

IN THE MATTER OF

MASSACHUSETTS BOARD OF
REGISTRATION IN OPTOMETRYFINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9195. Complaint, July 8, 1985—Final Order, June 13, 1988

This Final Order requires the Massachusetts board to allow truthful advertising by optometrists in the state, requires the optometry board to repeal its current regulation banning advertising of affiliations between optometrists and optical retailers, and also requires respondent to send a copy of the order to all optometrists currently licensed in Massachusetts and to all new applicants for five years.

Appearances

For the Commission: *Elizabeth Hilder.*

For the respondent: *Thomas A. Barnico and Steven H. Goldberg, Assistant Attorneys General, Boston, MA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Respondent

1. Respondent Massachusetts Board of Registration in Optometry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts (Mass. Gen. Laws Ann. ch. 13 §§16 *et seq.* and ch. 112 §§66 *et seq.*), with its principal office at 100 Cambridge Street, Boston, MA. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

2. The Board is composed of four optometrists and one public member, as provided in Mass. Gen. Laws Ann. ch. 13 §16.

3. While serving their membership terms, optometrist members of the Board may, and do, continue to engage in the business of providing

optometric services for a fee. Compensation for serving on the Board is limited to five hundred seventy-five dollars per year plus necessary traveling expenses for carrying out the business of the Board, and is paid out of fees collected by the Board. [2]

4. The Governor of the Commonwealth of Massachusetts appoints the four optometrist members and the public member of the Board.

5. The Board is the sole licensing authority for optometrists in Massachusetts. It is unlawful for an individual to practice or to offer to practice optometry in Massachusetts unless he or she holds a current license to practice issued by the Board.

6. The Board is authorized by Massachusetts law, Mass. Gen. Laws Ann. ch. 112 §71, to take disciplinary action against any licensee who engages in unprofessional conduct, fraud, deceit or misrepresentation in practice or in advertising, or who violates any rule or regulation promulgated by the Board pursuant to Mass. Gen. Laws Ann. ch. 112 §67. Disciplinary action by the Board may include the suspension or revocation of a license, or other limitations or restrictions on a licensee.

7. Board actions pertaining to optometrists in the Commonwealth of Massachusetts are decided by the four optometrist Board members, each of whose principal occupation is the private practice of optometry, and the public member.

Trade and Commerce

8. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, optometrists in Massachusetts compete with each other and with optometrists serving on the Board.

9. There are more than 1300 optometrists practicing in Massachusetts. More than \$100 million are spent on eye care annually in Massachusetts by Massachusetts residents, governmental entities, and private third-party payers.

10. In the conduct of their businesses, optometrists in Massachusetts receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering eye care services, purchase and use supplies and equipment that are shipped across state lines, and engage in business with optical establishments that conduct business throughout the United States. The acts and practices described below are in interstate commerce, or affect the interstate activities of optometrists in Massachusetts and third parties who pay for eye services, and are in or affect commerce within the meaning of Sections 4 and 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 44 and 45(a)(1). [3]

State Regulation of Optometry

11. With the exception of a statute barring claims that eyes are examined for free, the Commonwealth of Massachusetts does not, by statute or otherwise, ban or have any policy of banning truthful discount advertising by optometrists, truthful advertising about the goods and services that optometrists offer, or any other truthful advertising by optometrists.

Board Conduct

12. The Board has restrained competition among optometrists in Massachusetts by combining or conspiring with its members or others, or by acting as a combination of its members or others, to unreasonably restrict truthful advertising by optometrists. In particular:

a. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from truthfully advertising discounts from their usual prices and fees;

b. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and

c. Since at least October 1984, the Board has combined or conspired to prohibit optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

13. The Board has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things, the following:

a. Since at least January 1981, the Board has prohibited advertising by optometrists of discounts from their usual prices and fees, without regard to the truth or falsity of such advertising, on the purported ground that such advertising violates Board regulations and a Massachusetts statute that bars the use of words or phrases that convey the impression that eyes are examined for free (Mass. Gen. Laws Ann. ch. 112 §73A); [4]

b. Since at least January 1981, the Board has prohibited optometrists from permitting optical establishments and other commercial practices to advertise the optometrists' names or professional abilities, without regard to the truth or falsity of such advertising;

c. Since at least January 1981, the Board has coerced and intimidated optometrists into not advertising discounts from their usual prices and fees and into not permitting optical establishments or other commercial practices to advertise their names or the availability of their

services, by using one or more of the following practices: (i) sending investigators to interrogate them and inform them that such practices were improper; (ii) demanding their attendance at informal meetings at which the Board instructed them to cease such conduct because it violated Board regulations and state law; (iii) threatening to bring disciplinary action against them unless they ceased such conduct; and (iv) bringing disciplinary action against them for engaging in such conduct;

d. In October 1984, the Board promulgated and implemented regulations that prohibit advertising by optometrists that offers gratuitous services, rebates, discounts, refunds, or otherwise for the purpose of increasing the number of private patients, without regard to the truth or falsity of the advertising;

e. In October 1984, the Board promulgated and implemented regulations that prohibit advertising that contains testimonials or that is "sensational" or "flamboyant"; and

f. In October 1984, the Board promulgated and implemented regulations that prohibit optometrists from permitting or authorizing optical establishments or businesses to advertise or publicize the optometrists' names or the availability of their services. [5]

Effects

14. The effects of the combination or conspiracy and the acts or practices described above are and have been to restrain competition unreasonably and injure consumers in the following ways, among others:

a. Consumers are being deprived of truthful information about optometrists' services, prices, and fees, such as information about optometrists' offering of discounts to the elderly or others;

b. Consumers are being deprived of the benefits of vigorous price and service competition among optometrists;

c. Consumers are being deprived of truthful information about the availability and convenient location of optometrists' services, such as information that optometrists are located adjacent to optical establishments;

d. Optometrists are being prevented from disseminating truthful information about their prices and fees, and are being prevented from permitting optical establishments and other commercial practices to truthfully advertise or publicize their names or the availability of their services; and

e. Some consumers have paid higher prices for optometric services, some consumers have delayed or forgone needed optometric services, and some consumers have bought optometric services that are less

desirable to them than the services they would have purchased in the absence of the combination, conspiracy, acts, and practices.

Violation

15. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy and these acts or practices are continuing and will continue unless the Commission enters appropriate relief against the Board.