# BACKGROUND MATERIALS:
# A PRIMER ON THE APPLICATION OF ANTITRUST LAW TO THE P

Thus, there can be good reason to apply competition analysis to the collective actions by professionals. In the United States, anticompetitive restrictions involving professionals are typically subject to Section 1 of the Sherman Act,[1] which governs collective action in restraint of trade. Given the characteristics of the markets for professional services – with professional associations prescribing limits on the behavior of member-competitors – it should not be surprising that the federal antitrust enforcement agencies have a substantial history of intervention.

Part I of these materials describes the development of antitrust law as applied to the professions in the United States. Part II describes relevant limitations on U.S. antitrust enforcement, most notably the so-called state action doctrine. Part III provides examples of the Federal Trade Commission's efforts to foster competition among professionals. The Commission's actions include research and competition advocacy addressed to state and other regulators, in addition to law enforcement.

## I. THE DEVELOPMENT OF ANTITRUST LAW AS APPLIED TO THE PROFESSIONS

The professions typically require extensive education, training, and mastery of specialized knowledge. The professions are also characterized by an underlying belief in the goal of providing services necessary to the community. To institutionalize this purpose, the professions typically establish codes of ethics that establish the professionals' obligations to the public and those who employ their services. These codes of ethics often become an extensive system of obligations and regulations that govern the conduct of the profe

The Supreme Court next addressed the application of the antitrust laws[8] to the professions in *National Society of Professional Engineers v. United States*.[9] The professional society had adopted an ethical canon that prohibited its members from providing price information to a prospective client before the engineer was selected for the project. The rule effectively prohibited competitive bidding and prevented customers from selecting an engineer based on price. The society claimed that

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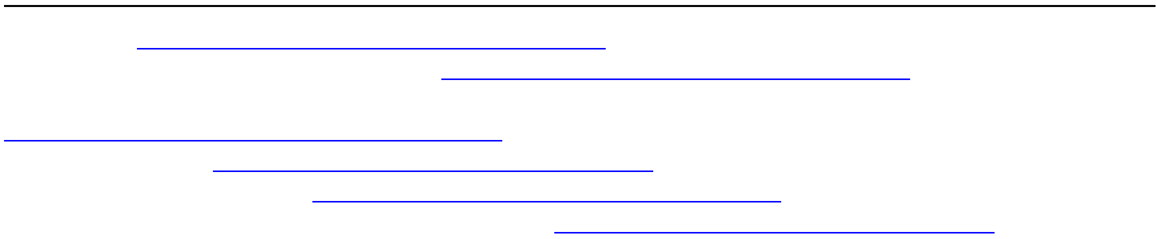
## II. LIMITATIONS ON ANTITRUST ENFORCEMENT

Although the professions are not generally exempt from the antitrust laws, the application of two related bodies of legal doctrine may result in the avoidance of antitrust condemnation for anticompetitive restrictions on the professions. First, the federal courts have developed doctrines of deference to government decision making. In particular, the state action doctrine may allow some restrictions in professional and other markets to escape antitrust liability when a state regulatory scheme operates. Based on principles of federalism and state sovereignty, courts have found that the Sherma

by dental hygienists imposed

In order for state supervision to be adequate for state action purposes, state officials mu

cases to enforce the antitrust laws against those who engage in anticompetitive conduct. Second, the Commission uses its expertise in competition law and economics to provide state and federal policy makers with analysis of the likely effects of proposed laws and regulations. Third, the Commission conducts research to increase its knowledge of issues affecting competition and consumers. Finally, drawing on experience from enforcement, advocacy, and research, the Commission seeks to educate the public through reports and speeches aSiy 1 T.80ion 32rough reports 56o 12 432.8984 653.76 Tmdu2p852T.80ion 32ro0 1296 arch to 2r



would otherwise be *per se* illegal) are reasonably necessary to realize those efficiencies. Thus, with appropriate safeguards, professional associations can undertake various activities to provide information about prices to members, consumers, and third party payers.

To help allay physicians' and other health care providers' concerns about potential antitrust issues regarding collaborative activity and to encourage the development of potentially pro-competitive and lawful arrangements, the Commission has undertaken a broad effort to inform and educate participants in the health care area. For example, the FTC and the Department of Justice jointly developed and published Statements of Antitrust Enforcement Policy in Health Care.[40] The Statements are intended to explain the agencies' analysis of several common types of collaborative activity among health care providers. The Statements provide some clear rules of thumb,

the current role of competition in health care and described how antitrust enforcement has worked and should work to protect existing and potential competition in health care.

*Eye Care Services*

The Commission has engaged in a wide variety of activities concerning the eye care industry. With regard to law enforcement, the FTC investigates and brings law enforcement actions for violations of the antitrust laws. For instance, the FTC brought an administrative case against a state licensing board composed of practicing optometrists, charging that the Board unlawfully restricted advertising of truthful, non-deceptive information about the price and availability of eye care services. After a trial, the Commission ruled that the Board's ban on such affiliation advertising unlawfully impeded entry by retail optical stores and raised prices for eye care. The FTC prohibited the Board from restricting certain types of advertising and required it to repeal its prohibitions against advertising affiliations between optometrists and optical retailers.[44]

In addition, the Commission has brought enforcement actions to address unfair or deceptive acts and practices under its consumer protection authority. For example, the Commission entered into consent agreements with two of the largest sellers of LASIK eye surgery services to resolve complaint allegations that they made the unsubstantiated claims that LASIK surgery would eliminate the need for glasses for life, and that LASIK surgery poses significantly less risk to the ocular health of patients than wearing contact lenses or eye glasses.[45]

The Commission promulgated the Ophthalmic Practice Rules (Eyeglass Rule) in 1978 to increase competition and consumer choice in the sale of eyeglasses.[46] The Eyeglass Rule requires eye care professionals to provide patients automatically, at no extra cost, with a copy of their eyeglass prescriptions after completion of an eye examination. The FTC promulgated this Rule because it found that many consumers were deterred from comparison shopping for18ETEMC /P ‹6 Tm(e need f4 322.62 Tm(ers )Tj68 TTEa( com

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example, the Contact Lens Report noted that licensing requirements may insulate in-state sellers from out-of-state competition or insulate eye care practitioners from non-practitioner sellers. Further, as noted in the report, staff found that health concerns do not appear to justify the costs imposed by these requirements.[56]

The FTC staff also has provided comments to state agencies and legislatures regarding the effects of restrictions on the sale of replacement contact lenses. For example, in March 2002 the Commission staff filed a comment before the Connecticut Board of Examiners for Opticians in a declaratory ruling proceeding on the interpretation and applicability of various statues and regulations concerning the sale of contact lenses.[57] In that comment, Commission staff concluded that out-of-state sellers should not be subject to state licensing requirements because the possible benefit consumers might receive from increased state protection did not outweigh the likely negative effect from decreased competition. Ultimately, the Connecticut Board of Examiners decided that state law did not require out-of-state sellers to obtain a license to sell contact lenses to consumers.[58]

*Legal Services*

The Commission has brought cases designed to increase competition for legal services. One case challenged an association of private lawyers who collectively agreed to withhold acceptance of appointments to represent indigent criminal defendants in the District of Columbia until the District government agreed to increase the compensation for such appointments.[59] The lawyers contested the FTC's claims on the grounds that the group boycott was necessary to ensure higher quality representation of criminal defendants than the low level of compensation permitted. The Supreme Court ruled that such justifications cannot authorize such an anticompetitive agreement between competitors.

In 2004 the Commission accepted a consent agreement for similar behavior by a group of attorneys representing indigent clients in Clark County, Washington.[60] The attorneys formed a "consortium" through which they collectively demanded higher fees from the county for defending homicide, attempted homicide, persistent offender, and death penalty cases. Lawyers in the group refused to accept certain new cases until their

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[56] *Id.* at 3.

[57] *See* FTC Staff Comment Before Connecticut Bd. of Exam'rs for Opticians (Mar. 27, 2002), *available at* http://www.ftc.gov/be/v020007.htm; *see also* Letter from Maureen K. Ohlhausen, Acting Dir., Office of Policy Planning, to Ark. State Rep. Doug Matayo (Oct. 4, 2004) (commenting on legislative proposal that likely would have conflicted with the FCLCA's release and verification requirements), *available at* http://www.ftc.gov/os/2004/10/041008matayocomment.pdf.

[58] Connecticut Bd. of Exam'rs for Opticians, In re Petition for Declaratory Ruling Concerning Sales of Contact Lenses, Declaratory Ruling Memorandum of Deci

demands for increased fees were met. Under the terms of the consent agreement, the attorneys are enjoined from engaging in similar conduct in the future.

Much of the Commission's activities regarding the legal profession is competition advocacy. During the past few years, U.S. competition authorities have encouraged numerous states to adopt pro-competitive professional regulations. There are many services traditionally performed by lawyers that do not always require legal training and may be performed by non-lawyers at lower cost to consumers. Consequently, the FTC has urged state regulators of the legal profession to exclude those services from the definition of the practice of law. For example, the Commission, with the Department of Justice, encouraged the Georgia bar to reject a proposal that would prevent non-lawyers from competing with lawyers to handle real estate closings.[61] The agencies argued that the proposal could prevent competition from out-of-state and Internet lenders and force consumers and businesses to pay more.[62] The agencies have made similar arguments to North Carolina,[63] Rhode Island,[64] Indiana,[65] Massachusetts,[66] Kansas,[67] New York,[68] and the American Bar Association.[69]

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[61] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Standing Comm. on Unlicensed Practice of Law, State Bar of Ga. (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.htm. The Georgia State Bar ultimately adopted the proposed opinion, concluding that the preparation and facilitation of the execution of deeds of conveyance on behalf of another by anyone other than a duly licensed attorney constitutes the unlicensed practice of law. The matter is now before the Georgia Supreme Court on direct review. On July 28, 2003, the Commission and the Department filed a joint *amicus* brief in that action raising the same objections set forth in the agencies' letter to the State Bar. *See* On Review of UPL Advisory Opinion No. 2003-2, Brief *Amici Curiae* of the United States and the Federal Trade Comm'n (July 28, 2003), *available at* http://www.ftc.gov/os/2003/07/georgiabrief.p

The Commission has also had an active campaign of competition advocacy against restrictions on various types of legal advertising, which reduce competition for legal services and limit the availability of information to consumers. The FTC view has been that while deceptive advertising by lawyers should be prohibited, restrictions on advertising should be specifically tailored to prevent deceptive claims and should not unnecessarily restrict the dissemination of truthful and non-misleading information. Thus, earlier this month, Commission staff argued against proposed amendments to the rules on attorney advertising in New York.[70] The proposed restrictions would prohibit certain quality descriptions, comparative claims, illustrations, and the appearance of persons other than the lawyer. Commission staff also argued against proposed advertising guidelines in New Jersey that would limit the use by lawyers or law firms of endorsements or testimonials from clients.[71] The Commission staff made arguments to the Alabama Supreme Court that were similar to the letters to New York and New Jersey.[72] The Commission staff position is consistent with arguments that the

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[66] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Task Force to Define the Practice of Law in Mass. re: Draft Proposed Definition of the Practice of Law in Mass. (Dec. 16, 2004), *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf; Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Rep. Paul Kujawski re: bill authorizing non-attorneys to perform certain real estate settlement services (Oct. 6, 2004), *available at* http://www.ftc.gov/os/2004/10/041008kujawskicomment.pdf.

[67] *See* Letter from Federal Trade Comm'n & U.S. Dep't of Justice to Jerry Alderman, Executive Dir., Kan. Bar Ass'n, re: Comments on Kan. Bar Ass'n's Proposed Definition of the Practice of Law (Feb. 4, 2005), *available at* http://www.ftc.gov/be/v050002.pdf.

[68] *See* Comments of F

Commission made to the to the ABA Commission on Advertising, in which the FTC argued against guidelines respecting dignity in advertising because such guidelines, no matter how they might be worded, would reduce consumer access to truthful, non-deceptive information without providing a countervailing benefit.[73] Commission staff have also opposed proposed limitations on attorneys participating in on-line attorney referral programs where attorneys provide solicitation information to potential clients that indicate a need for particular legal services.[74]

*Real Estate*

Since the 1980s, the Commission has actively investigated and challenged anticompetitive practices in the real estate industry, including efforts by private associations of brokers to disadvantage and limit competition from brokers who use non-traditional listing agreements.[75] Recently, as alternative limited service brokerage models have grown in prominence, the FTC also has become aware of actions through multiple listing services (MLSs), industry trade associations, and state regulatory and legislative bodies that are likely to make it more difficult for these limited-service business models to compete against traditional brokers. In July the Commission charged the Austin Board of Realtors ("ABOR"), an association of real estate brokers in the Austin, Texas, metropolitan area, with violating Section 5 of the FTC Act.

important public Web sites. These rules discouraged Austin MLS members from entering into such agency listings with their clients and thus impeded one way of providing unbundled brokerage services to consumers. The Commission's consent order with ABOR, which settled the charges, prohibits ABOR from adopting or enforcing any policy to deny, restrict, or interfere with the ability of its members to enter into non-traditional listing arrangements.

The Commission's advocacy program has addressed issues related to real estate transactions, such as laws that restrict non-attorneys from performing certain aspects of real estate closings.[77] Over the past two years, several state legislatures and real estate commissions – at the urging of state Realtor® associations – have considered or adopted minimum service requirements, which would have the effect of forcing consumers to purchase a state-mandated bundle of real estate brokerage services. Because these measures are likely to harm consumers, the FTC and DOJ have been active in advocating against them. In 2005, the Agencies sent letters to the Texas Real Estate Commission, the Alabama Senate, Missouri Governor Blunt, and Michigan state Senator Alan Sanborn providing analysis of the likely competitive effects of proposed minimum service laws. The agencies concluded that by effectively eliminating many of the most popular packages offered by limited-service brokers, these minimum-service laws would reduce competition among traditional brokerage models and limited service models. Further, the agencies noted the dearth of evidence that such laws are necessary to protect consumers; throughout the Commission's advocacy efforts staff were never presented with evidence of actual consumer harm from a limited-service brokerage model.

In 1983 the FTC released a comprehensive report on the real estate brokerage industry reflecting years of enforcement activity and industry research.[78] More recently, in an effort to further educate the Commission and the public about the substantial changes occurring in the real estate brokerage marketplace, and given consumers' strong interests in competitive real estate brokerage service markets, the FTC and DOJ held a workshop addressing competition po

to assess how they affect consumers. The FTC and DOJ have indicated that they plan to issue a joint report this fall setting forth the findings with regard to the state of competition in the real estate brokerage industry. The report will be based on the agencies' review of the testim