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ANTITRUST AND PROFESSIONALS: A TOUGH CHOICE

INTRODUCTION

In this era of "regulatory reform" and "New Federalism," a proposed amendment to the Federal Trade Commission's (FTC) reauthorization bill, concerning professionals, might seem to be the epitome of the Administration's philosophy. Yet it confronts conservatives with a tough choice. When Senator Ted Stevens (R-Alaska) introduced the amendment to prohibit the Commission from taking antitrust action against professional groups licensed at the state level, he accused the FTC of "extending federal bureaucracy more and more into our daily lives" and argued that the amendment would reduce regulatory interference. Representatives Thomas Luken (D-Ohio) and Gary Lee (R-New York), in support of a similar amendment argued that since state oversight boards exist for these professionals, the FTC represents just another, and unnecessary, layer of restrictive bureaucracy.

While the Luken-Lee bill passed the House December 1, these proposals have not gathered the support from Reaganites that many expected. In fact, among the most ardent opponents of the legislation is the Reagan Administration itself, in the form of James C. Miller, III, the deregulatory-minded FTC chief. Like many others who object to an exemption of state-licensed professionals from FTC oversight, Miller is concerned that the legislation would have unintended effects its authors neither expect nor desire.

This issue poses a particularly agonizing dilemma for many conservatives. On the one hand, a reduction in the power of the FTC sounds sensible. The Commission, after all, does not have the best record when it comes to allowing markets to operate without interference. Furthermore, as a general rule, devolving power to the lowest possible level of government allows the strongest input by the public and usually results in the least

regulated markets. In those cases where state and local regulation may be considered excessive, residents may choose to migrate to other, more market-oriented locales. But it is much more difficult to escape federal regulation, and federal bureaucrats often understand little of local conditions. National rules, designed to be impartial, may actually be improper for everyone.

On the other hand, the professions may be a case where a reduced federal role leads to more, rather than less, market regulation. The "learned professions" are certainly a special case. Because consumers are less able to judge the integrity of the services they receive, there is a case for some professional oversight and peer review. The existence of these licensing or review boards creates a mechanism, however, through which competition may be restricted. If the principles of federalism are followed blindly, therefore, and power is returned to the state and local levels, the opportunity is created for professional groups to exercise unreasonable control of the market.

Thus, two basic conservative goals--return of power to the states and the pursuit of freer markets--appear to conflict. Agreement exists that the aim of policy should be deregulation at all levels of government. But when a strong likelihood exists that a reduction of federal regulation will lead to even greater state and local regulation, a fundamental problem is created. The paradox is, therefore, that what appears to be a reduction in regulation (at the federal level) may lead to an <u>increase</u> in regulation (at the state level). Hasty decisions in this matter thus should be avoided to allow for careful and thorough analysis.

Granting an exemption for professionals from FTC authority does little to resolve the dilemna. It is important to consider all possible outcomes of such an action before making a final decision. If competition is severely limited and costs rise substantially, as some predict, the result in politically sensitive cases, such as health care, could be to provide more ammunition for those who wish to see far more federal intervention than exists today.

An exemption from FTC oversight for professionals, therefore, may not be the answer. It would better serve the cause of freer markets to leave professional groups within the FTC's jurisdiction while careful attention is given to reducing the level of regulation at all levels of government. The proposed professional exemption is a quick fix, which may backfire. It is a problem which requires far more detailed consideration.

THE LEGISLATION

The Luken-Lee bill (H.R. 3722) which has passed the House, would place a moratorium on FTC examination of professionals, effective until Congress enacts legislation that specifically gives the Commission both jurisdiction over such professionals,

and the power to preempt state regulation concerning them. The Stevens amendment to S. 2499, the FTC reauthorization bill, would exempt state-licensed professional groups and their non-profit associations from FTC oversight.[1]

The most important technical question surrounding these bills is the definition of "state-licensed professional." By one estimate there are some 800 occupations licensed by at least one state in the United States. Licensees range from doctors and lawyers to hairdressers, barbers, and more exotic occupations, such as bee keepers and lightening rod salesmen.[2] Presumably, supporters do not intend the amendment to cover all 800 groups, or additions to the list, as a right. Indeed, if state licensing provided automatic exemption from federal regulation, we could expect an explosion of licensing activity as the advantages of exemption from FTC oversight led to heavy lobbying of state governments.

According to the Committee report on the Senate bill, the intended definition of professional is that used by the National Labor Relations Board, namely:

> Any individual engaged in the performance of work:
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> a) requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning;
> b) requiring the consistent exercise of discretion and judgement in its performance;
> c) which is predominantly intellectual and varied in character; and
> d) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time.

The committee report for S. 2499 includes lawyers, physicians, dentists, engineers, accountants, architects, veterinarians, podiatrists, nurses, chiropracters, pharmacists, actuaries, optometrists, clinical psychologists, and surveyors as the sorts of occupations that meet the criteria. In spite of this guidance, however, it can be expected that a number of court challenges would be brought by excluded groups, in an attempt to be included in the definition.

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1 The analysis in this paper refers only to the "professionals" amendment to S. 2499 and not to the rest of the bill.

2 Simon Rottenberg, ed., Occupational Licensure and Regulation (Washington, D.C.: American Enterprise Institute, 1980), p. 2.

ARGUMENTS FOR THE EXEMPTION

Those supporting the legislation are primarily the large professional associations in the health care industry, including the American Medical Association, the American Dental Association, and the American Optometric Association. Groups such as the Design Professions Group, a coalition of the National Society of Professional Engineers, the American Society of Civil Engineers, the American Institute of Architects, and the American Consulting Engineers Council also argue that changes in the jurisdiction of the FTC are needed.

The most common arguments in support of S. 2499 and H.R. 3722 fall into two broad categories. Advocates call for a reduction in allegedly unnecessary and inappropriate regulation, and for a return of power to the states. They claim that Congress never meant for the FTC to regulate professional associations. Representatives of the AMA, for instance, argue that the FTC Act was passed to supplement the Sherman Act only in the areas of industrial and commercial business, and that it is in these areas that the FTC has developed its expertise. That expertise, they maintain, is not easily applied to the activities of non-profit professional organizations.[3]

AMA spokesmen also note that the FTC attempted in 1977 to gain jurisdiction over not-for-profit enterprises, but failed to win congressional approval.[4] This defeat is an indication, proponents claim, that Congress never intended the FTC to exercise power in this area.

In addition, supporters of the exemption for professionals argue that actions undertaken by the Commission impose an unnecessarily high cost. The FTC has been accused of issuing vague complaints, making unreasonable requests for thousands of documents, employing a staff which is prejudiced against professional self-regulation and various other activities detrimental to the professionals and their clients. The high cost, in both money and staff time, necessary to comply with FTC requests is seen as particularly onerous for non-profit professional associations. Many state and local professional groups have small staffs and limited resources. Forcing these groups to comply with requests for reams of documents means that valuable resources are taken away from other endeavors--such as continuing medical education programs, peer review processes, and impaired physician programs.[5]

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3 Statement of the American Medical Association to the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, April 20, 1982, p. 5.

4 Ibid., p. 13.

5 Joseph F. Boyle, "Can the U.S. Survive a Doctor/Government/Patient Relationship?" Government Executive, September 1982.

Advocates of H.R. 3722 and S. 2499 also complain about the organization of the Commission. Cases are tried before administrative law judges employed by the agency and then appealed to the Commission which issued the initial complaint. It is only after these steps are taken that a case may enter the federal court system, where arguments can be presented before a dispassionate judge.

Proponents of the amendment go on to argue that FTC interference has discouraged peer review programs, which are designed to help consumers and usually conducted by state and local professional associations. For example, local medical associations have been told by the FTC that they may no longer provide guidance to consumers on what constitutes a "reasonable" fee on the ground that this constitutes "price-fixing." They may no longer issue warnings about physicians' groups, clinics, or medical service organizations with poor performance records. And they may no longer set medical standards to protect patients from unethical practices.[6]

In addition, proponents allege that the FTC has unlawfully preempted state laws, on the argument that it is inappropriate for a non-elected federal Commission to override the laws of elected state legislatures. The Design Professions Group suggests that even if FTC oversight is not eliminated, the Act should be amended to make it clear the Commission cannot preempt state legislative or administrative standards.

Finally, the health professionals maintain that the removal of FTC authority will not exempt professional groups from Justice Department oversight or state antitrust laws. They claim, in other words, that FTC authority is not only inappropriate, but that it is redundant.

Some of the strongest advocates of the free market, such as Congressman Ron Paul (R-Texas), offer a slightly different argument in support of the legislation. Congressman Paul would not agree that FTC oversight should be eliminated because there is adequate regulation at the state level. Rather, he believes all government regulation of professionals--both state and federal--should be removed, and that removing the FTC's jurisdiction is but a first step towards a freely operating market for professional services.

ARGUMENTS AGAINST THE EXEMPTION

Inadequacy of State Regulation

The argument that sufficient regulation is already provided by state licensing boards, making FTC oversight unnecessary, is

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6 William Rial, "Should the FTC Regulate American Medicine?" National Journal, September 11, 1982, p. 1577.

dismissed by opponents of the amendments. State licensing boards are, for understandable reasons, dominated by practicing members of the profession, and it is the prevalence of practicing professionals on these regulatory boards, opponents of the exemption claim, that makes federal oversight necessary.

Furthermore, according to the National Association of Attorneys General, state laws cannot provide protection from excess regulation deriving from professional associations. First, in a number of states, the antitrust laws exempt professionals in whole or in part. Second, not all states have antitrust units, and in those that do the divisions are usually small with severely limited resources. The state of Maryland, with seven antitrust attorneys, represents one of the larger units in the country. In short, most state attorneys general simply feel they lack the resources to effectively police the actions of state licensing boards.

In addition, it is often unclear which state has jurisdiction over certain firms of professionals. Accounting and law firms, for instance, often spread across state lines and have offices in many cities, making antitrust violations difficult to prosecute.

Restrictions on Competition

Adam Smith noted over 200 years ago that, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices."[7] Opponents of the professionals exemption might not go as far as Smith, but they can point to a number of documented cases in which professionals have undertaken practices, often with the active or passive support of state regulators, apparently designed to reduce competition.

Consider, for example, the struggle between chain drug stores (with pharmacist employees) and independent drug stores (with pharmacist owners). State pharmacy boards, responsible for governing professional practices, are dominated by the independents. In fact, despite recent successes by chain drug store operators in gaining seats on these boards, there are still 32 states in which there is no chain store representation in the process for establishing rules for pharmacy practice. The result has been rules which include:

- Physical requirements pertaining to the size of the pharmacy department in relation to the size of the entire store,

- Requirements that the store manager must be a pharmacist, and

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[7] Adam Smith, Wealth of Nations, edited by Edwin Cannon (New York: Modern Library, Inc., 1937), p. 128.

- Regulations that prohibit a pharmacy computer from being connected with another pharmacy computer within a chain. This prevents quick and efficient transfer of patient information from one pharmacy to another for the safety and convenience of the consumer.[8]

Such restrictions seem almost specifically designed to hinder the operation of chain drug stores. With a reduced threat of antitrust prosecution influencing the state boards, chain drug stores could soon find it increasingly difficult to operate. As one might expect, the independent drug store operators support antitrust exemption while chain drug store owners oppose it.

Health care professionals are not the only groups which attempt to minimize competition, supposedly in the interests of the public. In many states a lawyer must be a member of his local and state bar associations if he hopes to practice, much like being forced to join a union closed shop. In most cases young attorneys are dependent on local lawyer referral systems to gain valuable experience. A lawyer who chooses not to join the local bar association almost always finds himself excluded from this system. In addition, non-bar members will often not be considered for court-appointed counsel positions by federal, state, or local courts. Thus, a young attorney who chooses not to join a bar association and acquiesce to limitations on competition stands to lose vital opportunities for gaining necessary experience.

Similar unpleasant choices face new entrants in many other professions. By effectively controlling entry to the profession, associations have been able to place many controls on trade. Perhaps the best known anti-competitive restrictions imposed by state professional groups were the advertising bans. For years, doctors, lawyers, optometrists, etc, were discouraged from advertising even the most basic information--office hours, methods of payment accepted, or fees for basic services, for example--by their state professional boards. Advertising is just as important to a young doctor trying to enter a market where he is not known to the public as it is to a young businessman with a new product. There have also been restrictions on where one might open an office, for whom one might work, and with whom one might establish a practice.

By placing restrictions on competition, state professional boards can keep prices, and thus the incomes of members, artificially high. And while the national organizations representing these professionals might fully understand the harm done by a local boycott or price-fixing case which receives national attention, state and local groups often do not feel similar restraints.

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[8] Statement of the National Association of Chain Drug Stores, Inc. before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, April 20, 1982, pp. 8-9.

To a group of doctors or lawyers in an isolated town the benefits of a price fixing scheme may strongly outweigh the potential political costs. After all, the benefits are shared by a few individuals, while the political costs are spread over the entire nation if the scheme is discovered. And the chances of exposure and discovery may appear slim, especiallly if FTC oversight is removed. There is some reason for concern, then, that while the officers of the national trade associations like the AMA or the ABA may have every intention of encouraging cost moderation through increased competition, local professional associations may not share these goals. With less enforcement activity at the federal level, these groups will find themselves with more freedom to pursue their own, perhaps more narrowly defined, goals.

Impact on the Public

Anti-competitive activities by professional associations are not the principal reason why continued FTC oversight has strong support. Most opponents of the exemption for professionals do not believe that every doctor, lawyer, architect, and engineer is waiting in the wings ready to collude as soon as they are granted relief from FTC oversight. Indeed, it is appreciated that the vast majority are hard-working, dedicated experts trying to serve the public and do their jobs to the best of their ability. Opponents of the exemption amendment are more concerned that entrusting state licensing boards dominated by the professionals with virtually unrestricted power, will lead to decisions that actually may hurt the consumer, even though they may be intended to protect standards and the interests of the public.

Consider, for example, a recent case in which the Alabama Medical Board decided that nurses could not "practice" without a doctor present. This decision might seem reasonable as an attempt to protect patients from anything less than the best possible care. But in rural areas, where one doctor may serve a large geographic area, health clinics run by nurse practitioners, under the general supervision of a doctor, may be crucial to the provision of health care to local residents. Under the Alabama ruling, many of these rural health clinics were shut down. Alabama regulators apparently did not realize that one result of their decision would be leaving individuals in remote areas with no health care.

Another example is the struggle over the licensing of midwives. Those doctors who oppose the practice of midwifery believe that physicians are needed to provide the best care for mother and infant. Others argue, however, that a healthy woman should have a choice about where she has her baby. In a situation where doctors control the state medical boards, with no oversight by the FTC, the chances are that strong and severe restrictions will be applied to midwives by the more powerful medical professionals.

Furthermore, it is often the case in any profession that innovative ways of providing a service are viewed with suspicion

by older practitioners. Younger members of the profession generally show a greater willingness to try new ideas, particularly in the form of new services, as they try to establish themselves. If control is primarily in the hands of the state licensing boards and thus the senior practitioners, innovation may be stifled.

State licensing boards may be inappropriate final regulators, then, both because of the great incentives for undertaking anti-competitive practices and the resistance to new entrants and methods that tends to characterize senior members of a profession. As a result, placing vitually unrestricted power in the hands of state licensing boards may result in even more regulation and restrictions on the operation of the market for professional services that we see from the FTC. In the case of health care, these considerations have led some 34 national organizations to form the Coalition to Save the Jurisdiction of the Federal Trade Commission over the Professions. Among them are:

- American Academy of Physician Assistants
- American Association of Bioanalysts
- American Association for Clinical Chemistry
- American Association of Nurse Anesthetists
- American Chiropractic Association
- American College of Nurse-Midwives
- American Dental Hygienists' Association
- American Medical Technologists
- American Nurses' Association
- American Psychological Association
- American Public Health Association
- American Speech-Language-Hearing Association
- American Society of Allied Health Professionals
- National Association of Optometrists and Opticians
- National Rehabilitation Counseling Association
- National Women's Health Network
- United States Women's Health Coalition
- Women and Health Roundtable
- American Society for Medical Technology
- International Chiropractors Association
- International Society for Clinical Laboratory Technology
- National Association of Chain Drug Stores

The Alternatives to FTC Jurisdiction

What would happen, then, if FTC jurisdiction were removed, from the perspective of competition policy. State antitrust enforcement appears to be inadequate, while the Department of Justice is unlikely to be able to provide the necessary antitrust restraints. The FTC has authority in the areas of consumer protection and fraud that the Justice Department lacks, and so may be able to bring cases that Justice could not. Furthermore, shifting responsibility for professional groups to the Department of Justice would require Justice to duplicate expertise the FTC has already begun to develop.

Thus, it appears that without FTC oversight, state licensing boards and local professional associations would be basically unrestrained in pursuing their own interests. Such a situation could easily lead to an increase in the number of restrictions placed on individual practitioners. While pursued in the name of "quality of service," these restrictions would have the effect of reducing or eliminating competition in many cases. Costs for consumers would then rise substantially. In the health care area, this could provide further fuel for the health care nationalization lobbyists.

Liberals have been pressing for years for total federal control over the health industry on the grounds that rapid cost escalation requires sweeping action. From 1980 to 1984, health care expenditures are expected to rise from 9.4 percent of America's gross national product to 10.2 percent. In 1980 alone, expenditures on health care rose from 8.9 percent of GNP to 9.4 percent, the fastest growth rate in 15 years. Given these trends, federal health care outlays are expected to increase from $62.4 billion in Fiscal Year 1981 to more than $110 billion by Fiscal Year 1984.[9]

Against this background of rapidly increasing costs, the opposition of some conservatives to an antitrust exemption for professional groups may be understood more easily. A widespread belief among scholars of the industry is that with the threat of FTC investigation removed, health care professionals will engage in business practices which will accelerate price increases through reduced competition, whereas the industry needs far more internal competition if costs are to moderate.

Indeed if health care costs continue to rise rapidly, after an exemption from FTC authority, the profession no doubt will be accused of escaping from the rules applying to other businesses in order to increase doctors' incomes at the expense of the public. Because of the impact of health case costs on the federal budget, this could provide proponents of nationalized medicine with just the ammunition they need irrespective of the truth of these charges. As James Miller noted in a speech before the Oral and Maxillofacial Surgery Political Action Committee:

> [I]f people become convinced that effective market competition is not possible in the health care field, I believe we are going to witness an explosion of direct federal regulation that will make the "naughty old FTC" pale in comparison. I don't even like to think about the government's telling you how to practice, what

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9 Statement of the National Retired Teachers Association and the American Association of Retired Persons before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, April 20, 1982, pp. 25-26.

> patients to see, and how much to charge...[T]his is what may well happen in the health care field if market competition isn't perceived to be working.[10]

Miller went on to point out that:

> [I]n the October 7th issue of the New England Journal of Medicine, Profesor Anne Somers, a noted health economist, advocates the adoption of government-determined fixed fees for physicians and other health professionals as the only effective way of controlling rising health care costs....[T]here are many people just waiting in the wings, eager to subject the health professions to extreme forms of national health insurance, hospital cost-containment, and who-knows-what-else in the way of government regulation. In my considered judgement, the chances of this type of regulation's coming to pass depend greatly on whether or not competition appears to be working in the health care industry.[11]

Miller is not the only person warning of this possibility, The American Association of Retired Persons (AARP) has expressed grave concern over rising health care costs for the elderly--those most directly affected. In testimony before Congress opposing H.R. 3722, representatives of the National Retired Teachers Association and the AARP reported that nearly 80 percent of their volunteer leaders voiced a strong preference for legislation specifically designed to curb spiraling health care costs over legislation designed to increase benefits. Both the AARP and the National Council of Senior Citizens are members of the Coalition to Save the Jurisdiction of the Federal Trade Commission over the Professions.

Finally, the FTC has defended its actions further by arguing that its rulings have not been nearly as restrictive as the AMA seems to believe. In his Atlanta speech, Miller assured surgeons that the FTC was "ready, willing and indeed eager to work informally with professional groups to avoid illegal conduct."[12] Miller claims that professional associations may continue to develop standards for measuring the quality and competency of care. They are forbidden only from interfering in the development of health care delivery organizations or clinics. Miller went on to argue that nothing prevents medical associations from warning consumers if a certain medical practice, clinic, or Health Maintenance Organization (HMO) is not offering high-quality care. Rather, medical associations are prevented by the FTC from prohibiting

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10 Remarks of James C. Miller III, Chairman, Federal Trade Commission, before the Oral and Maxillofacial Surgery Political Action Committee, Atlanta, Georgia, October 24, 1982, p. 2

11 Ibid., p. 3.

12 Ibid., p. 5

their members from working for an HMO or as a salaried employee of a hospital or clinic. There are no restrictions on peer review, Miller noted, and he pointed to a recent FTC advisory opinion approving the Iowa Dental Association's peer review program. Finally, Miller assured his audience that the FTC has no objection to the participation of health care professionals in voluntary coalitions to control health care costs.[13]

CONCLUSION

Many people agree that the FTC has been guilty of serious abuses in the past. It has imposed unnecessary costs on some firms and industries by going on needlessly vague fishing expeditions. The Commission has brought cases whose value was unclear and whose costs certainly exceeded benefits. But the way to deal with these problems, and others like them, is to make basic decisions about the FTC, including careful redefinition of its powers--if, indeed, the Agency should remain in existence. Providing exemptions for special groups--whether mortuary owners or professionals--merely gives a special privilege to particular groups instead of tackling the basic problems and providing solutions that will benefit everyone.

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[13] Ibid., p. 7-8.