

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.)
 - Points to examples: *Goldfarb v. Va. State Bar* (US 1975)
- 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

State Action and Professional Boards (cont.)

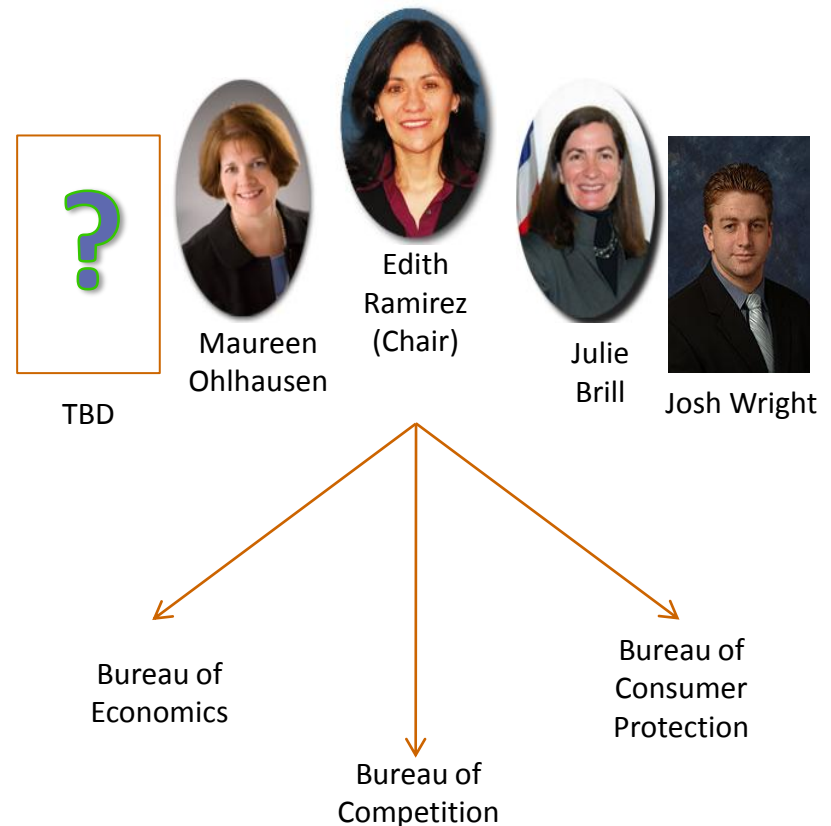
- The boards' response: political units created by the state do not require active supervision
 - Medical boards are acting pursuant to explicit directive from the state legislature
 - State law decides who is the “state,” not the FTC
 - “Industry participant” exception does not apply to state boards. *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

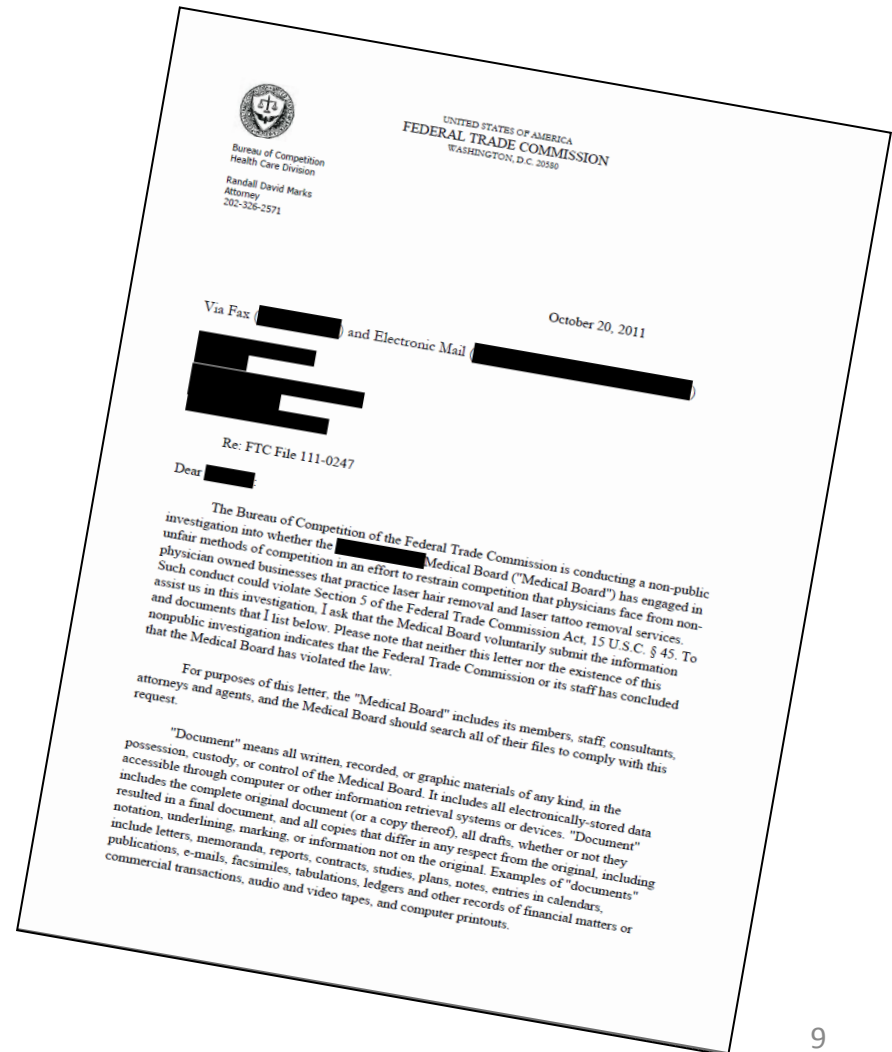
The Federal Trade Commission

- 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

United States of America
Federal Trade Commission
CIVIL INVESTIGATIVE DEMAND

1. TO [Redacted]

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED
☐ You are required to appear and testify.
 LOCATION OF HEARING: _____
 YOUR APPEARANCE WILL BE BEFORE: _____
 No appearance required
 DATE AND TIME OF HEARING OR DEPOSITION: _____

☒ You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

☒ You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE: _____
 June 1, 2012

3. SUBJECT OF INVESTIGATION
 See attached resolution, FTC File No. 121-0083

4. RECORDS CUSTODIAN/DISPUTED RECORDS CUSTODIAN
 Bradley S. Albert, Records Custodian

5. COMMISSION COUNSEL
 Bradley S. Albert, Malcolm Catt, Dominic Voté, and Llewellyn Davis

DATE ISSUED: 5/24/12
 COMMISSIONER'S SIGNATURE: [Signature]

INSTRUCTIONS AND NOTICES
 The delivery of this demand to you by mail is deemed to be a personal delivery to you. If you are a natural person, you must appear in person to receive this demand. If you are a corporation, partnership, or other entity, you must designate a person to receive this demand. The production of documents or the submission of answers and report in response to this demand must be made under oath or affirmation, in the form prescribed on the second page of this demand. If the person to whom this demand is delivered is not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responses for assessing such interrogatory or report question. This demand does not require approval by OIG under the Paperwork Reduction Act of 1995.

PETITION TO LIMIT OR QUASH
 The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to that return date. The original and seven copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS
 The FTC has a longstanding commitment to a fair regulatory enforcement process. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-800-RODO (1-800-746-7627) or www.sba.gov/ombudsman regarding the fairness of the investigation and enforcement actions of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a Federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these acts.

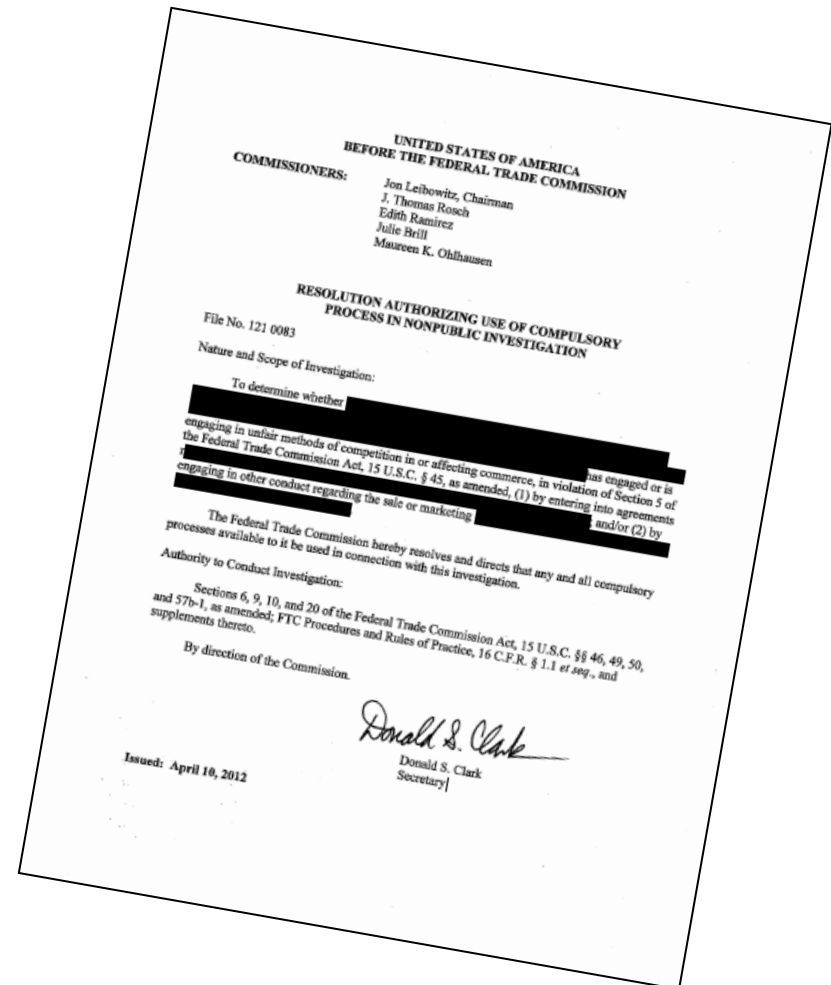
TRAVEL EXPENSES
 Use the enclosed travel voucher to claim reimbursement for what you are entitled as a witness to the Commission. The completed travel voucher and this demand should be brought to the Commission for payment. If you are personally or personally traveling to the Commission, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at 16 CFR 101.31. FTC/Investigation. Paper copies are available upon request.

FTC Form 144 (rev 2008)

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 Staff State Action Report:
<http://www.ftc.gov/os/2003/09/stateactionreport.pdf>
- FTC v. NC Board of Dental Examiners Docket:
<http://www.ftc.gov/os/adipro/d9343/index.shtm>
- AMA White Paper on State Action and State Medical Boards:
<http://www.ama-assn.org/resources/doc/arc/state-action-antitrust-exemption-white-paper-2012.pdf>
- Ingram Weber, *Comment: The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737 (Spring 2012):
https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/79_2/05%20Weber%20CMT.pdf
- ABA Antitrust Section Links to State Action Materials:
<http://apps.americanbar.org/antitrust/at-committees/at-exemc/main-exemptions/state-action.shtml>

Resources (cont.)

■ 4th Circuit Briefs in *NC Dental Board*

