
² For some history of the competition advocacy program and various views of the program see James Cooper, et al., *Theory and Practice of Competition Advocacy at the FTC* (forthcoming, ANTITRUST L. J.), available at <http://www.ftc.gov/ftc/history/040910zywicki.pdf>. For a positive evaluation of the program at its zenith, see Andrew J. Strenio, Jr., Today's Menu:

expend the FTC's whole budget -- far from it. But it is wise to evaluate whether our advocacy efforts are benefitting consumers more than it costs them as taxpayers.

Unfortunately, I cannot provide precisely what economists might like to see. We do not have data defining the likely magnitude of the effects on market outcomes if a policymaker follows our advice. Moreover, we cannot be certain that pro-competition outcomes would not result if the FTC had not filed a comment. Still, we can subjectively evaluate the FTC's work in this area, recognizing that if we prompt decision-makers to think harder about what they are trying to accomplish and whether it can be done in a way that is less restrictive of competition, we likely have provided some benefit.

Our recent advocacy filings generally have sought to achieve one of three objectives: (1) facilitating entry, (2) eliminating perverse market incentives, and (3) making it easier for consumers to get useful information.

I. Opposing Unnecessary Barriers to Entry

Much of our activity involves commenting on state and federal regulations or legislation that erect barriers to entry. Often the rationale for legislation is the protection of consumers through restrictions on who may offer certain goods and services to consumers or (perhaps more honestly) the protection of traditional businesses by sheltering them from new forms of competition. While firms generally profess a desire to keep government out of business, the instinct to seek protection from government is widespread. As one commentator put it last week, "calls to restrict competition, through government regulations and import barriers, are understandable – and usually wrong."⁴ The biggest problem with cementing barriers into the law

⁴ Robert J. Samuelson, *Competition's Anxious Victory*, THE WASHINGTON POST, Feb. 2, 2005, at A-23.

is that they are resistant to erosion by market activity.

When evaluating barriers to competition, the FTC favors a careful analytical approach that considers costs and benefits to consumers and relies on empirical evidence. We ask three basic questions:

First: What specific harm to consumers is the barrier designed to address?

The Commission looks for empirical evidence of consumer harm. Because states typically vary in the degree to which they regulate these activities, we often look for evidence of consumer harm occurring in states that allow the practice in question.

Second: Is the proposed restriction appropriately tailored to address that harm?

In endeavoring to answer that question, we look at whether, in addition to the activity the restriction attempts to prevent, it will curtail other pro-competitive activity.

Third: Does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition?

Here, we help perform the cost-benefit analysis that all policymakers should perform, emphasizing that competition generally is more successful at protecting consumers than government regulation.

A. The Unauthorized Practice of Law

⁵ Over the years the FTC staff has filed dozens of comments on licensure regulations and codes of conduct for various professions and occupations.

⁶ See, e.g., Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says “Cease Fire,”* 31 CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform real estate transactions than in which attorneys perform them); Michael Braunstein, *Structural Change & Inter-Professional Competitive*

barring competition from non-attorneys, is likely to reduce consumer welfare.

The West Virginia court ultimately reversed the lower court's decision to uphold the bar opinion on the ground that there was an insufficient factual record to determine that the real estate services fall within the practice of law.⁹ The court stated that such a public interest determination requires weighing considerations such as accountab15Ir2TpZ9duour. estate se[(estate seZ9duour.

⁹ *McMahon v. Advanced Title Services Company of West Virginia*, Case No.: 31706 (Supreme Court of Appeals of the State of West Virginia, Dec. 3, 2004).

¹⁰ *See, e.g., FANNIE MAE (DAVID W. BERSON & ORAWIN VELZ), ECONOMIC & MORTGAGE MARKET DEVELOPMENTS* (Jan. 18, 2005) (Housing Market Summary: Historical and Forecast), *available at* <http://www.fanniemae.com/media/pdf/berson/monthly/2005/011205.pdf>.

¹¹ *See* Letter from the Department of Justice and the FTC to the Kansas Bar Ass'n (Feb. 4, 2005), *available at* <http://www.ftc.gov/be/v050002.pdf>; Letter from the Department of Justice and the FTC to the Massachusetts Bar Ass'n (Dec. 16, 2004), *available at* <http://www.ftc.gov/os/2004/12/041216massuplltr.pdf>; Letter from the Department of Justice and the FTC to Indiana State Bar Ass'n (Oct. 1, 2003), *available at* <http://www.ftc.gov/os/2003/10/uplindiana.htm>; Letter from the Department of Justice and the FTC to the State Bar of Georgia (Mar. 20, 2003), *available at* <http://www.ftc.gov/be/v030007.htm>; Letter from the Department of Justice to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, et al. (Mar. 28, 2003), *available at* <http://www.ftc.gov/be/V020006.htm>; Letter from the Department of Justice and the FTC to Speaker of the Rhode Island House of Representatives, et al. (Mar. 29, 2002); Letter from the Department of Justice and the FTC to President of the North Carolina State Bar (Jul. 11, 2002); *available at* <http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf>; Letter from the Department of Justice and the FTC to the North Carolina State Bar (Dec. 14, 2001), *available at* <http://www.ftc.gov/be/V020006.htm>.

B. Entry into Futures Trading Services (Eurex entry)

Another example of a public entry barrier that could have stifled innovative services and led to higher prices was an¹² public entr^{7.5984} tmat

¹² See CFTC Release, at <http://www.cftc.gov/opa/press04/opausferemarks.htm>.

market for U.S. Treasury futures contracts.¹³ Although the entrant has not yet garnered a significant market share given the competitive reaction of the incumbent exchanges, consumers have benefitted handsomely as trading volume increased, and the exchanges offered customers “bargain prices” for Treasury futures trades.

C. Barriers to E-Commerce: Wine

In July 2003, the FTC staff issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.¹⁴ Direct shipment is a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of

¹³ *Chicago Takes on Europe*, BUS. WEEK., Jul. 5, 2004, at 76-77.

¹⁴ POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, REPORT OF THE STAFF OF THE FTC (Jul. 2003), *available at* <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

¹⁵ The study appears as an appendix to the FTC staff report. It was published separately as an FTC Bureau of Economics Working Paper, Alan E. Wiseman and Jerry Ellig, *How Many Bottles Make a Case Against Prohibition?* (Mar. 2003) (FTC Bureau of Economics Working Paper No. 258), and later published as Alan E. Wiseman and Jerry Ellig, *Marketing and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6:2 Business and Politics 5

study of wine retailing in McLean, Virginia found that 15% of a sample of popular wines available online were not available in retail locations in or close to McLean. In addition, this small-sample study also found that consumers could save money by purchasing more expensive wines online. Assuming the least expensive shipping method is used, the study found that consumers could save an average of 8-13% on wines costing at least \$20 per bottle, and an average of 20-21% on wines costing at least \$40 per bottle.

The report also examined concerns about the direct shipment of wine to consumers, given that underage drinking is a serious health and safety issue.¹⁶ The report concluded, however, that there is no systematic evidence of problems of Internet-related shipments to minors. Moreover, the report noted that safeguards, such as checking identification at delivery, may address these concerns, and that, in fact, some states have successfully followed this less restrictive approach.

The Supreme Court currently is considering whether state prohibitions on the direct shipment of wine from out-of-state sellers but not in-state sellers violate the dormant Commerce Clause of the Constitution in light of Section 2 of the 21st Amendment.¹⁷ The parties seeking removal of these restrictions, including two Nobel Prize winners and other economists on behalf of the AEI-Brookings Joint Center for Regulatory Studies, have relied on the staff report to

(2004), available at www.bepress.com/bap/vol6/iss2/art4. The authors explicitly note that a full welfare analysis of the removal of restrictions would require additional data.

¹⁶ If the restrictions on direct sale of wine to consumers are motivated by concerns about underage drinking, it is curious that many of the states direct their restrictions only at out-of-state vendors, while allowing direct intrastate shipments from in-state vendors.

¹⁷ *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir.), cert. granted, 124 S. Ct. 2391 (2004).

²² See Samuelson, *supra* note 4.

²⁴ Michael G. Vita, *Regulatory Restrictions on Selective Contracting: An Empirical Analysis of "Any-Willing-Provider" Regulations*, 20 J. HEALTH ECON. 955, 955-66 (2001).

²⁵ In 1998, CMS listed Rhode Island prescription drug expenditures at about \$400 million with annual growth of about 12.4%. See CENTER FOR MEDICARE AND MEDICAID S

These are examples of information standards that provide benefits for consumers that exceed the costs of developing and implementing the standard. Knowing whether any particular information mandate or standard is a good idea, however, requires an analysis of the outcomes that would occur absent mandated provision of the information and an estimate of the costs of the mandate.

There are times when providing more information is not the better policy. First, the collection and dissemination of information can be expensive, and the benefits from providing additional information will not always outweigh its costs. Second, more information, even if truthful, sometimes misleads or overwhelms consumers and will not result in greater consumer comprehension. Finally, additional information shared among sellers may provide an opportunity for tacit collusion.

A. Food Health Claims Information Regulation

In the food and nutrition area, we have pushed to allow manufacturers to provide more accessible and useable information to consumers. While we oppose unnecessary mandates, we want to ensure that the FTC and other government agencies, in the name of protecting consumers, do not block producers' incentives or ability to provide useful information to consumers and to compete on important nutritional attributes of their products.²⁶

Our participation in the food health claims area stretches back to the proposed food rule in the 1970s and continues through the more recent health claims period that began with

²⁶ No one should misread my comments to say that I think markets solve all information problems. Clearly they will not.

mortgages directly from lenders.³² Following up on this concern, the FTC staff subsequently released consumer research on the effect on consumers of disclosures of mortgage brokers' yield spread premiums.³³ The research revealed that the disclosure of the yield spread premium (which is only a small part of the total cost of a loan) distracted consumers from the bottom-line cost of the loan. As a result, consumers chose the higher cost loan more frequently when the broker fees were disclosed. Not only would the disclosure have fostered consumer confusion, it also would have distorted competition among different types of lenders. The confusing disclosure worked to the advantage of direct lenders, who, unlike brokers, did not have to disclose the implicit fees included in their loans.

The effectiveness and value of disclosures depends on whether the information disclosed is important to consumer choice and whether it distracts consumers from other, more important information. How much might this disclosure have cost consumers? It is hard to know for sure, but the effect on error rates was quite large. Without a broker disclosure, 90% of study participants chose the right loan, but only about 60-70% got it right when the broker disclosure was prominently displayed. FTC staff conducted a number of different comparisons, all of which tended to show large effects.

³² Comments of the FTC Staff Before The Department of Housing and Urban Development In the Matter of Request for Comment on Proposed Amendments to the Regulations Implementing the Real Estate Settlement Procedures Act (Oct. 28, 2002), *available at* <http://www.ftc.gov/be/v030001.pdf>.

³³ JAMES M. LACKO and JANIS K. PAPPALARDO, THE EFFECTS OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT, FTC BUREAU OF ECONOMICS STAFF REPORT (Feb. 2004).

³⁴ Comments of the Staff of the FTC to Representative Greg Aghazarian (Sept. 7, 2004), *available at* <http://www.ftc.gov/be/V040027.pdf>.

³⁵ Letter of Governor Arnold Schwarzenegger to Members of the California State Assembly Returning Assembly Bill 1960 Without Signature (Sept. 29, 2004), *available at*

³⁶ Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Consumer-Directed Promotion (Dec. 1, 2003), *available at* <http://www.ftc.gov/be/v040002text.pdf>; Comments of the FTC Staff Before the FDA In the

extent of the benefits of this program, but thus far I have not provided you the costs. Our advocacy program currently uses less than one percent of the FTC's budget.³⁷ That is less than \$2 million. How can it be so small? Many of our comments build on the experience and information we have obtained in the course of our enforcement and other policy development work, such as workshops. Also, we have been doing this for over 25 years, so we have some experience in making the program work. We focus on areas where we can make multiple comments; we avoid areas that are too contentious for us to reach consensus within the Agency; and we choose our battles carefully to focus on areas in which we have expertise and good empirical evidence to undergird our position. And, finally, we share this important workload with the Antitrust Division.

V. Conclusion

There are always those who oppose competition and view it as an inappropriate means of “organizing” the production and distribution of goods and services. Indeed, on almost every issue on which we comment, there are those who find our advocacy positions vexing. More dangerous are those who profess to favor competition but want to chip away at it when it does not produce a particular result.³⁸ While it would be great if we could, through advocacy, convert

³⁷ The total time on the program is on the order of 5 to 7 work years spread over 10 to 12 individuals in various components of the Commission, such as the Office of Policy Planning, the Bureau of Economics and the Office of the General Counsel, with help from other staff with expertise in specific topics. At the peak of the program, in the mid-1980s, the cost might have been closer to 4% of FTC resources. See Andrew J. Strenio, Jr., Press Release, FTC's Advocacy Program is Effective and Efficient (Jun. 8, 1987).

³⁸ *E.g.*, Allocution de Monsieur Jacques Chirac, President of France (Jan. 4, 2005), *available at* <http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2005/05VXFV.html>. President Chirac declares: “[L]et us favor competition. Not wild competition, which

those people, we must, regardless of our convert success, continue to stand up for the market. At a minimum, we should continue trying to convince the ultimate decision-makers to consider whether the cost of a proposed restriction outweighs its benefit. Over the years, we have been successful enough in this endeavor to demonstrate that the program is well worth the effort. The FTC's advocacy program will continue to stand up for consumer interests and market-based competition whenever they are threatened by ill-advised government proposals.

Finally, I would like to appeal to you, the economists, to engage in empirically-based research, particularly research that helps us and other policymakers estimate the benefits and costs of government actions at the state and federal level. Thank you.

destabilizes whole fields and endangers economic sectors, but rather regulated competition, to give more purchasing and economic power to consumers.” *Id* (translation).