nullity. The better reading of Paragraph 4 is that it applies only to administrative claims in and exclusion from the Medicaid program.

That reading, unlike TAP's, is consistent with the focus of the entire document. That focus is manifest, first, in the Preamble, where the parties indicate that they entered the Agreement with the "inten[t] to resolve civil claims for the conduct" to which TAP plead guilty. (L.F. 145, ¶ A). The "Covered Conduct" defined in Preamble Paragraph F specifically describes Medicaid claims and Medicaid-related conduct. (L.F. 146-49). All of the paragraphs prior to the Covered Conduct and after the Covered Conduct refer to Medicaid-related claims. In the opening sentence in paragraph F of the Agreement, the parties say that "the state of Missouri contends that it has Medicaid-related civil claims against TAP[.]" (L.F. 146). The parties go on to state their goal: "[T]he Parties mutually desire to reach a full and final compromise of the civil and administrative Medicaid-related claims the state of Missouri has against TAP." (L.F. 149). The Agreement further states, "The payment of the Settlement Agreement fully discharges TAP from any obligation to pay Medicaid-related restitution, damages, and/or any fine or penalty to the State for the Covered Conduct." (L.F. 152, ¶ 2). Licensure discipline is not among the releases "explicitly stated in this Agreement." (L.F. 152-153).

In *Commonwealth of Pennsylvania v. TAP Pharmaceutical Products, Inc., et al.*, 885 A.2d 1127 (2005), the Commonwealth Court of Pennsylvania reviewed a similar settlement agreement that TAP reached with Pennsylvania, and considered whether that agreement barred the state's non-Medicaid claims against TAP. The court determined that "because the term 'Covered Conduct' pertains solely to Medicaid claims, the reference. . . to administrative claims for the 'Covered Conduct' must limit the terms of the Commonwealth's release to claims solely arising under the Medicaid program." 885 A.2d at 1150.

The State of Missouri neither contemplated any claims other than Medicaid-related claims, nor intended to release any claims other than Medicaid-related claims against TAP. As did the Pennsylvania court, this Court should read the Agreement as limiting the release to only Medicaid-related claims.

If this Court finds that the Agreement is ambiguous as to whether the State of Missouri released the Board's licensure claims after reviewing TAP and the Board's contentions, public policy dictates that this Court should find in favor of the Board. The Board's licensing laws were enacted to protect Missouri citizens. *See Myers*, 779 S.W.2d at 290. The Board's mission is to promote, preserve, and protect the health, welfare, and safety of the public by enforcing and regulating

the practice of pharmacy in Missouri.⁶ The General Assembly granted the Board the power to make rules and regulations “necessary to carry out the purposes and enforce” the regulation of pharmacies and the practice of pharmacy.

§ 338.280, RSMo; *see* § 338.140, RSMo. TAP pled guilty to the “conspiracy to violate the Prescription Drug Marketing Act, 21 U.S.C. §§ 331(t) and 333(b) by causing the billing of free drug samples[.]” (L.F. 145-6, ¶ C). At no point in time has TAP denied pleading guilty to violating 21 U.S.C. §§ 331(t) and 333(b) or causing the billing of free drug samples. This type of conduct affects the health, welfare, and safety of the public of Missouri. The Board has a duty and responsibility to protect the public of Missouri from such conduct.

⁶ *See* <http://pr.mo.gov/boards/pharmacy/annual-report-2003.pdf>, at p. 4, last visited May, 18, 2007.

CONCLUSION

For the reasons stated above, the decision of the Board should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 20th day of May, 2007, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,482 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

State Solicitor