Fourth Circuit Holds State Agencies Operated by Market Participants Are Private Actors for State Action Purposes

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The case involved the market for teeth whitening services in North Carolina. Beginning in the 1990s, dentists began providing such services throughout the State. Around 2003, non-dentists also began offering teeth whitening services, often at lower prices than dentists. Dentists began complaining to the Board.

“The Board is a state agency created because the ‘practice of dentistry’ in North Carolina affects ‘the public health, safety, and welfare’.” *NCSBD*, No. 12-1172, slip op. at 4 (citing N.C. Gen. Stat. § 90-22(1)(a)). The Board is comprised of six licensed dentists, elected by dentists; one licensed dental hygienist, elected by dental hygienists; and one consumer member, appointed by the Governor. The Board is funded by fees paid by North Carolina licensed dentists and dental hygienists.

After receiving complaints from dentists, the Board opened an investigation into teeth whitening services and ultimately issued cease-and-desist letters to 29 non-dentist teeth whitening providers, calling on them to stop “all activity constituting the practice of dentistry.” *Id.* at 7. Through these letters, the Board successfully excluded non-dentists from North Carolina’s teeth whitening market.

The FTC filed an administrative complaint against the Board, charging it with an antitrust violation. The Board principally defended itself by arguing that it was exempt from the federal antitrust laws under the “state action” doctrine. The FTC disagreed and the Fourth Circuit upheld that conclusion.

Under Supreme Court jurisprudence, most recently exemplified by the *Phoebe Putney* opinion, “state-action immunity is disfavored.” *Id.* at 13 (citing *Phoebe Putney*, 133 S.Ct. at 1010). The FTC concluded that, for antitrust purposes, the Board was actually a private party, not a state agency, and, therefore, had to show both that it acted pursuant to a clearly articulated and affirmatively expressed state policy and that its behavior was actively supervised by the State itself. *Id.* (citing *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). Municipalities and substate governmental entities, on the other hand, only need to show that they acted pursuant to clearly articulated and affirmatively expressed state policy. *Phoebe Putney*, 133 S.Ct. at 1010.

The Fourth Circuit agreed with the FTC, stating that “state agencies ‘in which a decisive coalition (usually a majority) is made up of participants in the regulated market,’ who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs.” *NCSBD*, No. 12-1172, slip op. at 15
(citing Phillip E. Areeda & Herbert Hovenkamp, 1A Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 227b, at 501 (3d ed. 2009)).

The Court also agreed with the FTC that the Board could not satisfy the active supervision prong. In arriving at this decision, the Court focused on the fact that the Board’s “cease-and-desist letters were sent without state oversight and without the required judicial authorization.” NCSBD, No. 12-1172, slip op. at 19.

The Court then upheld the FTC’s finding that the Board’s behavior violated the FTC Act. First, applying, as the FTC did, the Supreme Court’s decision in American Needle v. NFL, 130 S.Ct. 2201, 2212 (2010), the Court concluded that because the dentist members were competitors, actively engaged in dentistry during their Board tenure, “they remain ‘separate economic actors’ with a separate financial interest in the practice of teeth whitening.” NCSBD, No. 12-1172, slip op. at 23 (citing American Needle, 130 S.Ct. at 2212). Thus, “[a]ny agreement between the Board members… deprives the market of an independent center of decision making.” Id. The court also upheld the FTC’s finding of concerted action, concluding that the Board’s discussions of non-dentist activity and their cease-and-desist letters supported the common objective of foreclosing the market.

Finally, the Court agreed with the FTC’s conclusion that the Board’s action amounted to an unreasonable restraint of trade. The Court endorsed the FTC’s analysis that the conduct was “inherently suspect” because “[t]he challenged conduct is, at its core, concerted action excluding a lower-cost and popular group of competitors,” and “[n]o advanced degree is needed to recognize” that the behavior “is likely to harm competition and consumers.” NCSBD, No. 12-1172, slip op. at 28-29.

As the Court concluded, “[a]t the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market.” NCSBD, No. 12-1172, slip op. at 32.

The FTC’s active enforcement presence in health care markets is long-standing and well-known. Both Phoebe Putney and this decision underscore that the FTC will not stand down when quasi-governmental agencies are in the mix and when the activities in question may lead to higher prices and higher medical spend.

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