What's antitrust got to do with it?

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The status of the FTC case against the North Carolina State Board of Dental Examiners, and why it should matter to you

Perhaps you've seen teeth-whitening kiosks in your mall.

When the North Carolina State Board of Dental Examiners spotted those kiosks, it wasn't happy.

Contending that teeth whitening falls within the practice of dentistry, the Board issued cease-and-desist letters to the operators of the kiosks, as well as their landlords and suppliers.

The resulting case is about much more than just teeth whitening – it is about the immunity of state regulatory boards from the federal antitrust laws.
As a result, the case has potentially far-reaching consequences. Are regulatory boards a state actor or a private entity? If you believe boards are state actors, the Federal Trade Commission (FTC) may not agree. And you may be surprised to learn that the FTC's view is based in large part upon who sits on the boards.

Antitrust law

To better understand this case, one must understand federal antitrust laws, which involve much more than just the greedy Monopoly man.

Antitrust laws are intended to promote competition and protect free competition from interference by private forces acting in their own self-interest. The goal is to prevent consumer harm, which could come in the form of higher prices, reduced output, lower product or service quality, and decreased innovation or product improvements. Antitrust laws are based upon the basic premise that free and open competition results in the best products and services.

The Sherman Antitrust Act, the primary federal antitrust statute, outlaws agreements in

restraint of trade and actions to unlawfully obtain, extend or maintain a monopoly. On the other hand, the Sherman Act does not outlaw having a monopoly, if that monopoly was achieved lawfully. Violation of the Act can result in criminal and civil liability, including treble damages.

To be sure, the Sherman Act is a very powerful statute. In fact, you might be an antitrust violator if you (for example):

- Make an agreement with your competitors to fix prices
- Make an agreement with your competitors to allocate sales by customer type or territory
- Refuse to do business with one company unless it stops doing business with another company
- Engage in "tying" (I will sell you A, but only if you also buy B.)
- Engage in other anti-competitive activity that causes consumer harm

The Federal Trade Commission

The Federal Trade Commission (FTC), which enforces antitrust laws, reviews proposed mergers and investigates business practices, was established in 1914 to promote consumer protection and the elimination and prevention of anti-competitive business practices. Its five commissioners are nominated by the President and confirmed by the Senate.

The 'Whitening' Case

The current litigation between the FTC and the North Carolina State Board of Dental Examiners arose when the Board (which has eight members, including six dentists elected by licensed dentists), reviewed its dental practice act and concluded that only licensed dentists were permitted to whiten teeth. But when it sent out those cease-and desist letters, the teeth-whitening industry complained to the FTC. The FTC opened an investigation in 2008 and, by June 2010, concluded that the Board's actions were anti-competitive.

The FTC brought an administrative complaint alleging that the Board had violated the antitrust laws, which prohibit unfair competition. The Board countered by moving to dismiss, arguing that its actions are exempt from federal antitrust laws because the Board's actions are authorized by the state and protected by state-action immunity.

In FTC administrative proceedings the FTC itself rules on motions to dismiss—perhaps not surprisingly, the FTC denied the Board's motion in February 2011. Later, an administrative law judge (who was bound by the FTC's conclusion regarding the state-action immunity issue) ruled that the Board had indeed behaved anti-competitively.

The Board appealed the case to a federal appellate court (the United States Court of Appeals for the Fourth Circuit), where the case is still pending. *The North Carolina Board of Dental*

Examiners v. Federal Trade Commission, No. 12-1172. Attorneys for both sides presented oral argument to the appellate court in early December 2012, and a ruling is expected any day now.

The questions raised by the North Carolina Case

The FTC's case against the Board raises two questions:

(1) Is the Board a private actor, or is it entitled to immunity as a state entity?
(2) If the Board is *not* immune, were its actions anti-competitive?

As state regulatory boards themselves, Federation of State Boards of Physical Therapy (Federation) members likely have a keen interest in the first question. To answer that question, the law divides organizations into three categories:

(1) The **state itself** is absolutely exempt from antitrust laws (for example, the state legislature and the state's highest court);
(2) **Municipalities and political subdivisions** (arms of the state) are exempt if they show they acted pursuant to a clearly articulated state policy to displace competition. (This is where the Board believes it belongs);
(3) **Private actors** are exempt only if they show that they acted pursuant to a clearly articulated state policy (#2 above) *and* that their behavior was actively supervised by the state.

The FTC contends that the Board is a private actor that must meet the highest standard for state-action immunity described in category 3 above.

The primary reason the FTC feels this way? Because licensed dentists sit on the Board.

In the words of the FTC, the Board is a private actor because it is "a regulatory body that is controlled by participants in the very industry it purports to regulate." Under this higher "private actor" standard, the Board must show both that it acted pursuant to a clearly articulated state policy to displace competition *and* that its actions were actively supervised by the state.

The FTC focused on the second test—active state supervision—and concluded that there was not sufficient involvement by any official state entities to supervise and review the Board's actions. The Board's general capacity to act and the state's general oversight was not enough.

The Board responded with numerous reasons why it believed it was an arm of the state, including that it was expressly forbidden from engaging in for-profit activities, its records were open for public inspection, it submitted annual financial reports to the state and gave public notice of meetings. Board members also must comply with a state code of ethics, are subject to the state administrative procedures act and can sue on behalf of the state. All of these examples are insufficient to show state action, according to the FTC.

This question of "state action" is relevant to all regulatory boards, particularly since many boards (like the North Carolina dental board) include practitioner members and have varying

degrees of interface with the state. Many commentators point to this case and others like it as evidence that the FTC strongly disfavors the "state action" defense and sets a high bar for "active supervision."

So what are the potential implications of the North Carolina case?

It is clear that the FTC believes that, because many Board members were also dentists, it cannot qualify as an arm of the state. And because the state was not sufficiently involved in overseeing the Board's actions, the Board can't satisfy the "state action" test for private actors, either. The FTC takes this position even though the Board's very purpose is to regulate dentists on behalf of the state.

As a result, at least according to the FTC, regulatory boards that include practitioners may need significant and ongoing state involvement to qualify for immunity. Otherwise, those boards face potential antitrust liability for their regulatory actions.

Enter the Federation

Because of these broader implications, the Federation and 23 other professional and regulatory organizations submitted *amicus curiae* ("friends of the court") briefs in support of the Board.

These organizations took no position on whether the Board's actions toward the teeth-whitening kiosks were appropriate or not and, instead, focused on the question of state-action immunity.

The Federation's brief (which was joined by eight other regulatory organizations) argues that the FTC's decision on the state action issue is erroneous as a matter of law and ill-advised as a matter of policy.

Among other things, the Federation points out that the fundamental purpose of state regulatory boards is public protection, not profit, and that states empower these boards with mandates to protect against unlicensed practitioners, ensure minimal standards, and regulate professional conduct. The FTC's actions jeopardize this regulatory process.

The Federation's brief makes three primary arguments. First, the FTC applied the wrong test for determining whether the Board was a state actor. The FTC improperly focused on the fact that dentists sat on the board and incorrectly looked behind the actions of the North Carolina legislature to determine whether the way the state set up the Board was sufficient.

Second, requiring "active supervision" of state boards negates the very efficiencies and benefits such boards are created to achieve. The states create agencies because they are often better equipped to deal with unforeseeable issues, or issues outside the competence of the state legislature or judiciary. When setting up regulatory boards, the states recognize that expert

members of the profession are better equipped to regulate. Requiring express authorization from the state for every agency action would diminish, if not destroy, the agency's usefulness.

Finally, the Federation's brief argues that the threat of antitrust liability could paralyze boards, deter participation in boards, and chill decision making.

The briefing is now complete, oral argument has been heard, and the parties are simply awaiting the appellate court's ruling. No matter how the Fourth Circuit rules, many believe the case ultimately will be appealed to the United States Supreme Court. So stay tuned . . .

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