

THE FEDERAL TRADE COMMISSION,
THE CONSUMER AND THE PUBLIC INTEREST

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Daniel J. McCauley, Jr.

My recent experience in the federal government legal service began a little over four years ago. Prior to that I had been in private practice for about ten years. My motivation in mentioning this to you is to point up that for 5/7ths of my professional life I have been concerned principally with private rights - the settlement or litigation thereof, whereas for the past 2/7ths of that time I have been exposed, as it is stated in Federal Trade Commission statutory language, to the interest of the public. Having had the most general of general practices, representing for the most part, not the "Poor People of Paris" but of Philadelphia. I have had more than ample opportunity to experience some of the frustrations of an attorney representing a client (a consumer) endeavoring to secure proper performance of a guarantee, warranty, service contract, or the like. To quote a rural, colonial, Pennsylvania colloquialism, it was sometimes a challenge equal to the efforts of a "Philadelphia lawyer". Thus, I believe it fair to say that my "outside-government" experience as well as my relatively short tenure at the Federal Trade Commission will support at least a modest claim to objectivity in discussing with you the Federal Trade Commission and its role in relation to the consumer.

At the same time I should hasten to add that my opening remarks have been solely for your benefit in evaluating the qualifications of the witness; I trust that they will not at the same time be so construed as to cause any alarm in the business community. It would considerably undermine the Commission's current and, I predict more rigorous, future enforcement program to be even slightly ascribable to a Freudian explanation, such as, that ten or twelve years ago some manufacturer should have more promptly honored its guarantee on the General Counsel's washing machine.

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Although there are those who would date the Federal Trade Commission's obligations to consumers as beginning in 1938 with the enactment of the Wheeler-Lea amendments to the Federal Trade Commission Act, there is considerable room for disagreement with them. There was in 1938, I would suggest, merely a shift (or perhaps only a tilt) in emphasis. As most of you, if not all, are doubtless aware, originally the prohibition in Section 5 of the Federal Trade Commission Act was leveled at "unfair methods of competition in commerce". This amendment followed upon a court determination (F. T. C. v. Raladam Co., 283 U. S. 643 (1931)) that to support an F. T. C. order to cease and desist there had to be a showing of an effect on competition among business men; absent such proof the challenged activities were not within the reach of the statute.

* The comments and observations in this statement are the author's and do not necessarily reflect the views of the Commission or of the author's colleagues upon the commission's staff.

For the purpose of this discussion we can concede that from 1914 until 1938 the main thrust of the statutes administered by the Commission was to outlaw unfair methods, which, if allowed to continue, might result in monopolistic practices or restraints of trade declared unlawful under the Sherman Act. It does not follow logically that the statutory proscriptions were solely for the purpose of protecting business of business men. Rather, the Congressional purpose in enacting this legislation was to protect a way of life - or, ultimately to protect the public - yes, the consumer - from the burdens and disadvantages of monopolistic control of the production and distribution of goods - usually consumer goods. Even so much as a casual scanning of the early volumes of the Commission's decisions will demonstrate clearly that the same activities which today we classify as unfair or deceptive acts or practices were then found to be unfair methods of competition. And, I would add, many times there was only a minimal evidentiary documentation of an adverse effect on competition. In fact, the ring was finally circled when the Commission issued an order, which was reversed on appeal, wherein the Commission ignored the necessity of showing an adverse effect on competition.

Rightly or wrongly, legally or illegally, properly or improperly, consciously or subconsciously, the Commission, long before 1938, had applied Section 5 of the Federal Trade Commission Act in effect solely for consumer interest. The Wheeler-Lea Amendment in 1938, as it related to Section 5, was, I submit, merely an affirmation by the Congress of the earlier expressed Commission view that John Q. Citizen had a stake in business' activities which affected consumers without regard to any effect on competition.

II

The Federal Trade Commission basically categorizes its activities as either anti-deceptive or anti-monopoly. I would like to analyze with you the jobs which we do and how you, as consumers and as representatives of consumer organizations, are affected by our work.

As I have mentioned previously, what the F. T. C. does it must do in the interest of the public. The public of course is not just John Q. Citizen. The public is the people in general or a section of the people. At the same time, then, the public is a number of John Q. Citizens. To conceive a composit John Q. Citizen is most difficult because at once he becomes a conglomerate of contradictions - he is consumer, but at the same time the grocer - he is consumer, but he is also seller as well.

In our society, for reasons that are economic, social and, yes, even political, the "public" (the composit John Q. Citizen) is likely, all at the same time, to be pulling in different directions, espousing conflicting causes, and urging contradictory principles. For example, one segment of John Q. Citizens consists of small independent retailers who favor enactment of federal legislation which would permit legalized price fixing. I refer to pending legislative proposals whereby a manufacturer could impose the exact price at which all retail customers would be required to sell the supplier's trade-marked commodities. Such price fixing precludes price competition among retailers for the consumer's dollar. Both the Commission and the courts have condemned such practices as per se violations of the Federal Trade Commission and Sherman Acts. I believe I would be on safe ground in predicting that these same retailers would vehemently object, and promptly complain to the Federal Trade Commission, if any of their suppliers agreed among themselves to restrict the marketing of their products to larger retail chain organizations.

In the final analysis, however, both types of agreements bring the same essential result - they restrict competition among retailers to the ultimate injury of consumers.

To restate the premise another way, then, our society has become an enmeshed entanglement of pressure groups for special interests. Too few of them have common or reconcilable interests; most all, however, seem to have treasure, to a greater or lesser extent. In fact, my own observation is that that segment of the public which seems to thrive more on enthusiasm than treasure is the consumer and his consumer organizations.

The Federal Trade Commission not only welcomes your support - it solicits you.

One of our very important functions is to submit comments to the committees of the Congress, and, also, to testify before them, regarding proposed legislation. During the 1959 fiscal year we furnished Congressional Committees approximately 100 legislative comments, and representatives of the Commission testified on at least 30 different occasions. To date in fiscal 1960 we have furnished comments on 52 proposed bills. Much too often we have been there to hold the line - to object to this or that proposed exemption from the law - to alert the Congress against piece-meal frustration of the anti-trust laws. This we conceive to be our function in the interest of the public. Whether considered from a short or long range point of view, John Q. Citizen - consumer - is the beneficiary.

III

Unlike other governmental agencies whose regulatory powers are limited to one industry or a group of related industries, the Federal Trade Commission's powers touch every type of large and small business which ventures into interstate commerce. On some the burdens of the Commission's potential powers lay more heavily than upon others. For example, under the Federal Trade Commission Act, the Commission may seek injunctive relief against false and misleading advertising of foods, drugs, devices and cosmetics - or, in a proper case, the Commission may refer false and misleading advertising of such items to the Attorney General with a recommendation for criminal prosecution.

An unending stream of writers and commentators on our statutes have expressed the view that the Federal Trade Commission is not a punitive agency - that its function is not to punish but to correct. Therefore, the argument goes, the Federal Trade Commission properly performs its statutory obligations if it induces business to stop a particular practice or to cease a line of misleading advertising. In the main one can hardly disagree with such writers and commentators because there is an abundance of legislative history to support their major premise. I would take a slightly different view - I have a minor premise which such writers and commentators tend to ignore. The minor premise is the statutory powers which I have heretofore mentioned concerning injunctions and criminal prosecutions. The effectiveness of the major premise balances to a degree on the use - not merely on the existence - of the minor premise. It is no secret - merely to examine our annual reports will show the facts - that these enforcement measures have not been utilized very often. I

think I interpret accurately the temper of the times - the climate, so to speak - when I predict to you that, as cases in these particular areas are investigated, and thereafter reviewed, they will be more closely scrutinized in the light of the enforcement powers which I have mentioned. When any such cases fall within the framework of the statute, it would seem that the abuse likely will encourage the use of the power.

What about business activities in fields other than foods, drugs, devices and cosmetics? As I indicated previously, they must ponder our laws on a day-to-day basis. High on our list are those businesses which, by their very nature, tend to work a fraud upon the public. Typical examples of these are Advanced Real Estate Fees, Business Loan Sharks, and schemes disguised as offers of employment, to name a few. I see no essential difference between stock frauds and similar schemes and these variants of the classic "con" operation. Since, in these cases, there is usually a violation of the Mail Fraud Statute, we do not, as a practice, rest content with a Commission cease and desist order. Our liaison with the Department of Justice in these cases is very good.

The Congress saw fit to carve out of the Federal Trade Commission's general jurisdiction certain specific industries - fur, wool, textiles and flammable fabrics - and, with respect these, we were given broad rule-making and regulatory powers, particularly with respect to labeling. We have, I believe, been most active in the fur and wool industries. Since the Textile Fiber Identification Products Act only became effective March 3, 1960, in the future consumers will become more aware of our activities under that Act. We have set out in the rules 16 generic names, some of which are now in common usage, such as rayon and nylon; others, however, destined for widespread advertising include polyester (dacron), spandex, olefin and azlon. You can see that the average homemaker has her work cut out for her in familiarizing herself with these fibers, their uses and their performance capabilities.

It is business generally, however, rather than the specific industries heretofore mentioned, which keeps us busy most of the time, and, potentially, every businessman is a candidate for Federal Trade Commission interest. The lifeblood of every business is its sales. Sales, in turn, depend heavily upon advertising. The Federal Trade Commission has jurisdiction to take action if such advertising is not truthful. Price, also, is an important factor in sales; the Robinson-Patman Act gives us power with respect to discriminatory pricing. Brokerage to buyers as well as promotional allowances or services are reviewable by the Federal Trade Commission under that Act. So you can see that once a business puts an item into the stream of commerce, the regulatory power of the Federal Trade Commission may well have been invoked. And, our powers with respect to mergers and other corporate entanglements and activities under the Clayton Act are designed to give effect to the long-range protection against monopoly and its vices.

The mere statement of the scope - in breadth and depth - of our jurisdiction more eloquently states our enforcement problem than any characterization which I might apply to it. Readily, then, one can see the wisdom of the Commission's continuing encouragement to business that it police itself - why so much time is spent with industries in assisting in the promulgation of Trade Practice Rules. But, as I have said before, voluntary compliance obtains, I believe, in direct proportion to the virility of the agency's involuntary compliance program.

IV

Whether the Federal Trade Commission in a particular case is endeavoring to stop a misleading advertisement - or to correct an unfair practice which may or may not affect competition - or to divest a corporation of business entities which it has acquired - it must, as I said before, act in the interest of the public. Ultimately then it acts for the benefit of the consumer, insofar as the consumer's interest can be so identified with the total public interest. During the current fiscal year the Commission has allocated two-fifths of its budget to antideceptive work and the remaining three-fifths to antimonopoly. Of one thing we can be sure - we can use and we have asked the Congress for more money.

The task, however, is not ours alone. The Federal Government has not so occupied the field that there is not room for state regulation. As you are aware, there are a great many abuses against consumers which are beyond the reach of the statutes which we administer because they do not involve commerce. State, county and municipal governments must protect consumers in situations where abuses are local in character. Just a month ago the Attorneys General of many states participated in a conference at the Department of Justice. The theme of the conference was consumer protection. Following close upon the Federal Trade Commission's Consumer Conference of this past December, the two are, I believe, clear indicators of the view of responsible Federal agencies that they sorely need the assistance of local authorities. I trust, then, that it is not presumptuous of me to urge you to encourage this. Two things are, I think, desirable: 1. uniformity among the laws of the several states relating to business or trade regulation, and 2. adequate budgets at the state, county and municipal levels to bring about effective law enforcement. Both the Department of Justice and the Federal Trade Commission are committed to the promotion of these ends.

From the Federal Trade Commission you are entitled to expect vigorous and effective law enforcement. True it is that a portion of our treasure is expended, as I have indicated, to educate business and bring about voluntary compliance with the law. This activity has been applauded not only in business circles, but in the Congress as well - and the Congress, I might add, oversees our activities with a very watchful eye. In the final analysis, however, both the Congress and the public, in my view, expect of the Federal Trade Commission that it will regulate - where the mandate of the statute requires - and that it will do so with dispatch.

I doubt that any activity of the Federal Trade Commission within the past several years so captured the public attention as our recent investigations and actions concerning payola and television advertising. Our first payola investigations were docketed on November 19, 1959. Less than four months later - on March 4, 1960 - we were able to report to the Congress that 155 investigations had been instituted, 60 complaints had issued, and 16 consent decrees accepted. Since then, there have been increases in all areas. I think it fair to characterize this as action with dispatch. Results such as these are

born of staff team-work and zealous dedication to the job. They also reflect executive direction - the full expropriation by the Commission itself, of its administrative functions. 1/

A very great proportion of the work performed by the Federal Trade Commission results from information brought to our attention by members of the public, both consumers and businessmen, either directly or through their Senators and Representatives. The Commission as a matter of policy encourages the public to participate in our work. In addition, the Commission and its staff initiate projects on their own. The least effective enforcement program, it seems to me, would be one figuratively, if not literally, in the hands of the mailman. On the other hand, I believe that the most effective enforcement is one grounded in administrative "expertise". This involves the Commission's deployment of its investigation and litigation forces against those industries - and those practices within industries - which require prompt and aggressive attention. To these ingredients I would add one spice - imagination. All of us at the Commission must, on a continuing basis, exert our imagination as well as our technical skills. The commodity is held in high regard among those whom we have a duty to regulate. We cannot overlook its importance. In these circumstances the public receives the very most in return for the public trust which has been entrusted to the commission and its staff.

1/ While the Commission's industrywide investigation of payola and other deceptive practices in the broadcasting media has received widespread publicity, our antimonopoly work has also increased. During fiscal year 1959 the Commission issued 80 antimonopoly complaints. During the first 9 months of the present fiscal year the Commission has issued 85 such complaints. I am advised that the Commission's Bureau of Investigation has over 500 formal investigations now under way which deal with restrictive or discriminatory practices generally described as within the antimonopoly phase of the Commission's work.