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THE COMMISSION, ANTITRUST AND THE PROFESSIONS: TESTING THE WATERS

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before the

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Thank you and good afternoon. It is a pleasure to join you today at this conference on antitrust in the health care field. Looking around the room, I see a number of people who are already experts in the area and, looking over the program for the conference, I see that anyone who was not an expert Wednesday morning will be an expert by the end of the day Friday. Since I would not pretend to be able to teach this group anything, that leaves me free to offer a few personal observations that relate to the current antitrust enforcement at the Federal Trade Commission. I remind you at the outset that I speak only for myself, not for the Commission as a whole or for any other commissioner.

A subject that has been of increasing interest to me is the movement in antitrust policy with respect to members of the learned professions. The Federal Trade Commission has placed major law enforcement emphasis on health care, including the conduct of members of the health care professions, for many years now. But my memory stretches back far enough to recall when it was newsworthy to report that the Commission had turned its attention to the professions, including the medical and allied health professions.

Things have changed. Today, everyone is accustomed to the fact that the antitrust laws apply to members of the professions, and only a modern-day Rip Van Winkle would be surprised by the long list of Commission orders against professionals. Indeed,

sometimes I sense that members of the antitrust bar expect that the government will always be there peering over the shoulders of the professions and that, as Justice Stewart decried, in announcing the only principle he could discern in the majority opinion in Von's Grocery, the government always wins.[1]

It is true that the Commission has had a very successful enforcement program in this area. In part, this may stem from the fact that we have chosen our cases with particular care. Our internal evaluation process has been used to advantage to focus on violations that are clear on the law and on the facts. Investigations that have not offered such clarity simply have not been pursued. Careful case selection undoubtedly has contributed to the Commission's strong enforcement record.

Another explanation for the Commission's success may be that many of our cases have involved garden-variety horizontal agreements, cases that have hardly been on the cutting edge of the law. It appears that the incidence of this kind of agreement among doctors and other health care professionals has decreased, and I expect it will continue to decrease as they become more aware of the antitrust implications of their actions.

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[1] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

I mentioned Justice Stewart's famous dissent in Von's Grocery for a reason. Although my memory doesn't stretch back quite that far, I believe that the Von's Grocery case was reasonably well accepted in its day. Today, of course, Von's is mentioned only for the purpose of laughing and pointing fingers. Plainly, Von's offers a lesson in humility for government policy makers. I am not going to suggest that time will reveal that the Commission's enforcement program with respect to the professions has validity comparable to that of the majority opinion in Von's Grocery. That is possible, of course, but I hope it won't come to pass since I support the Commission's activity in this area so far.

But the idea that the government always wins in this area does worry me a little. To say that we "win" cases actually may be a bit too self-congratulatory, since few of our cases against members of the profession go into litigation, and those that do seem to settle quickly thereafter or are not tested all the way through the courts. Not all of the cases in this area are garden variety. In accepting and issuing consent orders, the Commission develops its law enforcement policy and extends the application of the antitrust laws as they apply to professionals, professional associations and state boards.

It can be a matter of concern, it seems to me, when a small group of health care professionals finds itself the target of an

investigation and accedes to the demands of the Commission, entering into a consent agreement rather than litigating the matter. Individual doctors, for example, may have neither the money nor the time to fight a complaint, and they may be discouraged from doing so by the perception that the Commission always wins. Their willingness to consent may imply something about the merits of the Commission's case, or it may simply reflect their lack of will to fight.

This is an interesting and difficult problem. To raise it perhaps touches on deep waters having to do with the way the Commission goes about its business. Having walked to the edge of the water, before dipping in, I am going to step back for a moment to sketch the context in which professionals deal with the Commission today in terms of substantive antitrust.

Although the Commission's opinion in American Medical Association[2] was issued in 1979 and the Justice Department's suit against the AMA and individual doctors for the Group Health boycott[3] dates from the 1940's, most applications of antitrust law to professionals and various professional groups or boards have occurred in the last several years. During this time, the

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[2] 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd per curiam by an equally divided Court, 455 U.S. 676 (1982).

[3] American Medical Association v. United States, 317 U.S. 519 (1943).

law has evolved in certain ways that are important for professionals. One change is the manner in which the Commission has treated absolute bans on price advertising by professionals. In 1979, in the American Medical Association case, the Commission declined to apply the per se rule to broad proscriptions on advertising imposed on members of the AMA, because to do so would "preclude analysis of procompetitive justifications" for them. 94 F.T.C. at 1003. In the Massachusetts Board of Optometry[4] case, not quite ten years later, the Commission concluded that the state board's total ban on testimonial and "undignified" advertising "cannot be justified." Slip op. at 19.

Another way in which antitrust analysis has evolved in recent years has more general application. Two Supreme Court cases, Broadcast Music[5] and NCAA,[6] have been important in diminishing the polarity in traditional antitrust cases between rule of reason and per se offenses. Now, instead of an all-or-nothing analysis that depends on whether a challenged restraint has been categorized as a per se offense, we can apply to horizontal restraints an approach that considers possible

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[4] Massachusetts Board of Registration in Optometry, F.T.C. Docket No. 9195 (June 13, 1988).

[5] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[6] National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984).

justifications for otherwise suspicious conduct, without pursuing a full rule of reason inquiry.

The Commission explicitly adopted this approach in Massachusetts Board of Registration in Optometry. Under what I will call for simplicity the Mass. Board analysis, the Commission first asks whether the challenged conduct is "inherently suspect." If the answer is no, the conduct will be analyzed under the rule of reason. If the answer is yes, the Commission then considers the efficiency justifications for the conduct. If the justification is not plausible, if it can be rejected without an extensive factual inquiry, then the conduct can be condemned without further ado. If the justification is plausible, then a full rule of reason inquiry is appropriate.

The meaning of "inherently suspect" is critical to the analysis. In the Mass. Board case, the Commission said that conduct is "inherently suspect" if it seems likely, absent an efficiency justification, to restrict competition and decrease output. Tim Muris, formerly director of the Commission's Bureau of Competition, has said that any agreement between competitors to limit a significant aspect of their rivalry is likely to restrict output and, therefore, should be considered "inherently suspect." Some have suggested that "inherently suspect" and "facially anticompetitive" mean the same thing and that any agreement among competitors on the way in which they will compete

with one another is "inherently suspect." Others have suggested that "inherently suspect" should be limited to the conduct traditionally considered per se unlawful.

I am not sure precisely what "inherently suspect" means. If we adopt a broad definition of the term, virtually any agreement among competitors could be considered "inherently suspect." A broad definition of "inherently suspect" ultimately may lead to the same result as a more narrow definition, assuming that joint venturers or partners come forward with any valid justifications for their conduct. Conceivably, if the definition is sufficiently broad, joint venturers and partners might find themselves subject to greater antitrust scrutiny, at least initially, than they were before.

Defining "inherently suspect" as synonymous with the conduct traditionally considered per se unlawful presents the danger of falling back in the semantic trap we are trying to escape -- where antitrust analysis is defined by rigid categories, and we lose sight of the point, which is to reach a judgment about the reasonableness of the challenged restraint. The per se rule, the rule of reason and now "inherently suspect" all have been intended to serve this purpose. One advantage of the Mass. Board analysis is its explicit consideration of proffered justifications, which can and have been ignored in per se analysis. Another advantage is that, like the per se rule, this

approach may offer substantial efficiencies in law enforcement, both public and private.

After deciding that a practice is inherently suspect, the Commission considers any so-called "efficiency justifications" or "procompetitive justifications" for the challenged conduct. What are efficiencies? The dictionary definition is close to what the term means in antitrust cases -- a practice is considered efficient when it reduces costs, creates a new product or improves operation of a market. These justifications reflect the fact that the Sherman Act cannot mean what it says and that not every contract or agreement that restrains trade is unlawful.

Some agreements among competitors enhance competition. A familiar example, from Judge Bork's book, The Antitrust Paradox[7] (and from Judge Taft's opinion in Addyston Pipe & Steel[8]), is when lawyers form a partnership and agree, among other things, on prices and markets. The elimination of rivalry among the partners is necessary to the partnership and results in obvious efficiencies. In Addyston Pipe & Steel, Judge Taft said that this kind of restraint was "to be encouraged." 85 Fed. at 280.

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[7] R. Bork, The Antitrust Paradox 265 (1978).

[8] United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898).

Agreements, even price fixing, that are associated with legitimate partnerships, joint ventures or other economic integrations are not unlawful when they are ancillary to the integration and necessary to make the integration work. The creation of a partnership is an easy example, but suppose that the economic integration is less complete.

The decision of the Supreme Court in the Maricopa County Medical Society[9] case provides an example. The case involved an agreement among doctors on maximum prices for services provided under insurance programs approved by the doctors' medical care foundations. The Court applied the per se rule against price fixing, noting that neither the doctors nor the foundations sold insurance and that the foundations were not "analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." 457 U.S. at 356. The moral of this story is that when competitors join together for one purpose, immunity does not necessarily attach to everything they jointly do.

In considering justifications for suspect conduct, the question is whether the conduct creates or enhances competition by, for example, "reducing the costs of producing or marketing

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[9] Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

the product, creating a new product or improving the operation of the market." Mass. Board, slip op. at 12. The price agreements in Broadcast Music could have been categorized as inherently suspect -- indeed, the court of appeals found them per se unlawful -- but the Supreme Court held that they should be analyzed under the rule of reason, because of the substantial justifications for them.

National Society of Professional Engineers,[10] a case that has had important implications for the learned professions, illustrates a justification that the Supreme Court did not find plausible. The engineers argued that their rule against competitive bidding was justified because price competition could tempt engineers to cut corners, with risk to public safety. The Court rejected this proffered justification with what has become a classic line in the antitrust lexicon: "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." 435 U.S. at 696.

Less than ten years ago, after the decision in Professional Engineers, but perhaps before its implications were fully understood, the Commission regarded quality of care claims in health care cases with great respect and even fear. The respect is still there, but I think we are less timid today. That is

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[10] United States v. National Society of Professional Engineers, 435 U.S. 679 (1978).

partly because we are more familiar with the professions and partly because we have found that it is possible to distinguish between valid quality of care claims and those that are asserted as a cover for anticompetitive intentions.

Now, why is all this interesting? The Supreme Court was careful in the Goldfarb,[11] Professional Engineers and Maricopa cases to leave open the possibility that competition in the professions is different from competition in business and the possibility that professional ethical norms may promote this competition. I find it intriguing that despite the opportunity to present efficiency justifications and despite the Supreme Court's express invitation, few if any exceptions based on the needs of particular professions have since appeared in the case law or elsewhere.

Has the law overlooked genuine differences between the professions and business? Opportunities to distinguish the professions from other businesses under the antitrust laws may be squarely presented in cases involving codes of ethics of professional associations. My unabridged Webster's defines the word "profession" by talking at some length of specialized knowledge and skill. It says that a profession is a "calling" that maintains "by force of organization or concerted opinion high standards of achievement and conduct."

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[11] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

Historically, the ethical rules of professional associations have provided a signal of quality to the public, and many of the rules and standards and certifications of those associations still are considered efficient and procompetitive. Restrictions on advertising imposed by professional associations no doubt were important to certify quality when they were first promulgated, but the law today is clear that in most circumstances neither the state nor a private association may restrict truthful advertising. To the extent that restrictions on advertising remain a signal of quality, however, law enforcement may have reduced the procompetitive benefits of associations.

In an eloquent dissent in Shapero v. Kentucky Bar Association,[12] Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, identified a number of concerns that stem from a refusal "to recognize either the essence of professionalism or its fragile and necessary foundations." As Justice O'Connor observed, "heightened ethical demands" may be needed for certain professionals "because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess." 108 S. Ct. at 1930-31. I share many of these concerns. Although concern about destroying the

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[12] ___ U.S. ___, 108 S. Ct. 1916, 1925 (1988).

foundations of professionalism does not answer whether any particular ethical restriction on a professional is unlawful, the long history of the professions and of their associations suggests that we should proceed with caution in striking down additional restrictions.

Another area in which genuine concerns about professionalism may arise is the quality of care defense, or efficiency justification, that I mentioned earlier. The lesson that has emerged from the case law is that quality of care arguments cannot be used to mask anticompetitive agreements. For example, a concerted refusal to deal with an insurance company to coerce the insurer to pay higher fees to doctors cannot be defended on the ground that higher fees are necessary to ensure high quality patient care. This kind of agreement, like the rule against competitive bidding in Professional Engineers, seeks to displace the working of the market with cartel decisions. This argument has been rejected consistently by the Commmission and the courts.

A similar defense was rejected by the Supreme Court in Indiana Federation of Dentists,[13] where the dentists claimed that their collective refusal to provide patient x-rays to insurance companies was justified to ensure adequate dental care. Essentially, the dentists were arguing, as the engineers had in

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[13] Indiana Federation of Dentists v. FTC, 476 U.S. 447 (1986).

National Society of Professional Engineers, that competition was somehow inappropriate.

Joint action to collect and communicate information to insurers can be benign or even procompetitive, and many of the Commission's orders expressly permit such activity. But a concerted refusal to deal to coerce an insurer to raise its reimbursement levels clearly exceeds what is necessary to communicate information.

To give another example, a group of doctors cannot use low quality care to justify refusing to deal with a hospital in order to prevent the hospital from opening a free-standing clinic. Even if the claim of low quality is true as a matter of fact, the law does not permit a group of competitors to substitute their judgment for that of the market. In a competitive market, the proposed clinic will succeed or fail on its own merits.

It is important to remember, however, that true quality of care justifications are still available. For example, hospital privileges decisions have significant anticompetitive potential, because they are concerted decisions that affect the ability of a competitor to compete. But a denial of hospital privileges on the ground of incompetence is unlikely to be challenged by the Commission, provided the decisionmakers have a factual basis for

their conclusion. A denial of privileges on the basis of competence is efficient, just as restricting advertising that is false or deceptive is efficient.

A hospital's decision to provide a different quality of care, perhaps by granting privileges only to board-certified physicians, a so-called "Cadillac" strategy, arguably is a legitimate quality of care decision that also might, in certain circumstances, pass muster under Section 5. On the other hand, a denial of privileges that is motivated by economic concerns, to eliminate a competitor or a competing class of health care practitioners, without regard to the individual's qualifications or to the scope of practice under state law, is less likely to succeed.

Defenses other than competitive justifications are, of course, available. For example, unilateral decisions by doctors are not unlawful under Sherman Act standards. Although sometimes a horizontal agreement is relatively easy to infer, in other situations, it may be difficult for the government to discern whether doctors are acting in concert or unilaterally. One example might be a refusal by a group of doctors to treat emergency room patients. These refusals may look like boycotts, if the doctors act simultaneously. Simultaneous decisions to refuse to treat paying patients can suggest conspiracy, because the decisions apparently are inconsistent with the doctors'

economic self-interest unless other doctors also have agreed to refuse patients.

But suppose the doctors are simply refusing to treat patients they perceive as presenting a high risk of malpractice claims? Is this a conspiracy, or is each doctor acting unilaterally to avoid malpractice suits? Proving concerted action here might be very difficult indeed. If the doctors coupled their walk-out with other explicit economic demands for the group, an inference of concerted action can be drawn more easily.

Shortly after I began today, I expressed some concern about the fact that Commission cases involving professionals or their associations and state boards are likely to settle rather than proceed to litigation. I would like to come back now and test those waters ever so gingerly and briefly. When Commission policy is clear, the usual internal procedure for considering proposed consent agreements is efficient, and I fully endorse it. When judgments need to be made that balance the value of increased competition and specific needs to maintain professionalism -- in short, when new policy is to be established -- the consent procedure may leave something to be desired. Although litigation is costly, it does offer an opportunity for development of the facts and of a full record on which decisionmakers can then make careful judgments. I realize that

you may not always have full confidence in those careful judgments, but that is a subject for another day.

Let me emphasize that I recognize all the problems that litigation entails. The costs for individual litigants can be enormous. But when there are genuine justifications for particular conduct, it would be unfortunate, to say the least, if those justifications were not fully elucidated. When policy is being made in a case, the stakes can be high.

The Commission does not rely entirely on the parties to develop fully efficiency justifications. Even in an essentially uncontested matter, we consider possible justifications, consistent with our mandate to act in the public interest. But the Commission, despite the considerable expertise of its able staff, is not as well positioned as the parties to understand and develop efficiency justifications. If the parties do not defend their conduct, the justifications may lose their force.

Of course, I cannot and do not actually recommend that anyone must or should proceed to litigation, but I am concerned that parties may accede to the perceived will of the Commission without presenting their best justification, and I do think we must continue to exercise restraint to avoid inadvertent and inexpert dabbling in judgments that are properly left to the professions.

For the future, the Commission's law enforcement emphasis in the health care field likely will continue. Just how far the Commission will extend the law, however, is difficult to predict. Antitrust enforcement necessarily reflects what is occurring in the marketplace. One possible source of intimations of things to come in Commission policy regarding professionals may be the comments filed by the Commission's staff under the consumer and competition advocacy program. The staff of the Commission, through the advocacy program, provides comments, on request, to state and local legislatures and other government bodies concerning the likely competitive effects of proposed legislation or rules. The Commission authorizes the staff to file the comments, so we do review them, although we do not necessarily endorse them. Indeed, each advocacy filing contains an explicit disclaimer to that effect.

Frequently, the staff comments are a precursor of what the staff will recommend in law enforcement matters. Recent staff comments have suggested to state legislatures that certification for professionals may be preferable to licensing as a means of signaling quality without preventing individuals who do not meet the state's qualifications from also engaging in the same occupation. The staff maintains that certification permits consumers to choose between certified, presumably higher cost providers and uncertified, presumably lower cost ones. As far as

I know, the staff has not yet applied this analysis in an advocacy filing to state licensing for doctors or for that matter lawyers. Nor have they yet proposed law enforcement action to force a state professional board to eliminate its licensing requirements in favor of certification as a less restrictive means to achieve the same end.

I do not mention this to suggest that such a recommendation is imminent or to suggest that I would support such a recommendation. That case has yet to be made and, if it were, I would want to be very careful not to intrude on judgments that are properly left to members of the professions. I mention this only to suggest that the development of antitrust law as it applies to the professions is not yet set in stone and to suggest that if you represent professionals, you should attend to your defenses.