

Interlocutory Orders, Etc.

IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, June 6, 2018

Order denying respondent's motion to stay proceedings pending review by the United States Court of Appeals for the Fifth Circuit.

ORDER DENYING STAY PENDING APPELLATE REVIEW

On April 10, 2018, the Commission issued an Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's state action defenses ("April 10 Order"). Respondent filed a Petition for Review of the April 10 Order with the United States Court of Appeals for the Fifth Circuit and submitted to the Commission a Motion to Stay Proceedings Pending Appellate Review ("Motion to Stay").¹

The administrative proceeding that Respondent seeks to stay involves allegations that the Louisiana Real Estate Appraisers Board ("the Board") violated Section 5 of the Federal Trade Commission Act by unlawfully restraining price competition for real estate appraisal services. The adjudication has now proceeded through the close of most discovery and the exchange of witness lists, most exhibits, and expert reports. The evidentiary hearing is scheduled to begin on October 15, 2018.

Respondent argues that a stay is appropriate to protect Louisiana's sovereign interests because the Board is immune from suit under the state action doctrine, and that immunity is lost if the Board must go through trial. Complaint Counsel oppose the Motion for Stay. They argue Respondent neither is entitled to interlocutory appellate review of the Commission's April 10 Order, nor has shown good cause to stay the proceeding.

¹ Respondent subsequently moved for leave to file a reply in support of its Motion to Stay. The Commission grants the requested leave and has considered the contents of Respondent's Reply.

Interlocutory Orders, Etc.

Commission Rule of Practice 3.41(f)(1), 16 C.F.R. § 3.41(f)(1), states, in relevant part:

The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding: (i) Unless a court of competent jurisdiction, or the Commission for good cause, so directs

For the reasons explained below, the Commission does not find good cause to stay this proceeding.

Respondent's briefing in support of its Motion to Stay offers no good cause to stay this proceeding, and no reason why the Commission's April 10 Order should be overturned.² Respondent has not argued the state action issues – upon which its claim of immunity from suit relies – were wrongly decided. The Commission's April 10 Order comprehensively addressed applicability of the state action doctrine to this proceeding. That Order rejected Respondent's state action defenses as well as a mootness claim predicated on the state action doctrine. The Commission found that, to satisfy the state action defense, Respondent needed to demonstrate the State of Louisiana actively supervised its allegedly anticompetitive conduct. The Commission held there was no genuine dispute of fact that the Board's allegedly anticompetitive conduct was not actively supervised prior to revocation of its governing rule in 2017. Further, the Commission found the evidence the Board proffered was insufficient to show that the State of Louisiana actively supervised reissuance of that rule in 2017 or that it would actively supervise enforcement proceedings under the rule in the future. Respondent's briefing does not identify purported failures in the Commission's findings or reasoning.

² Beyond this, the Commission has long taken the position that the state action defense does not confer immunity from suit and that rulings denying the state action defense do not give rise to an immediate right to interlocutory appeal. *See, e.g., S. C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); Brief for the United States and the Federal Trade Commission as Amici Curiae, *Teladoc, Inc. v. Texas Med. Bd.*, No 16-50017 (5th Cir. Sept. 9, 2016).

Interlocutory Orders, Etc.

Respondent's other contention – that a stay would avoid potentially unnecessary litigation expenses – is not persuasive. As noted above, discovery and other pretrial proceedings have almost finished, and their expenses have already been borne. A stay would stop the progress of this litigation just before it reaches its culmination. Under these circumstances, the general maxim – that routine expenses of litigation are insufficient grounds for staying proceedings³ – applies.

The public interest supports denying a stay to avoid what may be ongoing anticompetitive conduct. The Complaint alleges that, through issuance and enforcement of its Rule 31101, the Board has prohibited appraisal management companies from arriving at real estate appraisal fees through the operation of the free market and that it has enforced the Rule in a way that tends to raise prices paid by appraisal management companies for real estate appraisal services. Complaint ¶¶ 3, 44. In the April 10 Order, the Commission found a controlling number of Board members were Board-licensed real estate appraisers. If the Complaint's allegations are substantiated, a Board controlled by real estate appraisers has been regulating appraisals in a manner that tends to raise appraisal fees. Until these allegations are resolved, the Board could continue to act in a manner that may be found anticompetitive. Accordingly, granting a stay could undermine the public interest in maintaining competition.

The public interest also favors the expeditious resolution of the Commission's complaints. *Cf.* Commission Rule of Practice 3.1, 16 C.F.R. § 3.1 (stating the Commission's policy to conduct its adjudicatory proceedings expeditiously). Commission opinions resolving competition issues provide valuable guidance not only to respondents, but also to third parties in similar circumstances. Here, resolving the Complaint's allegations may have particular utility for other states considering mechanisms to ensure that

³ *Cf.* Order Denying Respondent's Expedited Motion to Stay Part 3 Administrative Proceeding and Move the Evidentiary Hearing Date (Jan 12, 2018) ("Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters."). The Commission's January 12 Order addressed Respondent's third request to stay this proceeding. The current Motion to Stay is Respondent's fifth such request.

Interlocutory Orders, Etc.

lenders and their agents compensate appraisers at “customary and reasonable” rates, given the backdrop of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 1639e(i)(1). A stay could delay substantially such guidance.

Accordingly,

IT IS ORDERED that the Motion of Louisiana Real Estate Appraisers Board to Stay Proceedings Pending Appellate Review is hereby **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**WILH. WILHELMSSEN HOLDING ASA,
WILHELMSSEN MARITIME SERVICES AS,
RESOLUTE FUND II, L.P.,
DREW MARINE INTERMEDIATE II B.V.,
AND
DREW MARINE GROUP, INC.**

Docket No. 9380. Order, June 13, 2018

Order granting, in part, respondents' Expedited Motion for Continuance of Administrative Hearing.

ORDER GRANTING 30-DAY CONTINUANCE OF THE
ADMINISTRATIVE HEARING

Respondents Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (together, "Wilhelmsen") and Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. have moved to postpone the administrative hearing, which is scheduled to begin on July 24, 2018, until October 22, 2018. Complaint Counsel respond that Respondents have not shown good cause for the requested continuance and consequently oppose the motion.¹

Respondents argue that a parallel action brought by the Federal Trade Commission in federal district court, seeking a preliminary injunction barring Respondents from consummating the proposed transaction pending disposition of this administrative proceeding, will likely obviate the need for an administrative hearing. Wilhelmsen represents that "if the District Court enters a preliminary injunction . . . then Wilhelmsen Maritime Services AS will abandon the transaction without further litigating the administrative hearing." Motion,

¹ On May 30, 2018, Respondents moved for leave to file a reply to Complaint Counsel's opposition filing. That motion is granted. In opposing Respondent's Motion for Leave to File a Reply, Complaint Counsel request leave to file a surreply at some future date. In view of our disposition of the underlying Motion for Continuance, we do not find that a surreply from Complaint Counsel is warranted.