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FTC Competition Advocacy: A Point Where Professional Regulation Intersects Competition and Consumer Protection Policies

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*The views expressed herein are my own, and do not reflect the views of
the Federal Trade Commission or any individual commissioner.*

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Overview

- FTC Mission and Background
- Competition, Economics and Professional Regulation
- Principles of the Competition Advocacy Program
- FTC Activity Regarding Dentistry and Oral Health



FTC MISSION

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FTC MISSION

- The FTC is charged with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.
 - 15 U.S.C. §45
- This mandate includes enforcement of the antitrust laws and statutes protecting consumers from fraud, including false and deceptive advertising, as well as consumer and business education and policy research.



The Role of Competition and Consumer Protection Policy in the Economy

- Competition policy and consumer protection policy are key elements of the American economic system.
- Together, they enhance consumer welfare by fostering a competitive marketplace that gives consumers greater informed choice and leads to greater availability of products with the qualities desired by consumers at the lowest prices.



COMPETITION ADVOCACY

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Professional Regulation

- Professions in the United States are often subject to laws and regulations specifying who may enter the profession and what types of minimal competency requirements must be satisfied before the individual can receive a license.
- In the United States, there is no national license to practice in several professions: such as law, medicine, nursing, dentistry, accounting, and more.
- Rather, each state and the District of Columbia has adopted different standards for licensing individuals to various professions.



Principles of FTC Competition Advocacy

- Look at government imposed restrictions on competition and determine if they stand up to a cost-benefit test:
 - Will the regulation restrict competition?
 - If so, does this provide consumers with a benefit that would otherwise not arise?
 - Do consumers value this benefit more than it costs them in lost competition?
 - Are there less restrictive ways to reach the same goal?
- Base advice on empirical evidence and FTC expertise in economics, competition, and consumer protection



Examples of Advocacy Regarding Scope of Practice-type regulations.

- Health Care Delivery: Comment to Illinois Legislature to discuss how proposed law could unreasonably inhibit competition by retail health care clinics.
- Practice of Law: April, 2008: Comment to South Carolina Supreme Court to discuss competition between attorneys and non-attorneys in real estate settlement services.
- Dentistry: 1980's and early 1990s: Multiple comments to state legislatures and boards in throughout the United States to encourage competition between dentists and non-dentists for certain hygienic services.



FTC ADVOCACY AND ENFORCEMENT INVOLVING DENTISTRY

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FTC Advocacy: Louisiana Dental

- Example of where antitrust and consumer protection principles, when advocated effectively, can improve people's lives.
- In 2007 Dentists in Louisiana fought for legislation to expand Medicaid coverage to cover treatment of low-income children.
- Some dentists developed means by which to treat children in their schools through mobile dentistry services.
- Incumbent Dentists raised concern about this form of dentistry, and sought to prevent the practice of dentistry from occurring in public schools.



Louisiana Dental, con't.

- Dentists lobbied for a bill to be introduced that would ban all forms of dentistry in schools.
- Member of Louisiana legislature contacted FTC and sought analysis of the competitive impact of the proposed legislation.
- The proposed bill would have forced children to obtain any dental services in a brick-and-mortar dental office. The problem is that many children never receive such care; many are likely to receive dental services only if offered in an in-school setting.
- OPP, BC and BE advocated that such a law would harm consumers by unreasonably eliminating a safe competitive alternative.



Louisiana Dental, con't

- FTC emphasized that competitive restraints should be imposed only if benefits will inure to consumers.
- FTC advocacy pointed to the fact that proponents of the bill pointed to no empirical evidence to justify the restraint.
- FTC advocacy illustrated how there would be no benefits to children from this competitive restraint, and that such a restraint would have the effect of harming children.



Louisiana Dental, Con't.

- The FTC advocacy stimulated significant debate.
- First, the Dental Association denounced the advocacy on grounds that their law would be exempt from the antitrust laws, and argued, without evidentiary support, that there could be risks to children receiving dental care in their schools.
- Non-profit public health organizations filed comments describing how in-school dentistry helps children, and highlighted the dearth of evidence to the contrary.
- Newspaper editorials in both of Louisiana's major newspapers, citing the FTC, denounced the bill as being harmful to children.



Louisiana Dental, Con't.

- In response to the FTC advocacy, the legislature removed the absolute prohibitions of the first draft. The new bill mandated, however, that no mobile services could be provided if there was a dentist within a certain distance of the school as determined by the Board of Dentistry.
- The FTC was asked to comment again, and FTC staff explained that the modifications did not cure the consumer welfare concerns, and in fact added new antitrust concerns.
- Intense lobbying continued on both sides of the issue, and many citizens wrote letters critical of the bill and sent them to newspapers.



Louisiana Dental, Con't.

- As a result of the FTC advocacy, the Legislature adopted a bill that preserved the status quo, protected competition, prevented consumer injury, and mandated regulatory rulemaking.
- Louisiana Board of Dentistry has proposed rules, and in December 2009, FTC filed further comments about competition concerns raised in those rules. Outcome of the rules is still pending.
- Also, other jurisdictions and industry advocates have looked to the advocacy, have relied on its principles, and have inquired about these issues relative to oral health regulation.



FTC Enforcement In Dentistry

- *FTC v. Indiana Federation of Dentists*, 106 S.Ct. 2009 (1986) – Supreme Court upheld an FTC challenge to an agreement among dentists in Indiana to withhold certain information from insurers, which constituted an illegal agreement to restrain competition.
- *FTC v. California Dental Association*, 119 S.Ct. 1604 (1999) – FTC challenged an advertising restraint on dentists under the Sherman Act. The Court held that a more fulsome analysis was required to demonstrate competitive harm than the existence of the advertising restraints in question.



FTC Enforcement: South Carolina State Board of Dentistry

- FTC sued the State Board of Dentistry because it adopted an anticompetitive policy that also contradicted state law.
- State policy was enacted to expand dental hygienic services to school students, and the Board mandated that the services could only be provided if a dentist had treated the children first.
- FTC obtained an order mandating that the State Board abide by the statute and allow hygienists to provide treatment in schools, and requiring the Board to obtain FTC approval when adopting new regulations.



Conclusion

- Innovation in Dental Care Delivery improves competition, which can bring higher quality care at lower costs to consumers.
- Society and the economy benefit when consumers have more access to basic services.
- Innovation and improvement that expands safe access to dental care helps by lowering cost and providing better health and safety outcomes.
- Competition spurs the innovation and improvement that can lead to these pro-competitive outcomes.
- Policymakers should seek the least restrictive means possible when constraining competition through policies meant to further other public goals, such as public health and safety.



THANK YOU

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