

Opinion No. 2013-037

May 13, 2013

The Honorable Andy Davis  
State Representative  
Post Office Box 30248  
Little Rock, Arkansas 72260-0005

Dear Representative Davis:

You have requested my opinion on Senate Bill 968 of the 89<sup>th</sup> General Assembly, which is now Act 1169 (approved April 12, 2013). As you note, this legislation is designed to regulate physician dispensing of legend drugs. You have asked the following questions in this regard:

1. Does the legislature have the authority to amend a statute that a Circuit Court has declared unconstitutional and void?
2. Does the legislature have the authority to amend a statute that has been declared special legislation and therefore unconstitutional and void?
3. Does [Act 1169 of 2013], an amendment of a statute that has been declared unconstitutional and void, repose unregulated and/or undefined authority in the State Medical Board to use unbridled discretion to determine need for physician dispensing?
4. Does [Act 1169 of 2013] violate Judge Piazza's injunction that states the board can't require doctors to "show a need" to obtain the permit to sell medications?

## **RESPONSE**

In response to your first two questions, the General Assembly plainly has general authority to modify, for the future, the laws as declared by decisions of the courts. The answer to your third and fourth questions is “no,” in my opinion.

***Question 1 - Does the legislature have the authority to amend a statute that a Circuit Court has declared unconstitutional and void?***

The General Assembly cannot annul a court decision.<sup>1</sup> But it may modify, for the future, the law as declared by decisions of the courts.<sup>2</sup> The answer to this question is, therefore, generally “yes.”

***Question 2 - Does the legislature have the authority to amend a statute that has been declared special legislation and therefore unconstitutional and void?***

Generally yes. See response to Question 1 above. The General Assembly plainly cannot retroactively annul a court decision. But it can enact legislation to prospectively remedy an act that has been declared unconstitutional.

***Question 3 - Does [Act 1169 of 2013], an amendment of a statute that has been declared unconstitutional and void, repose unregulated and/or undefined authority in the State Medical Board to use unbridled discretion to determine need for physician dispensing?***

The answer to this question is “no,” in my opinion.

Under A.C.A. § 17-95-102(d), physicians may not dispense legend drugs until they have obtained approval by the Arkansas State Medical Board after

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<sup>1</sup> It has been stated in this regard that “[w]here litigation has proceeded to a judgment which determines the controversy on its merits, it is beyond the power of legislation to alter or control such judgment. In other words, legislative action cannot be made to *retroact on past controversies* which the courts in the exercise of their undoubted authority have determined, and the legislature *may not abrogate or reverse a judicial decision.*” 16 C.J.S. *Constitutional Law* § 128 (emphasis added). The exercise of such power by the legislature is unconstitutional under the separation of powers doctrine, embodied in Ark. Const. art. 4, §§ 1 and 2. See also *Federal Express Corp. v. Skelton*, 265 Ark. 187, 196, 578 S.W.2d 1 (1979) (finding no provision authorizing the legislature to retroactively annul a decision of the court).

<sup>2</sup> *Id.* at § 115.

application to the Board upon a “showing of need.”<sup>3</sup> As amended by Act 1169 of 2013, the statute exempts those licensed physicians who were dispensing before the act’s effective date.<sup>4</sup> Most significantly, however, Act 1169 added a new subsection (3) to section 17-95-102(d) that guides the Board’s determination whether such a “need” exists:

The board shall determine whether need exists for a physician to dispense a specific legend drug to the physician’s patient for a patient’s personal use and administration outside of the physician’s office based on such information as is necessary for the board to determine:

- (A) The legend drug or drugs that the physician requests to dispense;
- (B) The ability of a physician’s patient to obtain the legend drug from other medical professionals;
- (C) The availability of the legend drug to be prescribed by the physician;
- (D) The hours at which the legend drug may be obtained from other medical professionals;
- (E) The distance the physician’s patient must travel to obtain the legend drug from other medical professionals;
- (F) Whether the physician has been investigated by the board concerning the improper prescribing or use of a legend drug;
- (G) Whether the physician has a financial relationship with the manufacturer of a legend drug that would create the appearance of a conflict of interest;

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<sup>3</sup> Act 1169 of 2013 did not alter this basic Board approval requirement, but only amended slightly some of its wording and placed it under new subsection (d)(1). Prior to its amendment, the first sentence of section 17-95-102(d) stated: “No [licensed] physician ... shall dispense legend drugs without prior approval by the Arkansas State Medical Board after application to the board and on the showing of need.” Act 1169 amended this language slightly to replace “No” with “A” and to add “not,” so that it now states: “A [licensed] physician ... shall not dispense legend drugs without prior approval by the Arkansas State Medical Board after application to the board and on the showing of need.” Acts 2013, No. 1169, § 1.

<sup>4</sup> *Id.*; A.C.A. § 17-95-102(d)(2). Act 1169 contains an emergency clause and therefore became effective on April 12, 2013, the date of its approval. Acts 2013, No. 1169, § 2.

(H) Whether the physician dispensing a legend drug will foster cost containment through improved efficiency and productivity; and

(I) The procedures the physician has implemented to:

- (i) Assure compliance with the requirements of subsection (c) of this section;
- (ii) Monitor and guard against potential drug interactions;
- (iii) Store and safeguard the legend drugs; and
- (iv) Comply with § 20-7-601 et seq. concerning the reporting requirements to the Prescription Drug Monitoring Program.<sup>5</sup>

Prior to this amendment, the statute contained the “showing of need” requirement and directed the Board to “adopt regulations to carry out [the statute’s] purpose.”<sup>6</sup> As indicated by your question, a court declared the statute unconstitutional.<sup>7</sup> On January 17, 2013, in *Abraham v. Pierce*, the Circuit Court of Pulaski County granted the plaintiff’s motion for summary judgment, finding in part that the Board regulation “exceeds the Arkansas State Medical Board’s authority in that the Legislature reposed absolute, unregulated or undefined authority in the Board to use unbridled discretion to determine need for issuance of a permit....”<sup>8</sup>

It is of course well-established under constitutional “separation of powers” principles<sup>9</sup> that the legislature is not permitted to delegate its legislative authority,

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<sup>5</sup> The act also added a new subsection to exempt from the “need” requirement “[a] prescription for a topical medication.” A.C.A. § 17-95-102(d)(4); Acts 2013, No. 1169, § 1.

<sup>6</sup> A.C.A. § 17-95-102(e) (Repl. 2010).

<sup>7</sup> *Abraham v. Pierce*, Pulaski County Circuit Court Case No. 60CV 2010-7400 (2013) (order granting motion for summary judgment, finding in part that the Board regulation “exceeds the Arkansas State Medical Board’s authority in that the Legislature reposed absolute, unregulated or undefined authority in the Board to use unbridled discretion to determine need for issuance of a permit....”)

<sup>8</sup> Pulaski County Circuit Court, Second Division, Case No. 60CV 2010-7400 (2013) (order granting motion for summary judgment).

<sup>9</sup> Ark. Const. art. 4, §§ 2 and 3.

and therefore may not vest administrative boards with “unbridled discretion.”<sup>10</sup> It is equally clear, however, that the legislature can delegate to an agency the power to determine the facts and circumstances upon which a law may operate.<sup>11</sup> But such delegation must include appropriate guidelines for those who are to act under the law’s general provisions:

While the General Assembly may not delegate its legislative authority, it may by providing guidelines, delegate ‘the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is by its terms made to depend.’<sup>12</sup>

The Pulaski County Circuit Court order striking A.C.A. § 17-95-102(d) echoes the Arkansas Supreme Court’s pronouncement that a statute will not be upheld if it “reposes absolute, unregulated or undefined discretion in an administrative body....”<sup>13</sup> It thus appears that the statute was held unconstitutional for lack of adequate standards to guide the determination whether a physician had made the requisite “showing of need” to dispense legend drugs.

The General Assembly subsequently amended the statute to include the language set out above. These new provisions (subsection (d)(3)(A) through (I)) outline the matters to be determined by the Board as it assesses whether a physician has made the necessary “showing of need.” In my opinion, they provide the necessary guidance to the Board to withstand an allegation of an unconstitutional delegation of legislative authority.

In response to your specific question, therefore, it is my opinion that Act 1169 of 2013 does not repose unregulated and/or undefined authority in the Board.

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<sup>10</sup> *Venhaus v. State*, 285 Ark. 23, 684 S.W.2d 252 (1985); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972); *Walden v. Hart*, 243 Ark. 650, 420 S.W.2d 868 (1967). As stated in *Walden, supra*, “a statute or ordinance which ‘reposes absolute, unregulated or undefined discretion in an administrative body will not be upheld.’” 243 Ark. at 654 (quoting *City of Florence v. George*, 127 S.E.2d 210 (S.C. 1962) and citing 12 ALR p. 1435 and 92 ALR p. 400).

<sup>11</sup> *Hooker v. Parkin*, 235 Ark. 218, 357 S.W.2d 534 (1962); *Campbell v. Arkansas State Hospital*, 228 Ark. 205, 306 S.W.2d 313 (1957); *McArthur v. Smallwood*, 225 Ark. 328, 331, 281 S.W.2d 428 (1955); *Hogue v. Housing Authority of North Little Rock*, 201 Ark. 263, 144 S.W.2d 49 (1940).

<sup>12</sup> *Venhaus*, 285 Ark. at 27, quoting *Walden v. Hart*, 243 Ark. at 652 (in turn quoting *State v. Davis*, 178 Ark. 153, 10 S.W.2d 513 (1928)).

<sup>13</sup> *Walden, supra*.

***Question 4 - Does SB968 violate Judge Piazza's injunction that states the board can't require doctors to "show a need" to obtain the permit to sell medications?***

No. The injunction was issued following the circuit court's conclusion that A.C.A. § 17-19-102(d) (Repl. 2010) was unconstitutional. The statute was amended by Act 1169 of 2013, as explained above. This act is prospective and is presumed constitutional.<sup>14</sup> In the event of a challenge, the burden of proving otherwise will rest on the challenger.<sup>15</sup> The presumption of constitutionality will continue to attach to A.C.A. § 17-19-102(d), as amended by Act 1169 of 2013, unless and until a litigant obtains an express ruling by a court declaring the amended statute unconstitutional.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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<sup>14</sup> See generally *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

<sup>15</sup> *Id.*