

When Firms Ask the State to Squelch Competition: the Role of Advocacy



Russell Damtoft

Counsel for Inter American Affairs

Bureau of Competition

Federal Trade Commission

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The views expressed herein are those of the author and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

Two Types of Conduct to be Concerned about

- Pure business conduct
 - Cartels and other horizontal agreements
 - Exclusionary behavior by dominant firms
 - Anticompetitive mergers
- Our task is clear
- When business tries to get the state to do the same thing through regulation
 - Effects can be just as severe
 - And the state is the enforcer
- Our task is more complicated

A Two-Front War

- *“For competition to prevail, competition agencies must succeed on both fronts. Lose one and we lose the war.”*

The Second Front

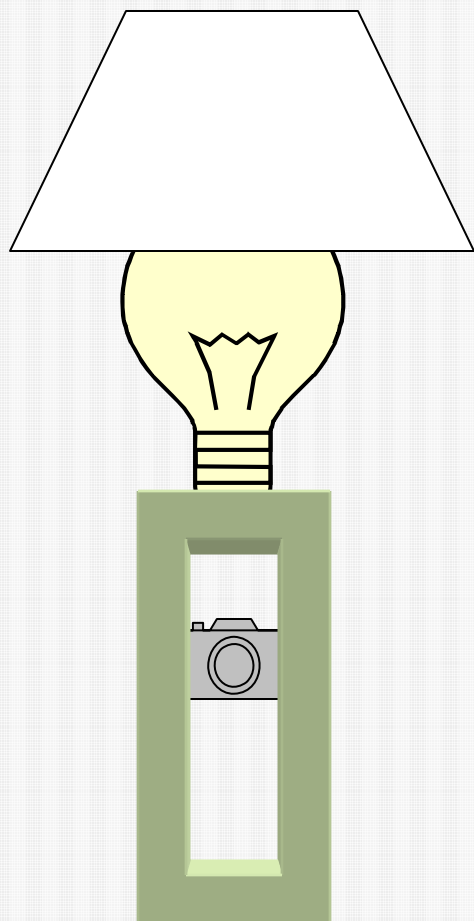
- *"It is a pyrrhic victory to break a cartel if its members successfully lobby for the authority to set prices collectively.*
- *It is a defeat to discover a price-fixing agreement among professionals only to have them obtain burdensome licensing restrictions."*
 - -- Timothy Muris, May 14, 2003

Imagine yourself . . .

- As a business person who wants to avoid the rigors of competition:
- How would you go about limiting competition?



There are Hard Ways to do it



- 1. Conspire With Competitors
 - Risk of cheaters
 - Risk of entry by non-conspirators
 - Cost of enforcing cartel
 - Risk of discovery
 - Jail
 - Fines
 - Lamps with hidden cameras

More Hard Ways

■ 2. Predatory Pricing

- Lose profits in the meantime
- Risk of entry when you raise prices to recoup
- Expensive
- High risk of failure

■ 3. Merge with competitors

- Many merged firms lose value
- Transactional costs
- Clash of corporate cultures
- Inefficiencies invite competition

And There are Easy Ways

- Get the government to do it for you!
 - Costs of lobbying are low
 - Government enforces the restriction
 - Ability of competition agencies to intervene are limited
- A low risk, low cost way to suppress competition



Why Does it Work?

- Restrictions are justified as consumer protection measures
- Consumer protection is an attractive goal
- But restrictions' impact on competition, prices, and quality is not well understood
- Relationship between restriction and alleged goal often poorly defined

Interests are not balanced

- Business supporters of restrictions are
 - Well organized
 - Have access to lawmakers
 - Have clear incentives to succeed
- Consumers who might oppose restrictions may
 - not understand implications themselves
 - Be poorly organized
 - Have limited incentives

Who does that leave?



Comisión Nacional de
Defensa de la Competencia



Tools to address government restrictions

- Law Enforcement (sometimes)
 - Legal issues
 - Sovereignty issues
 - Political Issues
- Competition Advocacy
 - Informs government of true costs and benefits of restrictions
 - Often the competition authority is the only one in government with the expertise and interests to do this

U.S. Advocacy Experience In Many Sectors

- Lawyers
- Dentists
- Optometrists
- Internet Sales
- Wine
- Funerals
- Airlines
- Gasoline
- Food Sellers
- Electricity
- Telecommunications
- Doctors
- Pharmaceuticals
- Motor Vehicle Sales

Many tools used

- Letters to regulators
- Testimony before legislators
- “Amicus curiae” briefs before courts
- Economic studies
- Public workshops and hearings
- Informal contacts with regulators

Case Study: Optometry

- Traditional solo practices
- Chain optical firms entered
- State regulatory bodies often dominated by traditional practitioners



Optometry (2)

- Boards passed restrictions that limited use of:
 - Advertising
 - Trade names
 - Commercial locations
 - Branch offices
 - Employment of optometrists by optical firms
- FTC conducted studies showing:
 - Prices higher in states with restrictions
 - Quality is unaffected
- Law enforcement not always effective: state's rights

Optometry (3)

- FTC conducted advocacy campaign before state legislatures
 - Used evidence of studies to highlight costs of restrictions and lack of benefits
 - Testimony to state legislatures
 - Letters to legislators
 - Publicity and transparency

Case Study: Lawyers

- States regulate practice of law in U.S.
- Regulation is
 - delegated to, or
 - Influenced by bar associations dominated by established lawyers
- Bar association resistance to advertising and marketing



Lawyers (2)

- State restrictions on:
 - Advertising (even after legalized by Supreme Court)
 - Non-lawyer actions deemed practice of law
- FTC conducted study:
 - showing costs were higher where restrictions prevented entry
 - pointing out that competition improves quality

Lawyers (3)

- FTC and advocated that state bar regulators and legislators remove:
 - restrictions on truthful advertising
 - restrictions on marketing of legal services
- That prevented new and more efficient practice forms from developing
- While recognizing the need and right of states to prevent deception

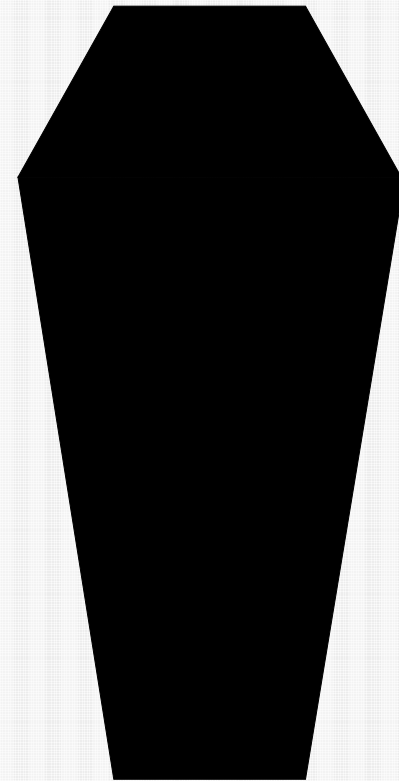
Lawyers (4)

- FTC and DOJ jointly advocated removal of definitions of practice of law that prohibited non-lawyers from:
 - Engaging in real estate closing services
 - Preparing deeds

That limited lower-cost providers of real estate services

Case Study: Funerals

- Funeral services regulated by state law
- Traditional funeral directors dominate in some states
- Caskets are the biggest expense



Funerals (2)

- Alternative sources of caskets emerge:
 - Mail order
 - Internet
 - Retail discount stores
- Some states respond by requiring sellers of caskets to be licensed funeral directors
- FTC advocacy intervention points out the costs imposed on consumers and lack of consumer benefit from the restrictions

Opportunities for input

- By invitation
- By legal mandate
- We are more effective when our opinion is invited
- Invitations follow investment in a reputation for reliability and impartiality
- Informal contacts lead the way

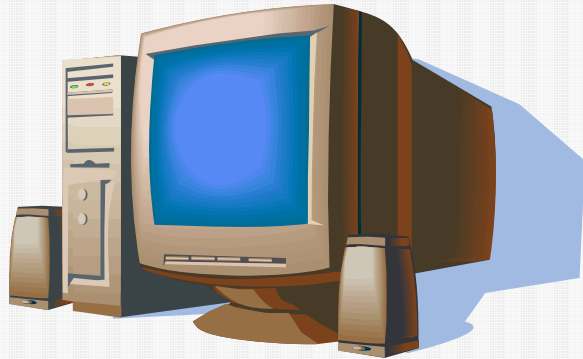
Effective advocacy requires:

- Research and empirical evidence
 - In-house capacity
 - Alliances with respected researchers
- A well documented case and persuasive logical argument are our only real weapons
- Awareness of the political environment: choose battles carefully

Transparency and publicity

- An effective strategy is to publicize:
 - the cost of the restriction to consumers
 - The relationship between the restriction and the purported consumer benefit
- When the costs and benefits are known, lawmakers are more likely to do the right thing for consumers

Resources



- www.ftc.gov/be/advofile.htm
- www.internationalcompetitionnetwork.org
- www.usdoj.gov/atr