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**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**
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## Working Party No. 2 on Competition and Regulation

# ROUNDTABLE ON COMPETITION IN PROFESSIONAL SERVICES

## -- United States --

*This note is submitted by the Delegation of United States to the Working Party No. 2 FOR DISCUSSION at its next meeting on 3 May 1999.*

**English text only**

**77467**

# COMPETITION IN PROFESSIONAL SERVICES

## United States

1. Regulation of professions in the U.S. occurs at the State governmental level in the form of occupational licensing laws and related business practice regulations. In addition, self-regulating professional associations promulgate recommended standards of practice or codes of ethics. Governmental and private regulations can serve the public interest by ensuring an acceptable standard of competence and integrity of professional services, which in turn promotes the health, safety and well-being of consumers. This is particularly beneficial when it would be difficult for consumers to evaluate the quality of professional services, and factors such as litigation, reputation and guarantees are inadequate to enable consumers to make an informed purchase decision. However, regulations may also restrict professionals' ability to compete effectively, resulting in consumer injury, without providing benefits that outweigh the harm to competition.[1]

2. The turning point for active application of the antitrust laws to the professions was the 1975 U.S. Supreme Court decision in *Goldfarb v. Virginia State Bar*.[2] Since then the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("DOJ") have undertaken a broad enforcement program designed to eliminate private restrictions on business practices of state-licensed professions that may adversely affect the competitive process and raise the prices or decrease the quality of professional services.[3] In addition, the agencies have submitted numerous comments on the benefits and costs of occupational regulation to state legislatures, regulatory commissions and others, filed *amicus curiae* briefs in private cases, issued advisory opinions concerning proposed ethical restrictions by professional associations and other agreements among professionals, adopted enforcement policy statements on certain cooperative activities of health care providers, and issued an industry-wide rule covering certain opthamalic services.[4]

3. The first section of this paper provides an overview of the agencies' enforcement actions; the second section sets out the principles articulated in our advocacies in regulatory and legislative proceedings and discusses a few recent advocacies.

## I. Enforcement actions

4. The agencies have challenged successfully anticompetitive restrictions imposed by private self-regulatory associations or state boards, where the state board regulation extended beyond protected "state action"[5] and other agreements among competitors, including restraints on advertising and solicitation, price competition, and contract or commercial practice.

### *1) Restraints on advertising and solicitation*

5. Private professional associations and State boards traditionally imposed restrictions on advertising and solicitation by professionals, claiming this was necessary to protect consumers from false or deceptive advertising or marketing practices. The agencies have examined whether these restrictions are so broad that they also unnecessarily restrict the provision of truthful information to consumers that could enhance competition.

6. Some of the most important cases that the Commission has brought challenging restrictions on the dissemination of truthful advertising of professional services have been in the health care area. In the seminal case of *American Medical Association* ("*AMA*"),[6] the Commission found, among other things, that the AMA, through its ethical guidelines, had illegally suppressed virtually all forms of truthful, non-deceptive advertising and similar means of solicitation by doctors and health care delivery organizations. The Commission ordered the AMA to cease and desist from prohibiting such advertising. However, it allowed the AMA to continue its use of ethical guidelines to prevent false or deceptive advertisements or oppressive forms of solicitation.

7. In the decade since the final decision in the *AMA* case, the Commission has challenged private dental,[7] medical,[8] and other professional associations [9] for various restrictions on the dissemination of truthful information, usually imposed through provisions in codes of ethics. In addition, the Commission has challenged and banned similar restrictive rules adopted by State boards responsible for regulating health care professionals that were not shielded from antitrust liability by the state action doctrine.[10]

8. In 1990, the Commission charged the American Institute of Certified Public Accountants, the dominant professional association in the accounting field, with restricting truthful, non-deceptive advertising by prohibiting members from making truthful claims in self-laudatory or comparative advertisements, or using truthful testimonials. It also alleged that the association restricted members' efforts to solicit clients directly and by referrals. The consent order bars the association from prohibiting its members from engaging in these practices.[11] Similarly, the Commission recently brought cases involving advertising of engineering services. For example, in 1993, the Commission entered a consent order with the National Society of Professional Engineers (NSPE) settling charges that the NSPE, through its ethics code, restricted truthful or nondeceptive advertising by its members.[12]

9. In 1996, the Commission found that the *California Dental Association* ("*CDA*")[13] applied ethical guidelines -- purportedly adopted to prevent deceptive advertising -- in a way that restricted its member dentists from engaging in a variety of truthful and nondeceptive advertising. CDA's restrictions covered advertising of prices, discounts, quality, superiority, guarantees, and availability of dental services. For example, CDA barred its members from representing that their prices were "low," "reasonable," and "affordable," prohibited money-back guarantees as misleading, and prohibited dentists from reporting the results of free dental screenings of school children on forms bearing the dentists' names and addresses (a means of soliciting new patients). The Commission condemned the horizontal restrictions on price advertising as *per se* illegal and also held these restrictions and other nonprice advertising restraints illegal under an abbreviated rule of reason analysis.[14]

10. CDA claimed that its "ethical" requirements resulted in more information to consumers, that its ban on quality claims was necessary to avoid deception, and that its actions were lawful because California imposed similar restrictions on advertising. The Commission rejected the claim as without any factual basis, and found that CDA did not have the power to interpret and enforce the state law itself.[15]

11. The Ninth Circuit Court of Appeals sustained the Commission's holding that CDA's price and nonprice restraints on advertising and solicitation were unlawful under an abbreviated rule of reason analysis.[16] The U.S. Supreme Court is reviewing this decision during its current term.

12. In acting to eliminate anticompetitive restraints on professional advertising, the Commission has emphasized the important role of professional associations in regulating deceptive advertising and in-person solicitation of "vulnerable" persons. The Commission's orders in the *AMA* case and all subsequent cases contain a proviso allowing a professional association to act against advertising claims that it "reasonably believes would be false and deceptive within the meaning of Section 5 of the Federal Trade Commission Act." The Commission's *CDA* decision stated that the "complaint did not challenge the right

... to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers."[17] The *CDA* order also permits the CDA to restrict solicitation of patients who may be particularly vulnerable to undue influence.[18]

***ii) Restraints on price competition***

13. An early DOJ case, *National Society of Professional Engineers v. U.S.*,[19] challenged a professional society's prohibition in its canon of ethics of competitive bidding by its members. In that case the Supreme Court held that the trial court was justified in refusing to consider the defense that the canon was justified "because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety." The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

14. The Commission has challenged various forms of price restraints by medical and other professional societies including the proscription of: i) underbidding for a contract or agreeing to accept compensation that was "inadequate" in light of the usual fees in the community;[20] ii) offering services at "discounted fees";[21] iii) low pricing and granting favorable credit terms;[22] and iv) requiring members to uphold the principle of "appropriate and adequate compensation."[23] Recently the FTC sued the International Association of Conference Interpreters ("AIIC") and its U.S. affiliate members, charging that the association published lists of fees that its members were required to charge. The complaint also challenged certain work rules facilitated price fixing and restrained price competition among AIIC members by requiring, among other things, that all interpreters on a team be paid the same rate, that fees be paid in day-long increments, that certain standards of lodging and transportation be provided, that payment be made for travel, rest and study days, and that services not be provided free of charge. The Commission's order requires AIIC to eliminate these rules and by laws regarding these challenged practices.[24]

15. Some cases have involved price-fixing agreements in the context of a joint arrangement. An important issue in these cases has been whether the agreement on price should be considered *per se* unlawful or ancillary to a legitimate joint venture and therefore analyzed under the rule of reason. In 1998, the Commission settled charges that three companies and two doctors illegally fixed prices for professional services for lithotripsy procedures -- a non-surgical treatment for kidney stones. The urologist-owners of the facilities in which the procedures were performed financially integrated by jointly investing in the purchase and operation of the machines used to perform the procedure. The complaint alleged, among other things, that the collective setting of fees for lithotripsy professional services was not reasonably necessary to achieve efficiencies from the legitimate joint ownership and operation of the lithotripsy machines nor were the urologists sufficiently integrated to justify the agreement to fix prices for lithotripsy services. There was a legitimate basis for establishing a set fee for use of the lithotripter but not for insisting that all doctors charge the same professional fee. The consent order prohibited the respondents from fixing prices and required them to terminate third-party payor contracts that include the challenged fees at contract-renewal time or upon request of the payor.

16. The FTC has also challenged less explicit price-related agreements that have an impact on prices. In *ASFE, Association of Engineering Firms Practicing in the Geosciences*,[25] the Commission issued a consent order settling charges that an association of engineers conspired with some of its members to restrain competitive bidding and to induce its members, through insurance and peer review programs, not to bid or give favorable prices or credit terms for civil engineering services. The consent order bars the association from using a peer review process to evaluate its members' fees, pricing, or bidding practices, disseminating materials concerning any engineering professional's intention not to bid, disclosing to an

insurer any information about a member's fees, pricing, bidding, or advertising, and stating that competitive bidding, low prices, or liberal credit terms affect any engineer's ability to obtain or keep insurance.

17. Collaboration by competing health care providers to thwart cost containment efforts also raises price fixing concerns. The Commission has brought numerous cases challenging health care providers' collective efforts to increase reimbursement levels through boycotts and other agreements to fix prices. In 1997, the Commission charged the College of Physicians and Surgeons of Puerto Rico and related medical groups with taking collective action to attempt to raise their reimbursement level under a program developed by the Commonwealth government to provide health care coverage for the 30% of the Puerto Rican population that is uninsured. The College called an eight-day strike, pursuant to which members closed their offices and, in some cases, canceled elective surgery without notice. With the cooperation of the Commonwealth government, the FTC reached a settlement that resulted in an injunction and a $300,000 payment to a catastrophic fund to be administered by the Puerto Rico Department of Health.[26]

18. The FTC has challenged concerted action to impede private, as well as government, cost-containment efforts. In 1997, the Commission charged a physicians group consisting of 85% of all physicians and 90% of all primary care physicians in Mesa County, Colorado with fixing prices in dealing with health plans and excluding health plans from entering the area by collectively refusing to deal.[27] The agreement allegedly resulted in higher prices for physician services and hindered the development of alternative health care financing and delivery systems. The case has been withdrawn from adjudication so that the Commission can consider a proposed consent order.

19. In recent years, the DOJ has challenged three anticompetitive physician hospital organizations ("PHOs"). PHOs usually include one or more hospitals and most of the physicians who have privileges at those hospitals' PHOs. In all three cases, there was no financial or other substantial integration among the competing physicians; thus, their joint-pricing activities were challenged as *per se* violations. All three suits were settled with consent decrees. In one such case, the Division alleged that the only women's hospital in Baton Rouge, Louisiana, had joined with 90% of the obstetrical/gynecological practitioners in that area both to protect the hospital from the development of competing inpatient services and to maintain or increase prices for both physician and hospital services above competitive levels. The parties entered into a consent decree enjoining the hospital and a corporation formed by the physicians from negotiating on behalf of competing physicians and from engaging in various other anticompetitive activities.[28]

20. The antitrust laws have long exempted collective bargaining between employees and employers. However, this exemption does not cover independent economic actors such as self-employed physicians in independent practice. Recently, an increasing number of physicians have been joining unions and other such organizations to increase their bargaining leverage with health plans. Although such organizations may lawfully collectively bargain for employed physicians, antitrust issues are implicated when they attempt to negotiate on behalf of otherwise competing, non-employee physicians.

21. On August 12, 1998, the DOJ filed a civil suit against the Federation of Physicians and Dentists, a physicians union, for orchestrating a boycott to extract artificially high fees for competing independent orthopedic surgeons in Delaware. The complaint alleged that in 1996 and 1997, nearly all of the orthopedic surgeons in Delaware joined the Federation and thereafter acted in concert through the Federation to resist the efforts of Blue Cross of Delaware to reduce the fees Blue Cross paid to them. The Federation purported to be operating as a third-party messenger on behalf of the orthopedic surgeons. A properly implemented third-party messenger system, with adequate safeguards against collusion, should not lead to a messenger's negotiating on behalf of competing independent physicians or enhance the bargaining leverage of such physicians. Such arrangements may facilitate the contracting process, reduce transaction costs, and thus ultimately benefit consumers. In this case, however, the Federation's messenger

system facilitated, rather than safeguarded against, collusion. The Federation encouraged the physicians to refuse to negotiate with Blue Cross except through the Federation. By the end of 1997, nearly all of the members of the Federation had rejected a Blue Cross fee proposal and terminated their contracts with Blue Cross. The case is currently in litigation.[29]

### *iii) Exclusion of Competitors*

22. The Commission has a long record of challenging concerted efforts to exclude new competitors and forms of competition in the health care sector. The cases have addressed obstruction of entry by HMOs,[30] non-physician providers,[31] hospital-sponsored clinics,[32] and other "alternative" arrangements.[33]

23. In the early 1990s the Commission issued a series of orders against alleged threatened boycotts by physicians to prevent local hospitals from pursuing an affiliation with the Cleveland Clinic, a nationally-known provider of comprehensive health care services.[34] The Clinic, which operated as a multi-specialty group medical practice, offered a pre-determined "global fee" or "unit price" covering all aspects of many services, such as surgery. The Commission's complaints alleged that when the Clinic sought to establish a facility in Florida, local physicians sought to prevent its physicians from gaining hospital privileges by threatening to boycott the hospitals. The Commission's orders prevent such conduct from recurring.

24. In 1994, the Commission settled charges that the medical staff of Good Samaritan Regional Medical Center conspired to boycott the hospital in order to force it to end its dealings with a potentially cost-containing multi-specialty physicians clinic that would have competed with the staff.[35] The consent order prohibits the respondents from agreeing, or attempting to agree, to restrict services offered by the hospital, clinic, or any other health care provider by refusing to deal with others offering health care services or by withholding patient referrals.

25. In June 1995, the DOJ sued the American Bar Association ("ABA"), alleging that the ABA, in its accreditation of law schools, restrained competition among professional personnel at ABA-approved law schools, by fixing their compensation levels and working conditions. The complaint also alleged that the ABA allowed its law school accreditation process to be captured by those with a direct interest in its outcome. Consequently, rather than setting minimum standards for law school quality and thus providing valuable information to consumers, which are legitimate purposes of accreditation, the ABA at times acted as a guild that protected the interests of professional law school personnel. ABA approval was a valuable asset to law schools as over 40 states required graduation from an ABA-approved school to qualify to take the state bar exam, and the ABA is the only agency the U.S. Department of Education recognizes as a law school accrediting agency. In 1996, the U.S. District Court entered a modified consent decree which prohibits the ABA from misusing its powers as the law school accrediting agency to restrain competition among professional personnel at ABA-approved law schools. The decree bars the ABA from fixing faculty salaries, refusing to accredit schools simply because they are for-profit, and refusing to allow ABA-approved law schools to accept credits from schools that are state-accredited but not ABA-approved.

26. Claims of exclusion from professional associations, provider-sponsored health plans, and the like or denial of accreditation or certification require careful analysis. Membership organizations perform valuable functions and cannot exist without membership rules, which can be procompetitive.[36] But exclusion can harm competition if excluded professionals are unable to compete effectively without access to the group.[37]

### *iv) Restrictions on contract and commercial practice*

27. In a number of cases the Commission successfully challenged ethical guidelines and membership requirements of professional associations that restricted their members' contractual or commercial practices. In the *AMA* case, the Commission found that the AMA's "contract practice" rules adversely affected competition by preventing the development of potentially more efficient forms of business format or practice. Under these rules, it was unethical for a physician, among other things, to provide medical services to patients under a salaried contract with a hospital or health maintenance organization that was not controlled by doctors or to enter into any partnership or other arrangement that involved sharing fees with non-physicians.

28. The Commission also has issued consent orders requiring professional societies to cease restricting their members from rendering services on a basis other than the traditional fee-for-service, such as becoming a salaried employee of a hospital or physician-owned physical therapy service, or practicing in other "nontraditional" ways, such as in a franchise arrangement or in "commercial settings."[38] For example, the FTC challenged the American Academy of Optometry's requirement that its members "practice in locations consistent with the majority of other health professions in the area."[39] The Commission charged that it restricted the choice of practice location to the traditional private office and prevented optometrists from practicing in shopping centers and other locations customarily considered "commercial" in nature. As a result, the Commission alleged, consumers were "deprived of the potential cost savings, convenience, and efficiency benefits of optometric practice locations in commercial settings in their purchases of optometric services and optical products." The case was settled with a consent order that prohibited the Academy from restricting the types of practice locations of its members or prospective members.

29. Another restraint on contracting in the health care sector with potentially anticompetitive results is the "Most Favored Nation" ("MFN") clause, which essentially requires a health care provider to charge an insurance company no more than the lowest prices the provider charges any other insurer or, in some cases, individual patients. Some MFNs go even further and explicitly or implicitly ensure that the MFN payer gets a distinct advantage over its rivals by, for example, specifically requiring the provider to charge rival payers a percentage greater than the rate the provider charges the MFN payer for the same services. This creates a "price buffer" between the services protected by the MFN and the services of competing plans. Under certain market conditions, MFNs discourage provider discounting, deter innovation, and reduce meaningful consumer choices in health plans, either by facilitating collusive pricing among competing providers or by discouraging providers from offering lower rates or more cost-effective care to rival plans.

30. The DOJ sued to stop Delta Dental of Rhode Island ("Delta") and unnamed co-conspirators from engaging in unlawful agreements that discouraged dentists from offering fees lower than those paid by Delta patients to patients covered by other insurance companies and to uninsured patients. Delta was the largest dental insurer in Rhode Island and had contracts with approximately 90% of the dentists in the State. Fees from dental services provided to Delta enrollees represented a substantial portion of most dentists' income. Almost all of the Delta dentists agreed to comply with the MFN clause and refused to contract at prices below Delta's with limited-panel dental insurance plans that were trying to enter the Rhode Island market. The case was settled with a consent decree. The Court rejected Delta's argument that most MFN clauses are *per se* legal and agreed with the Division that, under certain conditions, MFNs may have substantial anticompetitive effects and are properly analyzed under the rule of reason.[40]

## II. Advocacies

31. The goal of the agencies' competition advocacy programs is to prevent or reduce possible consumer injury caused by federal, state or local laws and regulations, or self-regulatory standards that interfere with the proper functioning of the marketplace. The Commission and DOJ pursue this goal by advising governmental and self-regulatory entities of the potential effects of proposed legislation or regulation on competition and consumers. Since the late 1970s, the Commission staff has submitted over 400 comments or amicus curiae briefs to state and self-regulatory entities on antitrust issues relating to such professionals as accountants, lawyers, dentists, physicians, optometrists, chiropractors, podiatrists, architects, paralegals, and veterinarians.[41]

32. The staff comments note that occupational regulation has both benefits and costs that must be weighed. Regulation may promote or assure a standard of service quality to consumers, especially when judging quality is more difficult for consumers than for providers. However, consumers can obtain information about service quality by other means including experience, advertising, and reputation as well as from the assurances provided by regulation.

33. Restrictions on business aspects of professional practice do not always benefit consumers, a conclusion that is supported by economic studies that have found little relationship between such restrictions and the quality of care provided.[42] Also, restrictions can limit professionals' ability to compete effectively with each other. Further, restrictions on professions can make it more difficult and costly for professionals to provide their services, and these higher costs may be passed on to consumers in the form of increased prices and reduced services.

34. Comments also have recommended removal of regulations that prohibit the location of professional offices in commercial locations. Staff contends that such location restrictions serve no apparent purpose other than to inhibit the formation of more convenient and higher-volume commercial practices that can take advantage of volume purchase discounts and other economies of scale that may be passed on to consumers as lower prices.

35. In the area of legal services, in 1996 and 1997, FTC and DOJ staff submitted comments in opposition to the Virginia State Bar's proposal to prevent non-lawyers and title company attorneys from competing with lawyers in performing closings of real estate transactions and refinancings. The comments argued that the proposal would increase costs to consumers who would not otherwise hire an attorney and was not justified on consumer protection grounds. Moreover, the proposal likely would lead to higher prices for lawyers' settlement services by eliminating competition from lay services. After the DOJ and FTC submitted joint comments to the Virginia Supreme Court, copies of the letter were forwarded to the Virginia legislature. Virginia then adopted a statute allowing lay services to continue to compete with law firms in providing closings. The Justice Department successfully challenged a similar effort in Kentucky.[43]

36. In 1997, FTC staff opposed a proposed rule by the Washington legislature that would require candidates for Certified Public Accountant status to earn at least 150 semester hours of undergraduate academic credit. Economic analysis indicated that such a rule would raise the educational entry requirements for CPA licensure and in turn would likely increase costs of entry and raise prices to consumers of CPA services. The comments also noted there was no persuasive evidence that the net effect of the proposal would be beneficial to consumers.

37. The Commission has also commented on proposed federal legislation to exempt health care professionals from the antitrust laws. In July 1998, FTC Chairman Pitofsky testified before the House Committee on the Judiciary opposing proposed legislation that would create an exemption from the antitrust laws to enable health care professionals to negotiate collectively with health plans over fees and

other terms of dealing. He testified that in addition to potentially harming consumers and raising health care costs, the immunity is unnecessary to protect legitimate collaboration among competing health care providers, would immunize anticompetitive activities that could diminish the effective functioning of health care markets, and would likely encourage those in other industries to seek similar exemptions.[44] He also noted that the proposed exemption would be a radical departure from existing labor law standards that protect the right to bargain collectively only in the employer-employee context but not to independent contractors like self-employed physicians. The bill did not pass, but a similar bill has been introduced in the current Congress.

## III. Conclusion

38. In the twenty-four years since the U.S. Supreme Court paved the way for the application of antitrust law to professional services, the Federal Trade Commission and the Department of Justice have pursued an active policy, through law enforcement actions and advocacy, of opposing anticompetitive restraints on the provision of such services. Although neither the FTC nor the DOJ has conducted a formal empirical study of the effects of their efforts, we note that the markets for the provision of many professional services have been substantially liberalized and deregulated during this period. We believe that the elimination of restraints on conduct, such as advertising, discount pricing, and contractual and commercial practices, has resulted in increased competition, providing substantial welfare gains for consumers.

## NOTES

1. A 1990 report by Federal Trade Commission economists concluded that occupational regulations frequently increase prices and impose substantial costs on consumers without increasing the quality of professional services. Cox and Foster, The Costs and Benefits of Occupational Regulation, Federal Trade Commission Bureau of Economics Staff Report, October 1990. The report recommended that the costs and benefits of any regulatory proposal be weighed on a case-by-case basis.

   421 U.S. 773 (1975). In this case, the Supreme Court struck down a minimum fee schedule adopted and enforced through disciplinary action by a state bar association, finding that the conduct was essentially private anticompetitive activity not shielded by the state action doctrine. Prior to this case, some courts believed that the "learned professions" should be treated differently, reasoning that because their goal is to provide services necessary to the community rather than to generate profits, their activities did not fall within the terms "trade and commerce" in Section 1 of the Sherman Act. The *Goldfarb* case also established that professional activities have a sufficient effect on interstate commerce to support Sherman Act jurisdiction.

3. Press releases and information about FTC and DOJ enforcement actions and competition advocacies are available on the FTC (http://www.ftc.gov) and DOJ (http://www.usdoj.gov/atr) home pages. There is a separate description of enforcement actions in the health care sector since the 1970s under "FTC Antitrust Actions in Health Care Services and Products." Summaries of 54 DOJ business review letters since the 1993 issuance of the DOJ/FTC Health Care Antitrust Statements of Enforcement Policy and of 32 DOJ health care cases since August 25, 1983 are available at http://www.usdoj.gov/atr/public/health_care/health_care.htm.

4. Advisory opinions and amicus briefs filed in health care cases can be found on the FTC home page, *id.* U.S. Department of Justice and Federal Trade Commission, Statements of Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (August 18, 1996). The Opthamalic Practice Rule, 16 C.F.R. § 456 (1996), issued under the FTC's consumer protection authority, requires opthamalic service providers to provide consumers without charge a copy of their prescriptions and prohibits conditioning the availability of an eye examination on a requirement that the patient agree to purchase any opthamalic goods.

5. This judicial doctrine provides generally that the antitrust laws do not apply to action by a state in its sovereign capacity or to private conduct directed or compelled by the state. Direct action by a state legislature or court is automatically exempt, without further inquiry. *See, e.g.*, Hoover v. Ronwin, 466 U.S. 558 (1984); Bates v. State Bar, 433 U.S. 350 (1977); Parker v. Brown, 317 U.S. 341 (1943). Where the challenged conduct is undertaken by a state agency, local government, or private party, further inquiry is required into whether the conduct followed "clearly articulated and affirmatively expressed state policy" to displace competition and, in the case of a private party, the restraint is subject to "active state supervision." *See, e.g.,* FTC v. Ticor Title Insurance Co., 544 U.S. 621 (1992); Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48 (1985).

6. 94 F.T.C. 701 (1979). The Commission's decision was affirmed and modified by the Court of Appeals, 638 F.2d 443 (2d Cir. 1980), and affirmed in a 4-4 vote by the Supreme Court, 455 U.S. 676 (1982).

7. *See, e.g,* Association of Independent Dentists, 100 F.T.C. 518 (1982)(general restriction on truthful advertising without Board of Director's prior approval).

8. See, e.g., American Psychological Association, 115 F.T.C. 993 (1992)(restrictions on truthful advertising, comparative statements on services, testimonials, direct solicitation, and participation in patient referral services); Connecticut Chiropractors Association, 114 F.T.C. 708 (1991)(restriction on truthful advertising of free or discounted services, including use of coupons, or ads deemed by the association to be "undignified or not in good taste" or implying "unusual expertise."); American Academy of Optometry, Inc. 108 F.T.C. 25 (1986)(restriction on all truthful advertising and solicitation).

9. *See, e.g.*, National Association of Social Workers, 116 F.T.C. 140 (1993)(restrictions on use of testimonials and other forms of truthful advertising or solicitation); Structural Engineers Association of Northern California, 112 F.T.C. 530 (1989)(restriction on solicitation).

10. *See, e.g.*, Texas Board of Chiropractic Examiners, 115 F.T.C. 470 (1992); Massachusetts Board of Registry in Optometry, 100 F.T.C. 549 (1988).

11. American Institute of Certified Public Accountants, 113 F.T.C. 698 (1990).

12. National Society of Professional Engineers, 116 F.T.C. 787 (1993). *See also* AFSE, the Association of Engineering Firms Practicing in the Geosciences, 116 F.T.C. 399 (1993)(restrictions on self-laudatory advertising); Structural Engineers Association of Northern California, 112 F.T.C. 530 (1989) (code of ethics prohibited advertising work or merit in a self-laudatory manner).

13. 121 F.T.C. 190 (1996), *aff'd* 128 F.2d 720 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 29 (1998).

14. The abbreviated rule of reason analysis is designed for restraints that are not *per se* unlawful but are sufficiently anticompetitive that they do not require a full rule of reason inquiry. *See* NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85, 106-10 & n.39 (1984)("The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.")(internal citations omitted). In *CDA*, the Commission found that there were substantial anticompetitive effects because the advertising restraints likely reduced output and deprived consumers of valuable information and competition among dentists, that CDA had sufficient market power to enforce the restrictions, and that the restraints did not yield any countervailing consumer benefits to justify the restrictions.

15. CDA also challenged the legal standard for analyzing the advertising restrictions as well as the substantiality of the evidence supporting the findings that there was an agreement in restraint of trade, that CDA bans truthful, nondeceptive advertising and that it had sufficient market power for its regulations to harm competition.

16. California Dental Association v. FTC, 128 F.2d 720 (9th Cir. 1997).

17. California Dental Association, 121 F.T.C. 190, 285.

18. *Id.* at 373; *see also* American Psychological Association, *supra* note 8; National Association of Social Workers, 116 F.T.C. 140 (1993).

19. 435 U.S. 679 (1978).

20. *E.g.*, AMA, *supra* note 6.

21. *E.g.*, Connecticut Chiropractor Association, *supra* note 8.

22. *E.g.*, AFSE, The Association of Engineering Firms Practicing in the Geosciences, *supra* note 12.

23. *E.g.*, Structural Engineers Association of Northern California, 112 F.T.C. 530 (1989).

24. International Association of Conference Interpreters, 123 F.T.C. 465 (1997).

25. *Supra* note 12.

26. FTC and Commonwealth of Puerto Rico v. College of Physicians and Surgeons, CV No. 972466 (D.P.R. 1997).

27. Mesa County Physicians Independent Practice Association, Dkt. 9284, 63 Fed. Reg. 9549 (Feb. 25, 1998).

28. U.S. v. Women's Hospital Foundation and Women's Physician Health Organization, 1996-2 Trade Cas. (CCH) ¶ 71,561 (M.D. La. 1996).

29. U.S. v. Federation of Physicians and Dentists, Inc., 98-475 (D. Del. 8/12/98).

30. Forbes Health System Medical Staff, 94 F.T.C. 1042 (1978).

31. State Volunteer Mutual Insurance Corp., 102 F.T.C. 1232 (1983).

32. *See* Medical Staff of Dickinson County Memorial Hospital, 112 F.T.C. 33 (1989); Medical Staff of John C. Lincoln Hospital & Health Center, 106 F.T.C. 291 (1985).

33. *See, e.g.*, Iowa Chapter of American Physical Therapy Association, 111 F.T.C. 199 (1988); Michigan Optometric Association, 106 F.T.C. 342 (1985); Sherman A. Hope, M.D., 98 F.T.C. 58 (1981).

34. Dirian Seropian, M.D., 115 F.T.C. 891 (1992); Medical Staff of Holy Cross Hospital, 114 F.T.C. 555 (1991); Medical Staff of Broward General Medical Center, 114 F.T.C. 542 (1991).

35. Medical Staff of Good Samaritan Regional Medical Center, 119 F.T.C. 106 (1994).

36. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

37. *Id.*

38. *E.g.*, Iowa Chapter of American Physical Therapy Association, 111 F.T.C. 199 (1988); Michigan Optometric Association, 106 F.T.C. 342 (1985).

39. American Academy of Optometry, 108 F.T.C. 25, 27 (1986).

40. U.S. v. Delta Dental of Rhode Island, 943 F. Supp. 172 (D.R.I. 1996), consent decree, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. July 2, 1997).

41. A summary of these advocacies is available in the United States' annual reports on developments in competition policy and enforcement to the Committee on Competition Law and Policy.

42. *See, e.g.,* Cox and Foster, *supra* note 1.

43. *See* DOJ press release at http://www.usdoj.gov/atr/public/press releases/1997/1210.htm.

44. Chairman Pitofsky's testimony is available on the FTC home page at http://www.ftc.gov/os/1998/9807/camptest.htm.