A matter of (anti)trust
The status of recent FTC cases and why they should matter to you

This article is based on a presentation given by Jennifer Ancona Semko, a partner with Baker & McKenzie LLP, at the 2013 FSBPT Annual Meeting.

Based on recent rulings by the Supreme Court and Fourth Circuit, state regulatory boards may run the risk of violating federal antitrust statutes. There are two cases critical to physical therapist boards - the Phoebe Putney Medical Center and the North Carolina State Dental Board.

In 2009, Phoebe Putney Medical Center, an Albany, Georgia hospital owned by a non-profit corporation and established by a hospital authority decided to acquire the only other hospital in town. The Federal Trade Commission (FTC) was not happy.

In the second case, the licensing board in North Carolina sent cease and desist orders to mall kiosks and suppliers and everyone but dentists in an attempt to stop non-dentists from performing teeth whitening. Once again, the FTC did not appreciate it.

In both cases, the common defense was state action immunity. State regulatory boards are authorized by their respective legislatures to fulfill their obligations to protect the public and while doing so, may run the risk of violating federal antitrust statutes. State action doctrine defines a safety zone in which boards may operate free from antitrust liability.

The cases have potential far-reaching consequences because the Supreme Court and Fourth Circuit redefined the scope of that safety zone with an arguably smaller buffer for regulatory boards.

One of the key issues was whether the boards are state actors or a private entity. In the North Carolina case, the court ruled the board was a private entity.

Antitrust laws

Antitrust laws are intended to promote competition and protect free competition from interference by private forces acting in their own self-interest. The belief is that antitrust laws protect consumers from higher prices, reduced output, lower product or service quality, decreased innovation or diminished product improvement. The premise is that free and open

competition results in best products and services.

The Sherman Act outlaws agreements in restraint of trade and actions to unlawfully obtain, extend or maintain a monopoly but it does not outlaw having a monopoly if it was achieved lawfully. Other antitrust acts are the Clayton Act and the Federal Trade Commission Act. Violation of these acts can create criminal and civil liability.

You may be guilty of violation of the antitrust act if:

- You make an agreement with your competitors to fix prices
- You make an agreement to allocate sales by customer type or territory
- You refuse to do business with Acme unless it stops doing business with Bates Co. (secondary boycotts)
- You engage in tying: I will sell you A, but only if you also buy B
- You engage in other anti-competitive activity that causes consumer harm

Federal Trade Commission

The Federal Trade Commission is a U.S. government agency established in 1914 with a principal mission of promotion of consumer protection and prevention of anti-competitive business practices. It is made up of five commissioners nominated by the President and confirmed by the Senate. It enforces antitrust laws, reviews proposed mergers and investigates business practices.

The State Action Doctrine was originally established by the Supreme Court in 1943 and elaborated upon in subsequent cases.

- State actions are not subject to federal antitrust laws
- Sub-state government entities are also immune, so long as they are acting pursuant to a clearly articulated policy to displace competition
- Private entities may be protected if, in addition, they are “actively supervised” by the state

Phoebe Putney

The Hospital Authority of Albany-Dougherty County was created by the state to operate and maintain healthcare facilities. It owns Phoebe Putney Memorial Hospital, one of two hospitals in county. The authority decided to purchase the second hospital in the county to turn it into a women’s/children’s hospital and the Federal Trade Commission filed a complaint alleging the transaction will violate the FTC Act and Clayton Act as it’s a merger to monopoly.

The Hospital Authority asserted a state action defense, arguing that the state law authorized it to acquire the hospital and shielded it from antitrust liability. The District Court and the Eleventh Circuit agreed, concluding that by authorizing acquisitions by the hospital authorities, Georgia had clearly articulated a policy to displace competition. They applied the Supreme Court’s “Town of Hallie” foreseeability test (it was foreseeable you might act in an anti-competitive way).

The FTC took the case to the Supreme Court, which ruled against Phoebe Putney in February

2013. It effectively overruled the foreseeability test and significantly narrowed the scope of state action protection. It decided to apply a more stringent test to determine whether the displacement of competition was the inherent, logical or ordinary result of the exercise of authority delegated by the state legislature. The Supreme Court emphasized that "state action immunity" is disfavored.

North Carolina Dental Board

The North Carolina State Dental Board reviewed its dental practice act and concluded the act permitted only dentists to whiten teeth. The board sent cease-and-desist letters to non-dentists and their suppliers/landlords. The teeth-whitening industry complained and the FTC opened an investigation in 2008. In June 2010 the FTC concluded that the North Carolina Board's actions were anticompetitive and brought an administrative complaint.

The FTC lawsuit alleges that the North Carolina Board violated antitrust laws that prohibit unfair competition.

The North Carolina Board moved to dismiss, arguing that its actions are exempt from federal antitrust laws as it is authorized by the state and protected by state-action immunity. The FTC denied the board's motion to dismiss in February 2011. In July 2011, it was ruled that the North Carolina Board actions violated the FTC Act.

Ruling appealed

Is the North Carolina board a private actor, or is it entitled to immunity as a state entity?

If the North Carolina Board is not immune, were its actions anti-competitive?

The FTC said the North Carolina Board is a private actor and must therefore meet the highest standard (clear articulation and active supervision), as the board is a regulatory body that is controlled by participants (dentists) in the very industry it purports to regulate (basically a fox guarding the henhouse theory).

The FTC Commission found no active supervision and said there was not sufficient involvement by any official state entities to supervise and review the board's actions. It added that the Board's capacity to act and the state's general oversight are not enough.

The FTC Commission ruling appealed to Fourth Circuit and the FSBPT joined other regulatory/professional organization in submitting amicus curiae briefs in support of the North Carolina Board. The argument was that the FTC decision was erroneous as a matter of law and ill-advised as a matter of policy because the fundamental purpose of state regulatory boards is public protection. Furthermore, the states vest boards with mandates to protect against unlicensed practitioners, ensure minimum standards and regulate professional conduct.

It was argued that the FTC applied the wrong test for determining whether the North Carolina Board was a state actor. The FTC improperly looked behind the actions of the North Carolina legislature to determine whether the means by which the state set up the North Carolina Board

was sufficient and whether North Carolina's Board's actions were "state action enough." The FTC focused on who was on the board and their potential private interests. It was pointed out that the standard has been rejected by the Supreme Court and that the FTC improperly required the North Carolina Board to show both clear articulation and active supervision.

It was also argued that requiring active supervision of state boards would negate the agencies' efficiency benefits as states create agencies because they are often better equipped to deal with unforeseeable issues or issues outside the competence of the legislature or judiciary. Requiring express authorization for every agency action would diminish if not destroy an agency's usefulness. Also, states recognize that experts are often better equipped to regulate; it creates an unnecessary layer of non-expert review.
It was further argued that the threat of antitrust liability could paralyze boards, deter participation and chill decision making.

The court ruling

In May 2013, the Fourth Circuit ruled in favor of the FTC citing dicta from the Phoebe Putney decision to justify its narrow reading. Its emphasis was on the Board being composed of a "decisive coalition" of participants in the regulated market chosen by and accountable to fellow market participants. One concurring judge noted that had the board members been appointed by the governor, it would be a state entity and the active supervision requirement would not apply.

Having concluded that the board was a private actor, the court concluded that active supervision was not present as the state did not oversee the cease-and-desist order. It said that generic oversight "does not substitute for the required review and approval of the particular anti-competitive acts challenged by the FTC." There was, therefore, no need to address the "clear articulation" prong.

The North Carolina Board is petitioning for writ of certiorari (a writ by which a superior court can call up for review the record of a proceeding in an inferior court) with some amicus support.

This matters to you

Why?

- The broader issue of state action is relevant to all regulatory boards
- Many boards include practitioner members
- The amount of interface with the state may vary
- FTC strongly disfavors state action defense and FTC seeks a high bar for active supervision

Potential implications

This and other FTC cases reflect its mission to narrow the scope of state action immunity. The FTC believes the state is not involved enough in overseeing the North Carolina Dental Board, particularly since some board members were also dentists, even though the dental board's very purpose was to regulate dentists on behalf of the state. According to the FTC, a board made up

of practitioners may need significant and ongoing state involvement to qualify for immunity. It also appears that there is an increased threat of antitrust liability for regulatory actions.

Points to ponder

- How clear is your board's enabling statute?
- How are board members selected?
- Is there active supervision by your state?

What's next?

These decisions likely do not foreshadow a program of review of licensing board activities, but complaints brought to the FTC's attention will get a receptive audience. The FTC has a long-held position against state action immunity. These cases may encourage the FTC to push that position even further and to be on the lookout for another case.

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