Office of Policy Planning
Bureau of Economics
Bureau of Competition

February 14, 2008

The Honorable William J. Seitz
Ohio Statehouse
Ground Floor, RM # 38
Columbus, OH 43215

Dear Senator Seitz:

The staffs of the Federal Trade Commission=s Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] are pleased to respond to your request that we review and comment on the likely competitive effects of Ohio Executive Order 2007 – 23S (Executive Order or Order), which establishes collective bargaining for home health care workers. In your letter, you asked the Federal Trade Commission (FTC or Commission) whether the Executive Order is liable to create competition problems because it confers collective bargaining powers on some health care providers and not others, whether "the unionization of small business owners who contract with the state for provision of home health care services funded under the Medicaid program violates federal antitrust laws," and "whether the program established by the Executive Order is immune from the federal antitrust laws under either the 'state action' immunity doctrine" or federal labor law.[2]

The Executive Order provides for collective bargaining on behalf of all Independent Home Care Providers (IHCPs), "regarding reimbursement rates, benefits, and other terms."[3] In our judgment, such collective bargaining may raise the cost of home health care services, and reduce access to them. At the same time, collective bargaining is not likely to ensure better quality care as a countervailing benefit for health care consumers. For those reasons, the Commission has enforced the antitrust laws when certain private groups of health care providers have colluded to fix prices,

[1] This letter expresses the views of the Federal Trad

and the Commission consistently has opposed legislative proposals to exempt from antitrust scrutiny various categories of health care providers. In fact, the Executive Order appears to require that private parties engage in conduct that normally would be deemed *per se* violations of federal antitrust law, including price fixing between competitors, unless protected by an immunity or exemption from antitrust scrutiny.

Interest and Experience of the Federal Trade Commission

Congress has charged the FTC with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[4] Pursuant to its statutory mandate, the Commission seeks to identify business practices and regulations that impede competition without offering countervailing benefits to consumers. For several decades, the Commission and its staff have investigated the competitive effects of restrictions on the business practices of health care providers.[5] The FTC and its staff have issued studies and reports regarding various aspects of the health care industry,[6] and the Commission has brought numerous enforcement actions against entities in the industry that have violated federal antitrust laws.[7] In addition, the FTC and its staff have analyzed competition issues raised by proposed state and federal regulation of health care markets.[8]

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[4] Federal Trade Commission Act, 15 U.S.C. ' 45.

[5] *See* Federal Trade Commission, *FTC Antitrust Actions in Health Care Services and Products*, *available at* http://www.ftc.gov/bc/hcupdate031024.pdf.

[6] *See, e.g.*, FEDERAL TRADE COMMISSION, PHARMACY BENEFIT MANAGERS: OWNES.00.02 0 0 10.02 212.04 368.2HI9 -1.P1.51(OF.18 368

More specifically, the FTC has focused on competition issues raised by collective bargaining by health care service providers. In addition to investigations conducted in the course of enforcement actions, there have been more general inquiries by the Commission and its staff into market issues pertinent to the Executive Order. For example, the FTC and the Department of Justice Antitrust Division (DOJ) jointly issued Health Care Statements dealing with, among other things, practitioner integration issues.[9] In 2003, FTC and DOJ considered diverse competition issues raised by health care markets in joint hearings.[10] Among the issues investigated in those hearings were the following: competition, regulation, and market entry issues for diverse health care professionals and para-professionals; unionization issues for health care service providers; professional vertical and horizontal integration issues; Medicaid and Medicare issues; and the impact of the state action doctrine on competition law and policy.[11] In 2004, the FTC and DOJ issued a report based on the hearings, a 2002 FTC-sponsored workshop, and independent research.[12]

In addition, the Commission's staff has conducted an in-depth review of the state action doctrine and has issued a report regarding the doctrine and its impact on competition in diverse markets.[13] FTC staff have presented testimony on the state action doctrine to the Antitrust Modernization Commission (AMC),[14] and FTC enforcement activities have been central to defining the scope of the doctrine.[15]

Discussion

A. The Executive Order Establishes Collective Bargaining for Certain Home Health Care Workers.

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[9] *See* STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE

large population of consumers through higher prices, reduced output, lower quality, and reduced innovation."[28]

Although the Executive Order only requires collective bargaining with the State itself, and only for services provided under Ohio's Medicaid waiver, Ohio consumers are not insulated from the effects of such collective bargaining. First, to the extent that the Executive Order raises reimbursement unde

Unless shielded from antitrust scrutiny by an exemption or immunity, the private conduct contemplated by the Executive Order would violate the antitrust laws. Specifically, the Order would permit competing providers to agree on the prices they would accept for their services, which constitutes *per se* illegal price fixing. The Health Care Statements issued by the FT

note that it is settled law that states cannot immunize private anticompetitive conduct merely by stipulating the application of state action immunity.[41]

Parker represents the Court's reading of the preemptive reach of the Sherman Act,[42] a reading "grounded in principles of federalism."[43] In *Parker*, the Court found "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by the legislature."[44] Accordingly, the Court held that the Sherman Act does not prohibit state regulation that tends to suppress competition when "the state itself exercises its legislative authority" and, "as sovereign," adopts and enforces such regulation.[45] Notably, however, the Court has recognized that the principles of federalism underlying the state action doctrine are best served if *Parker* immunity is narrowly construed: "Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends."[46]

Under the state action doctrine, the conduct of the state, as sovereign, generally is immune from antitrust scrutiny. However, "[t]he national policy in favor of competition cannot be thwarted by casting … a gauzy cloak of state involvement over what is essentially a private price fixing arrangement."[47] Although states *themselves* may adopt and implement policies in tension with federal antitrust law, subordinate political entities, including state regulatory boards and municipalities, "are not beyond the reach of the antitrust laws because they are not themselves sovereign."[48] Private parties, moreover, are not insulated from antitrust scrutiny merely because a state legislature stipulates their immunity.[49] When a state expresses a policy to displace competition in favor of regulation, but delegates to private parties the implementation of that policy, *Parker* immunity requires establishing that the anticompetitive conduct

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[41] *See* text accompanying notes 46-54, *infra*, regarding certain state action doctrine limits. Analysis of the question whether the Order is preempted by the federal Social Security Act and its implementing regulations is also outside the scope of this letter.

[42] "We may assume also, without deciding, that congress could, in the exercise of its commerce power, prohibit a state from maintaining … [such a program] because of its effect on interstate commerce." Parker, 317 U.S. at 350.

[43] *Ticor Title*, *supra* note 15, at 633.

[44] *Parker*, 317 U.S. at 350-351.

[45] *Id.* at 352.

[46] *Ticor Title*, 504 U.S. at 636.

[47] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106 (1980).

[48] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985) (municipality not the sovereign); *see also* Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 62-63 (1985) (state Public Service Commissions "acting alone" could not shield anticompetitive conduct from antitrust scrutiny); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975) (state bar association, which was state

is sufficiently "the state's own."[50] Two tests are required for that purpose: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[51] Because "IHCPs are not State employees,"[52] collective bargaining by them or their privately elected representatives cannot be immune unless it passes both of these tests. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*,[53] California's system for wine pricing was not immune from antitrust scrutiny because the legislature itself did not establish prices, review the reasonableness of price schedules, or engage in any "pointed reexamination" of the program – hence, failing the active supervision test.[54]

2. Federal Labor Law Issues: The Executive Order seeks to confer antitrust immunity styled as a labor exemption. Although FTC staff is primarily concerned with the competition and antitrust law implications of the Executive Order, the staff does note that the Order appears entirely at odds with federal labor policy. The federal labor exemption is limited to the employer-employee context; it does not protect combinations of independent business people.[55] The Order, however, expressly excludes employees in favor of independent contractors,[56] inverting the distinction Congress drew between them. Unlike the labor law system, the Executive Order also lacks the exclusions from protected negotiations for subjects unrelated to the intended purpose of those laws, as well as the oversight of the process by the National Labor Relations Board.

Moreover, the creation of a labor exemption for home health care workers is offered as a remedy for problems that collective bargaining was never intended to address. The stated goal of the Executive Order is to "ensure that the quality of services provided to in-home health care recipients remains constant."[57] The labor exemption, however, was not created to ensure the safety or quality of products or services. Collective bargaining rights are designed to raise the incomes and improve

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[50] *Ticor Title*, 504 U.S. at 635.

[51] Midcal, 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

[52] Executive Order, *supra* note 3, at 4.

[53] *Supra* note 51.

[54] *Id.* at 105-106.

[55] *See, e.g.*, Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942); United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460 (1949); American Medical Ass'n v. United States, 317 U.S. 519, 533-36 (1943) (rejecting assertions that the labor exemption to the antitrust laws applied to joint efforts by independent physicians and their professional associations to boycott an HMO in order to force it to cease operating). NLRA Section 2 (3) gives the right to bargain collectively only to "employees." The 1947 Taft-Hartley amendments to the NLRA incl

Respectfully submitted,

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