BRIEF FOR DEFENDANT-APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11-1679

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF DEFENDANT-APPELLEE FEDERAL TRADE COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

Plaintiff appeals the district court's dismissal of its civil action. Defendant successfully challenged the district court's subject matter jurisdiction over Plaintiff's action.

Jurisdiction to this Court is provided by 28 U.S.C. § 1291. The judgment was imposed and entered on May 9, 2011. Plaintiff filed a timely notice of appeal on June 27, 2011.

STATEMENT OF ISSUE

Whether the district court erred in dismissing Plaintiff's action based on a lack of subject matter jurisdiction.

STATEMENT OF FACTS

Proceedings Before the Federal Trade Commission

On June 17, 2010, the Commission initiated an administrative proceeding against the Board pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. (J.A. 150). See North Carolina Bd. of Dental Examiners, Docket No. 9343 (Fed. Trade Comm'n), http://www.ftc.gov/os/adjpro/d9343/index.shtm, ("FTC Docket") (last accessed November 27, 2011). In that proceeding, the 3

On July 14, 2011, the ALJ filed an initial decision finding that the Board violated Section 5 of the FTC Act, 15 U.S.C. § 45. North Carolina Bd. of Dental Examiners, 2011 WL 3152198 (Fed. Trade Comm'n July 14, 2011). The ALJ ordered the Board to cease and desist taking certain actions to discourage non-dentists from providing teeth-whitening services. Id. at *99. On July 28, 2011, pursuant to 16 C.F.R. § 3.52(b), the Board appealed the ALJ's initial decision to the full Commission. (Brief at 9). The Commission heard oral argument on the Board's appeal on October 28, 2011. FTC Docket. Pursuant to 16 C.F.R. § 3.52(b)(2), the Commission is required to issue its final decision within 100 days after oral argument.

Proceedings Before the District Court

On February 1, 2011–shortly before the hearing before the ALJ began–the Board filed the instant suit in district court. In general terms, the Board asserted that the Commission exceeded its authority and violated the United States Constitution in pursuing the instant administrative action.[2] (J.A. 8-92).

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[2] Specifically, the Board's complaint asserted: that the Commission does not have "antitrust jurisdiction over the State Board's enforcement of the Dental Practice Act" (Count I) (J.A. 37, ¶ 74); that the Commission is barred from forcing "the State of North Carolina" to be tried in a tribunal that is not the Supreme Court "or a lesser tribunal established by Congress . . . ." (Count II) (J.A. 37, ¶ 79); that the Commission is barred from "attempting to preempt North Carolina's statutorily mandated composition of a State Board . . . ." (Count III) (J.A. 39, ¶ 86); that the Commission "does not have the authority to consider or

(continued...)

The Commission moved to dismiss the Board's complaint on February 28, 2011. (J.A. 147). The Commission argued, among other things, that the Board could not collaterally challenge a pending administrative action and that it could ultimately seek review of a final cease and desist order through a direct appeal to this Court. (J.A. 151).

On May 3, 2011, the district court granted the Commission's motion to dismiss. (J.A. 149-58).[3] The court held that it is "well-settled that this court lacks jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here." (J.A. 153) (citing, among other sources, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950)). The district court also noted that the Commission had not yet issued a final order subject to review. (J.A. 153) (citing FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 241-42 (1980)).

The district court held further that this Court had already rejected the idea that a party could immediately appeal or challenge

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[2](...continued)
rule upon" its own jurisdiction over the Board, and that the Commission's determination of its own jurisdiction thus violates the Board's due process (Count IV) (J.A. 39-40, ¶ 90); that the Commission's assertion of jurisdiction and its administrative process violates the Administrative Procedure Act (Count V) (J.A. 42, ¶¶ 101-02); and that the Commission's assertion of jurisdiction and its administrative proceeding against the Board amount to a violation of the U.S. Constitution (Count VI) (J.A. 43, ¶ 107).

[3] The district court also denied a motion for leave to file an amicus curiae brief filed by several "State Boards." (J.A. 157-58).

the Commission's decision denying the state action defense. (J.A. 153) (citing South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006)). The district court also rejected the Board's argument that South Carolina Board of Dentistry did not apply because the Board had filed a direct federal suit in district court rather than an interlocutory appeal. (J.A. 154).

The district court emphasized that, if the Commission issues a final cease and desist order, the Board may appeal that order exclusively to this Court. (J.A. 154-55). 15 U.S.C. § 45(c). The district court also rejected the Board's argument that the Commission was acting in brazen defiance of its statutory authorization. (J.A. 155-156). Finally, the district court of statu

SUMMARY OF ARGUMENT

The district court did not err in dismissing the Board's claim. The Board cannot seek to enjoin an ongoing administrative proceeding. The Board also cannot immediately challenge–without a final order from the Commission–issues regarding the state action defense. Congress has already established that the Board may appeal a final cease and desist order and may raise issues relating to the state action defense by filing a direct appeal with this Court. For these same reasons, the Board's complaint is also not ripe for adjudication. Finally, the Board cannot meet the high standard that would be needed to justify a departure from normal exhaustion standards, such as actions in brazen defiance of the Commission's jurisdiction or actions in clear violation of the Board's constitutional rights.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN DISMISSING PLAINTIFF'S COMPLAINT.

A. Standard of Review.

This Court reviews de novo the district court's dismissal of an action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Vulcan Materials Co. v. Massiah, 645 F.3d 249, 261 (4th Cir. 2011).

B. Discussion of Issue.

The district court properly held that it could not enjoin a pending administrative proceeding.[4] The Board may advance its state action defense[5] arguments before the Commission. If the

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[4] The Board claims that "[t]he State Board is not required to exhaust all administrative remedies prior to seeking judicial relief when the Commission has acted outside of its limited authority and violated the State Board's constitutional rights." (Brief at 18). These arguments are addressed in Section B.4, infra.

[5] Although, as discussed infra, the Court should not address the merits of the Board's state action defense, a brief summary of that doctrine is included here. In Parker v. Brown, the Supreme Court held that Congress did not intend the federal antitrust laws to cover the acts of sovereign states. 317 U.S. 341 (1943). Subsequent Supreme Court cases developed what has become known as the "state action" doctrine. This doctrine permits a state's delegating to others (including private parties) its sovereign power to pursue anticompetitive policies. Because the careful balance between competition policies and federalism concerns underlying the doctrine exempts only sovereign policy choices from federal antitrust scrutiny, however, non-sovereign defendants must clear additional hurdles to qualify for that exemption. These hurdles vary depending on the likelihood that the decision-makers may be pursuing non-sovereign interests. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Thus, for (continued...)

Commission issues a final cease and desist order, the Board may appeal that final order to this Court. 15 U.S.C. § 45(c). Second, as this Court has already held, South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436, 441 (4th Cir. 2006), the

jurisdiction. Those subject to an enforcement action–including administrative proceedings–may not file a separate collateral challenge to that action in Federal courts. Rather, they must instead raise any issues or defenses they have in the enforcement case itself. See Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950) (holding that an opportunity for hearing in an enforcement action "satisfies the requirements of due process"); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938) (holding that the district court was "without jurisdiction to enjoin [NLRB's administrative] hearings"); Gallanosa by Gallanosa v. United States, 785 F.2d 116, 119 (4th Cir. 1986) (holding that a district court lacked jurisdiction to enjoin administrative enforcement proceedings both because no final agency decision existed and because jurisdiction to review a final agency decision rests exclusively with the courts of appeal).[6]

[6] See also, e.g., X-Tra Art v. Consumer Prod. Safety Comm'n, 969 F.2d 793, 796 (9th Cir. 1992) (holding that the opportunity for court hearing in enforcement action satisfies the "requirements of due process"); United States v. Alcon Laboratories, 636 F.2d 876, 882 (1st Cir. 1981) ("The Supreme Court's decision in Ewing precludes judicial interference with the FDA's decision to institute enforcement actions . . . ."); Southeastern Minerals, Inc. v. Harris, 622 F.2d 758, 764 (5th Cir. 1980) (holding that seeking "pre-enforcement review of the FDA's determination that probable cause existed to seize and initiate enforcement proceedings [was] clearly proscribed by Ewing"); Pharmadyne Labs., Inc. v. Kennedy, 596 F.2d 568, 570-71 (3d Cir. 1979) (finding no jurisdiction to enjoin enforcement actions under Ewing).

These cases stand for the important principle that permitting judicial review of agency actions in a court separate from the enforcement action itself would result in unnecessary and premature judicial interference in a pending proceeding. As the Supreme Court held in Ewing:

> [I]t has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

Ewing, 339 U.S. at 599;[7] see also Alcon Laboratories, 636 F.2d at 886 (holding that "the imposition of any formal, pre-enforcement hearing requirement might seriously impair the effectiveness of the Act's enforcement provisions"); cf. Wilton v. Seven Falls Co., 515 U.S. 277, 283 (1995) (holding, when a state proceeding "involving the same parties and presenting opportunity for ventilation of the same state law issues is pending" in another tribunal, "a district

[7] The Board argues that "in Ewing, Congress expressly provided the FDA the authority to determine probable cause as to whether an article may mislead the public. In this case, Congress has granted no such authority as to the Commission's unlawful actions against the State Board." (Brief at 28). For reasons discussed infra Section B.4, the Board has not met the high bar of showing that the Commission has acted in brazen defiance of its enabling statute or the Constitution. As a result, the Board must completely exhaust its arguments before the Commission and receive a final cease and desist order before it may pursue a direct appeal in this Court.

court might be indulging in '[g]ratuitous interference' if it permitted the federal declaratory action to proceed") (quoting Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942)).[8]

Here, the Board raised the claims alleged in its complaint as defenses and arguments in the ongoing administrative proceeding before the Commission. Specifically, the Board argued to the Commission that the state action doctrine deprived the Commission of jurisdiction. (J.A. 8-45, 150). The Commission denied the Board's motion to dismiss in a detailed opinion that analyzed the undisputed facts, allegations, and applicable law. North Carolina Bd. of Dental Examiners, 151 F.T.C. 607 (2011).

Although the Commission rejected the Board's arguments (Brief at 8-9) and although the ALJ has issued an initial decision (Brief at 9), the Commission has not issued a final decision regarding antitrust liability. The Commission will review the ALJ's decision de novo. 16 C.F.R. § 3.54(a) (stating that, upon review, the Commission "will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision"). Once that final order is issued, the Board may

[8] The Board cites seven cases in support of the proposition that "federal courts have repeatedly granted state agencies immunity from federal antitrust legislation." (Brief at 28-29). Notably, none of those opinions required a court to intervene in a pending matter before the Commission. Instead, they all appear to be direct actions filed by private parties directly in district court. Consequently, they do not address the Commission's arguments in this appeal.

seek judicial

unnecessary." Id. (citations omitted). Moreover, "every respondent to a Commission complaint could make the claim that [plaintiff] had made." Id. at 242-43. Such an early intervention would also "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." Id. at 242. Additionally, although the Court recognized that the burden of responding to the complaint through the administrative process could be "substantial," such burden did not constitute irreparable injury. Id. at 244.

Thus, Standard Oil prohibits judicial interference in the administrative process until the Commission issues a final cease and desist order (if it issues one at all).[9] The Commission is currently reviewing de novo the ALJ's Initial Decision and has not yet issued a final determination on antitrust liability. Consequently, the Board's complaint and this subsequent appeal are premature.

Moreover, the Board's arguments regarding its state action defense do not allow it to proceed directly to a Federal court.

[9] Similarly, in Floersheim v. Engman, 494 F.2d 949 (D.C. Cir. 1973), the seller of forms used in collecting debts–who was subject to a cease and desist order prohibiting certain deceptive and misleading practices–brought suit in district court seeking a declaration that certain forms conformed to the Commission order and an injunction preventing the Commission from seeking civil penalties based on non-compliance with its order. The court of appeals held that the district court did not have subject matter jurisdiction over the seller's complaint, because "[t]his is the kind of point that can be raised when an enforcement sanction is pursued," and directed dismissal of the action. Id. at 954.

This Court concluded that any rights a party may have under

entitle a party to step outside of the regular

In making a ripeness determination, this Court analyzes both of the following questions: "'(1)[is] the issue[ ] fit for judicial review and (2) will hardship fall to the parties upon withholding court consideration?'" West Virginia Highlands

(citing _____

action defense.[14] Although the Commission has rejected the Board's arguments regarding the state action defense, no final decision on antitrust liability has been reached. If the Commission ultimately issues an adverse final ruling regarding antitrust liability, the Board may petition this Court (and, in turn, the Supreme Court), for review. 15 U.S.C. § 45(c); Ukiah Adventist Hosp. v. FTC, 981 F.2d 543, 549 (D.C. Cir. 1992).[15] Consequently, Plaintiff's complaint is not fit for review at this time.

Similarly, as to the second question, withholding consideration in the district court will not place hardship on the

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[14] See, e.g., California ex rel. Christensen v. FTC, 549 F.2d 1321, 1324-25 (9th Cir. 1977) (determination of state action defense should be decided by the Commission); FTC v. Markin, 532 F.2d 541, 543-44 (6th Cir. 1976) ("We [the Court] think that the applicability of Parker v. Brown . . . should be determined Â

Board. "'[T]he purpose of the 'hardship to the parties' analysis is to ascertain if the harm

4. The Board Has Not Shown That It is Entitled to an Exception to the Exhaustion Requirement.

The Board argues that the district court had jurisdiction over its complaint because two exceptions to the regular exhaustion requirements apply. (Brief at 14-15). First, the Board argues that the Commission acted in brazen defiance of its jurisdiction. (Brief at 29-38). Second, the Board argues that the Commission has acted in violation of the Commerce Clause and the Tenth Amendment. (Brief at 38-49). The district court correctly rejected both of these arguments. (J.A. 155-157). As neither of these exceptions applies, the district court correctly held that the Board must continue to litigate its arguments before the Commission.

a. The Commission Did Not Act in Brazen

authority. The administrative complaint, issued pursuant to the Federal Trade Commission Act, charged that the Board is a "person," within the meaning of Section 5 of that statute, 15 U.S.C. § 45, and that its acts and practices are "in commerce or affect commerce," within the meaning of Section 4 of that Act, 15 U.S.C. § 44. (J.A. 48, ¶¶ 5-6). The ALJ agreed with these claims in its Initial Decision. North Carolina Bd. of Dental Examiners, 2011 WL 3152198 (Fed. Trade Com'n July 14, 2011). Neither of those jurisdictional predicates is "clearly" erroneous.

The Supreme Court has held that States and their regulatory bodies do constitute "persons" under the antitrust laws, see, e.g., Jefferson Cnty. Pharm. Ass'n Inc. v. Abbott Labs., 460 U.S. 150, 155 (1983); Lafayette v. La. Power & Light Co., 435 U.S. 389, 395 (1978). Consistent with this precedent, and recognizing that the antitrust statutes should be construed together, the Commission has many times exercised jurisdiction over state boards, such as the Board, as "persons" under the FTC Act. See, e.g., Virginia Bd. of

and receive products and equipment that are shipped across state lines . . . and transfer money across state lines in payment for these products and equipment." (J.A. 48, ¶6). The complaint charged further that the Board's actions "deter persons from other states from providing teeth whitening services in North Carolina." (J.A. 48, ¶ 6).

Similarly, the Board's claims do not satisfy the two requirements discussed in Long Term Care Partners, LLC v. United States, 516 F.3d 225 (4th Cir. 2008), and Leedom v. Kyne, 358 U.S. 184 (1958), for the district court to have jurisdiction over its complaint. First, the Board has not made a "'strong and clear demonstration that a clear, specific and mandatory [statutory provision] has been violated.'" Long Term, 516 F.3d at 234 (quoting Newport News Shipbuilding and Dry Dock Co. v. NLRB, 633 F.2d 1079, 1081 (4th Cir. 1980) (emphasis added) (alteration in original)). As discussed previously, the Commission has acted within its statutory mandate. Even if the law is uncertain regarding the Commission's authority, however, the Board is not entitled to the Leedom exception. North Carolina State Bd. of Registration for Prof'l Eng'rs and Land Surveyors v. FTC, 615 F. Supp. 1155, 1161 (E.D.N.C. 1985) (rejecting a plaintiff's argument that the Commission's rejection of state action immunity satisfied the first prong of the Leedom analysis).

In North Carolina State Board, the district court held that "the law [with respect to state action immunity] is presently rather unsettled. Moreover, this case does not present a situation analogous to that found in Leedom, in which an explicit and unambiguous statutory prohibition was clearly violated." Id. The Board has not shown how the Commission's interpretation of its own enabling statute and the state action doctrine satisfy the first Leedom requirement. Long Term, 516 F.3d at 234.[16]

Second, the Board has not shown that the proceedings before the Commission "wholly deprive [Plaintiff] of a meaningful and adequate means of vindicating its statutory rights." Id. at 236. Pursuant to the Commission's enabling statute, the Board may seek review of a cease and desist order (if one is issued) with this Court. See Bd. of Governors of Fed. Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 43-44 (1991) (distinguishing from Leedom a situation where, as a result of the enabling statute, a

[16] Additionally, in the administrative complaint, the Commission expressly discussed the jurisdictional basis for the complaint. (J.A. 48, ¶¶ 5-6). The Commission also explained why any state action defense would fail: "[T]he Dental Board has engaged in extra-judicial activities aimed at preventing non-dentists from providing teeth whitening services in North Carolina. These activities are not authorized by statute and circumvent any review or oversight by the state." (J.A. 50, ¶ 19).

party would "have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application").[17]

b. The Commission Has Not Clearly Violated the Constitutional Rights of the Board.

The Commission also has not "clearly violated the constitutional rights" of the Board under either

effort to avoid the limitations of that doctrine and short-circuit the statutorily-prescribed path for resolution of that question.

The principles of federalism underlying the Tenth Amendment have been enshrined by the courts, insofar as the Commission's jurisdiction is concerned, in the state action doctrine. See Parker v. Brown, 317 U.S. 341 (1943); California Retail Liquor Dealers Ass'n, 445 U.S. 97 (1980). Consequently, the Board's arguments of direct Tenth Amendment violations appear to be merely an attempt to avoid the limits on that doctrine. Those limits led the Commission to deny the Board's motion to dismiss the administrative complaint on state action grounds.

The Board's claim that the Commission has violated the Tenth Amendment does not withstand scrutiny. The Commission has neither charged that the Board's membership make-up itself constitutes a violation of the antitrust laws nor insisted that North Carolina change the Board's membership or provide additional oversight over its challenged acts and practices. Rather, the Commission has charged the Board with using its statutory authority under North Carolina law to exclude from the market non-dentist providers of teeth whitening services, without the necessary active supervision

by the State. Such a charge can hardly be viewed as a "clear" constitutional violation.[19]

Additionally, the mere fact that a party raises a constitutional challenge to an administrative proceeding does not allow it to escape exhaustion. As this Court has held, "'exhaustion is particularly appropriate when the administrative remedy may eliminate the necessity of dec

allow the courts to have benefit of an agency's talents through a fully developed administrative record." Id. Thus, the Board must exhaust the administrative proceedings and receive a final order from the Commission before it may come to this Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted, this 28th day of November, 2011.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

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1. This brief has been prepared using (SELECT AND COMPLETE ONLY ONE):

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