

FEDERAL TRADE COMMISSION

Regulating the Professions: The Intersection of Competition and Consumer Protection Policies

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The views expressed herein are my own, and do not reflect the views of the Federal Trade Commission or any individual commissioner.

FTC MISSION

- The FTC is charged with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.
 - 15 U.S.C. §45
- This mandate includes enforcement of the antitrust laws and statutes protecting consumers from fraud, including false and deceptive advertising, as well as consumer and business education and policy research.

The Role of Competition and Consumer Protection Policy in the Economy

- Competition policy and consumer protection policy are key elements of the American economic system.
- Together, they enhance consumer welfare by fostering a competitive marketplace that gives consumers greater informed choice and leads to greater availability of products with the qualities desired by consumers at the lowest prices.

The Role of Competition and Consumer Protection Policy in the Economy

- Strong competition benefits consumers by creating incentives for innovation, and by motivating sellers to provide more truthful, useful information about their products.
- Consumer protection policy supports those goals by ensuring the empowerment of consumers to participate in the marketplace by enabling them to make well-informed decisions about their choices.
- The interplay between protecting competition and ensuring that consumers can make effective choices among competing offerings is a constant feature of competition and consumer policy in the United States.

Professional Regulation

- Professions in the United States are often subject to laws and regulations specifying who may enter the profession and what types of minimal competency requirements must be satisfied before the individual can receive a license.
- In the United States, there is no national license to practice in several professions: such as law, medicine, nursing, dentistry, accounting, and more.
- Rather, each state and the District of Columbia has adopted different standards for licensing individuals to various professions.

FTC and Competition Advocacy

- As an important complement to its law enforcement mission, the FTC engages in competition and consumer protection advocacy before other policymakers, including state legislatures, regulatory boards, courts, and more.
- The FTC issues advocacy letters in response to invitations to provide policymakers with a framework to analyze competition and consumer protection issues raised by pending governmental actions or ongoing judicial disputes.
- Advocacy can play a particularly important role in addressing governmentally imposed restraints on competition, where other tools may be unavailable.
- There was strong support among those consulted for the FTC's advocacy efforts.

Agency Advocacy Regarding Professional Regulation

- The FTC has become concerned about efforts to prevent competition for services through the adoption of overly broad scope-of-practice or licensing restrictions.
- The FTC and DOJ have worked to address these concerns principally through advocacy efforts. The antitrust agencies have individually and jointly authored a series of advocacy letters opposing laws, regulations, and other proposals that would broaden a scope of professional practice in ways that would foreclose competition from other professionals in rendering particular services without providing countervailing consumer benefits.

Principles of the Advocacy

- Look at government imposed restrictions on competition and determine if they stand up to a cost-benefit test:
 - Will the regulation restriction competition?
 - If so, does this provide consumers with a benefit that would otherwise not arise?
 - Do consumers value this benefit more than it costs them in lost competition?
 - Are there less restrictive ways to reach the same goal?
- Base opinion on empirical evidence and FTC expertise in economics, competition, and consumer protection

Examples of Advocacy Regarding Scope of Practice-type regulations.

- Health Care Delivery: May, 2008: Comment to Illinois Legislature regarding limited service clinics (advocating that the legislature remove anticompetitive components of proposed legislation that would impede clinics' ability to compete with other health care providers).
- Practice of Law: April, 2008: Comment to South Carolina Supreme Court regarding practice of law (advocating that the court regulate the practice of law to allow for non-attorney competition for services requiring neither the skill nor knowledge of one trained in the legal profession).
- Dentistry: 1980's and early 1990s: Comments to state legislatures and boards in Texas, South Carolina, Montana, Tennessee, New Jersey and others regarding rules that would limit the scope of practice of non-dentists, the relationships dentists may have with non-dentists, advertising constraints among dentists, and other competition related concerns arising from proposed rules.

FTC Enforcement:

Indiana Federation of Dentists and California Dental Association

- FTC v. Indiana Federation of Dentists, 106 S.Ct. 2009 (1986) – Supreme Court upheld an FTC challenge to an agreement among dentists in Indiana to withhold certain information from insurers, which constituting an illegal agreement to restrain competition.
- FTC v. California Dental Association, 119 S.Ct. 1604 (1999) – FTC challenged an advertising restraint on dentists under the Sherman Act. The Court held that more a full analysis was required to demonstrate competitive harm than the existence of the advertising restraints in question.

FTC Enforcement:

South Carolina State Board of Dentistry

- Background: In 2000, South Carolina amended its Dental Practice Act. The legislature was concerned that many school children in low-income areas were receiving inadequate dental care because of the scarcity of providers.
- Prior to the 2000 amendments, hygienists could only perform those services in schools if a dentist had personally examined the patient within the preceding 45 days and had authorized such treatment.”
- Law relaxed the restrictions on oral hygienists performing oral prophylaxis and applying sealants in schools which allowed hygienists to perform those services so long as they were under the “general supervision” of a dentist.

FTC Enforcement:

South Carolina State Board of Dentistry

- In January 2001, a private dental services firm (HPS), began sending hygienists to schools in South Carolina to provide preventative dental care. HPS's hygienists performed oral prophylaxis and applied sealants on students that had not been pre-examined by dentists. In early July of that year, the Board received reports of “substandard patient care” by those hygienists.
- The Board enacted an emergency regulation pursuant to its rulemaking authority and reinserted the pre-examination requirement into by defining the term “authorized” to mean: the supervising dentist must have clinically examined the patient and actually determined the need for any specific treatment.
- This mandated that before treatment may be performed by a dental hygienist, the supervising dentist must provide an exam and a written work order for the procedures to be performed by the dental hygienist.

FTC Enforcement:

South Carolina State Board of Dentistry

- The Federal Trade Commission brought an action against the South Carolina State Board of Dentistry alleging that the Board engaged in unfair competition by promulgating an emergency regulation that prevented oral hygienists from performing certain services in school settings unless a dentist had first examined a student and prescribed a course of treatment.

FTC Enforcement:

South Carolina State Board of Dentistry

- The complaint stated:

“The effect of the emergency regulation was to reduce substantially the number of children (particularly economically disadvantaged children) who received preventive dental care. During the latter half of 2001, the period when the emergency regulation was in effect, HPS screened fewer than 6,000 children, about 13,000 fewer than it had screened during the first half of 2001. The emergency regulation also limited HPS’s ability to provide preventive dental care; as a result, the regulation deprived thousands of South Carolina children of preventive dental care.”

FTC Enforcement:

South Carolina State Board of Dentistry

- The Board appealed the FTC action to the Fourth Circuit, arguing that it was immune from suit under the “**state action** antitrust immunity” doctrine *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943)
- Appeal dismissed for lack of jurisdiction as the issue was not ripe for appellate review.

FTC Enforcement:

South Carolina State Board of Dentistry

- In 2007, the FTC and Board agreed to an order stating that:

“The Board shall provide written notice to the Commission at least (30) thirty days prior to the promulgation of any proposed or final rule, regulation, policy, issuance of a formal complaint in a disciplinary action, or other action of the Board, relating to the provision by dental hygienists of preventive dental services in a public health setting pursuant to S.C. Code Ann. § 40-15-110(A)(10), or any recodification thereof, including, but not limited to, an action concerning a dentist who authorizes, supervises, or bills for, the provision by dental hygienists of preventive dental services in a public health setting. Provided however, that if protection of the public health prevents Respondent from notifying the Commission thirty days in advance of an action, then Respondent shall provide the notice required by this Paragraph as soon as is reasonably practicable.”