

Economic Liberty, Health Care Competition, & Professional Regulations – Who Regulates Whom, and to What Effect

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The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner

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Federal Trade Commission

Sneak Preview (what's new)

- FTC Staff Comments on Texas Medical Board Proposed Rule § 193.13 to Add Supervision Requirements for CRNAs (Dec. 6, 2019)
- FTC Staff Comment to the North Carolina State Board of Dental Examiners Regarding Proposed Rule Changes to 21 N.C. Admin. Code 16W (Nov. 2019)
- FTC Staff Comment on New York's Proposal to Allow Licensure by Endorsement of Canadian Dental Licensure by Endorsement of Canadian Dental Licenses (2018)



Plus

- U.S. DEP'T HEALTH & HUMAN SERVS., U.S. DEP'T OF THE TREASURY, U.S. DEP'T OF LABOR, REFORMING AMERICA'S HEALTHCARE SYSTEM THROUGH CHOICE AND COMPETITION (Dec. 2018)
 - So, not us, but . . . “We are pleased to provide you with this report, prepared by the Department of Health and Human Services (HHS) in collaboration with the Departments of the Treasury and Labor, ***the Federal Trade Commission***, and several offices within the White House. This report describes the influence of state and federal laws, regulations, guidance, and polices on choice and competition in health care markets and identifies actions that states or the Federal Government could take to develop a better functioning health care market.
 - Healthcare Workforce & Labor Markets
 - Scope of Practice
 - Workforce Mobility
 - Telehealth
 - Foreign-Trained Doctors
 - Federal Funding of Medical Education



The Role of Competition in Health Care

- Competition benefits consumers – tends to
 - Promote innovation
 - Expand supply
 - Reduce price
 - Improve quality and efficiency (“value”)
- That does not mean that there is no room for regulation
- Health care is as special as it is, but not more special



Economic Liberty Task Force

- Convened by FTC Acting Chairman Ohlhausen
- <https://www.ftc.gov/policy/advocacy/economic-liberty>
- Primary focus = occupational licensing as a barrier to economic opportunity
- Continuation and amplification of longstanding, bipartisan FTC efforts
- Overview of mission and projects
 - Occupational Regulation
 - State-by-state variation, burdens, reciprocity
 - Outreach to states & academy, among others
 - 2017 round tables
 - New internal research



Regulatory boards, board members, and health care competition

- Not all boards are created, structured, or populated equal. However ... commonly,
 - Board members commit / volunteer their time, experience, and expertise to serve the public interest
 - But board actions *may* restrict entry or restrain *beneficial* rivalry
 - Input from those working in the regulated occupation can inform regulation in ways that are productive; **and yet**
 - Private interests & professional biases may create conflicts of interest and thereby increase risk of harm, even without anticompetitive or self-serving intent (see *NC Dental*)



But First, A Quick Story About Dental Regulators

- This is not the fabled *NC Dental* case (later)
- It's the fabled *SC Dental* case
 - In re South Carolina State Board of Dentistry
 - S.C. State Board of Dentistry v. FTC
- In Y2k SC state legislature eliminated statutory supervision requirement:
 - **So . . . Dental hygienists could do “screenings & cleanings” & non-invasive prophylactic dental care for poor kids, in schools, under general supervision of a dentist, without a prior in-person exam by the supervising dentist, just like in paying offices**
- In 2001, the SC Bd. – mostly practicing dentists – adopted an “emergency regulation” that re-imposed the pre-exam & supervision requirement
- FTC Complaint (2003) challenged under State Action Doctrine
- State ALJ 2003
- 4th Cir. State Action 2006
- Consent Order (FTC) 2007



A few common threads to carry over...

- Dentists (profession/occupation – service providers)
- Public health
- Dental Hygienists (profession/occupation – service providers)
- Low-income kids (and their parents)
- Very basic preventive dental care
- And antitrust? The market doesn't offer everything, but query how we decide to limit ...
 - Who can offer what services
 - Under what conditions?
 - Where?
 - At what cost/price?
 - Who can receive those services?
 - Etc.
 - Who decides? And on what basis?



Overview: Why Do We Care?

- Interest in Health Care
 - Look, we find it interesting
 - It's a whole lot of money: Reported (HA) for 2017:
 - US HC Spending Increased 3.9%
 - 17.9% of GDP (up from 17.7)
 - \$3.5 trillion total spend
 - \$10,739 per capita
- Plus, it's about health
 - Emerson: The first wealth is health
 - Me: If you've got your health, you've got your health, which is something; and if you don't, you've got bupkes, which is nothing.
 - Emmerson was the writer.
- Research → Policy → Health Care Cost, Access & Quality
- Importance of Nursing (and Nursing Regulations)
- Importance of Health Care Professionals & Service Providers



The FTC's Statutory Mission

- **Law Enforcement**

- Dual Mission under FTC Act § 5 (15 USC 45): **Unfair methods of competition in or affecting commerce**, and **unfair or deceptive acts or practices in or affecting commerce**, are hereby declared unlawful.
 - **Competition/Antitrust (federal antitrust laws)**
 - **Consumer Protection**
- Special statutes

- **“Policy R & D” under FTC Act § 6: the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce**, excepting banks [etc.] ... and common carriers ... and its relation to other persons, partnerships, and corporations

- OPP & BE
- Research & Reporting
- Education
- Advocacy

- **We Don't Build Better Mousetraps**

- We don't do industrial planning
- We foster an environment in which others can build better (and cheaper and more) mousetraps – bottom-up protection of competitive markets & consumers' ability to participate in them
 - Enforcement, plus
 - Inform, Nudge, Noodging, Kibbitz & Cajole



Antitrust Law > Competition Policy

- Two species of applied (or applied² economics)
 - Harm to competition & consumers within substantive & procedural bounds of US antitrust law
 - Harm to competition & consumers not necessarily reachable under US antitrust law
 - Broader, although legal not necessarily proper subset of policy



Research at the FTC

- A very broad purview (recall § 6 – to first approximation, all of commerce, subject to specific exclusions)
- Equally broad range of tools and output
- Direct or Indirect Relationship to enforcement (*ex ante* and *ex post* – **can both inform and constrain** cases, advocacy, and education)
- Qualitative & Quantitative, Formal & Informal, Published and Unpublished



What Is Competition Advocacy?

- Initiatives that rely on persuasion, rather than coercion, to convince public actors to pursue policies that further competition and consumer choice
- Advocacy can be used to raise concerns about regulatory and legislative barriers to competition and to cultivate a “culture of competition”
 - Law enforcement often not an option for addressing public restraints



Benefits of Advocacy

- Prevent anticompetitive harm that may result from regulations, laws, and industry practices
 - Regulatory harm can be broader in scope than conduct of individual firm
 - Regulatory harm can be more durable than commercial conduct
 - Regulatory harm can be insulated from scrutiny under antitrust laws
- Cost-effective and efficient
 - Minimal staff and budget required (advocacy activities accounted for approximately 2% of the FTC's budget in FY 2015)
 - Requires far fewer resources than enforcement
 - Can be easily replicated and scaled-up
- Expert competition authority can represent voice of consumers
- Promote competition law enforcement agenda



Health Care Competition and Nursing Regulations

- FTC interest & experience in health care competition – enforcement, research & advocacy
- FTC interest & experience in occupational regulation – enforcement, research & advocacy
 - Licensure-related regulations as barrier to entry



Policy Paper – 2014 Synthesis of Prior Advocacies & Analytic Framework (also Gilman & Fairman 2014)



But it's not just about nursing regulations

- Physicians: FTC Staff Comments on Texas Medical Board Proposed Rule § 193.13 to Add Supervision Requirements for CRNAs (Dec. 6, 2019) (physician regulations – although to limit CRNAs in effect)
- Dental Hygienists: FTC Staff Comment to the North Carolina State Board of Dental Examiners Regarding Proposed Rule Changes to 21 N.C. Admin. Code 16W (Nov. 2019)
- Dentists: FTC Staff Comment on New York's Proposal to Allow Licensure by Endorsement of Canadian Dental Licensure by Endorsement of Canadian Dental Licenses (2018)



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Licensure

- Stigler (econ theory of reg) **OR** Market Failure (Arrow...)
 - (Durable) information asymmetries
 - Credence goods & services: often difficult to assess Q of care at point of service (consumption)
 - Spillovers (public health)
 - Serious Risk from Charlatans
 - Plus agency issues, plus subsidies
- Or both -- MODELS vs models
 - Labor/IO
 - What if first best is off the table
 - Occupation vs Provision



Health Care

- **FTC's Broad Jurisdiction**
 - To first approximation, the entire economy, minus certain carve-outs
 - Plus it's health
 - Share of Economy/Total spend/Plus . . .
 - Not unrelated, broad public/personal concern with health
- **Health Care Delivery: It's the economy . . . through a federal and state regulatory thicket**
- **Nursing regulations**
 - FTC interest since '80s → '90s enforcement → FTC & DOJ ('03-04)
 - Same interval: growth/establishment of the profession + attendant literature
 - IOM Future of Nursing (2010/11)
 - New series of advocacies & Policy Paper
 - The IOM Concerns Recast: Regulations regulate (restrict) providers of health care services → supply (quantity & distribution) & cost of health care services → price & access
 - 6 Degrees of Freakonomics: Nurses to the Rescue (11/15/17)



Scope of Practice

- Licensing and scope of practice are two sides of the same coin
 - A license is the state's permission to work in an occupation or profession
 - Scope of practice sets forth the metes and bounds of a license
 - Positive
 - Negative (exclusionary)



- Costs & Benefits of Supervisory Requirements
 - Some evidence of wage and price effects
 - Some evidence on Q (CRNA) and background Q
 - Softer on mobility
- Bottom-up approach – Start with Entry Barrier & Exclusion
 - Do regs cause comp harm?
 - If so, are there countervailing efficiencies?
 - Do regs address demonstrable & substantial risk
 - Do they do it efficiently
 - Effective
 - Narrowly tailored to address harm
 - More efficient than alternatives
 - Net consumer benefit



Back to SC Dental (and NC Dental)

- Not just about whether to regulate occupation or profession or services, but substance, process, and effects
 - What are the regulations?
 - Intended & unintended effects
 - Institutional structures and resources
 - Strengths & weaknesses
 - Who regulates whom?
 - Intended & unintended effects



Rolling the rock up the eroding hill

- Work in licensure ongoing
 - General or over-arching policies
 - Work in APRN research & advocacy ongoing
 - Other HC (and non-HC) occupations
- Not just licensure or occupational regulation
 - Practice, delivery models, payment ...



The State Action Doctrine

- Grounded in principles of federalism
 - “Federal antitrust law is a central safeguard for the Nation’s free market structures” . . . BUT
 - Antitrust law was not intended to limit state sovereignty
- Two “prongs” of a state action defense
 - Clearly articulated and affirmatively expressed intent to displace competition (typically via regulation)
 - Active supervision by the state, when the challenged conduct does not reflect the actions of the state itself



The World After N.C. Dental

- The Court's decision clarified which entities need active supervision to obtain state action immunity (i.e., many regulatory boards)
- The decision did not change the substantive law on active supervision
 - Existing case law still controls
- Lots of questions remain, including
 - What constitutes sufficient active supervision of these kinds of boards?
- Private cases are sloooooowly percolating



Q & A

