



The States also raise a Tenth Amendment/federalism challenge to the rule. They argue that the FTC has improperly expanded its own statutory authority and has usurped the role of Congress in determining the extent of federal intervention in the governance of state activities.

The States further assert that the state laws declared "unfair" by the FTC are protected under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Supreme Court in *Parker* "...held that the federal antitrust laws do not prohibit a State 'as sovereign' from imposing certain anticompetitive restraints 'as an act of government.'" *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 391 (1978). The FTC counters that it promulgated Eyeglasses II pursuant to its rulemaking rather than its antitrust authority, and therefore the state action doctrine does not apply.

The States also urge that Eyeglasses II violates the Constitution's Guarantee Clause and the "guarantee" of freedom of the States to control their own affairs by majority rule. The States view Eyeglasses II as a fundamental threat to state sovereignty because it replaces the right to self-government with a scheme of how optometry should be regulated in each of the States, discounting various local conditions and the need for special or different types of regulation. The States argue that by directly regulating the "States as States," and prohibiting them from enforcing existing state laws or enacting new laws which in any way conflict with Eyeglasses II, the FTC has sought to set itself up as a "Super-State," inserting itself into the political process of each of the States and altering the structure of state government in our federal system.

On August 15, 1989, the U.S. Court of Appeals for the District of Columbia Circuit granted the States' motion for a stay of the effective date of the Eyeglasses II Rule. The court found that the Board and the other petitioners demonstrated the requisite elements warranting a stay, *i.e.*, irreparable harm and likelihood of success on the merits. The court's order stated that "...with respect to 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.'"

A briefing schedule was set by the court on September 27, 1989. The States filed their brief on the merits on

November 27. Four other briefs have already been filed at this time. The FTC's brief was due to be filed on February 6; six more briefs were scheduled to be filed by March 7. Oral argument is scheduled for May 10.

RECENT MEETINGS:

At its December meeting, the Board directed Executive Director Karen Ollinger to send a letter to ARK Group regarding the use of the diagnostic drug, Dapiprazole Hydrochloride, stating that the Board is not interested in seeking legislation to allow its use by California optometrists.

Due to inevitable first-year confusion, the Board passed a motion on a one-time basis to allow optometrists 120 days in which to complete any deficiencies in continuing education for the 1990 renewal period. An extension through July 1, 1990 was also authorized for satisfaction of the CPR training requirement, due to lack of notification.

The Board also selected its 1990 officers: Dr. Steven Chun is the new President; Dr. Tom Nagy is Vice-President; and Dr. Pam Miller is Secretary.

FUTURE MEETINGS:

May 21-22 in San Diego.

July 5 in Berkeley.

August 13-14 in Sacramento.

November 29-30 in San Francisco.

BUREAU OF PERSONNEL SERVICES

Office Supervisor: Janelle Wedge
(916) 920-6311

The Bureau of Personnel Services was established within the Department of Consumer Affairs (DCA) to regulate those businesses which secure employment or engagements for others for a fee. The Bureau regulates both employment agencies and nurses' registries. Businesses which place applicants in temporary positions or positions which command annual gross salaries in excess of \$25,000 are exempt from Bureau regulation; similarly, employer-retained agencies are also exempt from Bureau oversight.

The Bureau's primary objective is to limit abuses among those firms which place individuals in a variety of employment positions. It prepares and administers a licensing examination and issues

several types of licenses upon fulfillment of the Bureau's requirements. Approximately 900 agencies are now licensed by the Bureau.

The Bureau is assisted by an Advisory Board created by the Employment Agency Act. This seven-member Board consists of three representatives from the employment agency industry and four public members. All members are appointed for a term of four years. At this writing, funding has limited the bureau to two employees.

LEGISLATION:

AB 2113 (Johnson) abolished the Bureau, effective January 1, 1990, by repealing the entire Employment Agency Act in the Business and Professions Code, provisions of law which provided for the Bureau of Personnel Services, its funding, and its examining, licensing, and regulatory functions, and those provisions which provided for nurses' registries, prepaid computer employment agencies, and job listing services.

The bill reenacts certain of the above provisions in Title 2.91 of the Civil Code, sections 1812.500 et seq., entitled the Employment Agency, Employment Counseling, and Job Listing Services Act. The Act comprehensively regulates by statute the contents of employment agency, employment counseling service, and job listing service contracts, and advertising and the fees of such agencies. Among other things, the Act changes existing law by doing the following:

-The Act deletes licensing and regulation by the Bureau.

-Sections 1812.511 and 1812.516 of the Act provide for a three-day cancellation period in which a jobseeker may cancel a contract with an employment counseling service or a job listing service.

-Sections 1812.503 and 1812.515 of the Act require the filing of a copy of a required bond with the Secretary of State rather than requiring filing of the bond with the Bureau. The principal sum of the bond shall be \$3,000 for an employment agency, and \$10,000 for a job listing service. The bond shall be for the benefit of any person or persons damaged by any violation of the Act or by fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failures to provide the services of the employment agency in performance of the contract with the jobseeker, by the employment agency or its



agents, representatives, or employees while acting within the scope of their employment.

-The Act revises standards of conduct for employment agencies, employment counseling services, and job listing services. Section 1812.504 requires every employment agency to give a written contract to every jobseeker from whom a fee or deposit is to be received, whether directly or indirectly, and section 1812.516 requires the same of every job listing service.

-The Act provides that no employment agency or job listing service shall accept a fee from any jobseeker, or send any jobseeker for employment, without having obtained, orally or in writing, a bona fide job order for employment.

-Section 1812.523 of the Act makes certain contracts entered into by reason of fraud or misrepresentation void and unenforceable and provides for a cause of action for damages by any person injured by reason of a violation of its provisions.

-Section 1812.524 *et seq.* of the Act substantially reenacts the provisions dealing with nurses' registries.

BOARD OF PHARMACY

Interim Executive Officer:

Patricia Harris
(916) 445-5014

Pursuant to Business and Professions Code section 4000 *et seq.*, the Board of Pharmacy grants licenses and permits to pharmacists, pharmacies, drug manufacturers, wholesalers and sellers of hypodermic needles. It regulates all sales of dangerous drugs, controlled substances and poisons. The Board is authorized to adopt regulations, which are codified in Chapter 17, Title 16 of the California Code of Regulations (CCR). To enforce its regulations, the Board employs full-time inspectors who investigate accusations and complaints received by the Board. Investigations may be conducted openly or covertly as the situation demands.

The Board conducts fact-finding and disciplinary hearings and is authorized by law to suspend or revoke licenses or permits for a variety of reasons, including professional misconduct and any acts substantially related to the practice of pharmacy.

The Board consists of ten members, three of whom are public. The remaining members are pharmacists, five of whom must be active practitioners. All are appointed for four-year terms.

MAJOR PROJECTS:

Regulatory Changes Rejected. The Office of Administrative Law (OAL) recently reviewed and rejected three sets of regulatory changes submitted by the Board: section 1707.1, which requires pharmacists to orally consult with patients whenever a prescription drug is dispensed for the first time; section 1717(c), which specifies the tasks which may be performed by an unlicensed person under the supervision of a licensed pharmacist; and section 1710, which defines the term "inpatient hospital pharmacy." (See CRLR Vol. 9, No. 4 (Fall 1989) p. 75 for background information on these changes.)

OAL rejected section 1707.1 because it failed to meet the clarity standard and because the Board failed to summarize and respond to all comments. Specifically, OAL wanted the Board to clarify both the contents of "medication profiles" which the rule requires pharmacists to keep on all patients, and the term "patient" for purposes of the rule. The Board has released a revised version of section 1707.1 for comments and planned to resubmit the file to OAL by the end of January.

OAL also rejected the Board's amendment to section 1717(c) due to lack of clarity. Specifically, the phrase "dispensing and related tasks" was considered unclear. The Board changed the phrase to include and define the term "packaging" and released the revised proposal for the required comment period. The Board planned to resubmit the rulemaking file to OAL by the end of January.

The Board's new section 1710, which defines inpatient hospital pharmacy, was rejected by OAL under the clarity and necessity standards and because the Board failed to include a transcript, recording, or minutes of its public hearing. The proposal was amended, released for comments, and resubmitted to OAL on December 20.

English Proficiency Examination. New section 1719, Chapter 17, Title 16 of the CCR, approved by the Board in July, would require that candidates for licensure who have been non-U.S. residents for more than ten years to take and pass the Test of Spoken English in addi-

tion to satisfying all other licensure requirements. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 75 and Vol. 9, No. 3 (Summer 1989) p. 67 for background information.) This proposal, which is deemed to have a fiscal impact, is awaiting approval by the Department of Finance at this writing.

Foreign Graduates. Following an October 25 regulatory hearing, the Board adopted new section 1720.1, Chapter 17, Title 16 of the CCR, which sets forth the acceptable method of demonstrating curriculum equivalency for foreign graduates. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 75 for background information.) The Board also adopted three other regulatory amendments. Revised section 1720(d) requires foreign graduates to complete the equivalency evaluation process within five years. Section 1720(c) was amended to clarify that the file of an applicant who fails to pay the licensing fee for a two-year period after passing the licensing examination will be deemed abandoned. The Board also adopted a technical amendment to section 1720(b). The Board submitted its rulemaking file on these proposed changes to OAL on December 20.

"Black Bag" Regulation Also on October 25, the Board held a public hearing on the proposed addition of new section 1751.10. The new section allows a pharmacist to carry and furnish dangerous drugs, other than controlled substances, to patients in the home setting. It also allows the pharmacist to furnish devices for parenteral therapy in the home, when the dangerous drug or device is one currently prescribed for the patient. The Board submitted the rulemaking file on this change to OAL on December 8.

Preprinted Prescription Pads. During its October 25 meeting, the Board discussed a draft regulation on the issue of preprinted prescription pads. If adopted, the new regulation, section 1717.3, Chapter 17, Title 16 of the CCR, would define a "preprinted, multiple check-off prescription blank" and prohibit a pharmacist from dispensing a controlled substance on these pads. The regulation would also forbid the pharmacist from dispensing a dangerous drug or device from a preprinted, multiple check-off prescription blank where more than one item is checked off.

The Board believes the use of these pads must be regulated because they lead to mistakes and have a high poten-