State Intervention/State Action – A U.S. Perspective

Remarks of

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I. Introduction

Last December, in discussing the "positive agenda" of the Federal Trade Commission ("FTC") for competition policy, I identified four general principles:[1]

1. play an active role in promoting competition as a basic principle of economic organization through strong enforcement and focused advocacy;

2. focus antitrust enforcement resources on conduct that poses the greatest threat to consumer welfare;

3. make full use of the agency's distinctive institutional capabilities by applying the entire range of policy instruments to solve competition policy problems; and

4. attach a high priority to improving the institutions and processes by which antitrust policy is formulated and applied.

Today, I will focus on the second of these principles: targeting resources. Shaping a rational antitrust program requires identifying the practices that should receive the greatest scrutiny. Although *private* restraints have received the most attention in antitrust, focusing

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* The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

[1] *See* Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 363 (2003).

exclusively on these restraints leaves a gaping hole in the antitrust enforcement net. Therefore, I will discuss the problem of *public* restraints and a few promising strategies for addressing them that highlight the FTC's recent efforts to make public restraints a focus of antitrust scrutiny. To illuminate our work in the United States, I will also compare the European approach to the issue.

Although I intend to focus on the second of the four guiding principles of the FTC's "positive agenda," I hope that my discussion of the agency's approach to the problem of public restraints will showcase all four. By identifying and scrutinizing public restraints, we continue to promote competition as a basic principle of economic organization. Likewise, the task of combating public restraints requires use of the full range of the FTC's policy instruments, from economic studies and competition advocacy to administrative litigation. Finally, because a successful campaign against public restraints will require an exceptional level of coordination between governmental units – at the state, federal, and international level – it will necessarily entail improvements in the institutions and processes by which antitrust policy is applied.

In my presentation I will highlight three themes. First, I will explain the importance of devoting substantial resources to opposing public restraints. Second, I will emphasize the need to use a multi-faceted strategy that invokes a broad range of policy instruments. Finally, I will underscore the need for competition agencies to build new institutional relationships with other government bodies whose decisions involve the competitive process.

II. The Problem of Public Restraints

Attempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel.

The same is true of antitrust enforcement. If you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. You have simply dictated the form that it will take. Let me restate the point in the form of a competition policy theorem: as a competition system achieves success in attacking private restraints, it increases the efforts that firms will devote to obtaining public restraints.

Indeed, rational firms are likely to *prefer* public, governmental restraints, assuming that they are confident of their ability to secure such restraints. In many ways, public restraints are far more effective and efficient at restraining competition. Unlike private restraints, there is no need to maintain backroom secrecy or to incur the costs of conducting a covert cartel. Public restraints can be open and notorious. Public restraints are also a more efficient means of solving the entry problem. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides for only a limited number of licenses. Perhaps the clearest advantage of public restraints is that they frequently include a built-in cartel enforcement mechanism. While cheating often besets private cartels, public cartels suffer from no such defect. Cheaters, once identified, can be sanctioned through government processes.

The rational use of public restraints is not a new phenomenon. Nor is it something unusual. Rather, it happens all the time. Recent high profile examples include physicians and automobile dealers.

Those familiar with the Commission's antitrust enforcement in health care are well aware of the increasing number of physician price fixing cases. Since May 2002, for example, the Commission has issued complaints against sixteen groups of physicians for allegedly colluding to raise consumers' costs.[2] The number of physicians involved in these alleged price fixing arrangements has varied significantly, ranging from eight in Napa Valley to more than 1,200 in Dallas-Fort Worth. Most of these cases have been resolved by consent order. Not surprisingly, however, the Commission's efforts to combat these private arrangements among physicians have triggered a flurry of lobbying activity, primarily directed toward obtaining antitrust exemptions for physician collective bargaining at both the state and national levels. Over the past two years, the Commission has commented on three such bills, which were then pending before the

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[2] *See Surgical Specialists of Yakima, P.L.L.C.*, File No. 021 0242 (Sept. 24, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/09/surgicaldo.pdf>; *North Texas Specialty Physicians*, Docket No. 9312 (Sept. 16, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/09/ntexasphysicianscomp.pdf>; *South Georgia Health Partners, L.L.C.*, File No. 011 0222 (Sept. 9, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/09/sgeorgiado.pdf>; *Washington University Physician Network*, Docket No. C-4093 (Sept. 3, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/09/wupndo.pdf>; *Physician Network Consulting, L.L.C.*, Docket No. C-4094 (Aug. 29, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/08/physnetworkdo.pdf>; *Maine Health Alliance*, Docket No. C-4095 (Aug. 29, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/08/mainehealthdo.pdf>; *SPA Health Org.*, Docket No. C-4088 (July 25, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/07/spahealthdo.pdf>; *Anesthesia Serv. Med. Group, Inc.*, Docket No. C-4085 (July 15, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/07/asmgdo.htm>; *Grossmont Anesthesia Serv. Med. Group, Inc.*, Docket No. C-4086 (July 15, 2003) (consent order) *available at* <http://www.ftc.gov/os/ 2003/07/gasdo.htm>; *Brown and Toland Med. Group*, Docket No. 9306 (July 9, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/07/caadmincmp.pdf>; *Carlsbad Physician Ass'n, Inc.*, Docket No. C-4081 (June 20, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/06/carlsbaddo.htm>; *Syst. Health Providers*, Docket No. C-4064 (Oct. 24, 2002) (consent order) *available at* <http://www.ftc.gov/os/2002/11/shpdo.pdf>; *R.T. Welter & Assocs., Inc. (Professionals in Women's Care)*, Docket No. C-4063 (Oct. 8, 2002) (consent order) *available at* <http://www.ftc.gov/os/2002/08/profwomendo.pdf>; *Physician Integrated Servs. of Denver, Inc.*, Docket No. 4054 (July 16, 2002) (consent order) *available at* <http://www.ftc.gov/os/2002/05/pisdagreement.pdf>; *Aurora Associated Primary Care Physicians, L.L.C.*, Docket No. 4055 (July 16, 2002) (consent order) *available at* <http://www.ftc.gov/os/2002/05/auroraagreement.pdf>; *Obstetrics and Gynecology Med. Corp. of Napa Valley*, Docket No. C-4048 (May 14, 2002) (consent order) *available at* <http://www.ftc.gov/os/2002/05/obgyndo.pdf>.

legislatures of Alaska,[3] Washington,[4] and Ohio.[5] At the national level, a bill introduced earlier this year would exempt health care professionals from the antitrust laws when they negotiate with health plans,[6] and another would mandate the use of the rule of reason, rather than a *per se* rule, to evaluate collective bargaining by health care professionals.[7]

Efforts to use antitrust to combat private restraints among automobile dealers have triggered a similar response. For example, the Commission's *Fair Allocation System* case involved dealers in the Northwest United States who were losing sales to a competing dealer selling vehicles at discount prices over the Internet.[8] The full price dealers threatened to refuse to sell certain Chrysler models to consumers, and to limit warranty service, unless Chrysler limited the allocation of vehicles to the Internet seller. In October 1998, the Commission alleged that the full price dealers were engaging in a group boycott, and the matter was resolved by consent order. That was not the end of the story, however. The temptation to seek public restraints may be greatest in the face of innovations like the Internet, which can transform entire sectors. Therefore, it comes as no surprise that the dealers have had dramatic success in securing public restraints. There currently are laws prohibiting direct vehicle sales by manufacturers and online sellers without a franchise presence – which many regard as the next logical step in the evolution of the Internet vehicle sales business model – in every state except Alaska.[9]

A competition agency typically garners headlines by bringing and winning enforcement actions, not by convincing legislators, regulatory agencies, and other government bodies to adopt pro-competitive policies. But as these examples demonstrate, public restraints deserve as much attention as private restraints. Public restraints harm consumer welfare just as much as private restraints, and the harmful effects of public restraints often last much longer.

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[3] FTC Staff Letter to the Alaska House of Representatives on Senate Bill 37 (Jan. 18, 2002) *available at* <http://www.ftc.gov/be/ v020003.htm>.

[4] FTC Staff Letter to the Washington House of Representatives on House Bill 2360 (Feb. 8, 2002) *available at* <http://www.ftc.gov/be/v020009.pdf>.

[5] FTC Staff Letter to the Ohio House of Representatives on House Bill 325 (Oct. 16, 2002) *available at* <http://www.ftc.gov/os/2002/10/ohb325.htm>.

[6] H.R. 1247, 108th Cong. (2003).

[7] H.R. 1120, 108th Cong. (2003).

[8] *Fair Allocation Syst., Inc.* Docket No. C-3832 (Oct. 30, 1998) (consent order) *available at* <http://www.ftc.gov/os/1998/10/9710065.do.htm>.

[9] Robert D. Atkinson, *The Revenge of the Disintermediated: How the Middleman Is Fighting E-Commerce and Hurting Consumers* at 7 (Jan. 2001) *available at* <http://www.ppionline.org/documents/disintermediated.pdf>.

III. Strategies for Addressing the Problem

Both the United States and the European Union have attempted to address the issue of public restraints by creating a single market. Given the significant differences in U.S. and E.U. institutions, the similarities in the attitudes and approaches are impressive. Since their inception, both jurisdictions have recognized that governments often erect the most pernicious barriers to competition. From tariffs and state subsidies, to overly burdensome licensing and advertising restrictions, to other policies inspired by what economists call rent seeking, governments can damage consumers severely. Fortunately, both the U.S. Constitution and the Treaty of Rome incorporate open markets as one of their fundamental tenets. Both limit member states from burdening interstate commerce. Both give central government institutions the responsibility to curtail protectionism. Moreover, in many ways, both share parallel histories in creating and implementing competition policy.

A. U.S. History

Let me start with the United States. As you know, the United States declared independence 227 years ago. We achieved our own regime change – with, I might add, the assistance of France – over the objection of Great Britain. In the immediate aftermath, the Articles of Confederation governed the United States. The Articles, unfortunately, gave very few powers to the central government, including no power to regulate commerce among the states. Consequently, many states erected tariffs and other protectionist measures against out-of-state competitors.

Even then, policymakers recognized that government barriers to competition threatened commercial prosperity. For example, Alexander Hamilton, who would later become our first Secretary of the Treasury, helped write *The Federalist Papers*. These were essays designed to convince the public to ratify the new constitution. In 1788, Hamilton wrote that:

> An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part.[10]

Persuaded by such logic, state conventions soon ratified the U.S. Constitution, the document that still governs us. The Constitution restricted the states' power to disrupt national and international trade. Two provisions would prove vital to the development of a nationwide market. The first, the Supremacy Clause, provided that national law trumped state law.[11] The

[10] THE FEDERALIST NO. 11, at 89 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[11] U.S. CONST. art. VI, cl. 2.

second, the Commerce Clause, provided that Congress could regulate commerce with foreign nations and among the states.[12]

Although Congress used its new authority to enact commercial legislation, the Supreme Court effectively wielded the Constitution against state and local barriers to competition. In a crucial interpretation, the Supreme Court held that because the Commerce Clause affirmatively granted power to Congress to enact laws affecting interstate commerce, this Clause necessarily deprived the states of power to impede that commerce.[13] This aspect of the Commerce Clause has become known to generations of lawyers as the "dormant" or "negative" Commerce Clause.

Using the Supremacy and Commerce clauses, the Supreme Court invalidated state laws that unduly burdened interstate commerce, that overtly discriminated against out-of-state competitors, and that conflicted with Congress's creating a national market. In a well-known twentieth century case, a city banned the sale of milk that was not pasteurized within five miles of town. The Court said the ban disadvantaged out-of-state suppliers and lacked any plausible health justification.[14] In a classic 1824 case, New York had granted a company exclusive rights to operate steamboats over all of the waters within the state, even though Congress had created a national licensing system for coastal vessels. The Court struck the conflicting state regulation. This decision firmly established that national regulation trumped inconsistent state regulation.[15]

B. European History

Today, the Treaty of Rome is roughly as old – almost half a century – as the United States was in 1824. Of course, there are many differences between the European Union and the early United States. The United States has always had a largely common language and legal tradition, complete freedom of movement, and after 1789, a central government that enjoyed clear supremacy over its component states. By contrast, the E.U. is comprised of Member States, some of which have long traditions of state ownership and other state intervention in the economy.

Still, the E.U.'s development over the past half-century parallels that of the United States. From the outset, the E.U. committed itself to the free flow of goods, services, people, and capital. Like the Commerce Clause, the E.U.'s articles prohibit Member States from overtly discriminating against goods from other member nations.[16] Moreover, in both the E.U. and the United States, facially neutral regulations must not unduly burden interstate commerce.

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[12] *Id.* at art. I, § 8, cl. 3.

[13] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852).

[14] *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

[15] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

[16] Treaty Establishing the European Community Art. 28-30 (OJC 325 Dec. 24, 2002) *available at* <http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf>.

In some respects, however, the E.U. made a more positive commitment to the creation of a common market. The Treaty of Rome prohibits its Member States from interfering with commerce among themselves,[17] whereas the Commerce Clause merely grants Congress the authority to regulate commerce among the states. Furthermore, Article 86 of the Treaty limits the powers of the Member States to enact measures adversely affecting competition and empowers the European Commission to remedy them.[18] Similarly, Article 87 of the Treaty lets the European Commission challenge and order the repayment of competition-distorting state aid.[19] I applaud the Commission for its campaign against government intervention in the economy. We are acting to use our own antitrust laws to emulate this success.

C. Combating Public Restraints through Competition Advocacy

Despite the progress in the E.U. and United States, both must continue to use all available tools to fight public restraints on competition. As long as governments have existed, interested businesses have asked them to harm their competitors. As discussed above, these efforts often succeed. Typically promulgated under the banner of consumer protection, many regulations artificially and needlessly reduce the number of competitors and limit the ability of existing companies to compete.

Through competition policy, U.S. and E.U. competition agencies can and should help limit the impact of such rent seeking. Much of this work will involve persuading other government bodies and their constituents to adopt policies that promote competition. Rent seeking may have greater chances of succeeding at more local levels, because the interests may be more concentrated and because the costs of capturing a local government are often less than the costs of capturing a national or international body. Moreover, state and local officials have fewer resources to review regulation for its competitive impact. In the United States, some states may have only a few officials responsible for competition issues, and in the E.U. some member states have only recently enacted competition laws.

1. Advocacy Addressing Professional Licensing

A prime example of successful rent seeking involves the regulated professions, in particular overly strict licensing rules. I read with great interest Commissioner Mario Monti's March announcement of the E.U.'s study on the liberal professions.[20] This comprehensive,

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[17] *Id*.

[18] *Id*. at Art. 86 (formerly Art. 90).

[19] *Id*. at Art. 87 (formerly Art. 92).

[20] *See* Mario Monti, Commissioner for Competition, European Commission, *Competition in Professional Services: New Light and New Challenges*, Prepared Remarks for Bundesanwaltskammer, Berlin, Germany (Mar. 21, 2003) *available at* <http://europa.eu.int/comm/competition/speeches/text/sp2003_007_en.pdf>.

empirical analysis provides an excellent resource for policymakers and can generate support for easing rules in a manner that protects consumers. On October 28, the Competition Directorate General of the European Commission will hold a conference on "Regulation of Professional Services" in the European Union.[21] We look forward to learning the results of that conference.

In the United States, we also have examined licensing's costs and benefits. When it effectively restricts the supply of qualified professionals, licensing tends to raise prices. Studies of licensing in dentistry, perhaps the most analyzed profession, find price increases from 4 to 15 percent.[22] In eye care, studies find price increases from 5 to 33 percent from a variety of advertising and commercial practice restrictions.[23] The studies also find an ambiguous effect on overall quality.[24] While licensing can and should lead to higher competence for those allowed to practice, the higher prices can lead to lower consumption, and qualified professionals can be excluded.

During the past few years, U.S. competition authorities have encouraged the states to adopt pro-competitive professional regulations. For example, we recently encouraged the Georgia bar to reject a proposal that would prevent nonlawyers from competing with lawyers to handle real estate closings.[25] We argued that the proposal could prevent competition from out-of-state and Internet lenders and force consumers and businesses to pay more.[26] We have made

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[21] *See* European Commission, Regulation of Professional Services (Oct. 28, 2003) (conference agenda) *available at* <http://europa.eu.int/comm/competition/liberalization/conference/conference_agenda.pdf>.

[22] Carolyn Cox & Susan Foster, *FTC Staff Report, The Costs and Benefits of Occupational Regulation* at 31 (Oct. 1990); Morris Kleiner & Robert Kudrle, *Does Regulation Affect Economic Outcomes?: The Case of Dentistry*, 43 J. L. & ECON. 547, 547-82 (Oct. 2000).

[23] Cox & Foster, *supra* note 22, at 31.

[24] *Id*. at 40-41.

[25] *See* FTC/DOJ Letter to the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (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 Antitrust Division 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 of America and the Federal Trade Commission (July 28, 2003) *available at* <http://www.ftc.gov/os/2003/07/georgiabrief.pdf>.

[26] The Department of Justice successfully asserted such a position in recent litigation before the Supreme Court of Kentucky. *See Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, No. 2000-SC-0206-KB, 2003 WL 21990261 (Ky. Aug. 21, 2003) (holding that a proposed

similar arguments to North Carolina,[27] Rhode Island,[28] Indiana,[29] and the American Bar Association ("ABA").[30]

We also work with the states on other licensing issues. For example, FTC staff assisted Connecticut's attorney general by commenting before the state opticians' board. The staff comment argued against the adoption of a requirement that Internet sellers of replacement

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unauthorized practice of law opinion had the potential to restrain competition and rejecting a proposed opinion that would have prevented laypeople from competing with lawyers to close real estate transactions).

[27] *See* FTC/DOJ Letter to the President of the North Carolina State Bar re: Proposed North Carolina State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions (July 11, 2002) *available at* <http://www.ftc.gov/os/ 2002/07/non-attorneyinvolvment.pdf>; FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) *available at* <http://www.ftc.gov/be/ v020006.htm>. The North Carolina Bar ultimately revised its rules to eliminate the requirement that attorneys be physically present at the closing, and the bar also opted to permit nonlawyers to witness signatures on documents and receive and disburse funds.

[28] *See* FTC/DOJ Letter to the Rhode Island House of Representatives re: Proposed Restrictions on Competition From Non-Attorneys in Real Estate Closing Activities (Mar. 28, 2003) *available at* <http://www.ftc.gov/be/v020013.htm>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) *available at* <http://www.ftc.gov/be/ v020013.pdf>. The Rhode Island legislature declined to enact a bill in the 2003 session and is currently considering a similar measure.

[29] *See* FTC/DOJ Letter to the Indiana State Bar Ass'n Unauthorized Practice of Law Comm. re: Proposed Amendment to Indiana Supreme Court Admissions & Discipline Rule 24 (Oct. 1, 2003) *available at* <http://www.ftc.gov/os/2003/10/uplindiana.htm>.

[30] *See* FTC/DOJ Letter to the ABA re: Proposed Model Definition of the Practice of Law (Dec. 20, 2002) *available at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>. The ABA ultimately decided not to adopt a uniform model definition of the practice of law, but instead recommended that every state and territory adopt its own definition. *See* ABA Task Force on the Model Definition of the Practice of Law, Recommendation as Adopted (August 11, 2003) *available at* <http://www.abanet.org/cpr/model-def/recomm.pdf>. In the Report that accompanied the Recommendation, the Task Force noted that each jurisdiction should use a balancing test to determine who may provide legal services, and that – in addition to taking into account such key considerations as minimum qualifications, competence, and accountability – the balancing test should take into account both access to justice and the preservation of individual choice. *See* Report of the ABA Task Force on the Model Definition of the Practice of Law at 5 (Aug. 2003) *available at* <http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf>.

contact lenses have a Connecticut optician's license, given that such sellers merely mail out pre-packaged lenses pursuant to an eye doctor's prescription.[31]

2. Advocacy Addressing Advertising Restrictions

Besides licensing, we also have encouraged states to ease advertising restrictions. Certain regulations, of course, help consumers. Governments should prohibit false or deceptive advertising. Many advertising restrictions, however, stop truthful advertising about price and quality, including comparative ads and ads that trumpet past success. Some governments reduce the flow of information in other ways. For example, some states prohibit lawyers from ads that are "undignified," because such ads allegedly undermine respect for the legal profession.

The evidence shows that advertising provides valuable information and encourages firms to compete. Professional advertising leads to lower prices without lowering quality, while advertising restrictions tend to raise prices without raising quality. Advertising also facilitates the entry of new competitors by letting potential clients know that they have additional choices.

Of course, rent seeking does not explain every advertising restriction. Some assume that consumers cannot make informed judgments. In a well-meaning effort to protect consumers, state and federal governments used to ban all claims that a food product, or food ingredients, could reduce the risk of disease.[32] Although consumers clearly need protection from misleading health claims, there is rich scientific evidence that better eating habits can reduce the risk of chronic diseases like cancer, heart disease, and diabetes. Empirical analysis indicates that truthful marketing increases consumers' knowledge of diet and health, and encourages producers to improve their foods' nutritional content.[33] For example, an FTC staff study found that

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[31] *See* Comments of the Staff of the Federal Trade Commission, Intervenor, before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) *available at* <http://www.ftc.gov/be/v020007.htm>. Ultimately, the staff comment was successful. The Board held hearings in June and October of 2002. On June 24, 2003, the Board issued a memorandum decision holding that: (1) opticians and optical establishments located in Connecticut must be licensed by the state to sell contact lenses; (2) contact lens sellers located outside of Connecticut that sell lenses to Connecticut residents need not obtain a Connecticut license; and (3) contact lens sellers, whether within or without the state, may sell contact lenses only pursuant to a lawfully issued prescription. *In re Petition for Declaratory Ruling Concerning Sales of Contact Lenses*, slip op. at 5-8 (Conn. Bd. of Examiners for Opticians June 24, 2003).

[32] *See* Clement Pappas, *Maintaining a Level Playing Field: The Need for a Uniform Standard to Evaluate Health Claims for Foods and Dietary Supplements*, 57 FOOD & DRUG L. J. 25, 26-28 (2002).

[33] Pauline M. Ippolito & Alan D. Mathios, *FTC Staff Report, Health Claims in Advertising and Labeling: A Study of the Cereal Market* (1989).

consumers changed their cereal choices after manufacturers began advertising that fiber could reduce the risk of cancer.[34]

In the United States, we continue to seek the right balance. The current Commissioner of the Food and Drug Administration ("FDA"), Mark McClellan, is both a medical doctor and a Ph.D. economist. One of his top priorities is to ensure that consumers have earlier access to truthful diet and health information, while at the same time enjoying strong protection from fraud.[35]

3. Advocacy Addressing Restraints on E-Commerce

A final example of government barriers to competition involves a very old product, wine, and a very new technology, the Internet. The 21st Amendment to the U.S. Constitution, which repealed Prohibition, gives states special authority to regulate alcohol.[36] As a result, all 50 states required wine to pass through a wholesaler and a bricks-and-mortar retailer before reaching consumers. In recent years, however, the Internet has become a popular avenue to buy wine. Consumers literally can buy thousands of varieties over the Internet directly from the winery, often at lower prices than elsewhere. Perhaps not surprisingly, the traditional firms perceived the Internet as a significant threat. They successfully lobbied many state legislatures to prohibit wineries from shipping directly to consumers, largely on the theory that underage drinkers could buy wine online. Six states even made it a felony to ship wine directly.[37]

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[34] *See id*. For a more comprehensive discussion of FTC advocacy addressing restrictions on health and nutrition claims in food advertising, see Timothy J. Muris, Chairman, Federal Trade Commission, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, Prepared Remarks for the Aspen Summit, Cyberspace and the American Dream, the Progress and Freedom Foundation, Aspen, CO at 9-10 (Aug. 19, 2003) *available at* <http://www.ftc.gov/speeches/muris/030819aspen.htm>.

[35] The FTC and the FDA have worked closely on a number of joint initiatives. For example, the two agencies recently announced that Consumer Health Information Initiative, which will both help eliminate bogus health claims by increasing enforcement actions against false or misleading dietary supplement claims and provide new guidance to allow manufacturers of conventional foods to make a greater range of accurate, science-based claims about the health benefits of their products. *See* Timothy J. Muris, *Announcement of FDA's New Consumer Health Information Initiative* (Dec. 18, 2002) *available at* <http://www.ftc.gov/speeches/muris/murisfdastatement.htm>.

[36] U.S. CONST. amend. XXI, § 2.

[37] Atkinson, *supra* note 9, at 8.

We recently issued a report on online sales of wine.[38] Following our emphasis on empirical evidence, our economists studied a local market to evaluate the effects of restrictive state legislation on prices and variety. The study concluded that consumers can find substantially lower prices and enjoy greater choices over the Internet.[39] By dramatically reducing the costs associated with advertising and distribution, the Internet business model also promises to facilitate entry, thereby creating opportunities for entrepreneurship by small vineyards and fostering innovation. Following our emphasis on cooperating with state officials, we canvassed those that allow direct shipment, finding that most reported few or no problems with online sales to underage drinkers.[40] We hope that this report will inform the debate about direct shipping. Already, several states have asked us to comment on their direct shipping laws.

Along with our other activities, the wine report illustrates an important role for competition authorities. In the coming years, authorities increasingly should persuade other government bodies about the benefits of competition and the costs of anticompetitive regulation. Competition agencies have neither the resources nor the authority to stop every anticompetitive policy. Moreover, as we have seen too often, competition ultimately cannot flourish if the public is convinced that sound economic policy involves protecting producers. To succeed, we must promote competition policy as a form of regulation that competes with and is superior to other regulatory forms.

4. Importance of Intergovernmental Cooperation

The FTC has partnered with other government officials to promote effective competition policy. For example, the Director of the FTC's Bureau of Competition, Susan Creighton, recently addressed state antitrust enforcers at the annual seminar of the National Association of Attorneys General. The presentation focused on the state action doctrine, and its role in shaping the FTC's enforcement and advocacy agenda.[41] In addition to broad policy discussions, we have also worked with state officials to analyze the competition issues raised by specific proposed bills or other regulatory programs. State officials have asked us to comment on a wide range of issues, including proposals that would regulate the price of gasoline, prevent non-lawyers from offering real estate closing services, and require vendors of contact lenses to obtain in-state opticians licenses. Likewise, we have often received help from state officials. For example,

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[38] *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003) *available at* <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

[39] *Id.* at 16-22.

[40] *Id.* at 26-35.

[41] Susan A. Creighton, *A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates* (Oct. 1, 2003) *available at* <http://www.ftc.gov/speeches/other/031001naag.htm>.

many states joined in submitting an *amicus* brief in supporting the FTC's position in the *Ticor Title* state action case,[42] which we litigated to a successful conclusion before the Supreme Court.

Such cooperation increases the effectiveness of both the state and federal agencies. We can provide the states with the benefits of our expertise on competition policy, and give policymakers an unbiased perspective that focuses solely on consumer welfare. The state attorneys general, in turn, are well-positioned to understand and comment on regulatory proposals in their states. A state attorney general has greater knowledge of the state's policy goals, and the best ways in which the state can promote competition while meeting its other policy objectives.

We also have worked with other federal agencies to promote competition. For example, we have filed comments with the Environmental Protection Agency ("EPA") on boutique fuel regulations,[43] with the FDA on advertising regulations,[44] and with the Federal Energy Regulatory Commission ("FERC") regarding revisions to market-based rate tariffs and authorizations.[45] In connection with recent hearings on intellectual property jointly sponsored by the FTC and the Department of Justice ("DOJ"), we have sought to bring a competition perspective to the intellectual property rules formulated by the Patent and Trademark Office ("PTO").[46] In each case, we have encouraged our colleagues in other agencies to adopt rules that incorporate principles of competition.

Finally, we have also worked with our counterparts in other countries. The International Competition Network ("ICN"), launched here at Fordham two years ago, helps to promote competition in many different nations. Although the ICN's merger efforts have received much publicity, the ICN's second annual conference also discussed several constructive reports on competition advocacy. These reports focused on model advocacy provisions in member jurisdictions, advocacy efforts in specific sectors, and practical advocacy techniques. Such competition advocacy especially can help developing countries and those countries whose economies are in transition.

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[42] *Federal Trade Commission v. Ticor Title Insurance Co*, 504 U.S. 621 (1992).

[43] FTC Staff Comments to EPA on Unique Gasoline Fuel Blends ("Boutique Fuels"), Effects on Fuel Supply and Distribution (Jan. 30, 2002) available at <http://www.ftc.gov/be/ v020004.pdf>.

[44] FTC Staff Comments to FDA on Advertising and First Amendment Issues (Sept. 13, 2002) *available at* <http://www.ftc.gov/os/2002/09/fdatextversion.pdf>.

[45] FTC Staff Comments to the FERC on Terms and Conditions of Public Utility Market-Based Rate Authorization (Jan. 7, 2002) *available at* <http://www.ftc.gov/be/v020005.htm>.

[46] *See* FTC/DOJ Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (2002) (hearings home page) *available at* <http://www.ftc.gov/opp/intellect/index.htm>.

A few conclusions emerge from our history of trying to influence policy at the state, federal, and international level. Overall, policymakers largely have welcomed our efforts. Sometimes, they simply had not considered the regulation's impact on competition. We have made every effort, therefore, to inform others about the importance of competition principles.

We have been particularly effective in influencing policy when we offer empirical evidence regarding the impact on consumers. Not surprisingly, most advocates of restrictive regulation are rent seekers, who of course purport to represent consumers. Accordingly, when we enter the debate on a proposed regulation, we often can sway policymakers through actual evidence, and through our independence and expertise. For example, we have exhaustively studied gasoline markets and pricing, and have used these studies to support our efforts to persuade many state legislatures – including the legislatures of North Carolina,[47] Virginia,[48] New York,[49] and Wisconsin[50] – to reject bills that would prohibit to the "below cost" sale of motor fuels. Similarly, our professional licensing studies give us credibility to comment on state bills affecting many professions.

For these reasons, the competition agency of the future should commit itself to thorough conceptual and empirical analysis. Such analysis gives the agency a persuasive voice before the multitude of government bodies that inhibit competition, by intent or by inadvertence. Through empirical work and cooperation with other policymakers, the FTC is investing to become the agency of competition's future.

D. Combating Public Restraints through Antitrust Enforcement

While competition advocacy is surely the more diplomatic approach, when necessary, we do have another tool besides persuasion. We can also use antitrust enforcement to promote competition. The antitrust laws and their pro-competition ethic serve as an organizing principle

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[47] Letter to the Attorney General of North Carolina on House Bill 1203 / Senate Bill 787 (May 19, 2003) *available at* <http://www3.ftc.gov/os/2003/05/ ncclattorneygeneral cooper.pdf>. Currently, the bill remains pending before the relevant Senate committee.

[48] Letter to the Virginia House of Delegates on Senate Bill No. 458 (Feb. 15, 2002) *available at* <http://www.ftc.gov/be/v020011.htm>. The bill was ultimately rejected by the relevant House committee.

[49] Letter to the Attorney General of New York on Bill No. S.4947 and Bill No. A.8398 (July 24, 2003) *available at* <http://www.ftc.gov/be/nymfmpa.pdf>; Letter to the Governor of New York on Bill No. S04522 and Bill No. A06942 (Aug. 8, 2002) *available at* <http://www3.ftc.gov/be/v020019.pdf>. Governor George Pataki vetoed the first bill. The second bill is currently awaiting his decision.

[50] Letter to the Wisconsin House of Representatives on Wisconsin's Unfair Sales Act (Oct. 15, 2003) *available at* <http://www.ftc.gov/be/v030015.htm>.

in our economy. Antitrust plays a major role in shaping our markets and institutions. Indeed, the Supreme Court has called the Sherman Act "a comprehensive charter of economic liberty."[51]

1. The State Action Doctrine

Although antitrust cannot cure rent seeking, it can help address the problem. The FTC, for example, currently is examining certain state and local regulations that may raise significant antitrust concerns. This effort necessarily entailed a re-examination of the Supreme Court's 1943 opinion in *Parker v. Brown*, which held that states are shielded from the antitrust laws when they engage in *bona fide* exercises of their sovereign regulatory power.[52] Otherwise illegal conduct will be shielded from the antitrust laws if it is in furtherance of a "clearly articulated" state policy and is "actively supervised" by the state.[53] These rules are known as the state action doctrine. The doctrine is somewhat analogous to the Court of First Instance's decision in *Arduino*, which clarified that Member States can regulate a profession if they retain decision-making powers and establish sufficient control.[54]

2. The FTC's State Action Task Force

In the United States, unfortunately, some courts have expanded the protection of the state action doctrine well beyond its original scope. The "clear articulation" and "active supervision" requirements have been the subject of varied and controversial interpretation, sometimes resulting in unwarranted expansions of the exemption. To address these concerns, in June 2001, a State Action Task Force began to re-examine the scope of the doctrine. The Task Force was charged with making recommendations to ensure that the state action exemption remains true to its doctrinal foundation of protecting the deliberate policy choices of sovereign states, and is otherwise applied in a manner that promotes competition and enhances consumer welfare. The Task Force Report was issued last month.[55]

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[51] *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

[52] 317 U.S. 341 (1943).

[53] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*., 445 U.S. 97 (1980).

[54] *Arduino*, Case C-35/99, Judgment of the Court of First Instance, 19 Feb. 2002, *available at* <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999J0035>.

[55] Report of the State Action Task Force (Sept. 23, 2003) ("FTC State Action Report") *available at* <http://www.ftc.gov/os/ 2003/09/stateactionreport.pdf>.

a. Problems the Task Force Identified

The Report finds that the clear articulation standard has repeatedly been interpreted too broadly.[56] According to several appellate courts, once a state broadly authorizes certain acts or implements a general regulatory scheme for an industry, *any* anticompetitive effects flowing from the acts must have been foreseeable and are, therefore, a product of deliberate state policy. In other words, these courts equate a state's mere grant of general authority with a state's clear articulation of a policy to restrain competition. Thus, for some courts, the more general the state legislation, the more likely it is that the legislature intended to displace competition. That result stands the "clear articulation" test on its head.

Regarding "active supervision," the Report finds that neither the Supreme Court nor the lower courts have provided adequate guidance on how to identify entities that should be subject to active supervision, and what states should do to provide meaningful supervision.[57] In evaluating whether an entity is subject to the active supervision requirement, courts examine a variety of factors that are not tailored to the underlying goals of the active supervision standard. Examples include: whether the entity exercises governmental powers (like eminent domain), whether it lacks the ability to make or retain profits, and whether it has a "public" nature. These factors are not necessarily probative of whether members of the entity will pursue their own private interests rather than the state's. Non-profit corporations, for example, often try to restrain competition, either for their own benefit or for the benefit of their members. Other facts, such as the entity's structure, membership, decision-making apparatus, and public openness, are better indicators of the need for active supervision.

In addition, the Report finds that the state action doctrine largely ignores interstate spillover effects, which force citizens of one state to absorb the costs of another state's anticompetitive regulations.[58] In economic terms, this is a "negative externality," and it can cause significant efficiency losses. Most courts have not incorporated these costs into their analysis.

Finally, the Report discusses some concerns with the application of the state action doctrine to the activities of municipalities that are increasingly engaged in business on a profit-making basis, while using their law-making power to exclude competitive challenges.[59] Clearly, that tilts the playing field, and can harm consumers. The Report notes that there is some support, at both the Supreme Court and lower court levels, for a "market participant" exception that would potentially address this problem. Most courts have hesitated to embrace such an exception fully, however, and a few have rejected it outright.

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[56] *Id.* at 2, 25-36.

[57] *Id.* at 2, 37-39.

[58] *Id.* at 2-3, 39-44.

[59] *Id.* at 3, 44-49.

b. Clarifications the Task Force Recommended

To address these problems with the state action doctrine, the Task Force Report recommends clarifications to bring the doctrine more closely in line with its original objectives. These clarifications include:

- *Re-affirm a clear articulation standard tailored to its original purposes and goals*. An appropriate clear articulation standard would ask both (i) whether the state authorized the conduct at issue, and (ii) whether the state deliberately adopted a policy to displace competition via the conduct at issue.[60]

- *Clarify and strengthen the standards for active supervision.* An appropriate active supervision standard would encompass the following parameters: (i) a finding of active supervision must be based on a determination that the state official's decision was rendered after consideration of the relevant facts; (ii) the absence of an adequate factual record precludes a finding of active supervision; and (iii) the use of specific procedural measures – such as notice to the public, opportunity for comment, and a written decision – is significant, though not necessarily conclusive, evidence of active supervision.[61]

- *Clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision.* Application of the active supervision requirement is appropriate: (i) when an entity is acting as a market participant; or (ii) in any situation in which there is an appreciable risk that the challenged conduct results from the entity's pursuit of its own interests, rather than the interests of the state.[62]

- *Encourage judicial recognition of the problems associated with overwhelming interstate spillovers, and consider such spillovers for case and amicus/advocacy selection.* Although courts are understandably reluctant to interfere with purely intrastate regulatory regimes, they should consider the problem of interstate spillovers when the benefits of the anticompetitive regulation accrue overwhelmingly in-state and the costs fall overwhelmingly out-of-state.[63]

- *Clarify and strengthen the market participant exception to* Town of Hallie.[64] This under-utilized exception has its origins in the Supreme Court's statement in *City*

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[60] *Id.* at 50-52.

[61] *Id.* at 52-55.

[62] *Id.* at 55-56.

[63] *Id.* at 56-57.

[64] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985).

of Columbia v. Omni Outdoor Advertising[65] that a state action defense "does not necessarily obtain when the State acts not in a regulatory capacity but as a commercial participant in a given market."[66]

- *Undertake a comprehensive effort to address emerging state action issues through the filing of amicus briefs in appellate litigation.* As demonstrated by past Commission involvement, the Commission can play an important role in helping to explain the value of competition policy to the federal courts.[67]

3. Recent FTC Cases Raising State Action Issues

The Commission is not a newcomer to the state action area. The competitive impact of state regulations has long been a focus of the Commission's antitrust enforcement agenda. Indeed, many of the leading state action cases, including *Ticor Title*, originated as Commission investigations. Continuing this tradition, the Commission's litigating staff, working closely with the Task Force, have recently filed several cases that involve the Task Force's recommendations.

a. *South Carolina Board of Dentistry*

One such case was recently filed against the South Carolina Board of Dentistry. Because this matter is currently in administrative litigation, I will limit my description to the allegations in the administrative complaint, which issued last month.[68] The complaint alleges that the Board – a creation of the South Carolina legislature established to supervise the practice of dentistry and dental hygiene – unlawfully restrained competition in the provision of preventive dental care. According to the complaint, the Board promulgated an emergency regulation that unreasonably restricted the ability of dental hygienists to deliver preventive services, including cleanings, sealants, and fluoride treatments, on-site to children in South Carolina schools. The complaint further alleges that the Board's action was "undertaken by self-interested industry participants with economic interests at stake," and that it "was contrary to state policy, and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers."[69] Seven of the nine Board members are dentists,[70] and the preventive care in question involves services that both dentists and dental hygienists are trained to perform.

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[65] 499 U.S. 365, 374-75 (1991).

[66] FTC State Action Report, *supra* note 55, at 57.

[67] *Id.* at 57-58.

[68] *South Carolina State Board of Dentistry*, Docket No. 9311 (Sept. 12, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>.

[69] *Id.* at ¶ 1.

[70] *Id.* at ¶ 5.

Although the Board is vested with rule-making authority, the complaint asserts that the South Carolina legislature did not intend the kind of competitive restraint imposed by the Board. The complaint asserts that, to the contrary, in 2000 the legislature amended the South Carolina statute to make it easier for dental hygienists to provide preventive services in a school setting. In particular, the legislature eliminated the previous requirement that the patient must have been examined by a licensed dentist within 45 days prior to the treatment by a dental hygienist. According to the complaint, the Board's action, in July, 2001, reinstated that requirement, and is inconsistent with the policy of the legislature.

b. Household Goods Movers Cases

The Commission's recent series of household goods movers cases has also raised significant state action issues. The first of these was *Indiana Movers*, which provided the Commission with an opportunity to offer both state regulators and the antitrust bar clear and authoritative guidance regarding the "active supervision" requirement. The case involved allegations of anticompetitive conduct by Indiana Household Movers and Warehousemen, Inc. – an association representing approximately 70 household goods movers. One of the association's primary functions is to prepare and file tariffs, and tariff supplements, on behalf of its members with the Indiana Department of Revenue. According to the Commission's complaint, however, the association actively engaged in the establishment of collective rates to be charged by competing movers.[71] To resolve this allegation, the Commission and the association entered into a consent order. The order prohibits the association from knowingly preparing or filing tariffs containing collective rates, facilitating communications between member carriers concerning rates, or suggesting that members file or adhere to any proposed tariff that affects rates.[72] The order also requires the association to cancel all current filed tariffs affecting rates within 120 days and to amend its by-laws to require member carriers to abide by the order's provisions.[73]

Because the case was resolved by consent order, rather than a trial on the merits, the association did not raise a state action defense and the issue was not litigated. The Commission did, however, provide a detailed explanation of its views on the "active supervision" requirement in the Analysis to Aid Public Comment that accompanied the complaint and consent order.[74] While acknowledging that "the Supreme Court's standard for active supervision . . . is and will remain the ultimate test for that element of state action immunity, the Commission endeavored to

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[71] *Indiana Household Movers and Warehousemen, Inc.*, Docket No. C-4077, at ¶ 7(A) (Apr. 25, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/04/ihmwcmp.htm>.

[72] *Indiana Household Movers and Warehousemen, Inc.*, Docket No. C-4077, at ¶ II. (Apr. 25, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/04/ihmwdo.htm>.

[73] *Id.* at ¶ III.

[74] *See Indiana Household Movers and Warehousermen, Inc.*, Docket No. C-4077, at 5 (Apr. 25, 2003) (Analysis to Aid Public Comment) ("*Indiana Movers* Analysis") *available at* <http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf>.

use the Analysis to provide the Bar with guidance on an issue at the heart of its institutional expertise."[75] As the document itself explains, "this Analysis identifies the specific elements of an active supervision regime that [the FTC] will consider in determining whether the active supervision prong of state action is met in future cases."[76] Those elements are: (1) the development of an adequate factual record, including notice and an opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative – of how private action comports with the substantive standards established by the state legislature.[77]

The Commission subsequently entered into consent agreements with two other groups of household goods movers – the Minnesota Transport Services Association[78] and the Iowa Movers and Warehousemen's Association[79] – settling similar charges. In both cases, the state action defense was not available, for lack of active supervision. The Minnesota case also resulted in another procompetitive outcome. As a result of the Commission's discussions with state officials, the State of Minnesota repealed the state statute requiring the use of collective rates. Thus, to resume collective rate-making, the association would have to find some other source of authority that allows the practice, as well as demonstrate active supervision.

Three other movers' associations decided to contest charges that they engaged in unlawful collective rate-making. In July, the Commission issued administrative complaints against the Alabama Trucking Association,[80] the Movers Conference of Mississippi,[81] and the Kentucky Household Goods Carriers Association.[82] The Alabama and Mississippi cases have been withdrawn from adjudication for the purpose of considering a proposed consent

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[75] *Id.* at 5.

[76] *Id.*

[77] *Id.*

[78] *Minnesota Transport Services Ass'n*, Docket No. C-4097 (Sept. 15, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/09/minnesotado.pdf>.

[79] *Iowa Movers and Warehousemen's Ass'n*, Docket No. C-4096 (Sept. 10, 2003) (consent order) *available at* <http://www.ftc.gov/os/2003/09/iowamoversdo.pdf>.

[80] *Alabama Trucking Ass'n, Inc.*, Docket No. 9307 (July 8, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/07/aladmincmp.pdf>.

[81] *Movers Conference of Mississippi, Inc.*, Docket No. 9308 (July 8, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/07/msadmincmp.pdf>.

[82] *Kentucky Household Goods Carriers Ass'n, Inc.*, Docket No. 9309 (July 8, 2003) (complaint) *available at* <http://www.ftc.gov/os/2003/07/ktadmincmp.pdf>.

agreement.[83] The Kentucky case is currently before an administrative law judge. In that case, the Association has filed an answer raising a state action defense, asserting that the challenged conduct was undertaken pursuant to a clearly articulated policy of, and was actively supervised by, the Commonwealth of Kentucky.[84]

IV. Conclusion

If you ask the Americans in this audience to describe their field of specialization, they probably will say it is "antitrust law." Put the same question to our foreign guests, and many will say it is "competition law." Do the different words describe the same body of public policy? Does one label capture more accurately what public enforcement agencies actually do, or should be doing?

As time goes on, I have come to realize that "competition law" is the better characterization. In U.S. experience, "antitrust" is mostly associated with stopping private behavior that restrains trade. This connotation may be an inevitable consequence of the origins of the U.S. system, which Congress established in the late 19th and early 20th Centuries in response to perceived abuses by private firms.

In the past half-century, as the European Union, its member states, and other nations have created new systems, many jurisdictions call their statutes "competition laws." In doing so, they expressly have recognized that public intervention can rob the marketplace of its vitality at least as effectively as purely private conduct. By using the term "competition law," our foreign colleagues have underscored the dual private and public nature of what all of us must do as policymakers. The struggle to forestall private trade restraints is unavailing if public measures to suppress rivalry are a readily available, easily accessible substitute. In this sense, our role is not simply to enforce "antitrust laws" against private misconduct but rather to formulate "competition policy" that confronts all serious threats to free markets, whatever their source.

Reflecting upon the treatment of public restraints at home and abroad highlights a frequently overlooked dimension of global competition policy. At times, many view the increasing complexity of the world's competition policy with dismay. There is, however, a more positive perspective. The academic in me cannot help but notice that amid the difficulties of multiplicity are extraordinary possibilities to learn from comparative study. Our collective experience presents not simply problems to be solved, but also opportunities to be grasped. Developments in competition systems, both old and new, underscore the importance of combating public restraints as vigorously as private restraints and provide insights about how

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[83] *Alabama Trucking Ass'n, Inc.*, Docket No. 9307 (Aug. 29, 2003) (order withdrawing matter from adjudication) *available at* <http://www.ftc.gov/os/adjpro/d9307/030829orderwithdrawconsidstlmnt.pdf>; *Movers Conference of Mississippi, Inc.*, Docket No. 9308 (Aug. 12, 2003) (order withdrawing matter from adjudication) *available at* <http://www.ftc.gov/os/adjpro/d9308/030812orderwthdrawfromadjud.pdf>.

[84] Respondent Kentucky Household Goods Carrier Ass'n, Inc.'s Answer to Complaint (Aug. 18, 2003).

each jurisdiction can improve its capacity to resist both types of distortions. With the wisdom to adopt the good ideas of others, we can achieve a policy synthesis that surpasses what we could accomplish in isolation. To this end, we look forward to continued collaboration with our colleagues in the competition community with great enthusiasm.