8874637

BUREAU OF
CONSUMER PROTECTION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

COMMISSION AUTHORIZED

February 19, 1987

Mr. George L. Schroeder, Director
Legislative Audit Council
State of South Carolina
620 Bankers Trust Tower
Columbia, South Carolina 28201

Dear Mr. Schroeder:

The staff of the Federal Trade Commission is pleased to respond to your invitation to participate in the sunset audits of the South Carolina Boards of Optometry and Opticianry ("Boards").[1] This letter states our views on the manner in which provisions in the Optometry and Opticianry Practice Acts ("Practice Acts") and regulations governing these Boards may affect competition for the delivery of eye care service within the markets served by South Carolina optometrists and opticians.

In this letter we focus primarily on the statutory and rule provisions restricting advertising and the use of third-party solicitors by optometrists and opticians. Nondeceptive advertising disseminates information about the individuals or firms offering services that consumers may wish to purchase. This process is beneficial to consumers because it facilitates purchase decisions that reflect true consumer preferences and it promotes the efficient delivery of services. We therefore urge the Council to seek the repeal of those rules that restrict the use of truthful, nondeceptive advertising. We also comment on a rule that unnecessarily restricts the commercial forms in which optometrists may practice. This rule limits competition among professionals and may tend to raise prices, and we therefore recommend that the Council seek its repeal as well.

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate, the Commission has attempted to

---

[1] This letter represents the views of the FTC's Bureaus of Consumer Protection, Competition, and Economics, and not necessarily those of the Commission. The Commission has, however, authorized submission of this letter.

encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others. The Commission's goal has been to identify and seek removal of restrictions that impede competition, increase costs, and harm consumers without providing significant countervailing benefits.

I. ADVERTISING RESTRICTIONS

As a part of the Commission's efforts to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.[2] Empirical studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.[3] Studies have also provided evidence

---

[2] See, e.g., American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- is consistent with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and regarding the legal rights of potential clients or using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

[3] Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

that restrictions on advertising raise prices but do not increase the quality of goods and services.[4] Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

The Federal Trade Commission has examined various justifications that have been offered for restrictions on advertising and has concluded that they do not warrant restrictions on truthful, nondeceptive advertising. For this reason, the Commission staff believes that only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices.

Discounts, Bonuses and Premiums

Section 40-37-190 of the Optometry Practice Act imposes a flat ban on optometrists' "offer[ing] eye exams at a discount price or as a premium, the object of which is to induce the sale of ophthalmic services or materials."[5] In addition, both the Optometry and Opticianry Practice Acts (§§ 40-37-180 and 40-38-70, respectively) make it unlawful

> to offer or give eyeglasses, spectacles, lenses or any part used in connection therewith, as a premium or bonus with merchandise or in any other manner to induce trade or to give or offer to give anything of value . . . the object of which is to induce the examination of the eye or the sale of [ophthalmic materials].

This restriction does not apply to giving "ophthalmic products incidental to the use of the product being offered" (such as eyeglass cases or cleaning solutions) or to discounts for vision care products, provided certain disclosures are made.

We urge the Council to recommend the elimination of these provisions. These bans on discounts, premiums and bonuses

---

[4] Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979). See also Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

[5] As interpreted by the South Carolina Attorney General, this provision forbids any person from offering any discounts on eye examinations. See 84 S.C. Op. Att'y. Gen. 142 (1984).

deprive consumers of an important form of price competition that can readily be conveyed through advertising, and we can envision no consumer benefit from such restrictions. Moreover, the offering of such price terms not only can be of great benefit to consumers, but also may be a valuable promotional tool for new practitioners who are trying to establish themselves.

While we recognize the potential for deceptive schemes in the offering of discounts, premiums and bonuses, we believe total bans on such offers are overly restrictive and unnecessary. Both the Practice Acts already contain appropriate general prohibitions on untruthful or deceptive claims. Because any deceptive schemes are likely to involve false or deceptive claims, they would be prohibited under the current Acts.

Disclosure Obligations

Code sections 40-37-180 and 40-38-70 of the Optometry and Opticianry Acts, respectively, contain provisions requiring certain disclosures. The first of these appears to require that discounts from a "standard" price other than the offeror's "regular" price may be advertised only if the "standard" price and its source are disclosed in the ad. If interpreted in this way, this provision would effectively preclude the advertising of certain across-the-board discounts (e.g., "ten percent off manufacturers' list on all frames and lenses"). Since it is impractical to state in an advertisement the standard prices and their source for all of the goods and services covered by such an offer, the proviso likely suppresses this form of truthful and valuable advertising. Because it may harm consumers and competition, we suggest that the provision be eliminated.[6]

Another provision in Code sections 40-37-180 and 40-38-70 requires that certain disclosures be made in all price advertisements of ophthalmic goods and services. Such ads must state whether: (1) an advertised price for eyeglasses includes single vision or multi-focal lenses; (2) a price for contact lenses refers to soft or hard contacts; (3) a price for ophthalmic materials includes all dispensing fees; (4) a price for ophthalmic materials includes an eye examination; and, (5) a price for eyeglasses includes both frame and lenses.[7] Any disclosure obliga-

---

[6] It should be noted that at least one court has invalidated on First Amendment grounds similar requirements that advertisements for discounted prices include all regular non-discounted prices. South Ogden CVS Store v. Ambach, 493 F. Supp. 374 (S.D.N.Y. 1980).

[7] Such disclosure requirements were permitted, but not required, by § 456.5 of the Commission's Advertising of Ophthalmic Goods and Services Trade Regulation Rule ("Eyeglasses

tion increases advertising cost, either because it increases the length of the message or requires practitioners to forego some portion of the advertising message they would have delivered had the space not been taken by the disclosure. Unnecessary disclosure requirements could therefore result in less information being made available to consumers. Consequently, we believe that disclosures should be mandated only where they are necessary to prevent deception. Because we do not believe that there is anything inherently deceptive about truthful price advertising, we recommend repeal of these provisions.

Superiority Claims

Both the Optometry and Opticianry Boards have promulgated regulations forbidding the "slightest intimation of having superior qualifications or being superior to other [licensees]" (§§ 95-1-E and 96-20.6, respectively).

We urge the Council to recommend elimination of these rules. Bans on superiority claims clearly lessen competition among sellers. At a minimum they restrict comparative advertising, which can be a highly effective means of informing and attracting customers. When sellers cannot truthfully compare the attributes of their services to those of their competitors, their incentive to improve or offer different products, services, or prices is likely to be reduced.

Bans on claims of superiority are particularly likely to injure competition and consumers when they are as broad as those in the Practice Acts, which forbid even the "slightest intimation" of superiority. Virtually all statements about a practitioner's qualifications, experience, or performance can be considered to be implicit claims of superiority. Bans on all such claims would make it very difficult for optometrists and opticians to provide consumers with truthful information about the differences between their services and those of their competitors.

Solicitors

Both the Practice Acts impose bans on the use of solicitors to obtain patronage (§§ 40-37-220(15) and 40-38-220(15), respectively). These prohibitions appear to unnecessarily preclude optometrists and opticians from hiring third parties to assist in marketing vision care services and products. Restrictions that prohibit all third-party solicitation, including solicitation in situations where there is little or no risk of coercion,

---

I"), which was remanded in American Optometric Association v. FTC, 626 F.2d 896 (D.C. Cir. 1980). The Commission has chosen not to reissue the remanded portion of Eyeglasses I.

harassment, or similar abuses, may unnecessarily restrict the dissemination of truthful information about and sales of vision care services and goods to willing and competent purchasers. Similarly, restrictions that permit only licensed optometrists and opticians to engage in solicitation unnecessarily limit the ability of businesses to disseminate information that is beneficial to consumers and for which the professional expertise of an optometrist or optician is not required.

In certain circumstances third-party solicitation could conceivably result in overreaching or undue influence. See Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). But this does not justify prohibiting all third-party solicitation, just as the possibility of deception does not provide a legitimate basis for banning all advertising. The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982). After weighing the possible harms and benefits to consumers, the Commission ordered the AMA to cease and desist from restricting solicitation, but permitted the AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, may be vulnerable to undue influence. We suggest the Council consider this standard, which protects consumers while allowing them to receive information about available ophthalmic goods and services.

Professional Affiliations

Both the Optometry and Opticianry Boards have rules prohibiting the use of positions in professional organizations "for advertising purposes or for self-aggrandizement" (§§ 95-1(F) and 96-20(7), respectively). These rules may prevent the dissemination of information about eye care professionals that many consumers would find helpful in selecting professionals. Membership in organizations that devote time and resources to studying particular areas of vision care may well indicate skill in that area. While information about membership in an organization may be communicated in a deceptive manner, the mere possibility of deception does not justify a total ban. The Council should urge the replacement of this broad ban with more limited restrictions on deceptive statements concerning one's professional affiliations.

Office Displays

The Optometry Board has adopted several additional rules that appear to restrict optometrists' business practices unnecessarily but provide no apparent consumer benefit. Rule 95-1(D) forbids displaying licenses, diplomas or certificates where they are visible outside the office. Rules 95-1(H) and (K) forbid

displaying eyeglass signs, lenses and frames in optometric offices. These provisions preclude the use of office space to inform consumers of optometrists' educational backgrounds and ophthalmic products available for sale in their offices. We can envision no consumer benefit from such restrictions and recommend their repeal.

II. COMMERCIAL PRACTICE RESTRICTIONS

We also recommend that the Council consider revisions to a restriction on the commercial manner in which optometrists may practice. We believe that this restriction may not be in the best interests of consumers.

Office Locations

Board Rule 95-1(N) forbids the opening of optometric offices in business establishments such as jewelry, department or other stores. We are concerned that this provision may unnecessarily hamper optometrists who wish to market their services in a cost-efficient manner.[8] For example, banning the practice of optome-

---

[8] On January 4, 1985, the Commission proposed an Ophthalmic Practices Trade Regulation Rule ("Eyeglasses II") that would prohibit state-imposed bans on locating in retail centers, bans on employment or other business relationships between optometrists and non-optometrists, bans on nondeceptive trade names, and bans on branch offices. The Commission stated in its Notice of Proposed Rulemaking that public restraints on the permissible forms of ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety. See 50 Fed. Reg. 598, 599-600 (1985).

The Commission staff has recently published its report on the proposed rule. The staff concluded that "the rulemaking record demonstrates that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the quality of care in the market." The staff also concluded that the restrictions provide no quality-related benefits to consumers. The staff therefore recommended that the Commission promulgate a trade regulation rule prohibiting these restrictions. Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice (1986).

While the Presiding Officer also found that commercial practice restrictions raise prices to consumers and limit access to eyecare, he did not believe that the evidence cited in the two Commission studies, discussed infra at 12-14, provided an adequate basis upon which conclusions about the quality of care

try on the premises of a department store prevents optometrists from locating their practices where they can establish and maintain a high volume of patients because of the convenience of the location and a high number of "walk-in" patients. This higher volume may, in turn, allow professional firms to realize economies of scale that may be passed on to consumers in the form of lower prices. This restriction may also increase costs for chain optical firms by requiring optometrists associated with such firms to locate in separate offices. Such higher costs may decrease the number of chain firms, resulting in higher prices for consumers.

Commercial practice restrictions such as this one are frequently defended on the grounds that they help to maintain a high level of quality in the professional services market. Proponents claim, for example, that business relationships between professionals and non-professionals are undesirable because they permit lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits.

The available evidence, including comprehensive survey evidence, contradicts these contentions. Two empirical studies conducted by the staff of the Federal Trade Commission indicate that restrictions on commercial optometric practice, including restrictions on mercantile location, in fact harm consumers by increasing prices without providing any quality-related benefits.

---

issue could be drawn. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules (1986). Both the staff and Presiding Officer reports will shortly be under review by the Commission.

In a case challenging various ethical code provisions enforced by the American Medical Association ("AMA"), the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution, and from entering into partnerships or similar relationships with non-physicians, unreasonably restrained competition and thereby violated the antitrust laws. American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982). The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

The first study,[9] conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses provided by optometrists in markets with a variety of regulatory environments. The study found that eye examinations and eyeglasses cost significantly more in markets without chain firms than in markets where chain optical firms were present. The study data showed that prices were almost 18% higher in markets without chains.

The study also provided evidence that commercial practice restrictions do not result in higher quality eye care. The thoroughness of eye exams, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in restrictive and non-restrictive markets.

A second study[10] of cosmetic contact lens fitting concluded that, on average, "commercial" optometrists -- that is, for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

Other evidence, including survey evidence, indicates that state restrictions on commercial practice actually decrease the quality of care in the market by decreasing the frequency with which consumers obtain care. As a result of the higher prices associated with the restrictions, consumers tend to purchase eyecare less frequently and may even forego care altogether.[11]

---

[9] Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

[10] Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists and Opticians (1983). This study was designed and conducted with the assistance of the major national professional associations representing ophthalmology, optometry and opticianry.

[11] Public Health Service, Eyeglasses and Contact Lenses: Purchases, Expenditures, and Sources of Payment, National Health Care Expenditures Study 4 (1979); Benham and Benham, Regulating through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421, 438 (1975); Kernan, U.S. Health Profile, Washington Post, Apr. 26, 1979 at p. C-1, col. 4.

CONCLUSION

In sum, the evidence indicates that consumers are harmed by restrictions on truthful, non-deceptive advertising and by restrictions on the forms of commercial practice that may be used by eye care professionals. Such restrictions raise prices above the levels that would otherwise prevail, decrease the quality of care, and do not provide any consumer benefit. We recommend, therefore, that the Council seek to repeal or amend the rules discussed above to remove unnecessary constraints on innovative forms of ophthalmic practice and advertising.

Thank you for inviting our comments. If you would like to have copies of any studies or other materials referred to, but not enclosed with this letter, we would be happy to supply them.

Sincerely yours,

William MacLeod

William MacLeod
Director