Federal Trade Commission Investigations

Administrators in Medicine Annual Meeting

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Agenda

- Antitrust Background
- The State Action Doctrine
- Antitrust & Professional Boards
- Process Issues
- Strategy
- Resources
Antitrust 101

- Sherman Act Section 1: “Contracts, combinations, and conspiracies in restraint of trade” are unlawful
  - Per se rule applies to “naked restraints”
  - Rule of reason applies to most restraints

- FTC Act Section 5: “Unfair methods of competition”
  - FTC says this is broader than the Sherman Act
  - Contours are not clear – anything 3 Commissioners say is mean?
State Action Doctrine

- **Parker v. Brown** (US 1943) holds that nothing in the language or history of the Sherman Act suggests “that its purpose was to restrain a state or its officers or agents from activities directed by the legislature.”
  - Applies to actions of the state itself – the legislature and the state’s highest court acting in a legislative capacity

- **California Liquor Dealers v. Midcal Aluminum** (US 1980) addresses application of the State Action Doctrine to non-sovereign parties
  - Must be pursuant to “clearly articulated and affirmatively expressed” state policy
  - Must be “actively supervised” by the state
State Action and Professional Boards

- Key issue: is active supervision required for immunity (as if the professional board were a private actor)?

- FTC says yes:
  - Active supervision ensures that the State has exercised “independent judgment and control” *FTC v. Ticor Title* (US 1992)
  - Involvement of market participants means active supervision is required. *FTC v. NC Dental Bd.* (FTC 2011, pending in 4th Cir.)

- And the FTC says professional boards are generally not actively supervised
  - E.g. governor’s power to remove, reports, etc. are not enough
  - FTC points to W. Va., where dental board can only propose rules to the legislature, or CT, UT, IL, and CO, where state regulators supervise dental boards
The boards’ response: political units created by the state do not require active supervision

- Medical boards are acting pursuant to explicit directive from the state legislature
- State law decides who is the “state,” not the FTC
- “Industry participant” exception does not apply to state boards. See Haas v. Or. State Bar (9th Cir. 1989); Earles v. State Bd. of CPAs (5th Cir. 1988).
- States are ill-equipped to “actively supervise” state boards
- Boards without practicing physicians would be less effective
Conduct That Has Been the Focus of Concern

- Rules regarding who can perform procedures (N.C. Dental)
- Price fixing/price schedules (Goldfarb)
- Cease and desist letters untethered to judicial enforcement
The Federal Trade Commission

- Five Commissioners (no more than three from the same party) appointed by the President to seven year terms.
  - Currently only four sitting Commissioners
- FTC staff divided into Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics, each with a Director
- Divisions within the Bureau of Competition, each led by an Assistant Director, manage investigations
  - E.g., Anticompetitive Practices, Health Care
Launch of an FTC Investigation

- Typically begins with an informal inquiry with a voluntary request for information
- Can be prompted by complaints, news reports, etc.
- Drafted with definitions like a subpoena or document request
- Run by the staff without involvement by the Commissioners
- Informal investigations typically last a few months
FTC Compulsory Process

- FTC uses “Civil Investigative Demands” (basically subpoenas)
  - Can require the production of documents, interrogatory responses, or testimony
- FTC “investigational hearings” in lieu of traditional depositions
  - Counsel for the witness has no right to speak other than to raise a privilege objection
FTC Compulsory Process (cont.)

- Compulsory process requires authorization by the Commission
- Each investigation is overseen by leadership of the Bureau of Competition and the respective Division of BC
- Investigations can last years
First Steps When the FTC Comes Calling

- **Don’t panic**

- **Process**
  - Retain experienced counsel
  - Document hold notice to relevant employees, IT staff, etc.
  - Internal processes
  - How can we get the FTC what they need while minimizing burden and expense?

- **Substance**
  - What is the FTC *really* interested in?
    - History, justifications, real world effects?
  - What is really important to us? Why?
Big Picture -- How to Deal with the FTC

- The FTC does not have unlimited resources, but it has more than you
- The FTC believes it is acting in the public interest, and questioning their good faith will not be productive
  - “Come let us reason together”
- Find common ground – what is important, and what’s not
A Tale of Two Investigations

NC State Board of Dental Examiners

- Years and millions of dollars
- Still litigating
- Approach:
  - “Respondent has engaged in a pattern of dilatory filings that has become more harried and shrill as the hearing approached, and then commenced.”
  - Collateral attack on FTC
  - Move to disqualify all Commissioners
  - Seek discovery of FTC lawyers’ bar status
  - Motion to strike all references to an attorney that had not entered an appearance

NC Medical Board

- Months and not millions of dollars
- No litigation; no consent decree; no PR
- Approach:
  - Let us explain what is important to us. What’s important to you?
  - Let’s not spend time and money arguing over doctrine if we can agree on how to move forward.
- Result:
  - Clarify policy
  - Send letters
  - No PR
Resources

- FTC v. NC Board of Dental Examiners Docket: http://www.ftc.gov/os/adjpro/d9343/index.shtm
Resources (cont.)

- 4th Circuit Briefs in NC Dental Board