

Competition Advocacy: The Impact of FTC Staff Reports on Barriers to E-Commerce in Contact Lenses and Wine

by

Maureen K. Ohlhausen¹

I. Introduction²

The Federal Trade Commission's core mission is to protect consumers³ and it can use a variety of means to undertake this mission. Bringing cases against deceptive advertising and halting anticompetitive mergers are obvious ways to protect consumers and advance this core mission, and participants in this symposium have undoubtedly discussed some of the FTC's many successful enforcement actions. Enforcement is an important tool but it is not the Commission's only tool, however, and others may be better or more effective in certain circumstances. One effective tool is a form of persuasion is competition advocacy, which the FTC has undertaken in support of competition in many forums. FTC staff have submitted filings supporting competition principles to national professional organizations; state legislatures, regulatory boards, and officials; state and federal courts; and other federal agencies.⁴

¹ Acting Director, Office of Policy Planning, Federal Trade Commission.

² This paper represents the views of its authors and does not necessarily represent the views of the Commission or any individual Commissioner.

³ The FTC is charged by statute with enforcing those laws that prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. *See* Federal Trade Commission Act, 15 U.S.C. § 45.

⁴ *See, e.g.*, Comments by the FTC and the Department of Justice on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), *at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>; Comments of the Staff of the FTC to the Honorable Doug Matayo, (Oct. 4, 2004), *at* <http://www.ftc.gov/os/200410/041008matayocomment.pdf>; Comments of the Staff of the FTC,

It is often easy to measure the immediate effects of enforcement actions: the advertiser stops making the deceptive claim; the proposed merger is halted or the parties divest their overlapping assets. Sometimes the effect of competition advocacy is similarly easy to measure: the proposed anticompetitive restriction is defeated and the decisionmaker cites to the FTC's advocacy filing.⁵ Often, however, the effect of competition advocacy is harder to measure and its impact more diffuse. This paper examines the effect of the FTC's E-commerce workshop⁶ and two recent, related FTC staff reports – Possible Anticompetitive Barriers to E-Commerce: Contact Lenses and Possible Anticompetitive Barriers to E-Commerce: Wine – on the issues surrounding online distribution of contact lenses and wine. In the case of contact lenses, the FTC's interest coincided with, and perhaps gave some impetus to, Congressional action affecting

Intervenor, before the Connecticut Board of Examiners for Opticians (Mar 27, 2002), at <http://www.ftc.gov/be/v0200007.htm>; Brief of the FTC as Amicus Curiae Supporting Neither Party in *Cleveland Bar Association Relator v. Compmanagement, Inc., et al* (the Supreme Court of Ohio (Case No.: 04-0817)) V040023 (Aug. 3, 2004); Comment of the Staff of the FTC to the FDA on First Amendment Issues (Sept. 13, 2002), at <http://www.ftc.gov/os/2002/09fdatextversion/pdf>.

⁵ See, e.g., Comments of the Staff of the FTC to Representative Greg Aghazarian (Sept. 7, 2004), at <http://www.ftc.gov/be/V040027.pdf>; Letter of Governor Arnold Schwarzenegger to Members of the California State Assembly Returning Assembly Bill 1960 Without Signature (Sept. 29, 2004), available at http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf (acknowledging FTC comments in veto statement). Comments of the FTC Staff Before the FDA In the Matter of Obesity Working Group; (Dec. 12, 2003), at <http://www.ftc.gov/be/v040003text.pdf>; *Calories Count: Report of the Working Group on Obesity* (FDA Mar. 2004), available at <http://www.cfsan.fda.gov/~dms/owg-toc.html> (adopting many of the FTC staff recommendations).

⁶ Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet ("E-Commerce Workshop"). See Notice of Public Workshop and Opportunity to Comment, 67 Fed. Reg. 48472 (Jul. 24, 2002). The workshop agenda, the participants' written statements, and public submissions are available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.

competition in the market for replacement contact lenses. In the wine area, the FTC's report and related study have been in the forefront of the debate between those who oppose restrictions on online wine distribution and those who support it. This issue has taken on great importance in light of the Supreme Court's grant of certiorari in *Swedenburg*.⁷

While the long term impact of the workshop and these two reports is not yet completely clear, it is useful to examine their more immediate effects on the state of play in these matters to illustrate the value of Commission competition policy research and advocacy and to elucidate principles to guide future debates. This paper will summarize these two reports and discuss the effects of their release, as well as other related advocacy, on the debate surrounding online distribution of contact lenses and wine. The discussion will also highlight broader principles applicable to competition advocacy in general.

II. Genesis of the E-commerce Workshop and the Staff Reports

At the beginning of this paper, I noted that the Commission can typically advance its core mission through enforcement. In certain instances, however, the FTC cannot pursue enforcement actions against anticompetitive behavior because, under certain circumstances, such behavior is immune from the antitrust laws. For example, barriers to e-commerce, if they are the product of state action, may be unreachable by the Commission under the doctrine state action immunity.⁸ Thus, where proposed anticompetitive barriers would be protected by the state

⁷ *Swedenburg v. Kelly*, Supreme Court Docket No. 03-1274, 124 S. Ct. 2391 (2004) (granting petition for *certiorari*).

⁸ This doctrine was first articulated in the Supreme Court's 1943 opinion in *Parker v. Brown*, 317 U.S. 341, which held that, in light of states' sovereign status and the principles of federalism, Congress would not have intruded on state prerogatives through the Sherman Act without expressly saying so. *See also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

action doctrine, meaning the Commission could not engage in enforcement, the Commission's only available tool is its ability to persuade policymakers to rescind or refrain from adopting such barriers.

FTC Chairman Timothy J. Muris assembled a task force to take a hard look at the state action doctrine to see if businesses are invoking it improperly to shield anticompetitive conduct. As FTC staff conducted this inquiry, it found that many state regulations particularly impede online competition,⁹ and, in August 2001, Chairman Muris convened the Internet Task Force to evaluate regulations and business practices that could impede e-commerce and to find ways to overcome these barriers.¹⁰ One of the first actions that flowed from this inquiry involved contact lenses. In March 2002, FTC staff filed a comment before a state board that was considering whether to require stand-alone sellers of replacement contacts to obtain Connecticut optician and optical establishment licenses.¹¹ Staff concluded that such a requirement would increase

⁹ An influential document was *Revenge of the Disintermediated: How the Middleman Is Fighting E-commerce and Hurting Consumers*, Robert J. Atkinson, (Jan. 2001), available at www.ppionline.org/documents/disintermediated.pdf. This study examined attempts by traditional distributors in a number of industries – including contact lenses, wine, and automobiles – to prevent competition from Internet providers of these items.

¹⁰ See *supra* note 6. FTC staff also filed an *amicus* brief in a federal case involving an Oklahoma law that required all funeral goods suppliers to have a funeral director's license, even if the business was limited to online casket sales, thereby limiting a source of competition. FTC Amicus Brief in *Powers v. Harris* (Aug. 29, 2002), at <http://www.ftc.gov/os/2002/09/okamicus.pdf>.

¹¹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), at <http://www.ftc.gov/be/v020007.htm>. The Connecticut Board of Examiners for Opticians ultimately ruled that, under state law, out-of-state contact lens sellers do not have to have a Connecticut opticians license, although in-state sellers must have such a license. Connecticut Board of Examiners for Opticians, Declaratory Ruling Memorandum of Decision (June 24, 2003).

consumer costs while producing no offsetting health benefits and would be a barrier to the expansion of Internet commerce.

In October 2002, the Task Force organized a workshop to study these issues further. The workshop had three principal goals: (1) to enhance the FTC's understanding of potential anticompetitive barriers to e-commerce; (2) to educate policymakers about the effects of state regulation on competition; and (3) to examine potentially problematic business practices. The Task Force studied many different industries: wine; contact lenses; real estate; automobiles; caskets; legal services; auctions; retailing; and "emerging industries," such as telemedicine and cyber schools. Each industry had experienced growth in online commerce, but each also may have been hampered by potentially anticompetitive state regulations or business practices. At the workshop, Commission staff heard testimony from over 70 panelists, many of whom argued that state regulation interferes with e-commerce. These panelists particularly criticized licensing regulations, physical presence requirements, and outright bans on e-commerce in some industries. After the workshop, FTC staff reviewed the submitted material and gathered additional information. FTC staff have published reports on two of the industries, wine and contact lenses.

III. Contact Lenses

Sales of contact lenses in the United States are well over a billion dollars a year.¹² Data

¹² See, e.g., Keith Croes, *Contact Lens Market: Specialty Lenses and Favorable Demographics Are Driving Growth Worldwide*, OPTISTOCK MARKETWATCH, Nov. 2002 available at <http://www.optistock.com/mw/2002_11all.htm>; Joseph T. Barr, *The Contact Lens Spectrum Millennium Report*, CONTACT LENS SPECTRUM, Jan. 2000.

indicate that nearly 36 million people - almost 13% of all Americans - wear contact lenses.¹³

There are a number of contact lens manufacturers and many different channels of distribution, including eye care practitioners (ophthalmologists and optometrists), national and regional optical chains, mass merchants, and mail order and Internet firms.

The Federal Trade Commission has been active in the eye care industry for nearly three decades.¹⁴ Thus, it is not surprising that the staff of the Commission has paid attention to changes in the industry over time. One recent change was the spread of sales of contact lenses beyond traditional outlets – eye care practitioners – to big box retailers, mail order sales, and ultimately, Internet-based sellers. Unlike some other industries examined in the FTC workshop, much of the impetus for this change came from developments in contact lens technology, not just from the advent of the Internet. In the past, contact lenses were designed to be worn for long periods of time and, due to manufacturing inaccuracies, may have required custom fitting for

¹³ See Health Products Research (VIS) – Annual 2000 Year-End Consumer Contact Lens Survey (*cited in* BAUSCH & LOMB, 2001 ANNUAL REPORT TO VISION CARE PROFESSIONALS: TRENDS IN CONTACT LENSES & LENS CARE 8), *available at* http://www.optistock.com/trends_contact_lenses_2001_dec.pdf.

¹⁴ It enforces the Ophthalmic Practice Rules (“Eyeglass Rule”), which requires an optometrist or ophthalmologist to provide a patient, at no extra cost, a copy of the patient’s eyeglass prescription after completion of an eye exam 16 C.F.R. Part 456. The Eyeglass Rule did not require an optometrist or ophthalmologist to release a contact lens prescription to a patient after an eye exam. 16 C.F.R. § 456; *see also* Ophthalmic Practice Rules, Final Trade Regulation Rule, 54 Fed. Reg. 10,285, 10,299, 10,303 (Mar. 13, 1989). The Commission was considering whether to extend the prescription release requirement to contact lenses during its review of the Eyeglass Rule, which was part of its systematic review of its Rules and Guides to determine their effectiveness and impact. The Commission requested public comment about the overall costs and benefits of the Rule and related questions, and it received comments from numerous parties, including associations representing various segments of the industry and professions, state attorneys general, state optometry boards, and consumers. *See* Request for Public Comments, 62 Fed. Reg. 15,865 (Apr. 3, 1997)

each new pair. Consumers generally purchased these lenses from their eye care providers after an eye exam and lens fitting and replaced them infrequently. The advent of standardized disposable soft contact lenses – which consumers wear for only a few weeks and throw away – was followed by the growth of non-practitioner lens sellers, such as Internet-based contact lens retailers, who simply provide customers contact lenses that come from the manufacturer in sealed boxes labeled with the relevant power and size specifications.

While eye care providers still control the prescription process, consumers now not only purchase more lenses with greater frequency but they also have a greater choice of lens suppliers and modes of delivery. These changes have caused tension among eye care practitioners, bricks-and-mortar lens sellers, contact lens manufacturers, Internet lens sellers, and state officials over issues such as licensing contact lens sellers, contact lens prescription release requirements, and methods of verifying prescriptions. These tensions have led to state board proceedings,¹⁵ the adoption of new state¹⁶ and federal legislation,¹⁷ and litigation.¹⁸ The FTC and its staff have

¹⁵ See Connecticut proceeding *supra* note 11.

¹⁶ See, e.g., Arkansas Code §§ 17-90-108; 17-90-109; 17-90-110.

¹⁷ See Fairness to Contact Lens Consumers Act 15 U.S.C.A. §§ 7601-7610 (2004).

¹⁸ In *In re: Disposable Contact Lens Antitrust Litigation*, No. MDL 1030, (complaints filed M.D. Fla. 1994) a multidistrict litigation, the Attorneys General of 31 states and a certified class alleged that eye care professionals engaged in an organized effort to prevent or hinder consumers from obtaining their contact lens prescriptions. The complaints alleged two conspiracies: (1) that the practitioners and their trade associations conspired to prevent the release of contact lens prescriptions to consumers, and (2) that the manufacturers, practitioners, and trade associations, including the American Optometric Association, conspired to eliminate sales of contact lenses by pharmacies, mail order, and other alternative sellers. According to the complaints, the conspiracy severely restricted the supply of contact lenses available to alternative sellers, which has hampered the growth of such sellers, decreased the supply of lenses to consumers, and increased the price of lenses. The parties reached settlements, the last of which

weighed in on the issues raised in many of these matters.

As noted above, several months before the workshop, FTC staff filed a comment in a proceeding in Connecticut. After the FTC workshop but before the issuance of the Contact Lens Report, Congress considered and eventually passed the Fairness to Contact Lens Consumers Act.¹⁹ This Act resolved a number of the issues raised at the workshop, such as requiring eye care practitioners to release contact lens prescriptions to consumers upon the completion of a contact lens fitting. One hotly contested issue at the workshop was whether verification of prescriptions must be active – meaning that the eye care provider must affirmatively respond before the seller can provide the lenses – or passive – meaning that the seller can provide the lenses unless the eye care provider notifies him that the prescription is invalid. Some contact lens sellers were concerned that, under an active verification regime, eye care providers would prevent their patients from patronizing a competing lens seller by not responding to the verification request. Eye care providers were concerned that, under a passive verification regime, patients would too easily receive lenses with expired or incorrect prescriptions. In testimony on the Act, the Commission drew on evidence from the workshop regarding types of prescription verification systems and recommended that Congress specify the type of

the court approved in November 2001. As part of the settlement, defendant manufacturers agreed to sell lenses to alternative distribution channels.

¹⁹ 15 U.S.C.A. §§ 7601-7610. When the Commission issued a Notice of Proposed Rulemaking seeking comment on a proposed “Contact Lens Rule” to implement the Fairness to Contact Lens Consumers Act, *see* 69 Fed Reg. 5440 (Feb. 4, 2004), it also issued a notice regarding the completion of the regulatory review of the Eyeglass Rule. 69 Fed Reg. 5451 (Feb. 4, 2004). The Commission issued the Final Contact Lens Rule in 2004. 69 Fed. Reg. 40481 (July 2, 2004) (to be codified at 16 C.F.R. Part 315).

prescription verification.²⁰

Although the Fairness to Contact Lens Consumers Act resolved many of the issues raised at the workshop – prescription release, prescription verification, and prescription length – it did not resolve all issues, such as professional licensing for contact lens sellers. Thus, in March 2004, FTC staff released the Contact Lens Report. In the Report, staff reached several conclusions regarding online contact lens sales. Among its most important conclusions was that, although there are significant health issues concerning the use and sale of contact lenses, requiring a professional license to sell replacement contact lenses over the Internet is likely to raise prices and/or reduce convenience to consumers without substantially increasing health protections. Accordingly, the Contact Lens Report counseled that states wishing to consider regulation of replacement lens sellers in addition to existing prescription requirements and general consumer protection laws should consider adopting simple registration requirements.

In addition to the FTC rulemaking required by the Fairness to Contact Lens Act, Congress also included in the Act a requirement that the FTC conduct a study of the strength of competition in the sale of prescription contact lenses.²¹ Specifically, the FTC was required to study 1) the incidence of exclusive relationships between prescribers or sellers and contact lens manufacturers, and the impact of such relationships on competition; 2) the difference between online and offline sellers, including price, access and availability; 3) the incidence, if any, of contact lens prescriptions that specify brand name or custom labeled contact lenses and the

²⁰ Prepared Statement of The Federal Trade Commission Before the Committee on Energy and Commerce United States House of Representatives Washington, D.C. (Sept. 9, 2003), at <http://www.ftc.gov/os/2003/09/contactlens.htm>.

²¹ 15 U.S.C. § 7609.

resulting effect on consumers and competition; 4) the impact of the FTC Eyeglass Rule on competition; and 5) any other issue that may impact competition in the contact lens industry.²² It is notable that Congress called upon the expertise in these competition issues that the FTC staff developed through the workshop and the Contact Lens Report.

The FTC's interest and expertise in contact lens issues continues to impact the debate. In response to an inquiry from an Arkansas legislator, FTC staff issued comments concerning whether Arkansas legislation on contact lenses is preempted by the new federal Fairness to Contact Lens Consumers Act. The FTC staff concluded that certain features of the Arkansas legislation appear to be preempted by federal regulations.²³ In addition, the Arkansas legislation, as interpreted by the state Board of Optometry, requires that third-party providers of contact lenses, such as mail order, Internet, and other alternative providers, be licensed in Arkansas to sell contact lenses to Arkansas residents. Based on its findings in the Contact Lens Report, the staff concluded that such a requirement likely results in higher prices and reduced consumer choice, which could increase the incidence of health problems associated with contact lens use, such as over-wearing. In its comments, the FTC staff therefore recommended that Arkansas rescind its licensing requirement and, if the state finds it necessary to regulate contact lens sellers beyond existing regulations, that it should consider adopting a simple registration requirement

²² See *The Strength of Competition in the Sale of Prescription Contact Lenses: An FTC Study* (Feb. 2005), at <http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf>.

²³ Comments of the FTC Staff to The Honorable Doug Matayo, Member, Arkansas House of Representatives, Concerning the Interaction Between Enacted Arkansas House Bill 2286 (and a Draft Implementing Regulation) and The Fairness to Contact Lens Consumers Act and the Commission Contact Lens Rule (Oct. 4, 2004), at <http://www.ftc.gov/os/2004/10/041008matayocomment.pdf>.

instead.

IV. Wine

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

At the workshop, FTC staff heard testimony from all sides of the wine issue, including wineries, wholesalers, and state regulators. The staff also gathered evidence from package delivery companies, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), and regulators in states that allow direct shipping. In addition, FTC staff conducted the first empirical study of a wine market in a state that banned interstate direct shipping. The study examined the wine market in McLean, Virginia, and compared the prices and choices that consumers could find in area stores to those available online.

The Wine Report,²⁴ which considered the workshop testimony, the empirical study, and other evidence, concluded that, through the direct shipment of wine, states could significantly

²⁴ FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

enhance consumer welfare by increasing consumer choice and reducing wine prices. Using the *Wine and Spirits* list of the “Top 50 Wines” in America, the FTC staff’s empirical study found that 15% of a sample of wines available online were not available from retail wine stores within ten miles of McLean.²⁵ Given that the wines studied are the most popular wines of many of America’s largest wineries, it is likely that the wines of less-popular or smaller wineries are even more difficult to locate in wine retailers. Moreover, the same study suggested that, if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than \$20 per bottle, and an average of 20-21% on wines costing more than \$40 per bottle.²⁶ Less expensive wines may be cheaper in bricks-and-mortar stores, given that fixed shipping costs will be proportionately larger for less-expensive wines.

At the workshop, some parties expressed concern and offered anecdotes suggesting that interstate direct shipping might have the unintended effect of increasing underage access to alcohol or undermining tax compliance. To determine whether these concerns were factually-grounded, FTC staff contacted numerous officials from states that allow direct shipping to gather systematically information about whether these problems have occurred. The Wine Report stated that, in general, state officials report that they have experienced few, if any, problems with direct shipments of wine to minors, especially when compared with the problem of underage access to alcohol through traditional distribution channels.²⁷ In addition, several states that permit interstate direct shipping have adopted various procedural safeguards and enforcement

²⁵ *Id.* at App. A 28.

²⁶ *Id.* at App. A 27.

²⁷ *Id.* at 31.

mechanisms to prevent sales to minors. These include such precautions as requiring labeling of packages containing wine and requiring an adult signature at the time of delivery. For example, New Hampshire developed penalty and enforcement schemes in coordination with its enforcement agencies. Notably, the National Academy of Sciences recommended that states allow direct shipping but “tighten access” through these safeguards, rather than ban interstate direct shipping altogether.²⁸

The Wine Report also found that some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes. Most of these states reported few, if any, problems with tax collection.

Finally, the Report uncovered little actual evidence to support the distinction found in several states that permit intrastate direct shipment of wine but prohibit interstate shipment. While some parties have provided theoretical justifications for the distinction, the report found no evidence based on the experience of state law enforcement authorities to justify the distinction in practice. Indeed, some federal courts have found that the expressed justification for the distinction is nothing more than naked protectionism for in-state wineries.²⁹

Perhaps because the Wine Report provided the first empirical evidence regarding the impact of direct shipping, and the first survey of state enforcement officials, it garnered

²⁸ Reducing Underage Drinking: A Collective Responsibility 174-75 (2004), available at <http://www.nap.edu/books/0309089352/html/>.

²⁹ *Bainbridge v. Bush*, 148 F. Supp.2d 1306, 1311 n.7 (M.D. Fla. 2001), vacated on other grounds, *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Dickerson v. Bailey*, 212 F. Supp.2d 673, 694-95 (S.D. Tex. 2002), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

significant attention from the press. The Report also impacted the policy debate. The U.S. House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection held a hearing devoted specifically to the Report's findings, at which the Commission testified about the Report.³⁰

State policymakers also asked for the Commission's views on the direct shipping. In response to requests from three New York state legislators, the FTC staff provided comments on three bills that would allow out-of-state vendors to ship wine directly to New York consumers if the vendors comply with certain regulatory requirements.³¹ According to the staff comments, the bills would promote e-commerce and give New York residents access to a greater variety of wines at lower prices, while allowing the state to satisfy its other public policy goals, such as preventing shipments to minors. The comments also note that the bills contain all of the safeguards recommended by both the National Academy of Sciences and FTC staff, such as requiring an adult signature at the point of delivery. In addition, the comments discuss the issue's implications for e-commerce generally, noting that "if extended to other industries, physical presence requirements could seriously imperil the growth of e-commerce."

Finally, the Wine Report also may play a role in the litigation currently pending before the Supreme Court. The Court recently granted *certiorari* in two conflicting cases, out of the

³⁰ See Prepared Statement of the FTC Concerning "E-Commerce: The Case of Online Wine Sales and Direct Shipment," Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, United States House of Representatives (October 30, 2003), at <http://www.ftc.gov/os/2003/10/031030ecommercewine.htm>.

³¹ Letter from FTC Staff to William McGee, Chairman, New York Assembly Agriculture Committee 13-14 (Mar. 29, 2004), at <http://www.ftc.gov/be/v040012.pdf>.

Second and Sixth Circuits, regarding the direct shipping question. The Sixth Circuit held that Michigan’s regulatory scheme violates the Commerce Clause because it “treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state.”³² The court further held that Michigan’s regulatory scheme is not saved by the 21st Amendment because it does not “further[] any of the concerns” of the 21st Amendment, and any interest Michigan has in the regulation of direct shipments to consumers could be served by “reasonable non-discriminatory means.” In contrast, the Second Circuit held that New York’s law implicates a 21st Amendment concern because New York’s requirement that out-of-state wineries establish a “physical-presence” in the state “ensures accountability” and facilitates inspection of records and products to be sold, thus reflecting “valid regulatory concerns in this unique area of commerce.”³³ In addition, the Second Circuit concluded that the discriminatory nature of the law was irrelevant to its constitutional analysis because the 21st Amendment authorized New York “to regulate alcohol traffic within its borders” regardless of the “normal operation of the Commerce Clause.” In the court’s view, the Commerce Clause limits a state only when it seeks “to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government.”

In their petitions for *certiorari* and briefs on the merits, advocates of direct shipping have cited the Wine Report to bolster their argument that the discriminatory bans on interstate direct shipping do not further any of the 21st Amendment’s “core concerns,” such as preventing sales to

³² *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S.Ct. 2391 (2004).

³³ *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir.), *cert. granted*, 124 S.Ct. 2391 (2004).

minors or collecting taxes.³⁴ Although it remains to be seen whether the Court will rely on the Report in reaching its decision, it certainly provided the parties more empirical evidence than existed previously.

V. Concluding points

The Contact Lens and Wine Reports are examples of effective competition advocacy, which complements the Commission's enforcement agenda and provides an inexpensive and effective way to discourage the enactment of anticompetitive laws and policies. Oftentimes, policymakers' expertise lies in other fields and they have not fully considered the competitive effect of their proposals. Thus, impact of these Reports also highlights the importance of gathering empirical evidence in evaluating issues of public policy. In general, competition advocacy has been particularly effective in influencing policy when it includes empirical evidence regarding the impact on consumers, which gives competition advocacy filings more credibility with the public, the courts, and policymakers. In the debate over a particular policy, empirical evidence helps to counter the arguments of those who seek to limit competition for their own self-interest. Thus, competition advocacy performs both an educational and a persuasive function.

The contact lens and wine issues have implications for competition in general and e-commerce in particular. Anticompetitive state regulations can insulate local suppliers from competition, such as online suppliers, and deprive consumers of lower prices and greater

³⁴ Brief of the National Alcohol Beverage Control Association and the National Conference of States Liquor Administrators as Amici Curiae in Support of Petitioners, 2004 WL 389419 (Appellate Petition, Motion and Filing) (Feb. 26, 2004); Brief of Amicus Curiae Wine Institute in Support of Respondents, 2004 WL 2190366 (Appellate Brief) (Sep. 23, 2004).

selection. Although states may have legitimate regulatory concerns in many cases, they also may have less restrictive alternatives that would allow more competition and, ultimately, provide the greatest benefits to consumers.

Through a variety of forms of competition advocacy, the Commission and its staff have strongly encouraged policymakers to adopt pro-competitive rules in many different industries. To be persuasive and credible, competition advocacy must be firmly rooted in empirical evidence. Marshaling such evidence requires an agency investment in workshops, studies, and reports, such as the e-commerce workshop and the related reports and studies. These investments supplement the Commission's enforcement agenda and thereby allow it to reach further to protect consumer interests by persuading policymakers not to adopt anticompetitive restrictions.