

## THE FTC'S OPHTHALMIC PRACTICE RULE: TAKING A BOW TO STATE SOVEREIGNTY

by MARK S. BLODGETT

The Federal Trade Commission is not the only arm of the federal government regulating optometry,<sup>1</sup> but it is the agency that has proposed a controversial yet consumer-oriented rule that would eliminate many restrictive state professional practice regulations.<sup>2</sup> In an era of deregulation<sup>5</sup> and consumerism, perhaps it is not surprising that the FTC propose a rule as comprehensive as the Ophthalmic Practice Rule, Eyeglasses II.<sup>4</sup> After all, "over half of all Americans and more than 90 percent of elderly consumers use corrective eyewear and over eight billion dollars was spent on eye exams and eyewear in 1983."<sup>3</sup>

However, the debate on deregulation has generally thrown Congress into the uncomfortable position of choosing between the public good and special business interests<sup>6</sup> and the States have historically had licensing boards to regulate various occupations from physicians to beauticians.<sup>7</sup> These licensing boards have "benefitted those in the profession in the sincere but

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COBLENS, OPTOMETRY AND THE LAW 4 (1976).

<sup>2</sup>S\* *gmmfjy*, S. COBLENS, at 1-8; OCCUPATIONAL LICENSURE AND REGULATION 346-7 (S. Rottenberg ed. 1980); L. GERSTON, C FRALEIGH A R. SCHWAB, THE DEREGULATED SOCIETY 10, 15-16 (1988)(hereinafter cited as GERSTON \* FRALEIGH); 54 Fed. Reg. 10,285 (1989); 16 CF.R. 456 (1991); California State Bd. of Optometry v. FTC, 910 F. 2d 976 (D.C Or. 1990); MODERN MATURITY, Dec. 1989-Jan. 1990, at 13.

*Id.* GERSTON A FRALEIGH, at 15.

<sup>4</sup>54 Fed. Reg. 10,285,10,287; 910 F.2d at 978.

<sup>5</sup>54 Fed. Reg., at 10,285.

<sup>6</sup>GERSTON A FRALEIGH, *supra* note 2, at 16.

<sup>7</sup>M. at 10.

unsubstantiated conviction that doing so would benefit the public generally,"\* and historically, such state control has been upheld by the Supreme Court." Therefore, the issue has been and may continue to be: should there be a federal regulation that greatly limits state control of optometry in the interest of consumerism and fairness?<sup>10</sup> To attempt to resolve this issue, the legal history and merit of the Ophthalmic Practice Rule, Eyeglasses II, must be examined.

#### CONGRESSIONAL AUTHORITY

The Federal Trade Commission Act has been amended twice since its inception in 1914. "Section 5 was amended in 1938 so that the FTC could "prevent 'unfair or deceptive acts or practices' as well as unfair methods of competition."<sup>12</sup> The Magnuson-Moss Warranty-FTC Improvement Act further amended the FTC Act so that it applied to "acts 'affecting' commerce."<sup>13</sup> These amendments are as follows:

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations...from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.<sup>14</sup>

The FTC also has the power to state with specificity what is unfair pursuant to section 18 (a)(1) of the Magnuson- Moss Amendments by prescribing:

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce...,and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or

\**id.*

\**Id.*

"910 F.2d at 978; 54 Fed. Reg. 10,285; 16 C.F.R. § 456.4 (1991); OCCUPATIONAL LICENSURE AND REGULATION 346-7 (S. Rottenberg ed. 1980); GERSTON & FRALEIGH *supra* note 2 at 16.

"910 F.2d at 978.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*; 15 U.S.G5 45(a)(1988).

affecting commerce... Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.<sup>15</sup>

THE RULE: BARRING FOUR STATE PROHIBITIONS

The FTC's review of state regulation of optometry dates from the mid- 1970's<sup>16</sup> when state regulation was found

to discourage the 'commercial practice' of optometry--such as partnerships between optometrists and laymen, use of trade names, and chain operations combining the practice of optometry with the sale of eyeglasses in shopping centers--in favor of 'traditional optometric practice' typified by sole practioners [sic] operating in professional office buildings under their own names.<sup>17</sup>

Contrary to industry opinion, research conducted by the FTC indicates increased cost and less quality care due to excessive state restrictions.<sup>18</sup> These findings were published in 1980<sup>19</sup> and later resulted in the Eyeglasses II Rule in 1989.<sup>20</sup>

This Rule is found in Title 16, Section 456 of the Code of Federal Regulations under "State bans on commercial practice" and reads in part as follows:

(a) It is an unfair act or practice for any state or local governmental entity to:

(1) Prevent or restrict optometrists from entering into associations with lay persons or corporations...<sup>21</sup>

Even before its adoption, this Rule was criticized for reaching beyond Congressional authority.<sup>22</sup> Quite interestingly; however, the FTC claims that

<sup>15</sup>*Id.*; 15 U.S.C S 57a(a)(1)(1988).

<sup>16</sup>910 F.2d at 978.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*; 54 Fed. Reg., at 10,285-6; GERSTON 4 FRALEIGH. *supra* note 2 at 10.

<sup>19</sup>910 F.2d at 978.

<sup>20</sup>M. at 979.

<sup>21</sup>*Id.*; 54 Fed. Reg. 10,305(emphasis supplied); 16 CF.R. § 456.4(1991). The code section continues by listing prohibited acts found in varying degrees among the states. *Id.*

<sup>22</sup>910 F.2d at 979; 54 Fed. Reg. 10,305; 16 CF.R. 5 456 (1991); Daniel Oliver, FTC Commission Chairman, was opposed to the Rule due to lack of authority and federalism issues.

*Id.*

the Rule makes no intrusion into state regulation of qualifications of practitioners and the quality of the products and services they provide.<sup>23</sup>

Having found the state prohibitions on lay association to be an "unfair act or practice," three other state prohibitions are barred by the Rule: "(1) limitations on the number of branch offices which optometrists may own or operate (2) prohibitions on the practice of optometry in commercial locations; and (3) prohibitions on the practice of optometry under a nondeceptive trade name."<sup>24</sup>

The FTC has justified these prohibitions as being beneficial to consumers, just as the states have justified their rules and regulations restricting the practice of optometry as being necessary for quality care.<sup>25</sup> However, state restrictions were found by the FTC's economics bureau to limit consumer care and choice and to "impede innovation in the eye care industry."<sup>26</sup>

The cost of eyecare is exorbitant and state regulatory inefficiencies are accountable for a large part of this price.<sup>27</sup> For instance, exclusion of chain operations increased eyewear and examination prices by eighteen percent.<sup>28</sup> Apparently, this is but one example of higher prices due to anticompetitive restrictions.<sup>29</sup>

#### STATE REGULATION

Aside from case interpretations, state restrictions on optometry are comprised of state statutes, licensing board rules and regulations, and within their advisory context, attorney general opinions.<sup>30</sup> Not surprisingly, there is much jurisdictional variety among state regulation; however, the FTC has published statistics on state regulations that come within the four prohibited areas. Lay affiliations are restricted by a majority of states<sup>31</sup> and commercial locations for offices are prohibited by more than twenty.<sup>32</sup> Numerical limits on office sites<sup>33</sup> and trade name restrictions are common as well.<sup>34</sup> More than forty states in 1985 shared in at least one of the four prohibited areas.<sup>35</sup>

<sup>23</sup>910 F.2d at 979; 54 Fed. Reg. at 10305; 16 C.F.R. § 456.5(a).

<sup>24</sup>54 Fed. Reg., at 10,285,10,288; 16 C.F.R. § 456.4 (1991); 910 F.2d at 978-9; 924 F.2d 244. <sup>25</sup>910 F.2d at 978; 54 Fed. Reg., at 10,285-6; GERSTON & FRALEIGH, at 10.

<sup>26</sup>54 Fed. Reg., at 10,285-6,10,288. <sup>27</sup>*Id.* at 10,285-6.

<sup>28</sup>*Id.* at 10,286,10,288.

<sup>29</sup>*Id.* at 10,288-9.

<sup>30</sup>S. COBLENS, *supra* note 2, at 5.

<sup>31</sup>54 Fed. Reg., at 10,286.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

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A 1991 statutory survey of eight Southeastern states reveals that all have restrictions on lay association and that three have "locational restrictions."<sup>36</sup> For example, Mississippi provides that "it shall be unlawful for any person, persons, corporation, proprietorship, partnership, or any entity other than a licensed optometrist or licensed ophthalmologist to dispense, fit, or prescribe to the public contact lenses, or any medical appliance having direct contact with the cornea of the eye."<sup>37</sup> Tennessee places limitations on an optometrist practicing "in, or in conjunction with any retail store or other commercial establishment where merchandise is displayed or offered for sale;"<sup>38</sup> however, by contrast, Georgia's "board shall not provide by rule to restrict the location of the practice of a licensed doctor of optometry"<sup>39</sup> and South Carolina statutes allow for "mobile units" as offices.<sup>40</sup>

The First Circuit Court of Appeals has summarized these jurisdictional restrictions nationally as follows:

...laws or regulations prohibiting laymen from employing optometrists to provide optometric services, limiting the number of offices that may be owned or operated by optometrists individually or as participants in such associations, and prohibiting them from practicing in department stores or shopping centers, or from practicing under any name other than their own.<sup>41</sup>

### A QUINTESSENTIALLY SOVEREIGN ACT

By its order of August 15, 1989, the Columbia Circuit of the United States Court of Appeals granted the California State Board of Optometry's

*generally*, FLA. STAT. ANN. § 463 (West); GA CODE ANN. § 43-30; KY. REV. STAT. ANN. § 320 (Baldwin); N.C. GEN. STAT. § 90; S.C. CODE § 40-37; TENN. CODE ANN. § 563-8; aia. Code § 34-22; MISS. CODE ANN. § 73-19. The three states with statutory locational restrictions are Alabama, Kentucky and Tennessee. ALA CODE § 34-22-15; KY. REV. STAT. ANN. § 320350; TENN. CODE ANN. § 563-8-113.

<sup>37</sup>MISS. CODE ANN. § 73-19-61.

<sup>38</sup>TENN. CODE ANN. § 63-8-113.

<sup>39</sup>GA CODE ANN. § 43-30-5.

<sup>40</sup>S.C. CODE § 40-37-290.

<sup>41</sup>910 F.2d at 978-9; 54 Fed. Reg., at 10,286,10,305; 16 C.F.R. 456.4 (1991).

motion to stay the Eyeglasses II Rule.<sup>42</sup> The court addressed only statutory grounds for challenge and stated that:

The question of the Commission's authority to promulgate the rule presents two specific issues of statutory interpretation: whether a State acting in its sovereign capacity is a "person" within the FTC's enforcement jurisdiction under section 5(a)(2) of the Act, and whether a state law may be an unfair or deceptive act or practice within the FTC's rulemaking authority under section 18(a)(1).<sup>43</sup>

To resolve the first issue, the court looked at the intent behind Section 5 of the Act. Apparently, the Act's sponsor felt that it applied "to persons, partnerships, and corporations, and with respect to the great industrial activities in interstate commerce. It embraces...every kind of person, natural or artificial, who may be engaged in interstate commerce."<sup>44</sup> Very importantly, however, the intent of the Act was to reach monopolies and to further the purposes of the antitrust laws.<sup>43</sup>

Under the antitrust laws, the Supreme Court considers a state to be a person; however, common usage and statutory interpretation generally exclude the sovereign from the word "person."<sup>44</sup> Therefore, the first issue has been decided. The court continued by stating that a companion issue is whether the Act applies to a state's sovereign actions.<sup>47</sup> In regard to sovereignty, the

<sup>42</sup>910 F. 2d at 976-8; Intervenor in this consolidated case was the National Association of Optometrists and Opticians. Petitioner/Intervenor representatives included the Arizona, Arkansas, California, Florida, Missouri, Nevada, Oklahoma, Virginia, and Washington State Boards of Optometry. Also, representatives of the American Optometric Association and the California Optometric Association appeared on the petitioner's joint brief. Among those filing amici curiae briefs in favor of Eyeglasses II was the American Association of Retired Persons. *Id.*; MODERN MATURITY, Dec. 1989-Jan. 1990, at 13. "AARP members have a vital interest in having restricted eye-care and eyewear markets opened up for increased competition." *Id.*; California State Bd. of Optometry v. FIC, No. 89-1190 (D.C. Cir., filed Aug. 15, 1989). Upon granting the stay, the Court slated as follows: "Petitioners have demonstrated the requisite elements warranting a stay, i.e., irreparable harm, likelihood of success on the merits, lack of injury to respondent and the effect on the public interest. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (1977); Virginia Petroleum Jobbers Association v. FTC, 259 F.2d 921 (1958). Indeed, with respect to their showing of irreparable

harm, it is clear that any time a state is enjoined from effectuating statutes enacted by representatives of the people, it suffers a form of irreparable injury.' See *New Motor Vehicles Board of California v. Orrin F. Fox*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice, 1977)." *Per Curiam. Id.*

<sup>43</sup>910 F.2d at 979.

<sup>44</sup>*Id.* at 980.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

*Parker v. Brown*<sup>44</sup> "state action" doctrine provides "that when a State acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade."<sup>49</sup> Therefore, the court concluded that the FTCs authority is kept in check by the "state action" doctrine<sup>50</sup> and stated further that there is

nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.<sup>51</sup>

The FTC disagreed with this limitation of its authority when there is "unreasonable interference with the efficient functioning of interstate markets;"<sup>52</sup> however, the rule of construction enunciated by the Supreme Court is as follows: "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'<sup>53</sup> Otherwise state sovereignty is insufficiently protected.<sup>54</sup> The court repeated the need to protect the "quintessentially sovereign act" of state control over optometry,<sup>55</sup> and addressed any "ambiguities" by stating that "the clear statement doctrine leaves no room for inferences"<sup>56</sup> of intent<sup>57</sup> and that upholding "the rule would alter the usual balance between the Federal Government and the States."<sup>58</sup>

On November 28, 1989, the court ordered that "Sections 1(a)- 1(f), 1(h), 2, 3 and 5(c) of the Eyeglasses II Rule, which will be codified at 16 C.F.R. {456 1 (a) - 1(f), 1(h), 2, 3, 5(c) shall be effective immediately. All other

<sup>44</sup>317 U.S. 341, 63 S.Q. 307, 87 LEd. 315 (1943).

<sup>49</sup>910 F.2d at 980; 317 U.S. at 350-51; *City of Lafayette v. Louisiana Power & Light Co.* 435 U.S. 389, 391, 98 S.Q. 1123, 55 L. Ed. 2d 364 (1978); 54 Fed. Reg., at 10,296;924 F.2d 243,244.

<sup>50</sup>10 F.2d at 980.

<sup>51</sup>*Id.* at 981; 317 U.S. at 350-51 (emphasis supplied).

<sup>53</sup>910 F.2d at 981; 54 Fed. Reg.,at 10,296.

<sup>55</sup>910 F.2d at 981.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 982.

<sup>58</sup>*Id.*

*Id.*

<sup>a</sup>*Id.* (emphasis supplied).

portions of the Eyeglasses II Rule remain stayed pursuant to the court's order dated August 15, 1989.<sup>59</sup> Therefore, the four preceding prohibitions remain stayed.

#### FUNDAMENTALLY FLAWED

On January 8, 1991, the First Circuit Court of Appeals denied petitions to rehear the case<sup>60</sup> while the Commission claimed that it could still prohibit state regulations not coming within the exemption of *Parker* and other related cases.<sup>61</sup> However, the court stated that the FTC's "lengthy rulemaking was conducted entirely without regard to the possibility that any of the regulations and policies it would condemn as unfair might be shielded by *Parker*."<sup>62</sup> and upon denying the rehearing, characterized the Eyeglasses II Rule as "fundamentally flawed" while acknowledging the FTC's rulemaking authority only if kept within proper bounds.<sup>63</sup>

The FTC appears to have reached a formidable barrier with the state action doctrine. However, this agency's research studies appear formidable too and they present a compelling economic and public policy concern. Also, optometrists claim dedication to a high standard of care and patient welfare.<sup>64</sup>

In recent years the tight reign on the "professional market place" has been loosened somewhat by consumers and by the states, as well as by federal agencies.<sup>65</sup> Given the current law, could the far-sighted objectives of the

<sup>59</sup>California State Bd. of Optometry v. FTC, No. 89-1190 (D.C. Cir., filed Nov. 28, 1989). The effective sections define a patient, an eye examination, a prescription, an optometrist, an ophthalmologist and ophthalmic goods and services. Also included, among others, are the designated unfair practices of not providing "to the patient one copy of the patient's prescription immediately after the eye examination is completed" and of conditioning "the availability of an eye examination to any person on a requirement that the patient agree to purchase any ophthalmic goods from the ophthalmologist or optometrist." 16 CFR. § 456.1-3,5(1991); 54 Fed. Reg. 10399,10302,10304-5.

<sup>60</sup>924 F.2d at 244.

<sup>61</sup>*Id.* at 244; 317 U.S. at 350-51; Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48,57-65,105 S.Ct. 1721,85 L.Ed. 2d 36 (1985); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. 445 U.S. 97,105-06,100 S.Ct. 937,63 L.Ed. 2d 233 (1980); 435 U.S. 389,394-97, 98 S.Ct. 1123, 55 L.Ed. 2d 364.

<sup>62</sup>924 F.2d at 244.

<sup>63</sup>*Id.*

<sup>64</sup>Ga. COMP. R. & REGS. R. 430-3-.01(1984). Georgia's optometric code of ethics states that optometrists shall: "(a) keep the visual or optometric welfare of the patient uppermost at all times; (b) promote in every possible way the better care of the health needs of the citizens of their state;.... (d) see that no worthy person shall lack for optometric care regardless of the financial status of the person..." *Id.*

<sup>65</sup>OCCUPATIONAL LICENSURE AND REGULATION 346-7 (S.Rottenberg ed. 1980).

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FTC be more effectively pursued through consumer efforts in their respective states?<sup>66</sup>  
Perhaps this is an overlooked facet of the doctrine of "state action."