United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DEC 18 2014

Thomas Jones
339 Group LLC
249 Tilden Way
Edgewater, MD 21037

Re: FOIA-2015-00226
Documents Authored by Rafael Cruz

Dear Mr. Jones:

This is in partial response to your request dated November 21, 2014 under the Freedom of Information Act seeking access to all documents authored by Ted Cruz while he was Director of the Office of Policy Planning from July 2001 through January 2003. In accordance with the FOIA and agency policy, we have searched our records as of November 21, 2014, the date we received your request in our FOIA office.

We have located and reviewed approximately 45 pages of responsive records thus far, and are continuing our search for additional records. You are granted full access to the records located thus far, which are enclosed. Our final response will also include an invoice for any fees incurred by your request.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we are handling your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Dione J. Stearns

Dione J. Stearns
Assistant General Counsel

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

JAN 20 2015

Thomas Jones
339 Group LLC
249 Tilden Way
Edgewater, MD 21037

Re: FOIA-2015-00226
Documents Authored by Rafael Cruz

Dear Mr. Jones:

This is our second and final response to your request dated November 21, 2014, under the Freedom of Information Act seeking access to all documents authored by Ted Cruz while he was Director of the Office of Policy Planning from July 2001 through January 2003. In accordance with the FOIA and agency policy, we have searched our records as of November 21, 2014, the date we received your request in our FOIA office.

We have located an additional 81 pages of responsive records. I am granting partial access to the accessible records. Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5.5 U.S.C. § 552(b)(5). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Dione J. Stearns
Assistant General Counsel

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Consumer Protection

September 30, 2002

Robert G. Esdale
Clerk of the Court
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, Alabama 36104-3741

Dear Mr. Esdale:

The staff of the Federal Trade Commission is pleased to respond to the Supreme Court's June 26, 2002, invitation for comment on the proposed revisions to the section of the Alabama Rules of Professional Conduct entitled Information About Legal Services.[1] The FTC is charged by statute with enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] Pursuant to this statutory mandate, the Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. The Commission and its staff have had a long-standing interest in the effects on consumers and competition arising from the regulation of lawyer advertising.[3] We specifically draw your attention to comments the Commission staff submitted to the Commission on Advertising of the American Bar Association in 1994. A copy of that document is enclosed for your reference.

Debate about attorney advertising involves important policy concerns, such as preventing statements that would mislead lay people and thereby undermine public trust in lawyers and the legal system. The Commission staff's view, expressed in the comment to the ABA, is that it is best for consumers if concerns about misleading advertising are addressed by adopting

[1] These comments are views of the staff of the Bureaus of Consumer Protection and Economics and the Office of Policy Planning of the Federal Trade Commission. They do not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize the Bureaus of Consumer Protection and Economics and the Office of Policy Planning to submit these comments.

[2] Federal Trade Commission Act, 15 U.S.C. § 45.

[3] For example, the staff filed comments in 1987 when the Court was considering amendments to the Alabama Code of Professional Responsibility that would affect attorney advertising. Letter from Paul Davis, Director, FTC Atlanta Regional Office, to Robert Esdale, Clerk of the Alabama Supreme Court (Mar. 31, 1987).

restrictions on advertising that are tailored to prevent unfair or deceptive acts or practices. By contrast, imposing overly broad restrictions that prevent the communication of truthful and nondeceptive information is likely to inhibit competition and to frustrate informed consumer choice.[4] In addition, as discussed in the 1994 comment, research has indicated that overly broad restrictions on truthful advertising may adversely affect prices paid by consumers, especially for relatively routine legal services.[5]

The proposed revisions to the section of the rules on Information About Legal Services raise several concerns of the type we addressed in the comment to the ABA. For example, the proposed amendments to rule 7.1, Communications Concerning a Lawyer's Services, would prohibit references to past successes or results, testimonials[6], descriptions of quality, and visual or verbal portrayals not objectively related to the selection of an attorney. In our previous comment, we noted that banning all assertions that are self-laudatory or that relate to the quality of services offered may be unnecessarily broad and thus prohibit messages that consumers find useful in choosing a lawyer.[7] We also noted that rules against comparative claims and illustrations could also be too broad.[8] By contrast, the proposed revision on misleading or deceptive factual statements seems tailored to prevent advertising that may be unfair or deceptive.[9]

Proposed amendments to Rule 7.2, Advertising, would, among other things, prohibit the appearance of persons other than the lawyer in television and radio ads and require that the lawyer appear in front of a solid color background or a bookcase, or in his or her office. The proposed comment to this rule states that a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner and that advertisements using slogans, jingles, or oversized signs diminish public confidence in the legal system. The FTC staff's prior

[4] Indeed, private restrictions on professional advertising may in fact violate the federal antitrust laws, if there is evidence of the restriction's likely anticompetitive effects sufficient to overcome any procompetitive justifications for the restriction. *See generally California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (describing legal standard, although finding insufficient evidence of anticompetitive effects on the particular record established at trial).

[5] Submission of the Staff of the Federal Trade Commission to the American Bar Association, June 24, 1994, at 5-6. In addition, a 1996 survey of empirical economics literature on professional advertising revealed that most studies find advertising tends to reduce the price of professional services without reducing quality. On price, the authors concluded, "the overwhelming impression from the results reviewed...is of advertising having a downward effect on professional fees." On quality, they concluded that the empirical literature generally shows that advertising does not lead to lower quality, and even where advertisers have lower quality than non-advertisers, permitting advertising is associated with higher overall quality levels. *See* James H. Love and Frank H. Stephen, "Advertising, Price and Quality in Self-Regulating Professions: A Survey," 3 Intl. J. Econ. Bus. 227 (1996).

[6] The FTC staff is currently reviewing its own guides on the use of testimonials in advertising to reflect better consumer perceptions of these claims.

[7] Submission of the Staff of the Federal Trade Commission to the American Bar Association at 10.

[8] *Id.* at 11-12.

[9] *Id.* at 9.

comment to the ABA , in discussing the issue of dignity in attorney advertising, urged careful examination of the basis for concerns that such advertising would undermine public confidence in the justice system.[10] It also observed that it is possible that some consumers are most effectively reached by advertising that may be considered undignified (for example, under the proposed new rules ads that show an attorney in a setting other than before a bookcase or in his office or which use slogans) and that the interest of effectively communicating the availability of legal services to such consumers should not be ignored.

In sum, the Commission staff believes that, while deceptive and unfair advertising by lawyers should be prohibited, restrictions on advertising that are specifically tailored to prevent unfair or deceptive acts or practices provide the optimal protection for consumers. Consumers benefit from robust competition among attorneys and from important price and quality information that advertising can provide. Rules that unnecessarily restrict that competition or the transmission of truthful and nondeceptive information are likely to harm consumers in the state of Alabama.

Yours truly,

J. Howard Beales

J. Howard Beales III
Director
Bureau of Consumer Protection

David T. Scheffman, Director
Director
Bureau of Economics

R. Ted Cruz
Director
Office of Policy Planning

[10] *Id.* at 7-9.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Office of Policy Planning

COMMISSION AUTHORIZED

By Facsimile and First Class Mail

January 18, 2002

The Honorable Lisa Murkowski
Chair, House Labor and Commerce Committee
Alaska House of Representatives
Alaska State Capitol
Juneau, AK 99801-1182

Re: Alaska Senate Bill 37

Dear Representative Murkowski:

We write in response to your request for comment on Alaska Senate Bill 37, a bill that seeks to authorize competing physicians to engage in collective bargaining with health plans over fees and other terms.[1] As discussed below, the Commission has opposed legislation before the U.S. Congress that would create an antitrust exemption for physician collective bargaining, and the Commission staff has expressed similar concerns about bills before state legislatures. We continue to believe that the behavior authorized by the physician collective bargaining legislation would significantly increase health care costs and harm consumers.

You also specifically solicited our opinion on whether the bill meets the legal test of the state action doctrine. As you know, state economic regulation can immunize private parties from federal antitrust liability, but only where the displacement of competition furthers a clearly articulated policy of, and is actively supervised by, the state government. In the case of Senate Bill 37, the level of government involvement described falls far short of the level of "active supervision" required by the Supreme Court.

I. Physician Collective Bargaining

The Commission's opposition to legislation intended to create an antitrust exemption for physician collective bargaining has historically focused on two fundamental points, both of which are relevant to your consideration of Senate Bill 37:

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[1] These comments are views of the staff of the Bureau of Competition and of the Office of Policy Planning of the Federal Trade Commission. They do not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize the Bureau of Competition and the Office of Policy Planning to submit these comments.

(1) such legislation would likely harm consumers – an antitrust exemption would authorize price-fixing by physicians, which could be expected to result in increased consumer costs and decreased consumer access to care; and

(2) such legislation would not likely improve the quality of care – an antitrust exemption would not likely improve patient care, and there are other, more effective means of addressing quality of care issues that do not sacrifice the benefits of a competitive marketplace.

A. Consumer Harm

In testimony before Congress regarding a proposed federal antitrust exemption for physician collective bargaining,[2] the Commission detailed the predictable impact on consumers that such legislation would have:

> Without antitrust enforcement to block price fixing and boycotts designed to increase health plan payments to health care professionals, we can expect prices for health care services to rise substantially. Health plans would have few alternatives to accepting the collective demands of health care providers for higher fees. The effect of the bill . . . can be expected to extend to various parties, and in various ways, throughout the health care system:
>
> - Consumers and employers would face higher prices for health insurance coverage.
> - Consumers also would face higher out-of-pocket expenses as copayments and other unreimbursed expenses increased.
> - Consumers might face a reduction in benefits as costs increased.
> - Senior citizens participating in Medicare HMOs would face reduced benefits . . . .
> - The federal government would pay more for health coverage for its employees through the Federal Employees Health Benefits Program and military health programs.
> - State and local governments would incur higher costs to provide health

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[2] Testimony of Federal Trade Commission before the House Judiciary Committee on H.R. 1304 (June 22, 1999) ("FTC Testimony on H.R. 1304") at 5-6 *available at* <http://www.ftc.gov/os/1999/ 9906/healthcaretestimony.htm> (Attachment A) (footnotes 3-5 in original).

benefits to their employees.

- State Medicaid programs attempting to use managed care strategies to serve their beneficiaries could have to increase their budgets, cut optional benefits, or reduce the number of beneficiaries covered.

- State and local programs providing care for the uninsured would be further strained, because, by making health insurance coverage more costly, the bill threatens to increase the already sizable portion of the population that is uninsured.

These widespread effects are not simply theoretical possibilities. The record of antitrust law enforcement sets forth the impact of collective 'negotiations' on the public. For example, as described in the Commission's complaints, collective bargaining by anesthesiologists in Rochester, New York, and by obstetricians in Jacksonville, Florida, forced health plans to raise their reimbursement, and the result was increased premiums for the HMOs' subscribers.[3] Other cases have challenged actions by associations of pharmacists who succeeded in forcing state and local governments to raise reimbursement levels paid under their employee prescription drug plans.[4] In one such case, an administrative law judge found that the collective fee demands of pharmacists cost the State of New York an estimated $7 million.[5]

Prior Commission cases illustrate the types of physician conduct that have raised problems. Price-fixing is one type of such conduct, and last year's *Alaska Health Network, Inc.*[6] case is a prime example. In that case, the Commission alleged that competing physicians organized and conspired to fix the prices and other competitively significant terms on which they would deal with health plans in Fairbanks, Alaska. Another type of conduct is price-related group boycotts, such as the one addressed in the *M.D. Physicians of Southwest Louisiana, Inc.*[7] case. There, the Commission charged a group of competing physicians with conspiring not to deal with certain third-party payers, as part of an unlawful enterprise designed to prevent managed care contracts

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[3] Southbank IPA, Inc., 114 F.T.C. 783 (1991) (consent order); Rochester Anesthesiologists, 110 F.T.C. 175 (1988) (consent order).

[4] See, e.g., Baltimore Metropolitan Pharmaceutical Assoc., Inc. and Maryland Pharmacists Assoc., 117 F.T.C. 95 (1994) (consent order); Pharmaceutical Society of the State of New York, Inc., 113 F.T.C. 661 (1990) (consent order).

[5] See Peterson Drug Company, 115 F.T.C. 492, 540 (1992). See also Pharmaceutical Society of the State of New York, Inc., 113 F.T.C. 661 (1990) (consent order).

[6] Docket No. C-4007, 2001 WL 443471 (F.T.C. April 25, 2001) (consent order).

[7] Docket No. C-3824, 1998 WL 566834 (F.T.C. August 31, 1998) (consent order).

from taking hold in the Lake Charles, Louisiana region.

There is widespread agreement that horizontal agreements among competitors can raise the most significant competitive concerns. The facilitation of naked horizontal price-fixing is among the most serious of these concerns, as such conduct predictably and consistently results in substantial consumer harm. Departing from the general rules of antitrust in such a competitively sensitive area presents substantial risks that would not be offset by procompetitive gains from physician collective bargaining.

The two arguments that have typically been presented to justify a departure from the general rules of antitrust in this context are that, given health plan concentration, physician collective bargaining would (1) increase patients' quality of care, and (2) allow physicians to bargain on a more "level playing field." The former argument is based on a misunderstanding of both current law and the effects of collective bargaining, as will be discussed in the next section.

The latter argument is more straightforward, but equally problematic. As the Commission explained in its testimony before Congress:

> Arguments that consumers would not be harmed by an antitrust exemption for collective bargaining by independent health care professionals appear to rest on assertions that the [federal] bill would balance the bargaining power between health care professionals and health plans. These assertions, however, are incorrect. The bill would permit doctors to create monopolies. On the health plan side of the ledger, the evidence does not support the suggestion that most (or even many) areas have only one or two health plans.[8]

Furthermore, even if the assumption that physicians confront monopoly health plans were correct, authorizing collusive conduct by physicians would not necessarily serve the interests of consumers. The argument that physician collusion would merely counterbalance hypothetical monopsony power by health plans implicitly assumes that collective bargaining would generate physician fees no larger than the fees that would exist in a competitive market. However, there is little reason to believe that a successful physician cartel would settle for fees at the competitive level. If a health plan possessed actual market power, health care consumers could be doubly harmed by physician collective bargaining, because they could be forced to pay the health care plan's monopoly mark-up on top of the elevated fees charged by the physicians.

B. Quality of Care

Proponents of antitrust exemptions for physicians often suggest that greater physician bargaining power against health plans would result in increased quality of care for patients. This claim fails for two reasons: (1) physician collective bargaining has historically focused on

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[8] FTC Testimony on H.R. 1304, supra note 2, at 6-7.

physician compensation, rather than patient care; and (2) current antitrust law already permits physicians to work collectively on legitimate quality of care issues.

Immunizing collective bargaining imposes costs while providing little assurance that consumers' interest in quality care will be served. As the Commission stated before Congress:

> Collective bargaining rights are designed to raise the incomes and improve the working conditions of union members. The law protects the United Auto Workers' right to bargain for higher wages and better working conditions, but we do not rely on the UAW to bargain for safer cars. Congress addressed those concerns in other ways.[9]

Moreover, discussions between physician groups and health plans are not illegal. Current antitrust law permits doctors to collectively negotiate with health plans in various circumstances in which consumers are likely to benefit. The Health Care Guidelines – jointly issued by the Federal Trade Commission and the Antitrust Division of the Department of Justice – emphasize physicians' ability under the antitrust laws to organize networks, and other joint arrangements, to deal collectively with health plans and other purchasers.[10] In addition, through their professional societies and other groups, health care professionals can jointly provide information and express opinions to health plans.[11]

As the Commission explained in its congressional testimony:[12]

> [T]he antitrust laws do not prohibit medical societies and other groups from engaging in collective discussions with health plans regarding issues of patient care. Among other things, physicians may collectively explain to a health plan why they think a particular policy or practice is medically unsound, and may present medical or scientific data to support their views . . . .[13]

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[9] FTC Testimony on H.R. 1304, supra note 2, at 10.

[10] See Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,151 (Aug. 1996) ("Health Care Guidelines") *available at* <http://www.ftc.gov/reports/ hlth3s.htm>. The Health Care Guidelines discuss "messenger model" arrangements designed to minimize the costs associated with the contracting process.

[11] See, e.g., Schachar v. American Academy of Ophthalmology, 870 F.2d 397 (7th Cir. 1989); Statements 4-5 of Health Care Guidelines, supra note 10.

[12] FTC Testimony on H.R. 1304, supra note 2, at 7-8 (footnotes 13-15 in original).

[13] [The Health Care Guidelines] create an antitrust safety zone for health care providers' collective provision of non-fee-related information to health plans. . . . [See Statement 4 of Health Care Guidelines, supra note 10.]

> The Commission has never brought a case based on physicians' collective advocacy with a health plan on an issue involving patient care. Our cases have addressed instances in which physician groups (1) negotiated collectively on fee levels or other price-related issues, or (2) collectively refused to contract with plans, either to gain acceptance of their price-related demands or to prevent or delay market entry by managed care plans generally. In all such cases, the Commission has been very careful to make sure that its orders do not interfere with the legitimate exchange of information and views between health plans and health care practitioners. Indeed, in the Commission's first litigated case involving collective negotiations by physicians - *Michigan State Medical Society* - the opinion emphasized that the antitrust laws do not prohibit health care providers' collective provision of information and views to health plans.[14] Specific language was inserted in that order, and in subsequent orders, to make it clear that bans on anticompetitive agreements among competing providers do not prohibit the provision of information and views to health plans concerning any issue, including reimbursement.[15]

Accordingly, blanket antitrust immunity for physician price-fixing is not necessary to protect patient welfare.

II. The Alaska Bill

Nonetheless, Senate Bill 37, like its federal and state counterparts, seeks to confer antitrust immunity with respect to collective physician conduct. To be sure, Senate Bill 37 also contains a number of provisions designed to protect consumers from the potential harms arising from a physician collective bargaining exemption. In some respects, these provisions resemble protections contained in physician collective bargaining bills introduced in Texas and the District of Columbia, on which the Commission staff also has commented.[16] As with the protections in the Texas and District of Columbia bills, these provisions – addressing a health plan's market power, the size of the physician bargaining group, and potential boycott conduct – do not alleviate the risk of substantial consumer harm resulting from a collective bargaining exemption.

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[14] 101 F.T.C. [191,] at 302-09 [(1983)].

[15] Id. at 314; see also Southbank IPA, 114 F.T.C. 783 (1991) (consent order); Rochester Anesthesiologists, 110 F.T.C. 175 (1988) (consent order).

[16] Letter to the Texas Legislature on Senate Bill 1468 (May 13, 1999) *available at* <http://www.ftc. gov/be/v990009.htm> (Attachment B); Letter to the District of Columbia Office of Corporation Counsel on Bill No. 13-333 (Oct. 29, 1999) ("District of Columbia Letter") *available at* <http://www.ftc. gov/be/rigsby.htm> (Attachment C).

A. Minimum Threshold for Health Plan Market Power

Section (d)(1) of Senate Bill 37 states that physicians may "collectively negotiate with a health benefit plan the items described in (b)" – including fees or prices – provided that the health benefit plan has "substantial market power." "Substantial market power" is defined as "more than 15 percent of the market share." *Id.* at § (s)(4). Alternative formulas by which market power may be measured are set forth in Sections (f)(1) and (f)(2).

This market power screen is unlikely to guard against consumer harm.

First, the screen does not apply to all collective bargaining by physicians, or even to all price-related bargaining. Rather, it applies only to certain kinds of price-related matters. For example, the market share screen does not apply to negotiations concerning the formulation and application of reimbursement methodology. *Id.* at § (a)(6). The method a health plan uses to calculate its payments to providers for particular services, however, can have a direct and significant impact on the ultimate price that providers receive for their services, and thus such matters are also "price" terms. Moreover, even collective bargaining over other, more clearly "non-price" issues in a health plan contract can have a substantial effect on the ultimate costs paid by consumers.

Second, there are significant problems with the concept of health plan market power as defined in the bill. As the Commission staff noted in its comment on the District of Columbia bill:

> Market power is, simply put, the power to raise prices above competitive levels, or in the case of buyers, the ability to reduce prices below competitive levels. Market share can indicate market power, but only if based upon a properly defined market. Even if the bill's categories correctly identified relevant markets, a 15% market share . . . is not a level ordinarily assumed to constitute market power.[17]

Although the Alaska bill's definition of "substantial market power" is not entirely clear, one thing is certain: it does not define antitrust markets in a legal or economic sense. For example, it uses as a proxy for a relevant geographic market the health plan's "service area," but this area does not necessarily correspond to a proper relevant antitrust geographic market, and could serve to overstate the market share of the plan.

Furthermore, by setting the market power threshold at a 15 percent market share, the bill would authorize anticompetitive behavior by physicians in many situations in which the health plan would not in fact possess market power. Indeed, 15 to 20 percent is below the level courts

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[17] District of Columbia Letter, supra note 16, at 3-4.

typically require before upholding a finding of market power.[18] Finally, the bill does not take into account that even a plan with a large share of a market might be constrained from exercising market power if new entry by competing plans is easy.

Third, in practice, the market share screen appears unlikely to provide any limitation at all. That is because the bill would create a presumption that a health plan has substantial market power (Section (f)), unless the health plan persuades the Attorney General that it does not meet the 15 percent threshold. It seems unlikely that a health plan would seek to offer such proof, however, because the kind of price-related collective bargaining to which the market share screen applies can occur only if the health plan agrees to engage in such negotiations. *See* Section (d)(3). Thus, it appears that a health plan could simply decline to negotiate with physician collective bargaining groups, without making any showing regarding market share.

In addition, it should be noted that the bill's restrictions on collective fee negotiation to situations where the health plan consents to such negotiations would offer only limited protection to consumers. Such a restriction could limit certain kinds of anticompetitive effects, by preventing groups without health plan consent from engaging in even preliminary bargaining activities (such as physicians entering into agreements on the fee levels to be sought) that could facilitate anticompetitive agreements with respect to physicians' individual dealings with health plans. Nonetheless, a variety of risks remain. First, although participation is voluntary, some health plans may feel compelled to deal with a group if it includes most of the physicians in a particular specialty or many physicians with large numbers of loyal patients. Second, even absent any implicit coercion, in some circumstances a health plan may find it less troublesome to simply accede to price-setting by physicians and then pass the higher costs on to consumers. In either case, such behavior presents a risk not only to the enrollees of the particular plan in question, but also to other consumers, because a group of physicians organized to bargain with one health plan could more easily collude in its dealings with other health plans that eschew collective bargaining.

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[18] Although the federal courts have not identified a precise market share figure that constitutes market power, the guidance they have provided strongly suggests that 15 to 20 percent is not sufficient. In Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), for example, the Supreme Court rejected the possibility that the defendant hospital had market power in spite of the fact that it serviced roughly 30 percent of the relevant market. Subsequent opinions from lower courts have tended to adhere to this 30 percent "rule of thumb." See, e.g., United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995) (30 percent share of U.S. photocopying market too small to give rise to inference of market power); New York v. Anheuser-Busch, Inc., 811 F. Supp. 848 (E.D.N.Y. 1993) (40 percent market share insufficient to show market power in light of low barriers to entry); Manufacturer's Supply Co. v. Minnesota Mining & Manufacturing Co., 688 F. Supp. 303 (W.D. Mich. 1988) (25.8 percent market share insufficient to show market power).

B. Limitations on Size of Physician Negotiating Group

Section (g)(6) of the Senate Bill 37 states that an authorized third party "may not represent more than 30 percent of the market of practicing physicians in the geographic service area or proposed geographic service area if the health benefit plan has less than a five percent market share." In addition, Section (g)(7) authorizes the Attorney General to limit the percentage of practicing physicians represented by an authorized third party. However, the Attorney General may not impose a limit of "less than 30 percent of the market of practicing physicians" and may not impose any limit at all if "the market of practicing physicians . . . consists of 40 or fewer individuals." *Id.*

These limitations on the size of the physician group authorized to collectively bargain are also unlikely to adequately protect consumers. First, the 30 percent limitation applies only in those cases in which the health plan has a very small share of the (potentially ill-defined) market. Furthermore, the 30 percent limit appears to contemplate a percentage of all physicians and, if so, it would not necessarily prevent aggregation of a large portion of the physicians in a given specialty. Given the high level of specialization among physicians, and the fact that different medical specialty services often are not substitutable, the relevant market for antitrust purposes may be a particular specialty or specialties rather than physicians as a whole. And just as individual specialties may constitute different product markets, relevant geographic markets may differ by specialty.

C. Exclusion of Physician Boycott Conduct

Section (m) of the bill states that the antitrust exemption for physician collective bargaining does not extend to boycott conduct. Specifically, Section (m) states that no provision of the bill should be construed as authorizing "competing physicians to act in concert in response to a report issued by an authorized third party related to the authorized third party's discussion or negotiations with a health benefit plan." It further notes that authorized third parties "shall" inform physicians of Section (m) and "warn them of the potential for legal action against those who violate state or federal antitrust laws." *Id.*

Although this provision is likely to prevent Senate Bill 37 from being used as legal cover for explicit boycott threats, it does not protect consumers from all boycott-related concerns arising from physician collective bargaining. As the Commission has previously observed, collective negotiations can by their very nature convey an implicit threat that, if the health plan does not agree to terms acceptable to the physician group as a whole, it will be prevented from successfully negotiating agreements with the members of the group separately.[19] Furthermore, by

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[19] See Alaska Healthcare Network, Inc., Docket No. C-4007, 2001 WL 443471 (F.T.C. Apr. 25, 2001) ("Payors believed that they could not go around [Alaska Healthcare Network] to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or to give up their planned entry into Fairbanks."). See also

immunizing agreements among competing physicians on the fees and other terms they will accept from health plans, the bill facilitates coordinated conduct – such as collusive refusals to deal – that, even though not immune, would be difficult to detect and prosecute.

III. State Action Immunity

Under the judicially-created "state action" doctrine, a state may override the national policy favoring competition only where it expressly decides to govern aspects of its economy by state regulation rather than market forces. A state may not simply authorize private parties to violate the antitrust laws.[20] Instead, it must actually substitute its own active control for the discipline that competition would otherwise provide. To that end, the state legislature must clearly articulate a policy to displace competition with regulation, and state officials must actively supervise the private anticompetitive conduct.[21]

Senate Bill 37 faces severe difficulties under the "active supervision" prong of that test. In order for state supervision to be adequate for state action purposes, state officials must "have and exercise ultimate authority over the challenged anticompetitive conduct."[22] Senate Bill 37 falls far short of providing the "pointed reexamination"[23] of private anticompetitive conduct necessary to confer antitrust immunity.

The Supreme Court has made it clear that the active supervision standard is a rigorous one, designed to ensure that an anticompetitive act of a private party is shielded from antitrust liability only when "the State has effectively made [the challenged] conduct its own."[24] Active supervision requires that the state exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state

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Michigan State Medical Society, 101 F.T.C. 191, 296 n.32 (1983) ("the bargaining process itself carries the implication of adverse consequences if a satisfactory agreement cannot be obtained"); Preferred Physicians Inc., 110 F.T.C. 157, 160 (1988) (consent order) (threat of adverse consequences inherent in collective negotiations).

[20] See Parker v. Brown, 317 U.S. 341, 351 (1943) ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful").

[21] See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 92 (1980).

[22] Patrick v. Burget, 486 U.S. 94, 100 (1988).

[23] Midcal, 445 U.S. at 105-06.

[24] Patrick, 486 U.S. at 106.

intervention, not simply by agreement among private parties."[25] In this instance, the bill does not appear to provide the Attorney General with the means to exercise sufficient independent judgment and control.

Lack of Active Supervision

The regulatory scheme established by Senate Bill 37 endeavors to provide state supervision of physician collective bargaining by authorizing the Attorney General to approve or disapprove: (1) the composition of a physician collective bargaining group, (2) a brief report on any proposed collective negotiations, and (3) a contract that was the subject of collective bargaining. The Attorney General's role is limited in significant respects, however, making it unlikely that the regulatory scheme would be found to provide the level of active supervision required to confer antitrust immunity.

1. Review of Composition of Physician Groups

The power to approve or disapprove the composition of a physician collective bargaining group is provided by Section (g)(7). This provision states that the Attorney General may limit the percentage of physicians represented by an authorized third party, but that the limitation "may not be less than 30 percent of the market." Furthermore, the Attorney General "shall" consider the potential competitive benefits and anticompetitive effects described in Sections (k) and (l). The Attorney General has no power to impose such limitations when the market of practicing physicians consists of "40 or fewer individuals."

The Supreme Court has emphasized that active supervision requires that state officials "*have and exercise* power to review *particular anticompetitive acts* of private parties and disapprove those that fail to accord with state policy."[26] The Attorney General's limited review of bargaining groups at the formation stage, under Section (g)(7), would not amount to active supervision of "particular anticompetitive acts." Indeed, in a market of "40 or fewer individuals," the Attorney General has no authority whatsoever to review the composition of physician groups. This loophole may be particularly significant in a state like Alaska which, due to its population and its large geographic area, may have a large number of physician specialty markets consisting of 40 or fewer providers.

2. Review of "Brief Report" on Proposed Negotiations

The power to approve or disapprove a "brief report" on any proposed collective negotiations is provided by Section (h)(1)(B). This provision appears to provide the Attorney General with authority to disapprove proposed negotiations if the physician group is found to be

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[25] Federal Trade Commission v. Ticor Title Insurance Co., 504 U.S. 621, 634-35 (1992).

[26] Id. at 634 (emphases added).

"not appropriate to represent the interests involved in the proposed negotiations."[27] It is unclear, however, what authority this actually would confer, or how the Attorney General could make such an assessment on the basis of the limited information that the third party representative is required to submit. The report would describe the proposed subject matter of the negotiations and a statement of the expected efficiencies or benefits, but it would not supply a wide variety of information that would enable the Attorney General to assess the likely competitive effects of the negotiations. Further, there is no provision for the Attorney General to require submission of additional information, nor any mechanism by which to receive input from other physicians, affected health plans, or patients.

3. Review of Collectively Negotiated Contracts

The power to approve or disapprove a contract that was the subject of collective bargaining is provided by Sections (i) and (j). Section (i) states that the Attorney General "shall" either approve or disapprove a contract "within 30 days after receiving the reports required under (h)." During that brief period of time, the Attorney General is to attempt to ascertain whether "the competitive and other benefits of the contract terms outweigh any anticompetitive effects." Lists of competitive benefits and anticompetitive effects that the Attorney General "may" consider are provided in Sections (k) and (1), respectively.

These provisions have two principal defects that are likely to vitiate the active supervision required by the state action doctrine: (1) the Attorney General is presented with insufficient information, and (2) the Attorney General is given insufficient time. Additionally, a provision requiring a written decision for both contract approvals and disapprovals would help to ensure that adequate information is both sought and reviewed.

(a) Insufficient Information

In order for state action immunity to apply, Supreme Court precedent requires the State to "undertake[] the necessary steps to determine the specifics of the ratesetting scheme."[28] Senate Bill 37 falls far short of providing the information necessary for state officials to make such a determination. Moreover, what little information is provided is all at the initiative of third parties. The bill does not authorize the Attorney General to request or gather specific additional

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[27] The Attorney General may not approve the report if: (1) the group of physicians "is not appropriate to represent the interests involved in the negotiations" (a provision seemingly redundant with Section (g)(7), discussed above), or (2) the proposed negotiations "exceed the authority granted in this chapter." If either of these conditions is satisfied, the Attorney General "shall" enter an order "prohibiting the collective negotiations from proceeding."

[28] Ticor, 504 U.S. at 638.

information of any kind.[29]

The "brief report" would contain the "proposed subject matter" of the negotiations and one party's "explanation of the [expected] efficiencies or benefits." Notably absent from the "brief report" is a wide variety of information that would assist the Attorney General in assessing the likely competitive effects of the negotiations. An Attorney General armed with greater information – including, for example, information concerning product and geographic market definition, current price levels, availability of substitutes, or ease of entry for new competing physicians – would, of course, be better able to make appropriate determinations. An equally troubling omission from the process is any mechanism by which to receive input from other physicians, affected health benefit plans, or patients. Indeed, the process provides no notice to any of these groups, and so no means for them even to be aware of the potential value of their input.

To attempt to ascertain credibly whether "the competitive and other benefits of the contract terms outweigh any anticompetitive effects" – the core stated criterion of the Attorney General's review – without sufficient data, or adequate input from other parties, would be extremely difficult. Making judgments about competitive effects is the Commission's core function. To carry out this function, the Commission employs a large staff of lawyers and economists, who rely on information gathered from the careful review of a complete documentary record and interviews of numerous key witnesses. "Active supervision" need not necessarily entail the same exhaustive examination but, at the very least, it should constitute a pointed and meaningful review.

In addition, Section (h)(3) requires an authorized third party to provide the Attorney General with all communications "to be made to physicians" related to negotiations. This requirement, however, omits at least four additional categories of potentially critical competitive information: (1) communications from physicians to authorized third parties, (2) communications

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[29] Courts have tended to reject claims of state action immunity where state officials lacked sufficient information to conduct a meaningful review of the private conduct. See, e.g., Ticor Title Insurance Co. v. Federal Trade Commission, 998 F.2d 1129, 1140 (3d Cir. 1993) (finding lack of state supervision where Connecticut never obtained necessary information that would have enabled it to assess the appropriateness of filed rates). In contrast, courts have tended to accept such claims where the review included hearings and an opportunity for potentially affected parties to be heard. See, e.g., TEC Cogeneration Inc. v. Florida Power & Light Co., 76 F.3d 1560 (11th Cir.), amended in part, 86 F.3d 1028 (11th Cir. 1996) (rates determined by Public Service Commission rulemaking and subject to extensive agency proceedings); DFW Metro Line Services v. Southwestern Bell Telephone, 988 F.2d 601, 606-07 (5th Cir. 1993) (Public Utility Commission conducted both broad-based ratemaking proceedings and adjudications of specific complaints about the reasonableness of rates); Lease Lights, Inc. v. Public Serv. Co., 849 F.2d 1330, 1334-35 (10th Cir. 1988) (state held public hearings to assess reasonableness of rates).

from authorized third parties to health plans, (3) communications between physicians, and (4) communications between authorized third parties.

It is worth noting that the core conduct at issue here, naked price-fixing among horizontal competitors, is deemed to be *per se* illegal precisely because the law presumes that in almost no circumstances imaginable will the benefits "outweigh any anticompetitive effects."[30] To be able to attempt such a judgment, the Attorney General needs to be able to review the relevant information.

(b) Insufficient Time

The law of active supervision requires that the Attorney General have and exercise "independent judgment and control" sufficient to render the challenged conduct effectively that of the State and not that of private parties. Yet Section (i) allows only 30 days for the Attorney General to review the facts and render a decision about the anticompetitive effects of a given contract. The time period is mandatory ("shall either approve or disapprove . . . within 30 days") and there is no provision for extension.[31] It is by no means clear that the Attorney General could complete the "pointed reexamination" required to immunize the underlying physician conduct in such a short time.

IV. Transparency

Section (i) of Senate Bill 37 provides that "[i]f the contract is disapproved, the attorney general shall furnish a written explanation of any deficiencies along with a statement of specific remedial measures that would correct any identified deficiencies." Notably, the bill contains no complementary provision requiring a written decision to *approve* a proposed contract. A written decision, expressly considering the potentially anticompetitive implications of a proposed contract and attempting to quantify the consumer impact and expected effect on consumer prices, would serve a number of salutary purposes. First, it would inform affected parties of the levels at which prices were being fixed, and so provide an opportunity for comment or challenge as to the appropriateness of those levels. Second, it would help inform the public of the likely impact of the proposed contract on their health care costs.

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[30] See Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) (holding naked horizontal price-fixing among physicians to be per se illegal).

[31] In addition, the current legislative draft is ambiguous as to when the 30-day clock commences. Section (i) allows 30 days from receipt of "the reports required under section (h)," without specifying which report – the "brief report," the "copy of all communications," or the contract itself.

Under the current draft, an explanation is required only when the Attorney General disapproves a contract. From a consumer perspective, however, disapproval of a contract is the less troubling result. Disapproval indicates that market forces will continue to govern, whereas approval indicates that they will be temporarily suspended, with a potentially adverse impact on price and access. It is the latter situation that more clearly warrants an explanation and is more properly subject to consumer scrutiny.

* * *

In sum, the proposed antitrust exemption for physician collective bargaining is likely to result in increased consumer costs and threatens to reduce access to care. Furthermore, the risk of consumer harm does not appear to be offset by any substantial procompetitive benefits or increased quality of care.

Parties claiming immunity under the state action doctrine bear the burden of establishing their entitlement to such immunity. If the Alaska Legislature were to enact a bill that fails to provide for the level of active supervision required by Supreme Court precedent, physicians relying on the bill's provisions to confer antitrust immunity would risk exposure to potentially significant financial liability for their actions.

Thank you for your inquiry. We hope you find these comments helpful. Should you have any additional questions, please feel free to contact Jeff Brennan at (202) 326-3688.

Sincerely,

Joseph J. Simons, Director
Jeffrey W. Brennan, Assistant Director
Bureau of Competition

R. Ted Cruz, Director
John T. Delacourt, Attorney
Office of Policy Planning

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

March 29, 2002

The Honorable John B. Harwood
Speaker of the House of Representatives
Speaker's Office
State House
Providence, Rhode Island 02903

The Honorable Gerard M. Martineau
Majority Leader of the House of Representatives
Majority Leader's Office
State House
Providence, Rhode Island 02903

The Honorable Robert A. Watson
Minority Leader of the House of Representatives
Minority Leader's Office
State House
Providence, Rhode Island 02903

Members of the House Judiciary Committee
c/o The Honorable Robert E. Flaherty
House of Representatives
State House
Room 206
Providence, Rhode Island 02903

Re: Proposed Bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities

Dear Speaker and Members of the House of Representatives:

We understand that the Rhode Island House of Representatives is considering legislation that would amend the definition of "practice of law" to require lawyers to represent buyers in almost all aspects of the real estate closing process. The United States Department of Justice and the Federal Trade Commission recommend that the Rhode Island House of Representatives reject proposed bill H. 7462, "An Act Relating To Criminal Offenses - Law Practice." Lawyers and non-lawyers currently compete in Rhode Island to offer such services. There is no indication that consumers are harmed under current law, and substantial evidence that consumers benefit from competition between closing services offered by lawyers and non-lawyers. Based on other States' experience, the legislation is likely to increase closing costs and inconvenience for Rhode Island consumers and businesses.

The Interest and Experience of the U.S. Department of Justice and the Federal Trade Commission

The United States Department of Justice and the Federal Trade Commission are entrusted with enforcing this nation's antitrust laws.

For more than 100 years, since the passage of the Sherman Antitrust Act, the Justice Department has worked to promote free and unfettered competition in all sectors of the American economy. Restraining competition can force consumers to pay increased prices or accept goods and services of poorer quality. Consequently, anticompetitive restraints are of significant concern to the Department, whether they are imposed by a "smokestack" industry or by a profession. Restraining competition has the potential to injure consumers. For this reason, the Justice Department's civil and criminal enforcement programs are directed at eliminating such restraints. As part of those efforts, the Justice Department encourages competition through advocacy letters such as this one. The Department has been concerned about attempts to restrict non-lawyer competition in real estate closings. The Department has urged Kentucky, Virginia, and North Carolina to reject such opinions, through letters to their State Bars and an *amicus curiae* brief filed with the Kentucky Supreme Court last year.[1]

[1] In addition, the Justice Department has challenged attempts by county bar associations to adopt restraints similar to the proposed legislation. For example, the Justice Department sued and obtained a judgment against one bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. *United States v. Allen County Indiana Bar Association*, Civ. No. F-79-0042 (N.D. Ind. 1980). Likewise, the Justice Department obtained a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. *United States v. New York County Lawyers' Association*, No. 80 Civ. 6129 (S.D.N.Y. 1981).

Congress created the Federal Trade Commission in 1914 to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Federal Trade Commission is concerned about restrictions that may adversely affect the competitive process and raise prices or decrease quality. Because the Commission has broad responsibility for consumer protection, it is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception. Pursuant to its statutory mandate, the Federal Trade Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. The Commission has challenged anticompetitive restrictions on the business practices of state-licensed professionals, including lawyers.[2] In addition, the staff have conducted studies of the effects of occupational regulation[3] and submitted comments about these issues to state legislatures, administrative agencies, and others. The Commission also has had significant experience in analyzing and challenging restrictions on competition in the real estate industry.[4]

The Proposed Legislation

Broadly speaking, there are two types of real estate loan closings: those involving purchases, and those not involving purchases. Prior to closing a purchase, the closing agent will have prepared a deed transferring ownership and will have overseen the steps necessary to ensure that the seller has clear title to the property and that the funds for purchase are properly transferred. The title process involves an examination of the title record and the removing of exceptions to the title. At the closing, the closer will witness the signing of the deed transferring ownership, the execution of the documents transferring funds for purchase, and the execution of the loan documents prepared by the buyer's lender. Prior to a closing that does not involve a purchase -- such as a refinancing or home equity loan -- the closing agent will have updated the title history from the time the borrower purchased the property and overseen the steps necessary to transfer funds from the lender to the borrower or the holder of the borrower's existing mortgage on the property. The closer will then witness the execution of the loan documents and any other necessary papers. In lieu of hiring an agent to prepare the paperwork, search the title, and handle fund transfers, the lender can choose to perform all of these activities itself.

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[2] *See, e.g., Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990).

[3] *See, e.g.,* Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, FTC, October 1990.

[4] *Port Washington Real Estate Board*, 120 F.T.C. 882 (1995) (consent order); *Industrial Multiple and American Industrial Real Estate Association*, 116 F.T.C. 704 (1993) (consent order); *United Real Estate Brokers of Rockland, Ltd. (Rockland County Multiple Listing System)*, 116 F.T.C. 972 (1993) (consent order); *Bellingham-Whatcom County Multiple Listing Bureau*, 113 F.T.C. 724 (1990) (consent order); *Puget Sound Multiple Listing Association*, 113 F.T.C. 733 (1990) (consent order).

H. 7462 would apply to both residential and commercial closings. The bill would apply to initial purchases, refinancings, second mortgages, and closed-end home equity loans (in which a borrower receives a loan secured by the real estate, with a fixed repayment schedule). The bill would require buyers and borrowers to hire attorneys throughout the closing process. Buyers and borrowers refinancing existing mortgages would have to hire lawyers to represent them in "examining" title and removing exceptions to title, supervising the disbursement of funds, and responding to questions and ramifications of the transaction. Currently, lawyers and non-lawyers compete to provide these services. Moreover, almost all Rhode Island title searches are presently performed by independent third-parties who are not lawyers. If the bill's provision governing "examining" title means that lawyers must conduct title searches, the result would be a complete change in Rhode Island practice. If the bill refers instead to reviewing the results of the title search, this function also is currently performed both by skilled non-lawyers and attorneys. Furthermore, non-lawyers currently clear exceptions to title when doing so does not involve the practice of law. One of the most common tasks they perform is calling lenders and others to obtain releases from previous mortgages and performing other administrative work. Non-lawyers often disburse funds and respond to questions about Rhode Island real estate transactions, as long as they are not giving legal advice. If the bill is adopted, nonlawyers who perform these services would be guilty of the crime of unauthorized practice of law and subject to fines and imprisonment. *See* R.I. GEN. LAWS § 11-27-14 (2001).

The proposed legislation would except five real estate-related activities from the definition of the practice of law: (a) any corporation lawfully engaged in insuring titles to real property may continue "conducting its business;" (b) real estate agents and others whose principal source of income is commissions or profits from real estate sales or leases may draft deeds, mortgages, leases, and agreements in connection with sales or leases negotiated by them; (c) a domestically-chartered title insurance company lawfully engaged in performing real estate closings may continue "conducting its business;" (d) a corporation which is owned *exclusively* by Rhode Island attorneys and is lawfully engaged in performing real estate closings, may conduct its business, as long as any non-lawyer officer or agent employed by the corporation is acting under the direct supervision of an attorney licensed by Rhode Island; and (e) a lender may close its own home equity lines of credit. (Such lines involve allowing homeowners to borrow, repay, and then borrow again up to the line's limit, often using checks or credit cards, and thus differ from closed-end home equity loans.) The exception for real estate agents appears limited to the right to draft mortgages, deeds, and similar papers and does not appear to include the ability to answer questions or explain the ramifications of a real estate transaction.

The Public Interest Warrants Granting Rhode Islanders The Choice To Use A Lay Closing Service

In considering whether a service is the practice of law in Rhode Island, the Legislature must of course consider the public interest. Prohibitions on the unauthorized practice of law should serve the public interest and protect the public good, as the Supreme Court of Rhode

Island has recognized. *See Unauthorized Practice of Law Committee v. State of Rhode Island*, 543 A.2d 662, 665-66 (R.I. 1988).

Indeed, when the Supreme Court of New Jersey rejected an Unauthorized Practice of Law ("UPL") opinion similar to the legislation at issue here, it wrote:

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether nonlawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.
>
> . . .
>
> We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.

In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995).

In considering how best to protect the public interest, it is worth noting that the antitrust laws and competition policy generally consider sweeping restrictions on competition harmful to consumers and justified only by a showing that the restriction is needed to prevent significant consumer injury. Our analysis supports the conclusion that the public interest would not be harmed, and indeed would be significantly served, by continuing to allow competition from lay services in Rhode Island.

The Proposed Legislation Would Likely Hurt the Public by Raising Prices and Eliminating Service Competition

Free and unfettered competition is at the heart of the American economy. The United States Supreme Court has observed, "ultimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)); *accord*, *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990). Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689. In several States, as in Rhode Island today, non-lawyers compete with attorneys to provide real estate closing services, including the examination and clearing of title, the disbursement of funds, and the answering of non-legal questions.[5] Such competition has consistently resulted in lower prices and more choices in how and where closing services are provided. The proposed legislation would likely erect an insurmountable barrier that would prevent competition in Rhode Island from these lay closing services.

The legislation could cause Rhode Island consumers to pay higher closing costs in five ways.

First, the bill would force Rhode Islanders who would not otherwise choose to pay for the services of a lawyer at closing to do so. The legislation requires buyers to have legal representation, which means hiring and paying for an additional lawyer.[6] Buyers already pay for the services of the lender's closing agent as part of their closing costs. Hence, the bill would increase costs for all consumers who might prefer the combination of price, quality, and service that a lay closing service offers. Moreover, besides hurting consumers who are buying and selling homes and commercial properties, the bill would damage those obtaining closed-end home equity loans or refinancing existing real estate loans. Some lenders currently handle these closings without additional charge.

Second, the bill, by eliminating competition from lay providers, would likely increase the price of lawyers' closing services, because the availability of alternative, lower-cost lay services typically restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay agent would likely pay higher prices.

Third, the bill could reduce competition from out-of-state mortgage lenders and title companies, harming consumers who find lower interest rates or more attractive refinancing packages with these lenders. Out-of-state lenders may not have facilities in Rhode Island to close loans and thus may have to contract with in-state services to close them. These services may include lay providers, or be partially owned by lay providers, which the bill would forbid. Some

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[5] For example, the DOJ and FTC have analyzed the impact of competition from non-lawyer closing services in New Jersey, Virginia, and North Carolina. *See* Letter from Charles A. James and Timothy J. Muris to the Ethics Committee of the North Carolina Bar Re North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) <http://www.ftc.gov/be/V020006.htm>; Letter from Joel I. Klein and William J. Baer to the Supreme Court of Virginia Re Proposed UPL Opinion #183 (Jan. 3, 1997) <http://www.ftc.gov/be/v960015a.htm>.

[6] Rhode Island currently requires that buyers be represented by counsel or a title insurance company for purposes of searching the title. The buyer may sign a waiver of this right, in which case the lender selects the agent who will do this. *See* R.I. GEN. LAWS § 19-9-6 (2001). It is not clear that buyers could, under the bill, waive their rights to representation during the entire closing process, so that the lender's lawyer could represent the buyer throughout . (The statutory waiver appears to apply only to the title process.) Even if buyers could, they would presumably have to hire their own attorneys in the event of potential conflict of interests.

conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience. The convenience offered by Internet-based mortgage lenders may be especially important to some Rhode Island consumers. The bill could diminish these options.

Fourth, if by requiring lawyers to "examine titles," the bill applies to title searches, it means that consumers and businesses would have to pay attorneys to perform this time-intensive search currently conducted by third-party lay services.

The use of lay closers has reduced costs to consumers in other states. In 1995, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court rejected an opinion eliminating lay closings. The Court found that real estate closing fees were much lower in southern New Jersey, where lay closings were commonplace, than in the northern part of the State, where lawyers conducted almost all closings. This was true even for consumers who chose attorney closings. South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid $650 on average, while sellers paid $350. North Jersey buyers represented by counsel paid an average of $1,000 and sellers paid an average of $750. *See In re Opinion No. 26*, 654 A.2d at 1348-49.[7]

The experience in Virginia was similar. Lay closing services have operated in Virginia since 1981, when the State rejected an Opinion declaring lay closings to be the unauthorized practice of law. A 1996 Media General study found that lay closings in Virginia were substantially less expensive than attorney closings.

Virginia Closing Costs			
	Median	Average	Average Including Title Examination
Attorneys	$350	$366	$451
Lay Services	$200	$208	$272

Media General, *Residential Real Estate Closing Cost Survey*, September 1996 at 5. In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (Michie 1997). (At the time, the state Supreme Court had been considering an Opinion declaring real estate closings to be the practice of law. *See Proposed Virginia UPL Opinion No. 183*.)

[7] In South Jersey, about 40% of buyers and 35% of sellers were represented by counsel at closing. In North Jersey, 95.5% of buyers and 86% of sellers were represented by counsel.

Rhode Island's experience is likely to be similar. One industry source estimated that costs could increase by at least $200-500 if buyers are required to hire their own attorneys, in addition to paying for the lender's closing lawyer. Currently, if buyers choose to hire their own title lawyers, they pay an additional $200-500.

Furthermore, the bill is likely to hurt consumers by denying them the right to choose a lay closing provider that offers a combination of services that better meets individual consumer needs. Specifically, some of the Rhode Island companies that are owned in part by non-attorneys often close loans during the evenings or weekends, when consumers are off work, or are willing to come to the consumer's home or other convenient location. This is important for Rhode Islanders unable to take time off from work and for others for whom travel is difficult or time consuming. Consumers would likely lose this convenience under the bill, since many lawyers may be less likely to accommodate consumers in this manner.

A fifth way the bill will likely harm consumers is that it could prevent realtors from providing simple explanations of common documents used in real estate and mortgage transactions. H. 7462 would allow realtors to continue to draft deeds, mortgages, and other agreements. The realtors, however, presumably could not explain any of these agreements since the bill requires a lawyer to respond to "any questions and ramifications" of the real estate transaction. Hence, consumers would have to pay lawyers to explain the basic purchase and sales agreement they enter into as the first step towards buying a home. Currently, realtors fill out the agreement and can explain it. They may explain to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and other portions of this agreement. Likewise, realtors currently explain what is required by Rhode Island law to obtain a smoke detector certificate and other certificates required by law for the purchase and sale of a home. The bill appears to require lawyers to do this, as doing so could be considered "responding to questions or ramifications of the transaction."

In addition, commercial entities could be hurt by the bill. Buyers and sellers involved in commercial real estate purchases may already be represented by counsel, but may wish to use an independent lay closing agent for the services involved in closing, or use non-lawyers in their own legal departments. Yet, the proposed legislation would apply to commercial entities, forcing them in all instances to use lawyers or the title insurance companies excepted by the bill.

The Goal of Increasing Consumer Protection Does Not Warrant Adopting This Bill

Antitrust law and policy are very important forms of consumer protection. Consumers benefit immensely from competition among different types of service providers. As the United States Supreme Court has explained:

> The assumption that competition is the best method of allocating resources in a free market recognizes that *all elements of a bargain - quality, service, safety, and durability* - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

National Society of Professional Engineers, 435 U.S. at 695 (emphasis added); *accord, Superior Court Trial Lawyers Association*, 493 U.S. at 423. Allowing non-lawyers to compete permits Rhode Island consumers to consider all relevant factors in selecting a provider of closing services, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. In general, the antitrust laws and competition policy require that a sweeping private restriction on competition be justified by a valid need for the restriction and require that the restriction be narrowly drawn to minimize its anticompetitive impact. These requirements protect the public interest in competition. *See generally F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

There does not seem to have been any showing of need for extensive prohibitions of lay closing service competition. At a minimum, the House should not adopt H. 7462 unless it sees strong factual evidence demonstrating that Rhode Islanders are actually hurt by the availability of closing services performed by anyone other than an employee of a corporation owned entirely by Rhode Island lawyers, a domestically chartered title company, or a title insurance company, and finds that this is not outweighed by the harm to consumers of foreclosing competition.

The Justice Department and the Federal Trade Commission have spoken with several participants in the Rhode Island real estate industry, including lawyers. None has cited any instances of actual consumer injury in Rhode Island from non-lawyer closings. In fact, it appears that at least one attorney has absconded with real estate transaction proceeds. *See Four Lawyers Disciplined in Separate Cases*, PROVIDENCE JOURNAL, June 4, 1996 at B08 (attorney Philip Champagne embezzled $50,000 from proceeds of real estate transaction). A showing of harm is particularly important where, as here, the proposed restraint prevents consumers from using an entire class of providers. Without a showing of actual harm, restraining competition in a way that is likely to hurt Rhode Islanders by raising prices and eliminating consumers' ability to choose among competing providers is unwarranted.

Proponents of the bill have not demonstrated that skilled non-lawyers cannot perform the functions of examining titles and removing exceptions, supervising the disbursement of funds, and responding to non-legal questions and explaining the non-legal ramifications of a real estate transaction. Non-lawyers currently do almost all of the title searches in Rhode Island. Non-lawyers do work to remove title exceptions; they call lenders for discharges on previous mortgages, for example, and review the results of those calls to determine whether to remove an exception. Indeed, the process of removing exceptions is often easier in refinancings and closed-end home equity loans and yet legal representation of the borrower would also be required for them. Likewise, non-lawyers currently answer non-legal questions from buyers and borrowers. For example, if a consumer asks what a foreclosure is, a non-lawyer can answer that question.

Similarly, non-lawyers supervise the disbursement of funds, with no harm to consumers.[8] According to witnesses, closing is largely an administrative task that may be performed by non-lawyers.

Indeed, the proposed legislation appears to recognize that it is not necessary for a lawyer to perform the closing functions. The bill would continue to allow closings by lenders of their home equity lines of credit, and closings by "domestically chartered title insurance companies," and by any corporation "lawfully engaged in the insuring of titles to real property." Consumers and businesses who close using these entities would not have to hire lawyers to perform these functions. Non-lawyers could examine their title and remove exceptions, supervise fund disbursement, and answer their questions and explain the transaction's ramifications. (Of course, as in all situations, these non-lawyers could not provide legal advice.)

Moreover, a substantial number of closings involve home equity loans or the refinancing of existing loans.[9] Because a related transaction has already gone through the closing process once, property law questions (e.g., relating to clear title) are less likely to arise, and legal advice on these matters is less likely to be needed.

The assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. A consumer might choose to hire an attorney to answer legal questions, perform title work, provide advice, negotiate disputes, or offer various protections. Consumers who hire attorneys may in fact get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is no sound reason to eliminate lay closing services as an alternative. *In re Opinion No. 26*, 654 A.2d at 1360. Rather, the choice of hiring a lawyer or a non-lawyer should rest with the consumer. *Id.*

Less Restrictive Measures May Protect Consumers

Rhode Islanders will likely face substantially higher closing costs if competition from non-lawyers is forbidden by the bill. These costs should not be imposed without a convincing showing not only that lay closings have injured consumers, but also that less drastic measures cannot remedy any perceived problem. Rhode Island consumers can be protected by measures that restrain competition far less than extensive bans on lay closing work. For example, in permitting lay closings, the New Jersey Supreme Court required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney. *See In re*

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[8] The bill requires counsel to represent the buyer in supervising the disbursement of funds. The disbursement of funds is done by the lender and its representative. It is not clear what function the buyer's lawyer would have with regard to this task.

[9] The bill excepts home equity lines of credit but not closed-end home equity loans.

Opinion No. 26, 654 A.2d at 1363. This measure permits consumers to make an informed choice about whether to use lay closing services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997, *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (West 2001), which permits consumers to choose lay closing providers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling closing funds. Though more regulatory than the New Jersey approach, the Virginia approach is also more pro-competitive than the approach in the Rhode Island bill.[10]

Interstate Commerce Clause Issues

In assessing the proposed legislation, the House of Representatives may also wish to consider whether it may violate the Interstate Commerce Clause of the Constitution of the United States, Article I, § 8, Clause 3. The bill would define the tasks involved in closing real estate transactions as the practice of law and prohibit anyone from performing them other than lawyers and others who fall within the bill's specific exceptions. Thus, the bill would prevent all non-lawyers from competing to provide closing services (other than those acting on behalf of title insurance companies) and prevent employees of corporations not owned entirely by Rhode Island lawyers from competing to do so.[11] In *National Revenue Corp. v. Violet*, the First Circuit found that a Rhode Island statute declaring debt collecting to be the practice of law was unconstitutional under the interstate commerce clause. 807 F. 2d 285 (1st Cir. 1986). The United States Court of Appeals held that:

> [b]y defining all debt collection as the practice of law, and limiting this practice to members of the Rhode Island bar, Rhode Island effectively bars out-of-staters from offering a commercial service within its borders and confers the right to provide that service--and to reap the associated economic benefit--upon a class largely composed of Rhode Island citizens. . . .[T]he statute deprives the citizens of Rhode Island of any benefits arising from competition. . . . In this circumstance

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[10] The Virginia approach carries some additional risk of consumer harm, since licensing regulation itself can be used to thwart competition. *See* Cox and Foster, *supra* n. 3.

[11] The legislation lists 10 practices permitted to corporations and associations that might otherwise be considered the practice of law. Five of these relate specifically to real estate closings. The final practice, in the provision numbered 10, states that "domestically chartered title insurance" companies may conduct closings. This language appears to duplicate a smaller part of the exception granted by provision 1, which would allow any corporation lawfully engaged in the insuring of title to real property to continue closing if that was part of its business. Provision 10 specifically states that a "domestically chartered title insurance company," that is "lawfully engaged in performing real estate closings" may continue to conduct its business. Provision 1 does not refer to real estate closings specifically. If provision 10 is intended to allow domestically-chartered firms to perform more real estate closing tasks than other title insurance companies, then this exception may also raise separate Commerce Clause problems.

> it might appear that the local purpose, rather than being legitimate, is, in substantial part, to benefit the local bar. This appearance can be rebutted only by showing a legitimate purpose that could not be served as well by non-discriminatory means.

807 F.2d at 290. The court concluded that no such showing had been made. We would urge the House of Representatives to consider whether the proposed legislation could similarly burden interstate commerce in violation of the U.S. Constitution.

Conclusion

By imposing extensive prohibitions on lay closings, H. 7462 will reduce competition and will likely raise closing costs for Rhode Island consumers by requiring them to hire lawyers in circumstances where they may not be necessary.

Other states' experience suggests that the bill will likely cause consumers to pay significantly more for real estate closings. For example, in Virginia, median lay closing costs were $150 less. In parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid $350 less, on average, and sellers paid $400 less. Even consumers who chose attorney closings paid less as a result of the competition attorneys face from non-lawyer closings. Currently, Rhode Island consumers pay $200-500 more if they choose to hire their own title lawyers; the bill would likely raise costs by that amount or more for consumers who would otherwise choose not to hire a lawyer. In addition, the bill could curtail competition from out-of-state and Internet-based lenders, potentially increasing costs and reducing the convenience of the loan application and approval process. There has been no showing of harm to consumers from lay closings that would be substantial enough to justify these reductions in competition. Rather, the bill could harm Rhode Island consumers substantially. We respectfully recommend that the House of Representatives reject the bill.

The Justice Department and the Federal Trade Commission appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

Charles A. James
Assistant Attorney General

Jessica N. Butler-Arkow
Attorney
United States Department of Justice
Antitrust Division

By Order of the
Federal Trade Commission,

Timothy J. Muris
Chairman

Ted Cruz, Director
Office of Policy Planning

Federal Trade Commission

OFFICE OF POLICY PLANNING
6th and Pennsylvania Avenue, NW
Washington, DC 20580

FAX Number: 202-326-3548

Facsimile Transmittal Sheet

To:	Honorable Dennis Stapleton Chairman, Insurance Committee Ohio House of Representatives Fax number: 614.644.9494	Total number of pages sent (including this cover sheet): 14
From:	Ted Cruz Director Office of Policy Planning Telephone: 202.326.3683	Sending Org Code: 0412 Date: 10/16/2002 Time:
Subject:	Ohio House Bill 325	
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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Office of Policy Planning

Via Facsimile and First Class Mail October 16, 2002

The Honorable Dennis Stapleton
Chairman, Insurance Committee
Ohio House of Representatives
77 South High Street, 13th Floor
Columbus, OH 43266-0603

Re: Ohio House Bill 325

Dear Representative Stapleton:

This letter[1] responds to your request for comment on House Bill 325,[2] a bill to permit competing health care providers to engage in collective bargaining with health plans over fees and other contract terms. The Commission has opposed federal legislation that would create an antitrust exemption for physician collective bargaining,[3] and the Commission staff has expressed concerns about similar bills before state legislatures.[4] Such an exemption, the Commission has stated, likely will raise health care costs and reduce access to care, without ensuring better care

[1] This letter represents the views of the Federal Trade Commission's Bureau of Competition and Office of Policy Planning. It does not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has voted to authorize the Bureau of Competition and the Office of Policy Planning to submit these comments.

[2] H.B. 325, 124th Gen. Assem., Reg. Sess. (Ohio 2002) ("H.B. 325").

[3] *See* Testimony of Federal Trade Commission before the House Judiciary Committee on H.R. 1304 (June 22, 1999) ("FTC Testimony on H.R. 1304"), *available at* <http://www.ftc.gov/os/1999/ 9906/ healthcaretestimony. htm> (Attachment 1).

[4] *See, e.g.*, Letter to the Washington House of Representatives on House Bill 2360 (Feb. 8, 2002), *available at* <http://www.ftc.gov/be/v020009.pdf> (Attachment 2); Letter to the Alaska House of Representatives on Senate Bill 37 (Jan. 18, 2002), *available at* <http://www.ftc.gov/be/v020003.htm> (Attachment 3); Letter to the District of Columbia Office of Corporation Counsel on Bill No. 13-333 (Oct. 29, 1999), *available at* <http://www.ftc. gov/be/rigsby.htm>; Letter to the Texas Legislature on Senate Bill 1468 (May 13, 1999), *available at* <http://www.ftc.gov/be/v990009.htm>.

for patients. In our judgment, House Bill 325 raises similar concerns.

In addition, it is unlikely that House Bill 325 would immunize health care providers from liability for conduct that violates the federal antitrust laws. State economic regulation can immunize private parties from federal antitrust liability, but only where it satisfies the requirements of the "state action" doctrine. In this case, the level of governmental involvement called for in the bill falls far short of the "active state supervision" that the Supreme Court has required to displace federal antitrust law. Although the bill provides for review of both collective negotiations and collectively-negotiated contracts by the state Attorney General, it does not provide the Attorney General with sufficient information, sufficiently clear standards, or sufficient time to exercise "independent judgment and control" over physician collective bargaining matters. Furthermore, the bill requires a written opinion only when the Attorney General denies a petition to negotiate or adopt collectively negotiated terms in spite of the fact that, from the perspective of most consumers, this may well be a less troubling result than approval of a petition, which constitutes authorization to depart from competitive market forces.

I. An Antitrust Exemption for Health Care Provider Collective Bargaining Would Harm Consumers

The opposition of the Commission to antitrust exemptions for physician collective bargaining is based on two core concerns. First, an antitrust exemption will authorize physician price fixing, which is likely to raise costs and reduce consumer access to care. Second, an antitrust exemption is *not* likely to improve the quality of care. Other approaches are available that would improve quality and protect consumers, without sacrificing benefits of competition.[5]

A. An Exemption Will Likely Raise Costs and Reduce Access

On its face, House Bill 325 authorizes collective physician conduct that would constitute *per se* price fixing under the federal antitrust laws. The Health Care Statements issued by the Federal Trade Commission and the U.S. Department of Justice address this issue directly.[6] In Example 3 of Statement 8, competing physicians form a hypothetical independent practice association ("IPA") to "combat the power" of managed care plans by negotiating with them collectively rather than individually. The IPA involves no integration that is likely to result in

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[5] *See* Staff Advisory Opinion Re MedSouth, Inc., reflected in letter dated February 19, 2002, from Jeffrey W. Brennan, Assistant Director, Bureau of Competition, to John J. Miles, Ober, Kaler, Grimes & Shriver, *available at* <http://www.ftc.gov/bc/adops/medsouth.htm>.

[6] Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 1996) ("Health Care Statements"), *available at* <http://www.ftc.gov/ reports/hlth3s.htm>.

significant efficiencies (such as financial risk-sharing or clinical integration). This combination – collective negotiation over price and no significant efficiency-enhancing integration – means that "the physicians' agreement to bargain through the joint venture will be treated as *per se* illegal price fixing."[7]

There is widespread agreement among antitrust authorities that this type of naked horizontal price-fixing is among the most serious of competitive concerns, as such conduct predictably and consistently results in substantial consumer harm. As the Commission observed in its testimony before Congress opposing a federal exemption for physician collective bargaining:

> Without antitrust enforcement to block price fixing and boycotts designed to increase health plan payments to health care professionals, we can expect prices for health care services to rise substantially. Health plans would have few alternatives to accepting the collective demands of health care providers for higher fees. The effect of the bill . . . can be expected to extend to various parties, and in various ways, throughout the health care system.[8]

The affected parties would likely include consumers, who would be faced with higher insurance premiums and co-payments, as well as their employers. They also likely would include federal, state, and local governments, which would be forced to increase their health care budgets, cut benefits, or reduce the number of beneficiaries covered. Finally the affected parties would likely include the uninsured. Increases in health care costs likely resulting from physician collective bargaining would be expected to increase the number of individuals in this category and strain the resources of both the public and private entities that currently provide for their needs.

The consumer harm likely to result from physician collective bargaining is not merely a hypothetical concern. The Commission's experience investigating numerous cases of collective bargaining by competing health care providers has demonstrated that, in practice, such conduct can have a substantial negative impact on the public. For example, collective fee demands by pharmacists in the State of New York cost the state an estimated $7 million in increased health benefits expenditures for state employees.[9] In other cases, the Commission accepted consent orders settling charges that physician collective bargaining forced health plans to raise their

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[7] *Id.* at Statement 8, Example 3.

[8] FTC Testimony on H.R. 1304, *supra* note 3, at 5-6.

[9] *See Peterson Drug Company*, 115 F.T.C. 492, 540 (1992). *See also Pharmaceutical Society of the State of New York, Inc.*, 113 F.T.C. 661 (1990) (consent order).

reimbursement rates[10] – with the attendant risk of increases in premiums for policy holders – and state and local governments to raise the reimbursement levels paid under their employee prescription drug plans.[11]

In spite of these significant consumer harms, proponents of physician collective bargaining exemptions frequently argue that they are necessary to "level the playing field" between physicians and health plans. This argument, however, presupposes that physicians are at the mercy of monopsony health plans. Even were it the case that physicians were faced with monopsony health plans,[12] attempts to counterbalance that monopsony power with a physician cartel would *not* be likely to benefit consumers. If a health plan did, in fact, possess market power, health care consumers would be doubly harmed by physician collective bargaining, as they would be forced to pay any monopoly mark-up charged by that health plan *on top of* the elevated fees charged by the physician cartel. Without antitrust enforcement to block such price fixing, prices for health care services can be expected to rise substantially. Raising health care costs and making health insurance less affordable would threaten to increase the already substantial uninsured population, and thereby reduce access to health care services.

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[10] *See, e.g., R.T. Welter & Assocs., Inc. (Professionals in Women's Care)*, Dkt. No. C-4063 (Oct. 8, 2002) (consent order), *available at* <http://www.ftc.gov/os/2002/10/piwcdo.pdf>; *System Health Providers*, File No. 011 0196 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment), *available at* <http://www.ftc.gov/os/2002/08/shpdo.pdf>; *Aurora Associated Primary Care Physicians, L.L.C.*, Dkt. No. C-4055 (July 16, 2002) (consent order), *available at* <http://www.ftc.gov/os/2002/07/aurorado.pdf>; *Physician Integrated Services of Denver, Inc.*, Dkt. No. C-4054 (July 16, 2002) (consent order), *available at* <http://www.ftc.gov/os/2002/07/pisddo.pdf>; *Rochester Anesthesiologists*, 110 F.T.C. 175 (1988) (consent order).

[11] *See, e.g., Baltimore Metropolitan Pharmaceutical Assoc., Inc. and Maryland Pharmacists Assoc.*, 117 F.T.C. 95 (1994) (consent order); *Pharmaceutical Society of the State of New York, Inc.*, 113 F.T.C. 661 (1990) (consent order).

[12] *See also* FTC Testimony on H.R. 1304, *supra* note 3, at 7 (noting that available information covering the entire U.S. "does not support the suggestion that most (or even many) areas have only one or two health plans"). Furthermore, a health plan's ability to acquire and use monopoly power against providers is constrained by the antitrust laws. *See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); and *United States v. Aetna, Inc.*, Civ. No. 3-99CV 1398-H (N. D. Tex. Dec. 7, 1999) (acquisition by a worldwide provider of health, retirement, and financial services benefits of the health care business of a competing company allowed to proceed only after the acquirer agreed to divest its health maintenance organization businesses in Houston and Dallas-Forth Worth, Texas).

B. An Exemption Will Not Improve the Quality of Care

Even if physician collective bargaining exemptions are likely to raise costs, proponents of such exemptions argue that increased costs are nevertheless justified. These costs, they argue, are a small price to pay for improvements in the quality of care that may result from the types of communications that simply would not be possible in the absence of an antitrust exemption. This argument is unpersuasive for two reasons.

First, discussions between physician groups and health plans are not illegal. Current antitrust law permits doctors to negotiate collectively with health plans in various circumstances in which consumers are likely to benefit. The Health Care Statements, for example, describe multiple, antitrust-compliant methods by which physicians may organize networks, and other joint arrangements, to deal collectively with health plans and other physicians.[13] These methods include physicians' use of professional societies and other groups jointly to provide information and express opinions to health plans.[14] As the Commission explained in its testimony before Congress:

> [T]he antitrust laws do not prohibit medicals societies and other groups from engaging in collective discussions with health plans regarding issues of patient care. Among other things, physicians may collectively explain to a health plan why they think a particular policy or practice is medically unsound, and may present medical or scientific date to support their views.[15]

Second, in practice, physician collective bargaining has historically focused on physician *compensation*, rather than quality of care issues. This focus suggests that immunizing collective bargaining will impose costs without guaranteeing that patients' interests in quality care would be served. The Commission addressed this issue squarely in its congressional testimony as well, stating that:

> Collective bargaining rights are designed to raise the incomes and improve working conditions of union members. The law protects the United Auto Workers' right to bargain for higher wages and better working conditions, but we do not rely on the

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[13] *See generally* Health Care Statements, *supra* note 6.

[14] *See , e.g., Schachar v. American Academy of Opthalmology*, 870 F.2d 397 (7th Cir. 1989). *See also* Health Care Statements, *supra* note 6, at Statements 4-5.

[15] FTC Testimony on H.R. 1304, *supra* note 3, at 7. *See also* Health Care Statements, *supra* note 6, at Statement 4 (creating an antitrust safety zone for health care providers' collective provision of non-fee-related information to health plans).

UAW to bargain for safer cars. Congress addressed those concerns in other ways.[16]

Accordingly, blanket antitrust immunity for physician price fixing is not necessary to protect patient welfare.

II. House Bill 325

Like the other physician collective bargaining bills on which the Commission and Commission staff have commented, House Bill 325 would confer a broad authorization on competing health care providers to agree on the prices and other terms they will accept from health plans and to bargain jointly with plans to obtain these collectively-determined contract terms. While House Bill 325 differs from these bills in some respects, these differences do not eliminate the likelihood of substantial harm to consumers.

A. Minimum Threshold for Health Plan Market Power

House Bill 325 does not authorize physician collective bargaining in every instance, but rather limits bargaining over fees and fee-related matters to instances in which a health plan has "substantial market power over providers."[17] This market power screen, however, is unlikely to offer adequate protection to Ohio's health care consumers.[18]

The principal problem is that the concept of substantial market power used in the bill would perform no meaningful screening function. House Bill 325 provides that physicians may only engage in collective bargaining with a health plan regarding fees and fee-related matters after first demonstrating that the plan has "substantial market power." The bill further provides that a health plan has "substantial market power" if: (1) its market share exceeds 15 percent of health plan enrollees or 25,000 covered lives; or (2) the Attorney General determines that the plan's market power in the relevant area "significantly exceeds the countervailing market power of the

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[16] FTC Testimony on H.R. 1304, *supra* note 3, at 10.

[17] H.B. 325 at § 1751.133(B).

[18] An initial problem with this screening mechanism is that it does not apply to *all* price-related collective bargaining. For example, the bill does not require physicians to demonstrate "substantial" health plan market power before collectively negotiating "[t]he methods and timing of payments, including, but not limited to, interest and penalties for late payments." *Id.* at § 1751.132(I). Interest charges and penalties have a direct and significant impact on the ultimate price that providers receive for their services. Moreover, even collective bargaining over other, more clearly "non-price" terms can have a substantial effect on the ultimate price paid by consumers.

providers acting individually." Neither definition represents "substantial market power" in the accepted legal or economic sense.

Market share can indicate market power if based upon a properly defined market, but even if the bill's categories correctly identified relevant markets, a 15 percent market share is not a level ordinarily presumed to constitute market power. Using 25,000 covered lives as the threshold is also problematic as, depending on the size of the market in question, this figure could represent substantially less than a 15 percent share. Furthermore, that a health plan will be deemed to have market power whenever its negotiating power significantly exceeds that of any given individual provider would make the limitation even less connected to any economically meaningful concept of market power. Indeed, it is likely that this provision could be used to justify collective fee setting in virtually all cases. As a result, although it purports to do otherwise, House Bill 325 would, in effect, authorize competing providers collectively to negotiate fees with health plans that lack market power.

B. Pre-Negotiation Physician Communications

House Bill 325 also attempts to shield consumers from the competitive harms resulting from physician collective bargaining by providing the state Attorney General with oversight of the negotiating process and collectively-bargained contract terms. The extent of this oversight is central to the state action analysis, and is discussed in further detail below.

As in the case of the market share screen, however, an initial problem with this protective mechanism is that it does not cover *all* conduct that requires oversight. Most notably, House Bill 325 allows physicians to agree on the fees that they will accept in their negotiations *before* they obtain the Attorney General's approval to undertake actual negotiations.[19] As a result, even if the health plan ultimately were deemed to lack substantial market power (making collective fee negotiations improper under the bill), the physicians already will have agreed on acceptable price terms. The likelihood that such an agreement on fees would spill over into individual negotiations on price terms is substantial.

C. Health Plan Opt-Out Power

Finally, House Bill 325 attempts to limit the anticompetitive impact of physician collective bargaining by preserving a health plan's power to opt-out of collective negotiations or collectively-negotiated terms. Nothing in the bill *requires* a health plan to participate in collective bargaining. A health plan may refuse to negotiate with a physician collective bargaining group and attempt to negotiate with its members individually. Also, the petition to the state Attorney General for approval of collectively-negotiated terms must be submitted jointly

[19] *Id.* at § 1751.135(C)-(D).

by the health plan and the physicians that are party to the contract.[20]

Once again, however, these provisions are not likely to offer substantial protection to Ohio's health care consumers. Although a health plan is not *required* to negotiate with a physician collective bargaining group, the economic pressure to do so is likely to be substantial. As the Commission has previously observed, collective negotiations can by their very nature convey an implicit threat that, if the health plan does not agree to terms acceptable to the physician group as a whole, it will be prevented from successfully negotiating agreements with the members of the group separately.[21] Furthermore, by immunizing agreements among competing physicians on the fees and other terms they will accept from health plans, the bill facilitates coordinated conduct – such as collusive refusals to deal – that, even though not immune, would be difficult to detect and prosecute. Notably, the bill does not address these concerns, as it only requires that the petition to the Attorney General for approval of collectively-bargained terms – a petition that will be filed *after* the physician group has had an opportunity to pressure the health plan – to be filed jointly. The petition to the Attorney General for permission to bargain collectively with a health plan in the first instance, in contrast, may be submitted by the physicians alone.[22]

III. State Action Immunity

The antitrust immunity that House Bill 325 is intended to confer can be effective only if there is adequate state supervision of the collective bargaining activities authorized by the statute. Under the judicially-created "state action" doctrine, states may override the national policy favoring competition and provide that aspects of their economies will be governed by state regulation rather than market forces. States, however, may not simply authorize private parties to

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[20] *Id.* at §§ 1751.137(A) and 3923.356(A).

[21] *See Alaska Healthcare Network, Inc.*, Dkt. No. C-4007, (Apr. 25, 2001) (consent order) (In its complaint, the Commission alleged that "[p]ayors believed that they could not go around [Alaska Healthcare Network] to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or to give up their planned entry into Fairbanks."). *See also Michigan State Medical Society*, 101 F.T.C. 191, 296 n.32 (1983) ("the bargaining process itself carries the implication of adverse consequences if a satisfactory agreement cannot be obtained"); *Preferred Physicians Inc.*, 110 F.T.C. 157, 160 (1988) (consent order) (threat of adverse consequences inherent in collective negotiations).

[22] H.B. 325 at §§ 1751.136(A) and 3923.355(A).

violate the antitrust laws.[23] Instead, a state must substitute its own control for that of the market. To that end, the state legislature must clearly articulate a policy to displace competition with regulation, and state officials must actively supervise the private anticompetitive conduct.[24] In House Bill 325, the Ohio legislature has articulated an intent to displace federal antitrust enforcement. The critical question is whether the bill establishes a regulatory scheme with sufficient state supervision to satisfy the second prong of the state action test.

In order for state supervision to be adequate for state action purposes, state officials must exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[25] Our review of the bill indicates that its proposed regulatory scheme is not adequate to confer antitrust immunity.

A. Attorney General Approval of Negotiations and Contract Terms

Although House Bill 325 provides that the Attorney General must approve bargaining groups before they commence negotiations and must approve contract terms, these provisions do not appear to confer the kind of authority needed to confer state action immunity. In assessing whether there is adequate state supervision of a price setting scheme, the question is whether the state has exercised sufficient "independent judgment and control" such that "the details of the rates or prices" can properly be attributed to the state rather than private parties.[26] Thus, the Supreme Court has held that where, as in the case of the procedure authorized by House Bill 325, "prices or rates are set as an initial matter by private parties, subject only to veto if the State chooses to exercise it, the party claiming immunity must show that state officials have undertaken the necessary steps to determine the specifics of the ratesetting scheme."[27]

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[23] *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful.").

[24] *See California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.*, 445 U.S. 92 (1980). Although there are certain, limited exceptions to the active supervision requirement – *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (holding that the active supervision prong of *Midcal* does not apply to municipalities) – no such exception is applicable here.

[25] *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35 (1992).

[26] *Id.* at 634-35.

[27] *Id.* at 638.

1. Lack of Clear Standards

House Bill 325 does not provide the Attorney General with the means to exercise independent judgment and control over the details of price setting. For example, the bill fails to provide the Attorney General with clear standards to guide its decision to approve, or disapprove, a petition to negotiate or to adopt collectively-negotiated terms. The very nature and extent of the Attorney General's power under the bill to make such determination remains unclear. The Supreme Court has emphasized that active state supervision requires that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[28] The bill sets no clear standard for the Attorney General's review of physician petitions. It provides only that the Attorney General shall not approve negotiations, or contract terms, that "prohibit or restrict the performance of health care services by the providers that are parties to the contract, which health care services are within the recognized scope of practice of that category of provider."[29] It is not clear what this provision is intended to mean, but it is the only standard contained in the bill.

The Supreme Court has made it clear that the active supervision standard is a rigorous one, designed to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State has effectively made [the challenged] conduct its own."[30] In view of the highly limited examination of privately-set prices that the bill would authorize, it is unlikely that it would establish a sufficiently rigorous regulatory scheme to confer state action immunity.

2. Limitations on Review

In addition to failing to provide the Attorney General with sufficiently clear standards, House Bill 325 places strict limitations on the scope of the review, which further limit the Attorney General's ability to exercise independent judgment and control over the details of the physicians' private price setting.

a. Insufficient Information

For example, physicians petitioning for the permission to bargain collectively, or for approval of contract terms, are required to submit only basic identification and market share information, plus "such other data, information, and documents that the [petitioners] choose to

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[28] *Patrick v. Burget,* 486 U.S. 94, 100-101 (1988).

[29] H.B. 325 at § 1751.137(B).

[30] *Patrick,* 486 U.S. at 106.

submit."[31] In contrast, no provision grants the Attorney General the power independently to gather evidence or conduct hearings concerning the prices that result from the collective bargaining process, nor is there any mechanism by which to receive input from other physicians, affected health plans, or patients.

The limited nature of the state review is significant, because courts have rejected claims for state action immunity where state officials lacked the information necessary for a meaningful examination of rates.[32] In contrast, courts have found active state supervision of price setting arrangements where state officials' review included conducting hearings and providing a mechanism for complaining parties to challenge rates.[33]

b. Insufficient Time

House Bill 325 also imposes strict time limitations, allowing only 30 days for the Attorney General to review the facts and render a decision on a petition to negotiate or to adopt collectively-negotiated contract terms.[34] The time period is mandatory ("[t]he attorney general shall either approve or disapprove a petition . . . within thirty days") and there is no provision for extension. It is by no means clear that the Attorney General could complete the "pointed reexamination" required to immunize the underlying physician conduct in such a short time.

IV. Transparency

Finally, House Bill 325 requires a written explanation only when the Attorney General

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[31] H.B. 325 at §§ 1751.136(A)(9), 1751.137(A)(4), 3923.355(A)(9), and 3923.356(A)(4).

[32] *See, e.g., Ticor Title Insurance Co. v. FTC*, 998 F.2d 1129, 1140 (3d Cir. 1993) (finding lack of state supervision where Connecticut never obtained necessary information that would have enabled it to assess the appropriateness of filed rates).

[33] *See, e.g., TEC Cogeneration Inc. v. Florida Power & Light* Co., 76 F.3d 1560 (11th Cir. 1996), *amended in part,* 86 F.3d 1028 (11th Cir. 1996) (rates determined by Public Service Commission rulemaking and subject to extensive agency proceedings); DFW *Metro Line Services v. Southwestern Bell Telephone*, 988 F.2d 601, 606-607 (5th Cir. 1993) (Public Utility Commission conducted both broad-based ratemaking proceedings and adjudications of specific complaints about the reasonableness of rates); *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1334-35 (10th Cir 1988) (state held public hearings to assess the reasonableness of rates).

[34] *See* H.B. 325 at §§ 1751.136(C), 1751.137(B), 3923.355(C), and 3923.356(B) ("The attorney general shall either approve or disapprove a petition . . . within thirty days.").

denies a petition to bargain collectively or disapproves collectively negotiated contract terms.[35] Notably, the bill contains no complementary provision requiring a written decision to *approve* a proposed contract. A written decision, expressly considering the potentially anticompetitive implications of a proposed contract and attempting to quantify the consumer impact and expected effect on consumer prices, would serve a number of salutary purposes. First, it would inform affected parties of the levels at which prices were being fixed, and so provide an opportunity for comment or challenge as to the appropriateness of those levels. Second, it would help inform the public of the likely impact of the proposed contract on their health care costs.

By requiring a written explanation only when permission is denied, House Bill 325 accomplishes neither of these objectives. In fact, from the perspective of most consumers, disapproval of these arrangements is likely to be the less troubling result. Disapproval indicates that market forces will continue to govern, whereas approval indicates that they will be temporarily suspended, with a potentially adverse impact on price and access. It is the latter situation – one that seeks to depart from the national policy favoring competition, rather than collaboration and price fixing among rivals – that more clearly warrants a written decision and is more properly subject to consumer scrutiny.

* * *

In summary, House Bill 325 poses a substantial risk of harm to Ohio citizens. By authorizing price fixing by health care providers, the bill is likely to increase costs and reduce access to care, without any assurance that the state's interest in promoting quality health care would be furthered. Moreover, the bill is unlikely to achieve its stated purpose of conferring state action immunity on provider collective bargaining, because the regulatory oversight provided is insufficient.

Parties claiming immunity under the state action doctrine bear the burden of establishing that they are entitled to such immunity. Thus, should the Ohio Legislature proceed with a collective bargaining bill, it will be important to ensure that the bill establishes a regulatory procedure that meets the rigorous requirements that the Supreme Court has established. Otherwise, providers relying on the bill's provisions to provide antitrust immunity would risk exposure to potentially significant financial liability for their actions.

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[35] *Id.* at §§ 1751.136(C), 1751.137(C), 3923.355(C), and 3923.356(C).

I hope you find these comments helpful. Should you have any additional questions, feel free to contact Jeffrey W. Brennan, Assistant Director for Health Care Products and Services, at 202-326-3688.

Sincerely,

Joseph J. Simons, Director
Jeffrey W. Brennan, Assistant Director
Bureau of Competition

R. Ted Cruz, Director
John T. Delacourt, Attorney
Office of Policy Planning

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

February 6, 2003

The Honorable Timothy J. Muris
Chairman
Federal Trade Commission

Dear Chairman Muris:

I hereby resign my position as Director of the Office of Policy Planning of the Federal Trade Commission. As you know, I have been appointed Solicitor General of Texas. I will begin my service in Texas on February 10, 2003.

It has been an honor to serve on your team for the past 20 months at the Commission. The Office of Policy Planning was an integral part of implementing your robust vision for carrying out the Commission's mission of protecting America's consumers, and it was a privilege to help in that effort.

Thank you for my tenure at the Federal Trade Commission.

Sincerely,

R. Ted Cruz

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

March 8, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director TC
Jerry Ellig, Deputy Director
Office of Policy Planning

Re: Competition Advocacy Monthly Report

In order to provide the Commission with additional information concerning the results of Competition Advocacy, and to ensure the maximum possible lead time for the Commission on pending advocacy projects, the Office of Policy Planning will be providing these monthly reports on Competition Advocacy coordinated by OPP.

Results of Recent Advocacy

- *Matter No. V010008: Comments to OMB on FDA's Direct-to-Consumer prescription drug advertising survey, September 24, 2001.*

  SUCCESS. Staff urged (1) that OMB authorize the survey, and (2) that OMB add several questions to the survey. Both requests were successful. OMB both authorized the survey and added the key questions we requested, asking consumers about the extent of their insurance coverage for prescription medications, and asking both consumers and doctors about the extent to which they discuss the cost of alternative treatments.

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001.*

  PENDING. In response to our joint FTC-DOJ letter, the NC Bar has formed a special study committee to consider the issues raised (namely, whether to rescind their ethics rule requiring the presence of an attorney at all real estate closings and refinancings). It is possible that the committee will hold a hearing or other forum at which we will be invited to testify.

- *Matter No. V020003: Comments on Alaska physician collective bargaining legislation, January 18, 2002.*

  PENDING. The bill has not yet moved. We are awaiting further reports.

- *Matter No. V020009: Comments on Washington state physician collective bargaining legislation, February 8, 2002.*

  SUCCESS, for now. The NW Regional Office reports that our letter created substantial discussion in the legislature, and the legislation is dead for this session. A bill creating a study commission will likely pass; the study commission will likely consider how to address the FTC's concerns.

- *Matter No. V020011: Comments on Virginia legislation banning "below-cost" sales of motor fuels, February 15, 2002.*

  SUCCESS. We were invited to comment on this bill on Wednesday, February 13; a draft was circulated, and the Commission voted it out two days later, on Friday, February 15. The next Tuesday, February 19, the VA House Commerce and Labor Committee held a hearing on the bill, where the FTC staff comment was discussed extensively. As a result of that hearing, the legislation, which had already passed the Virginia Senate, failed in Committee in the Virginia House by a vote of 12-9.

- *Matter No. 011-0046: BMS-Buspar amicus brief (S.D.N.Y), January 8, 2002.*

  SUCCESS. Two weeks ago, the federal district court denied BMS's motion to dismiss. The ruling is remarkably broad, ruling in our favor on three different independent, and alternative, grounds. In short, the court ruled that (1) Orange book filings are not "petitioning" and so are not covered by *Noerr* immunity at all; (2) Even if Orange Book filings were petitioning, plaintiffs' allegations would also be sufficient to fall under the *Walker Process* fraud exception to *Noerr*, and (3) Even if they weren't, plaintiffs' allegations would also be sufficient to satisfy "objective baselessness" under *PRE*'s "sham" exception to *Noerr*.

Upcoming Advocacy Projects

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  FTC staff have been granted intervenor status before the CT Board of Opticians, in a proceeding to determine whether CT law (1) requires CT sellers of disposable contact lenses to have a CT optical license, (2) requires out-of-state sellers of disposable contact lenses to have a CT optical license if they ship to customers in CT, and (3) requires all sellers in CT to receive a doctor's prescription prior to shipping lenses to customers. The deadline to submit written comments is March 27; deadline for rebuttal comments is April 15. Staff are currently drafting comments to circulate to the Commission in the next two weeks.

- *Possible Joint Comment with DOJ on Rhode Island legislation requiring attorneys to supervise real estate closings.*

  The Rhode Island Legislature is considering a bill declaring that any nonlawyer who oversees a real estate loan closing would be engaged in unauthorized practice of law. DOJ plans to comment on the legislation and has invited the FTC to join them, in the same way that we produced the joint letter to the NC Bar. The letter would be similar to the NC letter. Timing is unclear at this point, but DOJ is preparing a draft of the letter to circulate to the Commission in the next couple of weeks.

- *Possible Amicus Brief in Powers et. al. v. Harris*

  The State of Oklahoma enacted legislation banning the sale of caskets by anyone who does not possess an Oklahoma funeral director's license. An Internet-based casket retailer is challenging the law. In addition to the law's effect on interstate commerce and competition, the case presents an interesting rhetorical wrinkle: the Oklahoma Attorney General claims that the law is based on the same consumer protection rationale as the FTC's Funeral Rule. Staff are preparing a draft amicus brief that would correct this mis-characterization of the funeral rule and explain the anticompetitive impact of the Oklahoma law, especially on Internet commerce.

- *Possible Automobile Franchising Study*

  In conjunction with BE, we are exploring possible studies we could conduct to assess the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

  This year, the Securities and Exchange Commission will likely consider proposals to restructure the industry that would consolidate stock market quotation and trade price data, which are currently divided up among firms that each possess a monopoly over data for various kinds of securities. Similar data for futures are provided in a more competitive fashion. In preparation for possibly filing advocacy comments on future SEC proposals, staff have contracted for a study that compares the structure of data consolidation in the securities and futures industries. The study's author is Dr. Sharon Brown-Hruska, a finance professor who has recently been announced to be nominated as a Commissioner at the Commodity Futures Trading Commission (she was named after she was contracted to complete the study).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

April 8, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director
Jerry Ellig, Deputy Director
Office of Policy Planning

Re: Competition Advocacy Monthly Report

Results of Recent Advocacy

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001.*

  PENDING. The special committee established by the NC Bar has retained antitrust counsel to help them investigate the issues raised in the joint FTC-DOJ letter.

- *Matter No. V020003: Comments on Alaska physician collective bargaining legislation, January 18, 2002.*

  PENDING. Ted Cruz testified via teleconference to the Alaska House Labor and Commerce Committee on March 22. He rebutted claims made by prior witnesses that the legislation would not raise prices because health plans had to consent to the collective bargaining, that it would not raise prices because health care plans were monposony buyers, and that the legislation was necessary to allow physicians to collectively discuss quality of care issues with health plans. He also warned that physicians acting collectively under the bill could potentially face substantial antitrust liability.

  Following the testimony, on March 26, 2002, the House Labor and Commerce Committee filed a report on Senate Bill 37. Of the six members of the Committee, one, Rep. Crawford, recommended that the bill should not pass. The remaining five, including Rep. Murkowski (who originally solicited the FTC staff comment), made no recommendation. No member of the Committee made a positive recommendation. The bill was subsequently referred to the House Judiciary Committee.

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  PENDING. FTC staff comments in this proceeding were approved by the Commission and submitted on March 27. Deadline for rebuttal comments is April 15, after which the Board will conduct a hearing and then issue a decision.

- *Matter No. V020013: Joint Comment with DOJ on Rhode Island legislation requiring consumer to hire attorneys to supervise real estate closings.*

  PENDING. The Rhode Island Legislature is considering a bill declaring that any nonlawyer who oversees a real estate loan closing would be engaged in unauthorized practice of law. The joint FTC-DOJ letter was approved by the Commission and sent to Rhode Island. The Rhode Island House Judiciary Committee subsequently approved the Bill by a vote of 12-4. Last year, when Rhode Island was considering similar legislation, the bill died in the Senate.

Upcoming Advocacy Projects

- *Consultation on Canadian predatory pricing guidelines*

  Canada's Competition Bureau has issued some revised draft guidelines on "unreasonably low pricing" that deal mostly with predation. The public comment period closes June 14, but the Canadians would like to consult with FTC staff informally via a conference call (likely involving DOJ as well) in the next few weeks. In conjunction with the General Counsel's office, we have assembled a plan to identify key issues and conduct the necessary preparation for the initial consultations. Written comments may or may not result, depending on the discussion and the Canadian Competition Bureau's preferences.

- *State Eyewear Proceedings*

  Optical and optometric boards in a large number of states have been asked by Johnson & Johnson to rule on questions similar to those raised in the Connecticut proceedings. We are exploring whether any of these boards have proceedings that would offer appropriate advocacy opportunities.

- *Possible Amicus Brief in Powers et. al. v. Harris*

  The State of Oklahoma enacted legislation banning the sale of caskets by anyone who does not possess an Oklahoma funeral director's license. An Internet-based casket retailer is challenging the law. In addition to the law's effect on interstate commerce and competition, the case presents a significant additional wrinkle: the Oklahoma Attorney General claims that the law is based on the same consumer protection rationale as the

FTC's Funeral Rule. Staff are preparing a draft amicus brief that would correct this mis-characterization of the funeral rule and explain the anticompetitive impact of the Oklahoma law, especially on Internet commerce. We expect to have a draft ready for Commission review by early May.

- *Automobile Franchising Study*

  In conjunction with BE, we are conducting a literature-review study assessing the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

  This year, the Securities and Exchange Commission will likely consider proposals to restructure the industry that would consolidate stock market quotation and trade price data, which are currently divided up among firms that each possess a monopoly over data for various kinds of securities. Similar data for futures are provided in a more competitive fashion. In preparation for possibly filing advocacy comments on future SEC proposals, staff have contracted for a study that compares the structure of data consolidation in the securities and futures industries. The study's author is Dr. Sharon Brown-Hruska, a finance professor who has recently been announced to be nominated as a Commissioner at the Commodity Futures Trading Commission (she was named after she was contracted to complete the study).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

April 10, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director
Jerry Ellig, Deputy Director
Office of Policy Planning

Re: Competition Advocacy Monthly Report

Results of Recent Advocacy

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001.*

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Upcoming Advocacy Projects

- *State Eyewear Proceedings*

  Optical and optometric boards in a large number of states have been asked by Johnson & Johnson to rule on questions similar to those raised in the Connecticut proceedings. We are exploring whether any of these boards have proceedings that would offer appropriate advocacy opportunities.

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- *Automobile Franchising Study*

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- *Securities Market Data Study*

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

May 24, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director
Jerry Ellig, Deputy Director
Office of Policy Planning

Re: Competition Advocacy Monthly Report

Results of Recent Advocacy

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001.*

  PENDING. The special committee established by the NC Bar has retained antitrust counsel to help them investigate the issues raised in the joint FTC-DOJ letter. Pending Commission approval, Jerry Ellig and Maureen Ohlhausen will attend the committee's June 7 fact-finding meeting in Raleigh to summarize the FTC's concerns and respond to others' testimony.

- *Matter No. V020003: Comments on Alaska physician collective bargaining legislation, January 18, 2002.*

  PENDING. The legislation was amended in the House on May 10 to strike language authorizing physicians to bargain collectively "on fee related and other issues," thus making it harder to determine what conduct the legislation authorizes. The House voted 29-10 to approve the amended bill and return it to the Senate. Final disposition is unclear.

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  PENDING. We saw no need to submit rebuttal comments, as most arguments focused on issues of Connecticut law. Hearing is scheduled for June 12; staff are planning to attend and be available for cross-examination under the rules of the proceeding.

- *Matter No. V020013: Joint Comment with DOJ on Rhode Island legislation requiring consumers to hire attorneys to supervise real estate closings.*

  SUCCESS. The State Senate referred the bill back to committee, where the bill is expected to die. DOJ says that one of its sources in RI credits our letter as a major influence prompting the Senate to refer the bill back to committee.

Upcoming Advocacy Projects

- *Hawaii gasoline price regulation*

  A member of the State Senate leadership in Hawaii asked FTC staff for comments on several pieces of legislation that would place price caps on wholesale and retail gasoline prices in Hawaii. Due to the very short notice and the Commission's full schedule, we did not attempt to produce a formal comment but instead provided the senator with excerpts from previous FTC staff comments on the effects of gasoline price controls. The legislation passed, but the price controls do not take effect until 2004, so we are assessing the possibility of a study or other means of providing information to inform discussion on this issue.

- *Study and possible Amicus Brief in Bolick et. al. v. Roberts*

  On March 29, a federal district court declared that Virginia's prohibition on direct shipment of wine to consumers by out of state (but not in-state) wineries violates the U.S. Constitution. The following week, a federal court reached a similar conclusion in regard to a similar prohibition in North Carolina, and a similar case was argued in New York this month. We are working with BE to design a study that would quantify the impact of this prohibition on Virginia consumers and assessing the possibility of filing an amicus brief in the Virginia case.

- *State eyewear proceedings*

  Optical and optometric boards in a large number of states have been asked by Johnson & Johnson to rule on questions similar to those raised in the Connecticut proceedings. We are exploring whether any of these boards have proceedings that would offer appropriate advocacy opportunities.

- *Possible comment to FDA on advertising issues*

  FDA has issued a request for public comment on how it can conform its regulation of advertising to the law enunciated in recent First Amendment commercial speech cases. We are working with BCP to assess whether the FTC can provide useful input based on the experience of the FTC's advertising practices division.

- *Possible advocacy or case opportunities regarding Alternative Medicine*

  The Federation of State Medical Boards recently adopted "Model Guidelines for the Use of Complementary and Alternative Therapies" that may result in discriminatory regulation that would reduce competition from licensed medical doctors who employ virtually any type of therapy or treatment "that mainstream Western (conventional) medicine does not commonly use, accept, study, understand, or make available." Along with BC's Health Care shop, we are exploring whether the Guidelines restrict competition and whether there are any case opportunities. There may also be advocacy opportunities if any medical boards employ a public comment process before adopting the guidelines.

- *Possible Amicus Brief in Powers et. al. v. Harris*

  The State of Oklahoma enacted legislation banning the sale of caskets by anyone who does not possess an Oklahoma funeral director's license. An Internet-based casket retailer is challenging the law. In addition to the law's effect on interstate commerce and competition, the case presents an interesting rhetorical wrinkle: the Oklahoma Attorney General claims that the law is based on the same consumer protection rationale as the FTC's Funeral Rule. Staff are drafting an amicus brief that would correct this mis-characterization of the funeral rule and explain the anticompetitive impact of the Oklahoma law, especially on Internet commerce. Motions for Summary Judgment in the case are due September 1.

- *Automobile Franchising Study*

  Debra Holt in BE is conducting a literature-review study assessing the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

  Dr. Sharon Brown-Hruska, author of our contract study on securities market data, has been formally nominated to be a Commissioner at the Commodity Futures Trading Commission.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

June 28, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director TC
Jerry Ellig, Deputy Director JE
Office of Policy Planning

Re: OPP Competition Advocacy Monthly Report

Results of Recent Advocacy

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  PENDING IN CONNECTICUT. Ted Cruz and Jerry Ellig attended the Board's June 12 hearing to summarize the FTC staff comments and undergo cross-examination. The Board could not conclude the hearing in one day and will continue the hearing on July 16-17.

  UNEXPECTED SUCCESS IN ALASKA. Unbeknownst to FTC staff, the Alaska AG also reviewed a copy of the CT staff comment. Johnson & Johnson had asked the Alaska Board of Dispensing Opticians for a declaratory ruling on the same three questions considered by the Connecticut Board, and the Alaska Board sought advice from the Alaksa AG's office. Twelve years ago, the Alaska AG had issued an opinion that contact lens sellers in Alaska had to be licensed in Alaska; citing the FTC staff comments heavily, the Alaska AG sua sponte reversed its position and withdrew its prior opinion, opining that state licensure was no longer necessary for online sellers of contact lenses to compete in Alaska.

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001.*

  PROGRESS, BUT STILL PENDING. Jerry Ellig and Maureen Ohlhausen attended the committee's June 7 fact-finding meeting in Raleigh to summarize the FTC's concerns and respond to others' testimony. The Committee met on June 21 and decided to recommend that the North Carolina State Bar withdraw the requirement that attorneys be "physically present" at closing and declare that nonlawyers can perform real estate closings as long as they refrain from giving legal advice. The State Bar will decide whether to adopt these recommendations in July.

- *Matter No. V020003: Comments on Alaska physician collective bargaining legislation, January 18, 2002.*

  PARTIAL SUCCESS. The legislation passed and was signed into law, but only after (in response to the FTC staff comment), the bill was amended to remove the language authorizing physicians to bargain collectively "on fee related and other issues." Thus, collective bargaining is authorized, but not on fees.

- *Matter No. V020016: California Copperweld legislation*

  POSSIBLE PRE-EMPTIVE SUCCESS. The California legislature was considering antitrust legislation that included a provision that would allow courts to find a parent company and its wholly-owned subsidiary guilty of a price fixing conspiracy if the parent firm made pricing decisions for the subsidiary (thus overturning *Copperweld*). The Chair of the Assembly's Business and Professions Committee asked the FTC staff for comments on the bill prior to a hearing on June 25. While we were preparing a proposed staff response, the bill's sponsor introduced an amendment removing the language that would have overturned *Copperweld.*

- *Matter No. V020008: Comments to the U.S. Judicial Conference on revisions to Rule 23 governing class actions, February 15, 2002.*

  NOT SUCCESSFUL. Although the FTC comment was subject to substantial discussion, the Judicial Conference ultimately did not incorporate any of the Commission's suggestions.

Possible Upcoming Advocacy Projects

- *Comment to FDA on advertising issues*

  FDA has issued a request for public comment on how it can conform its regulation of advertising to the law enunciated in recent First Amendment commercial speech cases. BCP and BE staff are drafting a comment that explains the benefits of the FTC's approach to advertising regulation. Comments are due to the FDA by July 30; we expect to have a draft ready for Commission review by mid-July.

- *New York gasoline legislation*

  The New York legislature has recently passed two bills outlawing "below cost" gasoline sales and prohibiting refiners from establishing company-owned gas stations within a mile or two of existing dealer-operated stations. Given that these are both areas (below-cost sales and divorcement legislation) where staff have substantial expertise and history in filing past comments, staff have begun analyzing both bills. We do not know yet if we will be invited to comment before the bills are signed into law.

- *Ohio physician collective bargaining*

  The Chairman of the Ohio House of Representatives' Insurance Committee has asked for the FTC's comments on legislation that would permit physicians to bargain collectively over fees and other matters. Staff have begun drafting a comment, which the legislator has requested by September so that members can consider them when discussing the bill prior to the next legislative session in January.

- *Amicus Brief in Powers et. al. v. Harris*

  The State of Oklahoma enacted legislation banning the sale of caskets by anyone who does not possess an Oklahoma funeral director's license. An Internet-based casket retailer is challenging the law. In addition to the law's effect on interstate commerce and competition, the case presents an interesting rhetorical wrinkle: the Oklahoma Attorney General claims that the law is based on the same consumer protection rationale as the FTC's Funeral Rule. Staff are drafting an amicus brief that would correct this mis-characterization of the funeral rule and explain the anticompetitive impact of the Oklahoma law, especially on Internet commerce. Motions for Summary Judgment in the case are due September 1; we expect to have a draft ready for Commission review by mid-August.

- *Hawaii gasoline price regulation*

  Hawaii's gasoline price control legislation requires the state's Department of Business, Economic Development, and Tourism to conduct a study that will outline policy options for reducing gasoline prices in Hawaii and assess the likely effects of the price controls that go into effect in 2004. Staff of that department in charge of the study have contacted FTC staff in search of relevant data and expertise. OPP is serving as the point of contact for the Hawaii DBEDT staff and working with FTC staff to see how we can be most helpful.

- *Hospital certificate of need proceedings*

  State "certificate of need" laws, which require hospitals to obtain state permission before expanding, have become an issue in some states where hospitals seek to expand facilities dealing with particular specialties where demand is growing (e.g., cardiac care). We are currently assessing advocacy opportunities on this issue, especially in markets where the FTC unsuccessfully sought to block hospital mergers and rivals now want to expand capacity.

- *North Carolina anaesthesiologists*

  Together with BC's health care shop, we are reviewing some NC regulations that appear to encourage physician groups with monopoly power in particular hospitals or small communities to refrain from negotiating with health plans so that they can bill at a higher rate as unaffiliated providers.

- *Internet real estate brokerage*

  We are reviewing the National Association of Realtors' recently-adopted guidelines on data exchange that may affect the ability of real estate brokers to display information about other brokers' listings on the Web.

- *Wine study relevant to Bolick et. al. vs. Roberts*

  To better understand the impact of Virginia's ban on direct shipment of wine by out-of-state producers, Alan Wiseman in BE is performing a price comparison of popular wines available via the Internet and in Northern Virginia stores. We will assess how to proceed on this topic when we see his findings in July.

- *Possible advocacy or case opportunities regarding Alternative Medicine*

  The Federation of State Medical Boards recently adopted "Model Guidelines for the Use of Complementary and Alternative Therapies" that may result in discriminatory regulation that would reduce competition from licensed medical doctors who employ virtually any type of therapy or treatment "that mainstream Western (conventional) medicine does not commonly use, accept, study, understand, or make available." Along with BC's Health Care shop, we are exploring whether the Guidelines restrict competition and whether there are any case opportunities. There may also be advocacy opportunities if any medical boards employ a public comment process before adopting the guidelines.

- *Automobile Franchising Study*

  Debra Holt in BE is conducting a literature-review study assessing the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

  Dr. Sharon Brown-Hruska is revising the study pursuant to comments from BE and OPP.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning

Office of Policy Planning
Transmittal Slip

Date: August 20, 2002

RE: OPP Competition Advocacy Monthly Report

TO:

Commissioner Swindle	Room 540
Commissioner Leary	Room 526
Office of the General Counsel	Room 568
Office of the Chairman and Attorney Advisors	Room 444
Office of the Executive Director	Room 426
Office of Congressional Relations (OCR)	Room 404
Office of Public Affairs (Press Office) (OPA)	Room 419
Bureau of Consumer Protection (BCP)	Room 468
Office of the Inspector General	Room 494
Commissioner Thompson	Room 340
Commissioner Anthony	Room 326
Bureau of Competition (BC)	Room 374
Bureau of Economics	Room 268
Office of the Secretary (OS)	Room 172

FROM: Ted Cruz, Director and Jerry Ellig, Deputy Director
Office of Policy Planning

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

August 20, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director TC
Jerry Ellig, Deputy Director JE
Office of Policy Planning

Re: OPP Competition Advocacy Monthly Report

Results of Recent Advocacy

- *Matter No. V020019: New York gasoline legislation*

  PENDING. The bills outlawing "below cost" gasoline sales and prohibiting refiners from establishing company-owned gas stations within a mile or two of existing dealer-operated stations passed the legislature on June 25. FTC staff comments were delivered to Governor Pataki's office on August 8, but the Governor has not yet formally received the bills.

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  PENDING. At the request of the private parties, the Board has rescheduled the continuation of the hearing for October 9-10.

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001 and March 29, 2002.*

  PROGRESS, BUT STILL PENDING. The State Bar's Ad Hoc Committee on Real Estate Closings planned to recommend in July that the State Bar follow our advice, but opted to postpone the recommendations until the October State Bar meeting. The Committee plans to hold a second fact-finding hearing on Sept. 13 to give additional parties an opportunity to comment. BE has reviewed an extensive memo prepared by a UNC law professor who opposes the Committee's recommendations. OPP is also assessing the merits of a possible state action case if the State Bar continues to bar non-lawyers from performing real estate closings in spite of legislative language that appears to permit them.

Possible Upcoming Advocacy Projects

- *Amicus Brief in Powers et. al. v. Harris*

  The State of Oklahoma enacted legislation banning the sale of caskets by anyone who does not possess an Oklahoma funeral director's license. An Internet-based casket retailer is challenging the law. In addition to the law's effect on interstate commerce and competition, the case presents an interesting rhetorical wrinkle: the Oklahoma Attorney General claims that the law is based on the same consumer protection rationale as the FTC's Funeral Rule. An amicus brief should be ready for Commission review the week of August 19; the Court deadline for filing the brief is August 30.

- *Comment to FDA on advertising issues*

  FDA has issued a request for public comment on how it can conform its regulation of advertising to the law enunciated in recent First Amendment commercial speech cases. BCP and BE staff are drafting a comment that explains the benefits of the FTC's approach to advertising regulation. The FDA has extended its deadlines, and comments are now due by September 15; we expect to have a draft ready for Commission review by the end of August.

- *Ohio physician collective bargaining*

  The Chairman of the Ohio House of Representatives' Insurance Committee has asked for the FTC's comments on legislation that would permit physicians to bargain collectively over fees and other matters. Staff have begun drafting a comment, which the legislator has requested in September so that members can consider them when discussing the bill prior to the next legislative session in January.

- *Revised RESPA regulations*

  BCP and BE are assessing the possibility of offering comments on HUD's proposed revisions to regulations implementing the Real Estate Settlement Procedures Act.

- *Hawaii gasoline price regulation*

  Hawaii's gasoline price control legislation requires the state's Department of Business, Economic Development, and Tourism to conduct a study that will outline policy options for reducing gasoline prices in Hawaii and assess the likely effects of the price controls that go into effect in 2004. Staff from OPP, BE, and the SF Regional Office have met via conference call with staff from DBET and the Hawaii Attorney General's office to share our perspectives on Hawaii's gasoline market and discuss how the FTC may be of help. DBET staff are preparing a package of information for us to review, and Tom Dahdouh in the SF office will meet with the private SF attorney who played a key role in motivating the Hawaii Attorney General's price-fixing suit against the oil companies.

- *Hospital certificate of need proceedings*

  State "certificate of need" laws, which require hospitals to obtain state permission before expanding, have become an issue in some states where hospitals seek to expand facilities dealing with particular specialties where demand is growing (e.g., cardiac care). We are currently assessing advocacy opportunities on this issue, especially in markets where the FTC unsuccessfully sought to block hospital mergers and rivals now want to expand capacity.

- *North Carolina anaesthesiologists*

  Together with BC's health care shop, we are reviewing some NC regulations that appear to encourage physician groups with monopoly power in particular hospitals or small communities to refrain from negotiating with health plans so that they can bill at a higher rate as unaffiliated providers.

- *Internet real estate brokerage*

  We are reviewing the National Association of Realtors' recently-adopted guidelines on data exchange that may affect the ability of real estate brokers to display information about other brokers' listings on the Web.

- *Wine study relevant to Bolick et. al. vs. Roberts*

  To better understand the impact of Virginia's ban on direct shipment of wine by out-of-state producers, Alan Wiseman performed a price comparison of popular wines available via the Internet and in Northern Virginia stores. Preliminary data analysis suggests that Northern Virginia consumers pay somewhat higher prices and have fewer varieties available as a result fo the law.

- *Possible advocacy or case opportunities regarding Alternative Medicine*

  The Federation of State Medical Boards recently adopted "Model Guidelines for the Use of Complementary and Alternative Therapies" that may result in discriminatory regulation that would reduce competition from licensed medical doctors who employ virtually any type of therapy or treatment "that mainstream Western (conventional) medicine does not commonly use, accept, study, understand, or make available." Along with BC's Health Care shop, we are exploring whether the Guidelines restrict competition and whether there are any case opportunities. There may also be advocacy opportunities if any medical boards employ a public comment process before adopting the guidelines.

- *Automobile Franchising Study*

  Debra Holt in BE is conducting a literature-review study assessing the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

  Dr. Sharon Brown-Hruska, author of the study, was unanimously confirmed by the U.S. Senate as a Commissioner of the Commodity Futures Trading Commission.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning

Office of Policy Planning
Transmittal Slip

Date: October 31, 2002

TO:

Chairman Muris	**Room 444**
Commissioner Anthony	**Room 326**
Commissioner Thompson	**Room 340**
Commissioner Swindle	**Room 540**
Commissioner Leary	**Room 528**
Office of the General Counsel	**Room 568**
Office of the Executive Director	**Room 426**
Office of Congressional Relations (OCR)	**Room 404**
Office of Public Affairs (Press Office) (OPA)	**Room 419**
Bureau of Consumer Protection (BCP)	**Room 468**
Bureau of Competition (BC)	**Room 374**
Bureau of Economics	**Room 268**
Office of the Secretary (OS)	Room 172
Office of the Inspector General	NJ-1110

FROM: Ted Cruz, Director
Jerry Ellig, Deputy Director
Office of Policy Planning

Re: OPP Competition Advocacy Report

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

October 31, 2002

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director TC
Jerry Ellig, Deputy Director JE
Office of Policy Planning

Re: OPP Competition Advocacy Report

Results of Recent Advocacy

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001 and March 29, 2002.*

  PROGRESS, BUT STILL PENDING. Jerry Ellig attended the Sept. 13 meeting of the State Bar's Special Committee on Residential Real Estate Closings and reiterated the principal points in the FTC-DOJ joint letters. Subsequently, the Committee voted to recommend a pair of opinions to the State Bar that would eliminate the requirement that an attorney be physically present at closing and allow non-attorneys to perform about as many of the closing functions as North Carolina's statutes appear to permit. At its October meeting, the State Bar Council decided to publish the proposed opinions for public comment in the fourth quarter of 2002. Next decision will occur at the end of January, when the committee will consider the comments and recommend whether the State Bar should adopt the opinions at its January meeting.

- *Matter No. V020019: New York gasoline legislation*

  PENDING. The bills outlawing "below cost" gasoline sales and prohibiting refiners from establishing company-owned gas stations within a mile or two of existing dealer-operated stations passed the legislature on June 25. The Governor has not yet formally received the bills, and so he has not yet acted on them. A service station trade association in New York has complained to staff that the FTC letter will likely result in a veto.

- *Matter No. V020017: Ohio physician collective bargaining*

  PENDING. The Chairman of the Ohio House of Representatives' Insurance Committee has asked for the FTC's comments on legislation that would permit physicians to bargain collectively over fees and other matters. The letter was voted out by the Commission and sent to Ohio on Oct. 15. Impact will not be known until we see what (if any) legislation on the topic is introduced in the Ohio House when it reconvenes next year.

- *Matter No. V020023: Comments to Alabama Supreme Court on attorney advertising rules*

  PENDING. Comments on proposed rules regulating attorney advertising were approved by the Commission and sent to the Alabama Supreme Court on September 30.

- *Matter No. V020021: Comment to FDA on advertising and 1st Amendment*

  PENDING. Comments explaining how the FTC's approach to deceptive advertising complies with the First Amendment's commercial speech doctrine were approved by the Commission and filed on Sept. 13.

- *Matter No. V020015: Amicus brief in Powers et. al. v. Harris*

  PENDING. An Internet-based casket retailer is challenging a law banning casket sales by parties other than funeral directors. On Sept. 4, we filed an amicus brief clarifying that, contrary to defendant's claim, the purpose of the FTC's Funeral Rule is to permit competition in the sale of funeral goods by parties other than funeral directors.

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  PENDING. Hearing was continued on October 9-10. The Board denied requests by all intervenors (including FTC staff) who wished to file closing statements. No word yet on when a decision is expected.

- *Matter No. V030001: Revised RESPA regulations*

  PENDING. After consultation with HUD staff, BCP, BE, and OPP prepared comments on HUD's proposed revisions to regulations implementing RESPA. Comments were filed with HUD on October 28.

Upcoming Advocacy Projects

- *Hawaii gasoline price regulation*

  Hawaii's gasoline price control legislation requires the state's Department of Business, Economic Development, and Tourism to conduct a study that will outline policy options for reducing gasoline prices in Hawaii and assess the likely effects of the price controls that go into effect in 2004. BC, BE, and OPP staff have had several discussions with them about how to conduct such a study. SFRO and BE are now reviewing 10 boxes of documents forwarded by Spencer Hosie, Hawaii's outside counsel in its price-fixing case against the oil companies.

- *Study of Virginia's ban on direct shipment of wine*

  To better understand the impact of Virginia's ban on direct shipment of wine by out-of-state producers, Alan Wiseman performed a price comparison of popular wines available via the Internet and in Northern Virginia stores. Preliminary data analysis suggests that Northern Virginia consumers pay somewhat higher prices and have fewer varieties available as a result of the law. Alan and Jerry Ellig are now revising the study for possible publication in a scholarly journal, with a goal of having a complete draft available to inform possible FTC advocacy activities that may arise if some state legislatures revise their direct shipment laws next year in response to recent court decisions invalidating some of the laws.

- *Internet real estate brokerage*

  We are reviewing the National Association of Realtors' proposed guidelines that would allow individual brokerage firms to opt out of allowing MLS information about their listings to be available to customers of Internet realtors.

- *Real estate closing cost study*

  We are discussing with HUD the possibility of undertaking or collaborating on a study of the effect on closing costs of state laws or regulations that prohibit non-attorneys from conducting residential real estate closings.

- *Hawaiian buses*

  We are evaluating a complaint from a public interest group that the city of Honolulu bars tour buses from unloading passengers at a popular park, while at the same time offering subsidized city bus service to the same location.

- *Automobile Franchising Study*

  Debra Holt in BE is conducting a literature-review study assessing the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

The SEC is currently holding hearings on market structure issues that will include a discussion of appropriate regulations governing the consolidation and sale of price and transaction data. SEC will likely initiate a rulemaking next year to revise its market data regulations. We are assessing the most productive way to address the issue. Sharon Brown-Hruska, who produced a background for us on the topic, is now a Commissioner at the Commodity Futures Trading Commission.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning

Office of Policy Planning
Transmittal Slip

Date:	**February 6, 2003**	
TO:	**Chairman Muris**	**Room 444**
	Commissioner Anthony	**Room 326**
	Commissioner Thompson	**Room 340**
	Commissioner Swindle	**Room 540**
	Commissioner Leary	**Room 528**
	Office of the General Counsel	**Room 568**
	Office of the Executive Director	**Room 426**
	Office of Congressional Relations (OCR)	**Room 404**
	Office of Public Affairs (Press Office) (OPA)	**Room 419**
	Bureau of Consumer Protection (BCP)	**Room 468**
	Bureau of Competition (BC)	**Room 374**
	Bureau of Economics	**Room 268**
	Office of the Secretary (OS)	**Room 172**
	Office of the Inspector General	**NJ-1110**
FROM:	**Ted Cruz, Director** **Jerry Ellig, Deputy Director** **Office of Policy Planning**	
Re:	**OPP Competition Advocacy Report**	

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

February 6, 2003

MEMORANDUM

To: Chairman Muris
Commissioner Anthony
Commissioner Thompson
Commissioner Swindle
Commissioner Leary
FTC Senior Staff

From: Ted Cruz, Director TC
Jerry Ellig, Deputy Director JE
Office of Policy Planning

Re: OPP Competition Advocacy Report

In addition to reporting on results of advocacy over the past several months, we include a summary of advocacy efforts undertaken by OPP since June 2001, along with our subjective assessment of the extent to which we believe FTC involvement affected the outcomes.

Results of Recent Advocacy

- *Matter No. V020019: New York gasoline legislation*

  SUCCESS. Governor Pataki vetoed the encroachment bill on December 20. Veto message does not mention FTC and indicates that the Governor is not opposed in principle to this type of bill, but is concerned that it would unnecessarily constrain construction of new service stations in NY City.

  SUCCESS. Below-cost sales bill was pocket vetoed on February 4. Veto message indicates that the Governor opposed the bill because a price only slightly below cost that caused a de minimis injury to one competitor would be illegal; he prefers an approach that would permit some below-cost pricing and give the Consumer Protection Board authority to forbear from enforcement in certain situations. Retail gasoline dealers trade association complained prior to then that the FTC letter made a veto much more likely. New York's AG also opposed the bill.

- *Matter No. V020006: Joint Comments with DOJ on North Carolina Bar ethics rules requiring attorneys to supervise real estate loan closings, December 14, 2001 and March 29, 2002.*

  SUCCESS. On January 24, the State Bar adopted a pair of opinions that would eliminate the requirement that an attorney be physically present at closing and allow non-attorneys to obtain signatures and receive and disburse funds. This appears to allow non-attorneys to perform as many of the closing functions as North Carolina's statutory definition of the "practice of law" permits. The opinions include language suggesting that the State Bar believes that a traditional closing – handled by an attorney who is physically present – gives the consumer the best legal representation. We will continue to monitor the situation to assess whether these opinions have the effect of permitting competition from non-lawyers.

- *Matter No. V020021: Comment to FDA on advertising and 1st Amendment*

  SUCCESS AND PENDING. FDA's proceeding was a broad effort to solicit ideas on how to alter its approach to advertising regulation to comport with 1st Amendment principles, rather than a formal proceeding seeking comment on a specific proposed rule. On December 18, 2002, FDA announced an initiative to increase enforcement against bogus health claims by dietary supplements and also permit food manufacturers to make a greater range of truthful health claims. These actions are consistent with advice offered by the FTC in this and previous proceedings. We understand that FTC's ongoing program of research and commentary on food and drug advertising has provided support for the FDA's ongoing efforts to liberalize regulation and focus enforcement on misleading claims.

- *Matter No. V030003: FDA Trans-Fat Labeling*

  SUCCESS. FDA plans to conduct consumer research on the trans-fat footnote, consistent with FTC staff's recommendation.

- *Matter No. V030001: Revised RESPA regulations*

  PROGRESS, BUT PENDING. HUD has included FTC staff in discussions about how to change and test its proposed RESPA disclosures. Most recent version of the RESPA form is much clearer, and it moves the YSP disclosure to the second page (where it is not so prominent). FTC staff's impression is that our involvement has made a difference, in part because OMB has urged HUD to consider many of FTC staff's recommendations.

- *Matter No. V020015: Amicus brief in Powers et. al. v. Harris*

  UNSUCCESSFUL. A federal district court in Oklahoma ruled against all of the plaintiff's constitutional arguments. It is clear from the judge's decision that he does not believe that the Oklahoma law requiring casket sellers to have a funeral director's license protects consumers or furthers the goals of the FTC's funeral rule, but he does not believe the legislation is unconstitutional (an issue on which the Commission did not take a position). Our brief may still have a positive impact if the decision is appealed, as the Oklahoma decision contradicts a decision in a similar case in Tennessee.

- *Matter No. P964910: Comment on US Sentencing Commission Guidelines*

  UNSUCCESSFUL. Comment was voted out by the Commission on December 18. The Sentencing Commission declined to address white-collar fraud, other than securities fraud, but may do so in the future.

- *Matter No. V030004: Joint FTC/DOJ Comments to ABA on UPL*

  PENDING. Comment was voted out by the Commission on December 20. The ABA Task Force invited a representative of the FTC to present our views on February 7. Notably, the ABA's Antitrust Section recently voted out a comment largely agreeing with the joint letter's criticisms of the proposed definition, recommending that the ABA should focus on persuading consumers about the value that attorneys add and preventing nonlawyers from representing to consumers that they are lawyers.

- *Matter No. V030005: Testimony on Hawaii Gasoline Price Controls*

  PENDING. Jerry Ellig delivered this testimony on January 28. Ultimate policy impact will not be clear until the state legislature decides what it will do on price controls, divorcement, and rent cap for lessee-dealers. Officials from Hawaii's Department of Business, Economic Development, and Tourism have said our testimony was very helpful, and that previous consultations with FTC staff were of great assistance to them when they drafted a bill for the Governor this year that would repeal the divorcement law.

- *Matter No. V020017: Ohio physician collective bargaining*

  PENDING. Impact will not be known until we see what (if any) legislation on the topic is introduced in the Ohio House this year. Ohio newspapers report the bill is held up in the committee whose chairman requested our comments.

- *Matter No. V020023: Comments to Alabama Supreme Court on attorney advertising rules*

  PENDING.

- *Matter No. V020007: Declaratory Ruling by the Connecticut Board of Examiners for Opticians.*

  PENDING. CT Board has not yet made its decision. Bob Hubbard in the NY AG's office filed our CT comment with the Florida court handling the MDL litigation. J&J has told the court that it will no longer insist that its customers prove that they are in compliance with all state laws; it will only cut off a customer if state officials inform it that a customer is not in compliance. It will also permit customers to use passive verification of prescriptions. Bob believes that the judge would likely have ruled against J&J, and he credits the FTC's CT comments with influencing the judge.

Discontinued Advocacy Projects

- *Internet real estate brokerage*

  As staff was reviewing the National Association of Realtors' proposed guidelines that would have allowed individual brokerage firms to opt out of allowing MLS information about their listings to be available to customers of Internet realtors, the NAR decided not to issue the proposed guidelines.

- *Hawaiian buses*

  The public interest group that complained about Honolulu's restrictions on tour buses from unloading passengers at a popular park has withdrawn the complaint.

Potential Upcoming Advocacy Projects

- *E-Commerce Workshop Reports*

  OPP staff have begun drafting two reports based on October's workshop on barriers to e-commerce that could serve as background for advocacy in a wide variety of industries. One report will cover the entire workshop, and the other will focus specifically on online wine sales (on which Alan Wiseman and Jerry Ellig have conducted original empirical research, below)..

- *Study of Virginia's ban on direct shipment of wine*

  To better understand the impact of Virginia's ban on direct shipment of wine by out-of-state producers, Alan Wiseman performed a price comparison of popular wines available via the Internet and in Northern Virginia stores. Preliminary data analysis suggests that Northern Virginia consumers pay somewhat higher prices and have fewer varieties available as a result of the law. Alan and Jerry Ellig are now revising the study for consideration as a BE working paper and for possible publication in a scholarly journal.

- *Below-cost gasoline sales*

  We have received calls from reporters and read news articles indicating that several states are considering bills that would ban "below cost" gasoline sales or mandate a minimum markup on gasoline. It is unclear at this time whether FTC staff will be invited to evaluate any of these bills.

- *Texas Title Plant Regulations*

  A former president of the Texas Land Title Association has petitioned state regulators to relax costly requirements that title insurers create or lease a "title plant" – a facility replicating all land records in a county or other geographic area. A proceeding on this proposal is unlikely to occur until September, and we are assessing whether this is a good advocacy opportunity.

- *Real estate closing cost study*

  The Title Appraisal Vendor Management Association is conducting a member survey to gather data on the effects on closing costs of state laws or regulations that prohibit non-attorneys from conducting residential real estate closings. We will discuss with TAVMA the possibility of obtaining this data when the survey is done.

- *Automobile Franchising Study*

  Debra Holt in BE is conducting a literature-review study assessing the consumer impact of various aspects of state automobile franchising regulation and restrictions on Internet sales of automobiles.

- *Securities Market Data Study*

  The SEC is currently holding hearings on market structure issues that will include a discussion of appropriate regulations governing the consolidation and sale of price and transaction data. SEC will likely initiate a rulemaking next year to revise its market data regulations. We are assessing the most productive way to address the issue. Sharon Brown-Hruska, who produced a research paper for us on the topic, is now a Commissioner at the Commodity Futures Trading Commission.

Qualitative assessment of OPP advocacy results

The table below represents our subjective judgment of the extent to which FTC involvement influenced the outcome, based largely on conversations with decisionmakers and others involved in the specific issue. Percentages indicate our judgment based on numerous specific facts and circumstances in each case; they should be interpreted as ballpark estimates rather than precise quantifications.

Project	% Successful outcome	% probability that decisionmakers listened to FTC	% probability of same outcome w/out FTC advocacy
FDA DTC survey	100	100	50
FDA 1st Amendment	50	75	25
FDA Trans-fat	Pending		
Buspar brief	100	100	75 (merits) 0 (petitioning)
NC real estate closings	80	100	25
RI real estate closings	90	80	50
AK physicians	50	100	25
WA physicians	90	100	50
OH physicians	Pending		
VA gasoline	100	100	50
NY gasoline Encroachment Sales below cost	 100 Pending	 50	 50
HI gasoline price controls	Pending		
Rule 23	0	0	100
CT contact lenses	Pending		
AK contact lenses	100	100	10

OK caskets	0	10	100
AL attorney ads	Pending		
ABA UPL	Pending		
HUD RESPA	Pending		
Sentencing Commission	0	0	100
CA Copperweld	100	25	75

FDA DTC survey

OMB adopted FTC's suggestions and FDA performed survey. Since these were specifically FTC suggestions, it is highly likely that FTC participation was a necessary condition for getting these changes in the survey.

FDA - advertising and 1st Amendment

(Described above.)

FDA Trans-fatty acid labeling

(Described above.)

Buspar brief

Court accepted all 3 FTC arguments. FTC participation altered the focus of the case to explicitly address petitioning arguments.

NC real estate closings

(Described above.)

RI real estate closings

Legislation reached floor of Senate but was returned to a study committee, which has not been staffed and has not received any resources to conduct the study. This is a likely sign that the legislature will kill the issue. Sources familiar with the Rhode Island legislature say the FTC-DOJ letter had no effect on decision to get the legislation to the floor, because legislative leadership had committed to do so and was not going to violate that commitment. However, we are told that the letter did induce second thoughts and helped persuade legislators to send the bill back to the committee. DOJ has indicated that they have received similar feedback.

Alaska physician antitrust immunity

Legislation passed after language explicitly authorizing collective negotiation over prices was stripped from the bill. An Alaska legislator told OPP staff that the amendment was offered in response to the FTC letter.

Washington physician antitrust immunity

Legislation was referred to a study committee. A legislator told NW Regional Office that this occurred as a result of the FTC's letter.

Ohio physician antitrust immunity

(Described above.)

Virginia below-cost gasoline sales

Bill was defeated in committee after opponent distributed FTC letter during debate. Opponents credit FTC letter with swaying the votes necessary to kill the bill.

New York below-cost gasoline sales and retail encroachment

(Described above.)

Hawaii gasoline price controls

(Described above.)

Amendments to Rule 23

FTC recommendations were not adopted.

Connecticut contact lenses

(Described above.)

Alaska contact lenses

Alaska Attorney General reversed its previous position, declaring sua sponte that out-of-state contact lens sellers do not need an Alaska license to sell contacts to consumers in Alaska. The opinion heavily cites, and often borrows language from, FTC staff's Connecticut filing.

Oklahoma casket sales

(Described above.)

Alabama attorney advertising rules

No decision yet.

ABA Proposed uniform definition of unauthorized practice of law

No results yet.

HUD RESPA comments

(Described above.)

Comments on US Sentencing Commission Guidelines

(Described above.)

California Copperweld legislation

The chair of the Assembly's Business and Professions Committee asked the FTC staff for comments on the bill prior to a hearing. While we were preparing our analysis and consulting with the legislator, the bill's sponsor introduced an amendment removing the language that would have overturned *Copperweld*. It is unclear whether the knowledge that FTC staff were looking at the issue affected the legislator's decision. After discussions with FTC staff, California's Attorney General also switched his position and decided to oppose the proposal.

Peterson, Mark D.

From: Ted Cruz
Sent: Wednesday, February 05, 2003 8:46 AM
To: Ted Cruz
Subject: New Contact Info

Tomorrow is my last day at the Commission; I head to Austin Friday morning. It's been a real privilege serving with all of you. The Commission is a unique and special place, and I'm grateful for the many dear friends and wonderful colleagues I have had these past two years. I have learned a tremendous amount from each of you, and have enjoyed it immensely. It's been an honor, especially, serving as part of the terrific team that Tim has brought together, and working with the dedicated members of the Office of Policy Planning. I'm proud of all we were able to accomplish, and am looking forward to seeing the Commission's many more significant successes for consumers in the coming years.

My new contact info, as of February 10, is below:

Solicitor General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1824
(512) 474-2697 (fax)
ted.cruz@oag.state.tx.us

Take care, thank you for everything, and please keep in touch.

Ted.

Peterson, Mark D.

From: Ted Cruz <HQ.DCMAIL2.TCRUZ>
Sent: Wednesday, July 03, 2002 2:29 PM
To: Tim Muris
Cc: Christine Wilson; Jeanine Balbach; Maureen Ohlhausen
Subject: Eyes III

Attached is a brief memo Maureen prepared summarizing the conference call yesterday with Rubinfeld and Bond.

TC

<u>*Noerr* Talking Points</u>

- There is widespread, bipartisan agreement that an overly expansive interpretation of *Noerr* can insulate serious anticompetitive conduct from antitrust scrutiny.

- Everyone respects the First Amendment, but market participants should not be allowed to exploit governmental processes and "game the system" to achieve improper advantages.

- There are a number of areas where *Noerr* caselaw could be made more clear:

  - "Petitioning" – *Noerr* only applies to genuine petitioning of government; it does not extend to informational filings with government agencies exercising ministerial authority. "Petitioning" requires advocacy of a position before a governmental body with discretion to decide. (Tax return example.)

  - Misrepresentation – *Noerr* does not immunize deliberate misrepresentations in an adjudicatory context. *PRE*, which concerned defining "sham" lawsuits, should not be read to alter this basic principle.

  - Pattern – Under *California Motors*, filing a pattern of challenges without regard to the merits of any individual challenge is actionable under the antitrust laws. Again, *PRE* did nothing to alter this standard for "pattern" litigation.

Peterson, Mark D.

From: Ted Cruz <HQ.DCMAIL2.TCRUZ>
Sent: Monday, June 24, 2002 7:46 PM
To: Tim Muris; Jeanine Balbach
Cc: John Delacourt
Subject: Possible FDA Approaches

Attached, per CEA's request, is a one-pager on possible FDA approaches to anticompetitive conduct under Hatch-Waxman.

TC

Possible FDA Pharmaceutical ...

Possible FDA Steps to Promote Pharmaceutical Competition

The following proposals constitute two unilateral steps that the FDA could take to limit anticompetitive "gaming" of the Hatch-Waxman drug approval process, and thereby promote greater competition from generic drugs. Both possibilities have been discussed with FDA, and are currently under consideration.

I. Prohibit the Use of Multiple 30-Month Stays

A careful reading of the automatic stay provision of the Hatch-Waxman Act, in conjunction with the provision governing notice of certification, suggests that it is possible to read the statute as providing for only one 30-month stay. FDA does not currently read the statute in that manner, but, were FDA to reverse its position and decide to allow only one 30-month stay, there is a good argument that such an interpretation (which would certainly be challenged) would likely survive judicial scrutiny under *Chevron* deference.[1]

II. Prohibit the Listing of Product-by-Process Patents

The Hatch-Waxman Act requires the listing of patents claiming a drug product or a method of using a drug, but not the process making the drug. The Act's legislative history and the FDA's regulations also make clear that process patents are not intended to be listed. However, a number of drug companies have obtained and listed "product-by-process" patents where the drug substance A is old, but the process of making it by steps B and C is new. FDA could clarify in its regulations that product-by-process patents are, in effect, process patents, and so not listable. FDA is considering this argument as well.

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[1] The stay provision – § 355(j)(5)(B)(iii) – references the notice provision twice. In both instances it references a specific sub-part of the notice provision – § 355(j)(2)(B)(i) (hereinafter "2(B)(i)"). First, it states that the NDA filer may bring a patent infringement action within 45 days of receipt of "notice provided under paragraph 2(B)(i)." Second, it describes the 30-month stay as "beginning on the date of the receipt of the notice provided under paragraph 2(B)(i)." The notice provision, in turn, arguably draws a distinction between an original certification (i.e., a certification relating to a patent listed in the Orange Book at the time the ANDA was filed) and an amended certification (i.e., a certification relating to a late-listed patent). Original certifications are covered by sub-part 2(B)(i) (to which the 30-month stay provision refers), while amended certifications are covered by a separate and distinct sub-part – § 355(j)(2)(B)(iii) (hereinafter "2(B)(iii)"). The automatic stay provision's specific reference to sub-part 2(B)(i) therefore suggests that a 30-month stay can be read to be available only when a patent infringement suit is filed in response to an original certification. A difficulty with this interpretation, however, is that it could be subject to manipulation by generics; if generics deliberately filed an ANDA without a certification, and then amended to include a certification, there is no straightforward reading that ensures that at least one 30-month stay would be available. FDA is considering these arguments currently.

Peterson, Mark D.

From: Ted Cruz <HQ.DCMAIL2.TCRUZ>
Sent: Wednesday, July 18, 2001 4:12 PM
To: William Kovacic; Alden Abbott; Debra Holt; John Delacourt
Cc: William Cohen
Subject: Fwd: State Action Outlines

Backgournd outlines for tomorrow's meeting.

TC

State Action Outlines

Peterson, Mark D.

From: Ted Cruz <HQ.DCMAIL2.TCRUZ>
Sent: Friday, July 27, 2001 9:56 AM
To: Tim Muris; William Kovacic; Alden Abbott; Debra Holt; David Scheffman; Ernest Nagata; John Delacourt; Joseph Simons; Neil Averitt; William Cohen; Robert Davis
Subject: State Action meeting

Attached are background materials for the meeting today at 3 pm in the Chairman's office. The first, is a brief discussion outline for this afternoon. The second is a more detailed background paper, prepared by the group, on some of the issues to be discussed. Review of the background paper is not necessary before today's meeting.

See y'all at 3.

Ted.

Parker Discussion Outline.wpd Parker summary 7-26.wpd

PARKER v. BROWN STATE ACTION

Possible Improvements in the Law

Clear Articulation

· Require authorization and intention to displace competition (not mere foreseeability); demand that anticompetitive conduct be contemplated

· Across-the-board, or
· For private actors (limit *Hallie* to municipalities), or
· For per-se illegal private conduct

· Urge sliding scale, depending on severity of conduct

· Require compulsion for private parties (attack *Southern Motor Carriers*)

· Require, at a minimum, anticompetitive conduct that ordinarily occurs, routinely occurs, or is inherently likely to occur under a given regulatory regime for private parties (less frontal attack on *Southern Motor Carriers*)

· Challenge immunity where there are substantial interstate spillovers (perhaps file jointly with neighboring state AG)

· Advance a market participant exception to political subdivision's immunity

· For per se illegal private conduct, require a Consumer Impact Statement; deem failure to sign conclusory as to lack of clear articulaton.

Active Supervision

· Require active supervision for any government agency including market participants

· Require active supervision for any government agency including market participants, unless a member of the state AG's staff is part and defends competition.

· Require minimum procedural requirements, such as public hearing and written decision

· Require municipalities (supervising private actors) to report to the state

<u>Potential Areas for New FTC Actions</u>

- Eyeglasses
- Auto Brokers
- Auto Dealer Regulations
- Ticor II
- Ticor Task Force
- Airport Gates
- Exclusive Taxicabs at Airports
- Pre-need Funeral Regulations
- Garbage
- Teacher certification
- Hospital accreditation
- Cable TV
- Advocacy: Partner with State Think Tanks - Cost/Benefit Analysis

PARKER v. BROWN STATE ACTION

Current State of the Law

I. State of the Law: State as Sovereign

1. The Supreme Court has made it clear that the actions of a state legislature (*Parker*) and of a state supreme court acting in a legislative fashion (*Bates*) are those of the state acting as sovereign and are covered by state action immunity without need for further inquiry.

2. The Supreme Court has held that cities are ineligible for "sovereign" treatment, *City of Lafayette*, but otherwise has not ruled on other questions of sovereignty.

3. Circuit court law on executive departments is not extensive, but what there is uniformly treats full-fledged executive departments as sovereign arms of the state.

4. The law is less clear as to lesser state instrumentalities. Generally, but not always, "state" status has been denied (unless the instrumentality merely recommends action, and the state is the actual decision maker).

- Most recent cases have found that regulatory boards are not the state.
    - Special purpose instrumentalities are generally denied "state" status.

5. Key factors for analyzing the status of lesser state instrumentalities include:

- whether the instrumentality's scope is state-wide or local, and
- the degree to which the instrumentality is subject to state control

Other factors have included the nature of the instrumentality's formal organization, the status of its employees, and the source of its funding.

6. Areeda and Hovenkamp suggest the following decisional rule:

> Presumptively we would reserve the "state itself" designation only for government agencies *both* that are statewide in their jurisdiction and that have no particular susceptibility to capture by a particular business group. This would certainly include the legislature, state supreme court, and governor's office. It would *never* include agencies that are dominated by members of the regulated industry and not directly answerable through the electoral process . . . . It would not include municipalities, counties, school districts, or other regulatory authorities with less than statewide jurisdiction.

7. By and large, the cases have conformed to this decisional rule.

II. State of the Law: Clear Articulation

1. Under the first prong of the *Midcal* standard, the challenged restraint must be one "clearly articulated and affirmatively expressed as state policy" (*Midcal*). Several of the Supreme Court's cases (*Boulder, Hallie, Southern Motor Carriers,* and *Omni)* give general guidance:

- Compulsion is unnecessary: "the federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct." (*Southern Motor Carriers*)

- Nor is there need for express, specific authorization for the challenged conduct (*Southern Motor Carriers*) or an express statement that the state expected the actor to engage in conduct that would have anticompetitive effects (*Hallie*); however, a general grant of power to enact ordinances is not sufficient. (*City of Boulder*)

- What is needed is a clearly articulated and affirmatively expressed state policy to displace competition: the appropriate question is whether "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure."(*Southern Motor Carriers*)

- The test can be stated in terms of foreseeability: has the state delegated "the express authority to take action that foreseeably will result in anticompetitive effects"? (*Hallie*) Is "suppression of competition . . . the foreseeable result of what the statute authorizes"? (*Omni*)

- The Court has discussed foreseeability in varying terms: *Hallie* spoke of what the legislature had contemplated and what logically would result from the delegated authority; *Southern Motor Carriers* found intent to displace competition from the presence of rate regulation and a regulatory structure in a particular field; *Omni* concluded that competitive disadvantages to entrants "necessarily" followed from the nature of zoning regulation.

2. Supreme Court law, however, leaves many open questions. Standards articulated by the courts of appeals have varied greatly in the nature and intensity of the inquiry required.

- Several cases have found clear articulation from general authority to engage in business; the Fifth Circuit's *en banc* opinion in *Hammond*, however, may herald a move away from this.

- Several cases have found clear articulation from the presence of a regulatory scheme in the field at issue; some courts have been satisfied with the presence of a general regulatory scheme; others have looked for regulation of the conduct at issue.

- Some courts have tended to assume that authorized conduct is foreseeable; other courts have looked more to the likelihood that there would be anticompetitive conduct; still others have focused directly on whether there was an intention to displace competition.

- In most instances, rulings have not appreciably differed between settings where the state has been acting as a regulator and settings where the state has been a market participant.

3. The quality of court of appeals decision making in this area has been uneven. In the past 5 years two courts have reversed initial panel decisions following submission of amicus briefs by the Department of Justice, in one instance joined by the FTC.

III. <u>State of the Law: Active Supervision</u>

1. The "active supervision" prong of *Midcal* seeks to determine "whether the State has exercised sufficient independent judgment and control so that the details" of the restraint "have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor.* The requirement applies to private actors but not to municipalities. *Hallie.*

2. There is a gray area with respect to the kinds entities to which the active supervision requirement may or many not apply, consisting of hybrid state or local entities with a combination of some governmental characteristics and the active participation of private actors, such as regulatory boards and special purpose (*e.g.*, hospital) authorities. Application of the active supervision requirement to these entities is determined case-by-case, based on an examination of the public/private characteristics of the entity. That examination is not always as rigorous as it might be.

3. The test for sufficiency of active supervision requires that state officials "have <u>and exercise</u> power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*; *Ticor.* A "negative option" procedure does not constitute active supervision if the state does not conduct a meaningful substantive review. *Ticor.*

4. Recent circuit court rulings on sufficiency of active supervision generally have been consistent with *Patrick* and *Ticor.* Serious problems are not apparent.

5. As suggested by *Ticor,* the kind and degree of supervision required depend on the nature of the conduct and the amount of discretion private actors have under the regulatory scheme.

6. Private price agreements particularly require the state's imprimatur. *Miller v. Oregon Liquor Control Commission,* 688 F.2d 1222 (9th Cir. 1982) (requiring review for reasonableness of prices), *subsequently withdrawn and then re-filed with order in Miller v. Hedlund,* 813 F.2d 1344 (9th Cir. 1987). As in *Ticor,* withholding of key information from a regulatory commission precludes a finding of active supervision. *Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996).

7. If the regulatory scheme leaves little discretion to private actors, little supervision is required. *See, e.g., Municipal Utilities Bd. of Albertvillle v. Alabama Power Co.,* 934 F.2d 1493 (11th Cir. 1991). At the extreme, active supervision may not be required if governmental actors are the effective decision maker and private actors have no discretionary authority with respect to the challenged conduct. *Zimora v. Alamo Rent-A-Car, Inc.,* 111 F.3d 1495 (10th Cir. 1997).

8. If a state or local governmental entity would be entitled to state action immunity for the alleged conduct, private actors working in concert with the entity or under its direction may be entitled to share the immunity without a showing of active supervision. *Zimora v. Alamo Rent-A-Car, Inc.,* 111 F.3d 1495 (10th Cir. 1997); *Cine 42nd Street Theater Corp. v. Nederlander Organization,* 790 F.2d 1032, 1048 (2d Cir.1986).

9. Judicial review may constitute active supervision, *Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co.* 981 F.2d 429 (9th Cir.1992), but the court must have jurisdiction to review the specific conduct at issue. *Snake River Valley Electric Ass'n v. PacifiCorp*, 238 F.3d 1189 (9th Cir. 2001). State court review for procedural error and sufficiency of evidence does not constitute active supervision; *Patrick* requires substantive review. *Shahawy v. Harrison,* 875 F.2d 1529 (11th Cir. 1989); *Pinhas v. Summit Health, Ltd.,* 894 F.2d 1024 (9th Cir. 1990).

Possible Improvements in the Law

I. Possible New Approaches: Clear Articulation

1. Add Rigor to Clear Articulation Requirement

- Possible Formulations: a two-prong standard requiring:

    i. state authorization for the conduct at issue and

    ii. state intention to displace competition in the manner at issue.

The state need not articulate an express policy displacing competition in the manner at issue. Rather, the state's intention to displace competition could be drawn from the words of the statute, the legislative history, the nature of the authorized conduct (*e.g.*, the extent and pervasiveness of the relevant regulatory regime), and the likely consequences of the authorization in the given economic context.

- Relevant Precedent: the approach is consistent with Supreme Court law; it can be viewed as building upon the thinking in *City of Boulder* to interpret the foreseeability standard stated in *Hallie* and *Omni.*

- Advantage: The two-prong structure would require courts to look beyond mere authority. Formulating the second prong in terms of displacing competition would focus courts on the relevant issue and avoid problems that have flowed from making foreseeability the operative inquiry.

2. Add Rigor to Clear Articulation Requirement in Settings Where Private Actors are Involved

- Rationale: same as cited in *Hallie* for requiring the two-pronged *Midcal* test for private actors: "Where a private party is engaging in the anticompetitive activity there is real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement."

- Possible formulation: the two-pronged standard proposed in item 1, based on authority and intent to displace competition in the manner at issue (leaving foreseeability to municipalities only).

- Relevant Precedent: *Southern Motor Carriers*, which addressed private conduct, spoke in terms of displacing competition; it did not mention the term "foreseeability." The Supreme Court cases that have used foreseeability language, *Hallie* and *Omni*, both involved conduct of municipalities.

- Alternative formulation: An alternative would be to revert to a requirement that the state compel the conduct at issue, at least in cases involving private actors. Although there is a basis for this in the Court's early decisions,[1] *Southern Motor Carriers* squarely rejected a compulsion standard, even for private actors.[2] Re-establishing a compulsion standard would require a change in Supreme Court law.

3. Add Rigor to Clear Articulation Requirement for Conduct Otherwise Per Se Illegal

- Rationale: state should not be presumed to have intended to condone egregiously harmful conduct without a clear demonstration of that intent

- Possible Formulations:

  1. the two-pronged standard proposed in item 1

  2. alternatively, the standard could based on the formulation advanced by the FTC but

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[1]*See Goldfarb*, 421 U.S. at 791 ("Anticompetitive activities must be compelled by direction of the State acting as sovereign."); *cf. Cantor*, 428 U.S. at 598 (finding no immunity where there was no reason to believe that the regulatory scheme could not function effectively without the challenged conduct).

[2]*See Southern Motor Carriers*, 471 U.S. at 60 ("The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties.").

rejected by the 11th Circuit in *Lee County*: treat as foreseeable an anticompetitive effect that ordinarily occurs, routinely occurs, or is inherently likely to occur; rejection in a merger context might not forestall acceptance in a *per se* context

- Relevant Precedent: *Ticor*'s discussion of active supervision indicated that greater state involvement may be required before immunizing price fixing, as opposed to less egregious conduct. *See* 504 U.S. at 639 ("[o]ur decision should be read in light of the gravity of the antitrust offense").

II. Possible New Approaches: Active Supervision

1. Identifying Entities Subject to Active Supervision: There is a gray area with respect to the kinds of entities to which active supervision may or many not apply, consisting of hybrid state or local entities with a combination of some governmental characteristics and the active participation of private actors, such as regulatory boards and special purpose (*e.g.*, hospital) authorities. Application of the active supervision requirement to these entities is determined case-by-case, based on an examination of the public/private characteristics of the entity.

Possible Formulations of a Better Rule:

A. The active supervision prong of *Midcal* applies to any entity consisting in whole or in part of market participants.

- Areeda & Hovenkamp, ¶ 227b at 501, "would presumptively classify as "private" any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market."

- The active supervision must be performed by a governmental official/entity outside the entity in question.

- Rationale: to protect against "capture" or conspiracy involvement of governmental representatives within the entity. (But *Omni* says that official involvement in conspiracy is a matter for state/local government and should not become enmeshed in an antitrust case.)

- Is supervision by a municipality sufficient? Since a municipality's immunity is derivative of the state's immunity under *Parker,* it is arguable that there should be some linkage that provides accountability to the state, perhaps a reporting requirement.

B. Alternative rule: In order to qualify for exemption from the active supervision requirement, an entity that includes market participants must include as an overseer a designated representative of the state attorney general [who is competent to assess restraints on competition and whether the group's action is within the contemplation of state policy].

- Note: This rule could place a significant burden on offices of state attorneys general, particularly if applied to hybrid entities at the local level. Might also be criticized as imposing a requirement inconsistent with principles of federalism.

2. Procedural Requirements

- The FTC in *Ticor* argued that a supervising agency should be held to certain minimum procedural requirements, such as holding a public hearing and issuing a written decision explaining its actions.

- The Supreme Court declined to prescribe particular requirements, and no lower court has appeared willing to impose such requirements.

- Nonetheless, such requirements would provide greater assurance that a meaningful substantive review has been conducted.

III. **<u>Possible New Approaches: Sliding Scale</u>**

The current over-breadth of the state action doctrine is arguably attributable to the fact that the limitations on the extent to which quasi-official bodies can engage in anticompetitive conduct have been applied uniformly to vastly different factual circumstances. Both the clear articulation and active supervision requirements have been weakened by opinions addressing factual circumstances in which strict observance of these formalities was unduly burdensome or otherwise inappropriate. One way the Commission could combat this erosion of the clear articulation and active supervision requirements is to argue in favor of a sliding scale to guide their application.

Such a scale could take many forms, but the Supreme Court's framework for evaluating state action that affects a constitutional right could provide a useful model. To oversimplify dramatically, depending on the factual circumstances, the Court might subject the state action at issue to strict scrutiny, intermediate scrutiny, or rational basis scrutiny. The degree of scrutiny to which the Court elects to subject a particular state action can, of course, have a significant impact on the final outcome of the case.

A similar framework, when used to evaluate anticompetitive practices purportedly subject to the state action doctrine, could promote more rational results. The key factors to consider would be the nature of the anticompetitive practice and nature of the party engaged in that practice. If the practice at issue is price fixing, for example, a strongly articulated policy and close supervision by the state would be required to confer antitrust immunity. Likewise, if the party engaged in the practice has only a loose affiliation with the state – e.g., a quasi-official body dominated by interested market participants – strong enforcement of the clear articulation and active supervision requirements would be warranted. An initial summary of such a framework might look something like this:

Degree of Clear Articulation/ Active Supervision Req'd	Nature of Anticompetitive Practice	Nature of Party Engaged in Anticompetitive Practice
strong	per se violation	quasi-official body dominated by interested market participants
moderate	"quick look" rule of reason violation	quasi-official body
weak	rule of reason violation	municipality

The adoption of this, or a similar, framework would have a number of advantages, including the following:

- Narrows the scope of the current state action doctrine. The current state action doctrine is essentially a lowest common denominator rule. The federal courts have – quite reasonably, in many instances – interpreted the clear articulation and active supervision standards as requiring very little in the way of real antitrust oversight when the practice at issue has minimal competitive impact or the party engaged in the practice is clearly an arm of the state. By applying the standards developed in these cases to all practices purportedly covered by the state action doctrine, however, the courts have eroded their function as an effective limitation. Adopting a sliding scale will provide the courts with an exit from this one-size-fits-all paradigm and its corrosive effect on existing limitations to the state action doctrine.

- Distinguishes unfavorable precedent. A sliding scale is not a silver bullet, but it would provide potential grounds on which to distinguish some of the more expansive judicial interpretations of the state action doctrine. For example, in Town of Hallie, et al. v. City of Eau Claire, 471 U.S. 34 (1985), the Supreme Court held that the clear articulation standard merely requires that anticompetitive conduct be a foreseeable consequence of a state statute, rather than that the statute compel the anticompetitive conduct. Under a sliding scale, however, one could argue for the resurrection of the compulsion standard on the grounds that the practice at issue in Town of Hallie was tying, rather than a consensus per se practice like price fixing, market allocation, or output restrictions. Sandy River Nursing Care, et al. v. Aetna Casualty, et al., 985 F.2d 1138 (1st Cir. 1993) could be distinguished on similar grounds. In Sandy River, the First Circuit held that price fixing by regulated insurance companies was immunized by the state action doctrine because the statute at issue expressed a clearly articulated "uniform approach to ratemaking." Under a sliding scale, one could argue that such a minimal clear articulation is not generally sufficient to immunize price fixing, but sufficed in Sandy River because there was little risk of competitive harm. Although the insurers were permitted to fix prices, they did so in a market in which government-established price caps had already been imposed.

- Provides clear guidance to the states. One potential objection to any effort to narrow the scope of the state action doctrine is that states will be forced to conduct a searching and burdensome antitrust inquiry before delegating even the most minimal policy responsibilities to municipalities or quasi-official bodies. A carefully crafted sliding scale will eliminate this concern by making it clear that an in-depth inquiry – potentially involving consultation with the Commission – is only required when the practice at issue is likely to have a significant anticompetitive impact (i.e., if undertaken by a private actor, the practice would be a per se violation) or the party engaged in the practice is only loosely affiliated with the state. In other circumstance, a less clear articulation and more minimal supervision may suffice.

- Places reasonable limitations on the federal role. Another potential objection to any effort to narrow the scope of the state action doctrine is that the federal government will use purported antitrust concerns as a basis for consistently interfering in policy areas reserved to the states. For example, an opponent of the Task Force's proposal to require the filing of Consumer Impact Statements might argue that the Commission could use the process of preparing and filing such statements to discourage, through delay and administrative burden, disfavored policy initiatives, whether they posed legitimate antitrust concerns or not. The adoption of a well crafted sliding scale, however, would make it clear that filing of such a Statement is only required when antitrust concerns are paramount. Such a step could be key to winning support for a Consumer Impact Statement proposal, as it is much more likely to be accepted as a situation-specific requirement than as a new component of all policy making involving a party other than the state itself.

IV. Possible New Approaches: A Possible Market Participant Exception

- The possibility of a market participant exception was suggested by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365 (1991), where the majority stated in dictum that *Parker* immunity "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."

- Chief Justice Burger's concurrence in *Lafayette* also suggested a market participant exception. The Chief Justice would have limited the Court's holding in that case to municipalities acting in a proprietary capacity, and he would have imposed a stricter standard to qualify for immunity. (However, he apparently would have given municipalities absolute *Parker* immunity for their non-proprietary activities.)

- Areeda & Hovenkamp, ¶ 224e3, agree that ordinary rules pertaining to business competition should apply when a governmental entity participates in a market in competition with private firms (but note that this comprises a narrow class of cases).

- No court has yet taken up the Court's invitation. The Federal Circuit and Ninth Circuit appear willing to entertain the possibility of a market participant exception; the Eighth Circuit has declined to take the lead in adopting such an exception; and other circuits have been somewhat hostile to the idea (in particular, the Eleventh).

- A proprietary/governmental distinction has been rejected by the Supreme Court in another context (but the case predates *Omni*). Areeda & Hovenkamp, ¶ 224e3 at 435, note that the distinction between proprietary and non-proprietary municipal activities "is widely thought to have proved unworkable in identifying appropriate areas of municipal tort liability."

<u>Possible Formulations</u>:

1. State action immunity under *Parker* is not available to a political subdivision of a state acting in a proprietary capacity as a market participant.

2. Alternative formulation: To qualify for state action immunity under *Parker,* a political subdivision of a state acting in a proprietary capacity as a market participant must demonstrate both

   (a) that the conduct was undertaken pursuant to, and authorized by (a foreseeable result of) a state policy to displace competition with regulation, and

   (b) that an implied exemption from federal antitrust law is necessary in order to make the state's regulation work, and even then the conduct would be exempt only to the minimum extent necessary. [Chief Burger's formulation in *Lafayette*]

V. __ <u>Possible New Approaches: Spillovers</u>

1. Actions taken by or under the auspices of one state could have anticompetitive consequences in another state. A wide array of commentators have suggested that state action immunity doctrines inadequately address such spillovers.

   - Thomas Jorde comments: "The state action doctrine . . . might be refined by the courts to make clear that state regulation producing substantial spill-over costs is not exempt from the antitrust laws. Parker's solicitude for the regulatory activities of states need not be read to extend to the extrajurisdictional exportation of substantial costs. . . . Moreover, from the perspective of economic federalism values, spill-over costs are contrary to the values of citizen participation and governmental efficiency. State regulations producing such costs, therefore, do not deserve deference."

   - Robert Inman and Daniel Rubinfeld argue: "[T]here appears to be no protection for political participation at the national level in *Midcal*. As a consequence, nonresidents affected adversely by a state's regulation at present have no direct say in its passage and remain exposed to any resulting monopoly spillovers." The authors urge requiring antitrust review of "any state regulation with significant monopoly spillovers where the affected out-of-state consumers did not have a direct say in the approval of the regulation."

- Frank Easterbrook has urged an approach to state action immunity permitting states to adopt "*any* regulations they choose, at any level of government they choose, so long as the residents of the state that adopts the regulation also bear the whole monopoly overcharge."

2. There is virtually no support in the case law for limiting state action immunity based on interstate spillovers. The courts have taken note of potential harm from spillovers from one municipality to another, but they have not taken account of spillovers between states. Indeed, *Parker* itself epitomized a context involving substantial interstate spillovers.

3. Interstate spillover considerations are more likely to provide guidance for case and advocacy selection than to serve as a basis for self-standing legal argument. It also might be possible to use amicus filings to encourage courts to begin taking some cognizance of the considerable spillover scholarship, perhaps beginning in dicta or in secondary holdings in contexts where this would supplement other, established grounds for rejecting state action immunity. Direct recognition of spillover considerations might eventually evolve.

VI. <u>Possible New Approaches: Consumer Impact Statement</u>

From a public choice perspective, much of the anticompetitive conduct occurs because those harmed are diffuse, and unaware of the injury, whereas those benefitted are concentrated and politically mobilized. On that view, definition and clarity are the enemies of state anticompetitive programs.

The FTC could try to provide some of that clarity. In an appropriate test case, the FTC could send a Consumer Impact Statement to a state governor considering signing anticompetitive legislation. That statement would (1) state explicitly that the legislation in question conflicts with and is intended to immunize private parties from the federal antitrust laws, and (2) estimate the consumer harm that will likely flow therefrom.

If the governor signs the statement, we have at least increased political accountability. If, as is almost certain, he refuses to sign, the FTC could deem that refusal as affirmative indication that the state does NOT intend to displace competition, and therefore has not clearly articulated an intent to displace antitrust liability. If the FTC's intended presumption were included on the face of the original Consumer Impact Statement, the presumption would be all that more reasonable.

This approach is obviously not without risks, political and legal, but it could serve to focus the debate significantly. By increasing the political accountability of state actors, and, in particular, by making explicit which actors are ultimately responsible for anti-consumer decisions, it reflects themes the Supreme Court (Justice O'Connor in particular) has emphasized repeatedly in recent federalism decisions. And it provides a sound basis for not accepting implied and ambiguous state repeals of the federal antitrust laws. Moreover, if the test case were successful, plans could be made to replicate it on a wider basis.

History of Significant FTC Actions

Eyeglasses I and II

The Federal Trade Commission has studied the optometry industry since the mid 1970s. The studies examined the effects of advertising and commercial practice restrictions on the price and quality of output in the industry as well as the effects of state laws prohibiting contact lense fittings by opticians. The results of those studies were in general that the restrictions raised prices without improving quality. The actions of the Commission as a result of the studies included a pair of rule-making proceedings that lead to rules prohibiting restrictions on: (1) non-deceptive advertising; (2) the ability of consumers to receive their eyeglass prescriptions; (3) optometrists affiliating with non-optometrists; (4) optometrists locating in commercial settings; (5) optometrists opening branch offices and (6) optometrists using non-deceptive trade names. The first two rules were put in place in "Eyeglasses I" and the last four were put in place in "Eyeglasses II." The advertising portion of Eyeglasses I is now addressed through litigation rather than through a rule, and the Eyeglasses II rules were vacated as being outside of the Commissions's jurisdiction (the rules declared certain state statues unfair). However, none of the substantive findings of the Commission were rejected.

Over the last 20 years, the Commission has successfully worked with some states to implement pro-competitive rules that are similar to those proposed in Eyeglasses I and II.

The *Ticor* litigation

The *Ticor* litigation involved a challenge to rate-setting agreements among title insurance companies on the fees that they would charge for background title searches. Such agreements were authorized by state law but, in some particular cases, were not actively supervised. The generally successful outcome in this case suggests that the Commission can effectively litigate in the state-action arena when it focuses its inquiry on narrowly defined and carefully selected targets. The outcome also suggests, however, that reviewing courts may decide such cases on similarly limited grounds, leaving the more general policy issues still unresolved.

The litigation in *Ticor* was carefully focused. The FTC looked only at agreements on the fee for the underlying title examination, thus avoiding other areas that might constitute the "business of insurance." The agency was also careful to concentrate on just the few states that most clearly failed to provide active supervision of these agreements. Out of fifty possible states, the agency brought initial complaints against thirteen. Five of those were dropped before the matter was decided by the ALJ; two more were dropped at the suggestion of the ALJ; and two more were dropped during the certiorari process. That left four states as respondents when the matter reached the Supreme Court. The Court found either that those states had acted improperly, or that the matter should at least be considered on remand, so that the focused case was in fact successful. On the other hand, the Court's decision did not fully clarify the general standards of conduct that would apply to other, more typical states.

Taxicab litigation

The Commission opened a group of investigations into municipal regulation of taxicabs. Two of these resulted in complaints, alleging that the municipality conspired with and facilitated conspiracy among taxicab owners, and that this resulted in agreement on matters like fares and entry. Both complaints were dismissed before trial, as a result of further state action. In the case of New Orleans, the state legislature passed an aggressive supplemental statute, explicitly declaring a policy that municipalities should regulate taxicabs and should be exempt from federal antitrust liability while doing so. See 105 F.T.C. 1 (1985). In the case of Minneapolis, the city government took a more conciliatory tack, amending its code to increase the number of taxi licenses available. 105 F.T.C. 304 (1985). In each case the Commission determined that continuing the litigation would then not be in the public interest. Each of these outcomes can be thought of as desirable to some degree -- either loosening the competitive restrictions, or at least forcing the state to be explicit about its anticompetitive policy choices. They therefore stand as further examples of the practicality of focused litigation. On the other hand, the two cases also suggest that litigation in this area can be affected by events and tacit compromise proposals from the political world, thus creating an extra layer of complexity.

Advocacy letters on New York milk regulation

The agency's six advocacy letters on New York milk regulation gave a particularly pointed, quantitative analysis on the costs and benefits of a program that limited entry into milk distribution. This helped to garner press coverage and raise the public awareness of an issue where consumers were being seriously harmed. The letters may have also contributed, however, to a period of strained relations between the agency and Congress.

The milk letters were unusual in two respects. First, they involved the FTC in conducting a cost-benefit analysis of a state regulation, rather than having us present the state with relevant information that we already had in hand from earlier work. Second, some of the letters forced their conclusion to the attention of a reluctant state government, rather than having us respond after our views had been actively sought out by someone in that government. One letter had a particularly high profile since it was sent directly from the FTC Chairman to the Governor. The aggressive approach adopted in these letters was probably useful insofar as it provided a model for the kind of internal cost-benefit review that states should adopt. On the other hand, these letters coincided with, and perhaps contributed to, a period of generally estranged relations with Congress. It is possible that the state government sought support from the New York congressional delegation, and that other delegations grew concerned that the agency would interfere with state policies that reflected arcane political as well as economic considerations.

Notwithstanding that, however, these difficulties can probably be diminished by suitable exercises of tact, such as by ensuring a prior request for our views, or by giving prior notice to the state delegation. On balance, the New York experience suggests that we should not be deterred from writing aggressive letters in important cases, but that a more reliable general policy may be to find ways to induce states to conduct real cost-benefit analyses themselves, rather than trying to routinely conduct such analyses from here.

Potential Areas for New FTC Actions

Eyeglasses

The eyeglasses area could yield several potential new cases.[3] Since 1990, Commission staff have commented on a number of statutory and regulatory schemes regarding optometry. In 1997, for example, Gary Kennedy of the Dallas Regional Office appeared before the New Mexico Board of Optometry to discuss certain revisions of the rules governing optometry. Some of the proposed rules prevented optometrists from entering into any business arrangements that had "certain prohibited features." Other rules appeared designed to hinder coordination between an optometrists and other professionals. The Board itself is composed of six people, four of whom are practicing optometrists who were appointed by the governor from a list proposed by "state organization affiliated with the American optometric association."

A review of the optometry practice rules in New Mexico, for example, shows that some of the restrictions may be currently in effect. For example, NMAC 16.16.21.9 prohibiting unprofessional conduct includes prohibitions on "splitting fees"as well as the making of any claims of "professional superiority"without allowing non-deceptive claims. Additionally, NMAC 16.16.17.8 regarding advertising might be read as limiting the ability of an optometrist to adopt a non-deceptive trade name. An optometrist's ability to locate a practice is limited by NMAC

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[3]As part of our systematic review of Commission rules, BCP has been conducting an analysis of the market for prescription eyeglasses and contact lenses. The rule under review requires an optometrist or ophthalmologist to provide a patient, at no extra cost, with a copy of the patient's eyeglass prescription immediately after the eye examination is completed. It does not require the release of a contact lens prescription to the patient after an eye exam. Some commenters argued for an extension of the rule to contact lense prescriptions so that consumers could shop around for the best prices. There is little evidence available on price differences and the potential for consumer harm. The few price surveys conducted have limited value because of methodological problems. One found a price difference of around $33 per year between mass merchant discounters and traditional sources. Another found price differences of up to $100 per pair. A small ongoing survey being conducted by BE finds price differences of up to $168 per year between optometrists and discounters. This (small) survey also suggests that the prices may be systematically higher in Virginia than in Maryland.

16.16.16.8. Finally, a contact lense prescription may only be released by an optometrist to another optometrist or to an ophthalmologist (NMAC 16.16.19.11) and "only a licensed optometrist or physician may prescribe, dispense, adapt, employ, modify, provide, sell or fit contact lenses in New Mexico" (NMAC 16.16.19.8).

More research is required to determine which other states have restrictions like those described above and to find those that are promulgated by independent bureaus rather than by the state itself.

Rules Prohibiting Auto Brokering

There are a number of different types of services that are "brokering" new automobile sales. First, a broker might receive a customer’s auto requirements and then solicit competitive bids from dealers. Second, buyers clubs and referral services get discounted prices for vehicles through advance volume agreements with dealers. Finally, credit unions might provide similar services. Each of these services help consumers by making price competition more effective either by lowering search costs or by allowing customer access to volume discounts.

There appears to be at least four types of restrictions that are imposed on auto brokering:

1. outright prohibition,
2. open dealing requirements that might subject dealers that work with brokers to punishment from other dealers (depending on the provisions of the open dealing requirements, they might also be a facilitating practice for price fixing if the requirements include price publication requirements),
3. requiring the broker to describe itself as a used car dealer by defining a used car as any car sold by a dealer, and
4. limitation on advertising by brokers, particularly limitation on brokers describing themselves as brokers on particular makes of cars.

Whether restrictions like those described above are candidates for case generation depends on the authority promulgating the restriction. Often the restrictions are found in legislation or proposed legislation. See e.g., Letter to the Honorable Rick McConnell from C. Steven Baker (2/22/1994), Letter to the Honorable Ted Weggeland from Jeffrey Klurfeld (4/29/1994) (both describing state laws restricting new vehicle brokering services). Similar rules appear to be statutory in Texas as well. However, "New Motor Vehicle Boards" do exist and might be the source of such restrictions in other cases. For example, California has a board that is composed of 9 members, including 4 new car dealers and which has the power to adopt rules and regulations. Pennsylvania has a similar Board.

The rules do more than hinder the business of brokering sales of new cars and trucks and harm consumers by limiting price competition at the retail level. Because they interfere with the development of new organizations that retail new vehicles, the rules may hinder efficiency improvements in that area. For example, an additional question is raised by the possibility that these rules may interfere with plans by the car manufacturers to use the internet to market their cars. As with the eyeglasses cases, more research is required to determine which states have restrictions like those described above and to find those that are promulgated by independent bureaus such that state action issues are raised.

State Auto Dealer Regulation

On May 8 of this year, Commissioner Leary spoke of what he termed his preliminary views on state dealer legislation. He noted that in the last year 29 bills in 24 states have been signed into law further regulating the relationship between auto manufacturers and their dealers. These laws appear to hinder the transformation of an industry from one that must attempt "to sell products they have already made" to one where they will be able to "make products they have already sold." Such a transformation, caused by the use of the Internet by manufacturers to communicate directly with consumers, could lead to a more efficient industry.

Commissioner Leary also noted that such a use of the Internet by auto manufacturers threatened dealers who then appeal for new laws to restrict internet marketing by manufacturers. The dealers' lobbying is ordinarily protected by Noerr and the laws by Parker, but the end results are restraints of "great potential concern."

Legislation of this sort is a good candidate for advocacy, and if there are states were similar rules have been imposed by a state board rather than the state legislature, they may yield cases as well.

Rules Hindering the Provision of "Pre-need" Funeral Services

Pre-need funeral services and products are those that are planned and often paid for in advance. Because the payment occurs prior (sometimes a long time prior) to the actual need for the service or product, these contracts have some of the characteristics of financial planning. Funeral planning in this sense is an extension of estate planning.

Many states have regulatory regimes covering pre-need funeral planning covering funding options as well as the goods and services provided under pre-need funeral contracts. Some of the rules are purely statutory, some purely administrative and some are a combination of the two. An example of a regime that is purely administrative is that of the Massachusetts Board of Registration in Embalming and Funeral Directing. The Board consists of five members, four of whom have had at least five years practical experience in embalming and funeral directing.

One rule of the Board of Registration in Embalming and Funeral Directing is that all pre-need funeral contracts be between the buyer and a licensed funeral establishment. 239 C.M.R. § 4.02(1). Another rule provides that other than a registered licensed or registered certified funeral director, no "person shall prepare, negotiate or execute a pre-need funeral contract with a buyer or potential buyer; or receive, control or manage any funds tendered as payment for the funeral goods and/or services." 239 C.M.R. § 4.02(2). Finally, all pre-need "centers or offices which engage in the preparation, negotiation or execution of pre-need funeral contracts or arrangements shall be located within a duly licensed funeral establishment." 239 C.M.R. § 4.02(8). There are also detailed regulations on the contents, funding and marketing of pre-need contracts. 239 C.M.R. § § 4.03 - 4.08.

These rules limit who is able to form pre-need contracts with consumers and under what circumstances. The rules might interfere with the development of the market in the same way as the auto brokering or optometrist restrictions. For example, a possible use of pre-need funeral contracting might be by a for-profit version of a funeral planning or memorial society that acts as a type of a broker (similar to the brokers in the auto industry).[4] As brokers, these firms might reduce consumers search costs and allow consumers to take part in volume discounts. Additionally, suppliers of products used in funeral services (e.g., casket manufacturers) might be interested in vertically integrating into the funeral services industry through the pre-need market. Finally, the restrictions might limit the scale of funeral service operations.

Further investigation into the rules of the Board and the effect of those rules, as well as an investigation into the industry itself, is needed to determine whether the rules have an anti-competitive effect. A more searching review of the rules and how they are interpreted by the Board might lead to other restrictions that inhibit competition.

Ticor II

Another project would involve litigation in order to clarify an issue left open by the Supreme Court's *Ticor* decision, which is the exact extent of state supervision needed to immunize a substantially-anticompetitive private agreement, such as one setting rates.

Ticor examined this issue in two states, and held that the supervision there was insufficient to confer immunity. However, the situations involved were the easy cases at one end of the spectrum. The states had adopted negative-option plans and the Court noted that "the potential for state supervision was not realized in fact . . . [A]t most the rate filings were checked for mathematical accuracy. Some were unchecked altogether." 504 U.S. at 638. A new test case might therefore be useful in defining the standards of sufficiency in other regulatory environments that do not involve total abdication. Both Mike Antalics and Pat Roach, who were on opposite sides of *Ticor*, suggest that the Court's opinion fell short of what was needed in that respect, and that such a clarification would be useful.

The FTC might set a goal of establishing a kind of administrative-law standard for state supervision of rate-setting. This might require some minimum mix of notice, hearing, and written decision by a state agency before the outcome would be accepted as "a product of

[4] It appears that the Catholic Church may provide just such a service in Pennsylvania. Apparently, the Church has signed up a subset of the funeral homes in the state to provide funeral services and that the Church gets discounts from those homes for the Church's "customers." There is also some indication of similar services in Texas.

deliberate state intervention, not simply . . . agreement among private parties." Some participation by the state attorney general might be used in addition to, or in lieu of, some of the previous elements.

A test case on this issue could be brought in any industry where states permit important horizontal agreements. One traditional example is the authorization of rate-setting bureaus among Nevada intrastate motor carriers. The state statute declares its guiding purpose with pastoral innocence: "to discourage any practices which would tend to increase or create competition that may be detrimental to the traveling and shipping public or the motor carrier business within this state." Nev. Rev. Stats. § 706.151(1)(e). To this end the statute authorizes the regulatory authority to "adopt regulations providing for agreements between two or more fully regulated carriers or two or more operators of tow cars." These agreements may relate to "fares of fully regulated carriers," "all rates," and "all charges of . . . operators of tow cars for towing services performed without the prior consent of the owner of the vehicle." Id. at § 706.166(4). The question for us will be whether the resulting agreements have been scrutinized by the state authorities with sufficient care.

Airport gates

Another litigation project would challenge the management of an airport that has the gate capacity to support two efficient-sized hubs, but that has given so many gates to the dominant carrier that only a single hub has been achieved. Such an airport would have needlessly created a monopoly in a presumed market for "hub-based air transportation," or, expressed differently, would have lessened competition by permitting only one airline to achieve the particular efficiencies associated with hub operations.

One airport that may present this fact pattern is Dallas -- Fort Worth. That has reportedly given so many gates to American Airlines that no fully effective alternative remains. This outcome is not entirely rational in profit-maximizing terms, but it might be explainable on the hypothesis that the airport is responding to political incentives and is safeguarding the profitability and employment of an important local company.

This case would have some strategic appeal since it takes up the issue of total or partial exclusive-dealing contracts by special-purpose government agencies (such as airports), as to which there is a lot of bad law, and gives us a chance to change that law. The troublesome cases have held that legislation giving general authority to airport authorities must have contemplated some use of exclusivity, since exclusivity is commonly used and useful in such functions. However, these cases may have been too quick to go further and infer a legislative intent to authorize even *anticompetitive* exclusivity, when more probably all that was contemplated was the usual exclusivity in the normal course of business operations. Our case would tee up this issue in the Fifth Circuit, which is likely to be particularly receptive to competition concerns.

An investigation of this matter would nonetheless have to engage with and overcome a number of issues: (1) Is exclusivity of gates more or less common and useful than exclusivity on things like ground transportation, which was the subject of most of the decided cases? (2) What is the specific language of the Texas authorizing statute, and to what degree might that actually contemplate the conduct here? (3) What specific rules of conduct do we want airport authorities to follow? Do we want them to act as rational monopolists, or in some other way, and if in some other way, how do we define it? (4) To what extent does the Department of Transportation also look at these issues under statutes that put competition provisions in federal airport-funding laws? Could we act more effectively by consulting with DOT and persuading them to use their own regulatory tools?

Taxicab Company Exclusive Airport Service Contracts

A number of U.S. airports are currently served by a single taxicab company pursuant to an exclusive contract. These airports include: Detroit Metropolitan Wayne County Airport, Honolulu International Airport, Greater Pittsburgh International Airport, Seattle-Tacoma International Airport, and Washington-Dulles International Airport. The party entering into the exclusive contract with the taxicab company, that is purportedly acting on behalf of the state, is generally one of the following: (1) the executive branch of the state government (e.g., the state department of transportation); (2) a municipality; or (3) a quasi-official body (e.g., an airport authority). Where the contracting entity is the executive branch of the state government, the entity is clearly acting on behalf of the state and is entitled to antitrust immunity under the state action doctrine. See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, 810 F.2d 869, 876 (9th Cir. 1987). Where the contracting entity is a municipality or quasi-official body, however, it is potentially subject to federal antitrust liability.

The potential harms to consumers resulting from an exclusive contract for airport taxicab service are the harms one would expect to see in any monopoly situation. Consumers of taxicab services at the listed airports are likely to pay higher prices, experience longer wait times due to reduced supply, and receive lower quality service (e.g., less well-maintained vehicles and less courteous drivers). The administrative costs associated with enforcing the exclusive contact are also likely to be passed on to the consumer.

There are three relatively recent cases that have addressed the issue of state action immunity for exclusive airport taxicab service contracts. The first, referenced above, is Charley's Taxi Radio Dispatch, which dealt with a contract between a taxicab company and the Hawaii Department of Transportation. Contracts between taxicab companies and state executive branch agencies are clearly covered by the state action doctrine. As a result, exclusive contracts in this category do not present a promising case generation opportunity.

The other two cases – Independent Taxicab Drivers' Employees, et al. v. Greater Houston Transportation Co., 760 F.2d 607 (5th Cir. 1985) and Woolen v. Surtran Taxicabs, Inc., 801 F.2d 159 (5th Cir. 1986) – involved contracts with a municipality and an airport authority, respectively. In both cases, the Fifth Circuit held that the exclusive arrangement was covered by the state action doctrine.[5] These cases can be distinguished, however, on two separate grounds. First, in both instances, the court relied on Texas statutes that grant municipalities relatively explicit authority to regulate vehicles for hire and airport operations. Second, in Woolen, the court declined to make much of the distinction between a municipality and an airport authority, given that the airport authority in question was distinct from a municipality for no other reason than to permit two municipalities – Dallas and Fort Worth – to operate the airport jointly.

An additional factor counseling in favor of an antitrust challenge to these arrangements is that the entity operating an airport often has a financial interest in the transaction. The entity operating the airport will typically collect a per cab or per passenger trip fee from the taxicab company. While part of this fee is used to compensate the airport for services provided to the taxicab company, the remainder is often used to subsidize other airport operations. The degree to which trip fees influence a municipality or airport authority is debatable, given that such fees are a minor source of airport revenue.

Proponents of these arrangements assert that they have the following procompetitive benefits:

- By limiting the number of taxicabs serving an airport, exclusive arrangements improve service. Given the ease of entry, the market for taxicab services is prone to oversupply. During situations of oversupply, per operator revenue drops, forcing operators to reduce their costs to preserve an acceptable income stream. The net result is a dramatic increase in the number of poorly maintained vehicles. Exclusive arrangements prevent this result by limiting supply.

- By limiting the number of taxicabs serving an airport, exclusive arrangements relieve consumers of costs that would otherwise be imposed in the form of additional air pollution and traffic congestion.

Proponents of these arrangements also assert that their competitive impact is minimal, given the following market conditions:

- In virtually all major cities, the market for taxicab services is highly regulated already. Regardless of any airport-specific regime, a city's taxicab licensing regime likely dictates: (1) the number of cabs, (2) the fares charged, (3) the conditions of service (i.e., vehicle maintenance requirements), and (4) insurance coverage requirements. Given this fact, the competitive impact of any airport-specific regime is likely to be minimal.

- Opening the airport to additional taxicab companies is unlikely to bring fares down or improve service for two reasons. First, the "first in, first out" system by

[5] Interestingly, in spite of its judicial victory in Independent Taxicab, the City of Houston subsequently decided to forego the use of exclusive airport taxicab service contracts. Instead, it adopted an open system, pursuant to which any taxicab company licensed to provide service in the metropolitan Houston area may also solicit passengers at Houston Intercontinental Airport.

which consumers select a taxi at an airport cabstand severely restricts comparative shopping. Second, consumers at airports, who will often be unfamiliar with the city and its taxicab service, typically have no knowledge of a taxicab company's prior service record and will be unable to evaluate the quality of the current service until that service has been purchased.

Refuse Collection

The proportion of local governments using competition in the provision of refuse collection services has increased substantially over the past decade. The competition is introduced in two ways. In the first, jurisdictions contract out the service. In the second, they simply drop the service and allow private firms to compete for customers (referred to as shedding the service). The percentage of jurisdictions providing residential collection service with public employees dropped from 52% in 1988 to 37% in 1997; the corresponding numbers with respect to commercial entities are 40% (1988) and 23% (1997).

The benefits of moving to private provision have been substantial. A number of studies have compared local services under municipal monopolies vs contracting out arrangements. The contracts were awarded both through formal bidding procedures and informal bidding or negotiation processes. A summary of these studies[6] reports that contract collection is significantly more efficient than municipal collection and no less effective. The studies suggest that the average public service is about 35% more costly than contract collection.

Direct state involvement in regulating refuse collection is not widespread. State involvement in licensing is the most common form, mainly licensing of the collection vehicles. Some states or local governments require suppliers to have a sold waste collection license for each truck they operate. Most states and local governments require safety inspections of the vehicles.

A large number of the municipalities providing residential refuse collection with public employees are either larger cities in the Northeast or smaller cities in the South. Perhaps a reasonable next step would be to approach one of the large private carriers to develop a shorter list of municipalities where private providers have tried to compete and been refused or have faced unreasonable barriers.

Once a promising municipality has been identified we can determine whether the city has been authorized by a state statute to hinder or prevent competitive provision of these services. If not, then we can intervene. If the state has indeed granted authority, then there is a further question of whether the authorization has been granted properly and with the right kind of safeguards. If not, there may still be scope for intervention.

Encouraging better internal state cost-benefit reviews

[6]Emanuel S. Savas, Privatization: The Key to Better Government, Chatham House, 1987.

One project might seek to improve the states' internal analyses of the costs and benefits of their regulations. This would try to approach the problem of anticompetitive state regulation on a structural and process level, rather than through case-specific litigation. The aim here is to establish working ties with think tanks and advocacy groups in every state, who may be able to help head off harmful regulation, rather than trying to combat it after the fact.

This project starts with the assumption that truly anti-consumer regulation is less likely to be enacted or to survive if its costs and benefits are made explicit and visible. It also assumes that the task of making these things explicit will be most effective if undertaken at the state rather than the federal level. The federal agencies probably don't have the resources to review the actions of all fifty states; nor do the state agencies necessarily have an interest in providing us with the information needed to make such a process work. However, these same state agencies may be relatively responsive to requests from supervisory offices within or closely affiliated with their own governments.

Present procedures for internal state review are not immensely effective, however. The AEI-Brookings Joint Center for Regulatory Studies examined the procedures in use in all states, and concluded that the best programs were those in California, New York, and Virginia, where separate review offices were established. We have obtained the overview papers prepared in New York and Virginia, and have spoken with a think tank that works with the California government. We have also gotten the review papers prepared by Massachusetts and South Carolina, two other states that are reputed to be particularly active. In all of these jurisdictions it appears that the review office has conducted true, quantitative cost-benefit analyses only in the cases of a very few, narrow regulations. In the more usual instance the review would rely on much more impressionistic concepts, noting that the benefit of one program would be "improved public health," or that the cost of another "could not practicably be measured." Given that the review-office approach has not worked as well as one might hope, even when strongly backed by deregulatory-minded governors, it may make sense to look for an alternative.

One alternative might be for the FTC to establish ongoing ties with a number of economically oriented think-tanks at the federal and, even more, at the state level. Groups of this sort are relatively conspicuous in national politics. Representatives include AAI, Brookings, AEI, Heritage, and Cato. More localized versions of these organizations also exist in many if not all states, however. The FTC could establish some convenient means of communication, such as an e-mail talk group, for communicating in both directions. That could serve a number of purposes. It would let the state groups alert us to pending legislation that might call for comment from this agency. It will also let us suggest to the state groups certain considerations or lines of argument that they could develop and pass along to the state government, which would improve the quality of the state analysis while still coming from a local entity that is "inside the tent."

Teacher Certification

Teacher certification is an area where the agency might usefully contribute through its advocacy program. Bringing good people into teaching is likely to be an important and cost-effective way to help improve national education. And recruiting good teachers could be made easier if the educational system adopted a more market-oriented approach, reducing the number of formal education-school requirements in order to increase the supply of teachers in critical specialties.

The nation will need a large number of new teachers in the coming decade – 210,000 new hires per year by one common estimate, of whom at least 45,000 will have to be entirely new entrants into the teaching profession. These requirements are not evenly distributed. There is an oversupply of elementary-school teachers, but substantial shortages of people who can teach particular subjects such as math and the sciences, particularly at the high-school level.

Entry into the field is limited by the requirement for certification or licensing of teachers. Certification is most commonly done through formal programs in schools of education. The problem of undersupply in some specialties might therefore be addressed by creating alternative routes for certification, which would provide accelerated training in teaching skills to people who already have substantive familiarity with their field. This could allow entry into the teaching profession by people who are retiring from the military or industry, are making a mid-life career change, or who wish to teach for only a few years.

It seems likely that states are receptive to this line of thought, but also in need of hearing it repeated. Forty-five states have reported that they are implementing alternatives to conventional teacher education programs. However, one advocacy group that follows this issue has concluded that only ten states have effective programs actually in place. From 1983 through 1996, only about 50,000 people entered teaching through alternative-certification routes.

Any FTC involvement in this issue will have to be carefully framed in order to avoid the historical experience that overly-theoretical advocacy letters have tended to be relatively ineffective. If possible, it would be good to conduct some original research showing the effects that regulatory entry barriers have had on the pool available for the selection of teachers. It might be good to express conclusions on this point in relatively neutral economic terms, and not to venture into unfamiliar areas such as the particular qualifications make for an effective teacher. This would not only keep us away from unfamiliar pitfalls, but would also allow us to approach the states with what would be, for them, a new perspective on a familiar issue, and thus perhaps to make a difference to them.

The Rhode Island Department of Elementary and Secondary Education has a notice on its website making the following announcement: "At this time, there is no process for alternate certification in Rhode Island. However, the commissioner has set as a priority the development and implementation of an alternative route to certification." That state might therefore be considered as an early candidate for an advocacy letter.

<u>Hospital accreditation</u>

Another law-enforcement investigation could look into possible agreements to limit the non-price competition among hospitals. This would look into the actions of an organization that is made up of competing hospitals, that establishes standards for certification, and whose certification is a de facto requirement for licensure at the federal level and in many states. While most of the written standards involve unexceptionable guidelines for health and safety, some appear to be interpreted and applied in ways calculated to serve the convenience of hospitals at the expense of patient comfort and preferences.

The organization in question is the Joint Commission on Accreditation of Healthcare Organizations. The Joint Commission's corporate members are the American College of Physicians, the American College of Surgeons, the American Dental Association, the American Hospital Association, and the American Medical Association. Certification by the Joint Commission has a number of compelling practical advantages. The group's website reports that certification "often fulfills state licensure requirements" and that it "may be used to meet certain Medicare certification requirements."

The Joint Commission thus has a structure that would seem, ex ante, to be very worrisome in antitrust terms. The group includes virtually all horizontal competitors in the industry, and it has, in certification standards that are closely interwoven with state licensure requirements, a powerful enforcement mechanism to prevent cheating on cartel conduct. Moreover, a quick check of clearance records suggests that it has been some years since this group was closely examined.

Some provisions in the Joint Commission's accreditation standards appear in fact to be anticompetitive, limiting patient choice without any apparent benefits for health or safety. For example, accreditation standards reportedly limit some of the times and terms on which hospital patients can receive visits from family members. This doesn't seem like a matter so clear-cut as to require totally uniform treatment by all hospitals, however, and in fact certain assertive classes of family members (husbands of new mothers, parents of small children) are treated differently. As a result, the otherwise-uniform certification standards appear to be horizontal agreements to restrict the non-price rivalry by which hospitals might otherwise compete to make themselves more patient-friendly. (I would like to defer presenting further operational details until I am sure I have the facts in order.) There may also be other restrictions in the ways that the accreditation standards are applied, for which the litigating staff could look while it is conducting interviews on this initial issue.

In looking at these issues, the FTC will want to be careful and, where appropriate, even deferential in its recognition of genuine health and safety issues. We will probably not want to engage in an unsupported dispute on the merits of those issues. On the other hand, it may be appropriate and even necessary to take on those issues where: (1) the Joint Commission's safety claims are intuitively implausible; (2) some other healthcare providers disagree with them; and (3) the Joint Commission's standards have internal inconsistencies in the way that alleged safety issues are treated in different contexts, thus objectively casting doubt on their true importance.

State-action issues will be woven throughout this subject. Since the Joint Commission's certification is accepted by many agencies of government as sufficient for licensure, some governmental action is clearly present. On the other hand, the really problematic conduct here seems to arise from the Joint Commission's interpretation and application of published principles that are reasonable on their face. This would seem to make the action that of the private standard-setting organization, under the standards described in Allied Tube & Conduit, since the action was not actually taken by the state itself, or even substantively reviewed by it.

Cable television

A final project might look into possible anticompetitive exclusion of cable television companies. In some localities there appears to be only one cable franchisee, and it may be worth checking to see if the local regulators contributed to this situation in ways unauthorized by their state statute.

A preliminary look at this topic suggests that there is probably not going to be a major problem here. Calls and e-mails to the people the FTC most familiar with the industry produced the more or less uniform reaction that improper exclusion was possible, and worth watching for, but that they did not know of any recent instance where it had occurred. The FCC also watches this area and prepares a substantial annual report on "competition in video markets."

That said, there may be something to be found here. John Wiegand of the San Francisco office reports that some years ago we received allegations of collusion between incumbent cable operators and municipalities. The municipality would supposedly pass a tax or franchise fee on cable that was either arguably (or in some cases, obviously) above the level permitted by federal law. The incumbent would agree to pay this fee so long as it retained its monopoly status. If a new entrant (an "overbuilder") approached the municipality, the city rejected its proposals. The FTC conducted an investigation with this fact pattern in Dixon, California, about 1989. Wiegand will check to see if there have been more recent allegations that might be reconsidered.

Kent Cox reports another case involving a cable company called RCN. RCN attempted to enter several Massachusetts markets as an overbuilder, but was rebuffed by the local authorities. It was then forced to reconfigure its operations into a less desirable form as an "open video system" in order to avoid state regulation. See M.G.L.A. ch. 166A §§ 3, 6; 47 U.S.C. § 522(7). This case is relatively unappealing, however, since the "exclusionary" conduct of the local authorities consisted only of requiring that RCN serve all the area, rather than cherry-picking certain neighborhoods, if it wanted to enter at all. This regulatory conduct may or may not have been precisely legal, but it does not seem likely to make for the best test case.