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A RETROSPECTIVE OF CONSUMER PROTECTION INITIATIVES

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Article follows

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A RETROSPECTIVE OF CONSUMER PROTECTION INITIATIVES

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Few federal agencies have the courage to examine their win/loss record—to describe for public scrutiny what they have done well and what they have not done so well. A retrospective like the FTC 90th Anniversary Symposium can help identify where we want the Federal Trade Commission to go in the future, and, just as importantly, how it will get there. At the same time, there is a very real threat whenever looking backwards that our focus will be too narrow, causing a myopic view of our past. For instance, the assigned topic of this retrospective was to comment on three of the FTC's rules—the Cigarette Rule,[1] the Children's Advertising Rule (Kid Vid Rule),[2] and the Do Not Call Rule.[3] Commentators have characterized these rules respectively as a qualified success, a failure, and an unqualified success.[4] In a vacuum, this might indicate that the Pitofsky-led Bureau of the 1970s was totally misguided, leading up to the ultimate debacle of the Kid Vid Rule. The fallout from that debacle leaves the impression that the Commission during the 1970s

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[1] Unfair or Deceptive Advertising and Liability of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (proposed July 2, 1964); 30 Fed. Reg. 9484 (withdrawn July 29, 1965); superseded by legislation, Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341.

[2] Children's Advertising, 43 Fed. Reg. 17,967 (proposed Apr. 27, 1978); 46 Fed. Reg. 48,710 (Oct. 2, 1981) (terminating rulemaking process).

[3] Telemarketing Sales Rule, 67 Fed. Reg. 4492 (notice of proposed rulemaking Jan. 30, 2002); 68 Fed. Reg. 4580 (finalized rule Jan. 29, 2003).

[4] William MacLeod, Elizabeth Brunins & Anna Kertesz, *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy, infra* this issue, 72 Antitrust L.J. 943 (2005); Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism, infra* this issue, 72 Antitrust L.J. 911 (2005).

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not only did not contribute to consumer welfare but also left a message that the FTC should never again take on serious health issues nor deal with special audiences, namely kids, despite the persistence of problems in both of these areas.

The selection of these three rules bias this retrospective and create the impression that certain types of rulemaking are unimportant, non-beneficial, or, in the extreme, harmful to consumers and the economy. Indeed, one might even assume from the Cigarette Rule, the Kid Vid Rule, and the Do Not Call Rule that rulemaking as a tool has been only somewhat effective in addressing consumer fraud. If we are to look backward for the purpose of forward thinking, examining several additional rules of that period—for instance, the Holder in Due Course Rule, the Care Labeling Rule, and the Octane Rule—provides a more balanced analysis.

Those charged with protecting American consumers in the early 1970s faced rampant consumer fraud. Mary Gardiner Jones, then a Commissioner, would say every week: "Jodie, what are we doing about it? There is fraud in the carpet industry, there is fraud in the used car industry, people are getting lemons, there are simply no protections." A retrospective article from 1990 described the problem that existed:

> Inner-city stores were selling shoddy furniture, fly-by-night contractors were promising to install aluminum siding that never appeared, the proverbial used car dealers were hawking lemons, and countless other shady characters were operating in similar fashion in scores of different fields. In each of these cases, the defrauded consumer was saddled with the bill when a holder in due course demanded payment.[5]

Clearly consumers faced massive fraud. Yet the problem that faced the Commission's leadership was: What can we do about all of this fraud? At the time, Section 13(b), the provision that now allows the Commission to bring temporary injunctions to address violations of consumer protection laws, did not yet exist.[6] The only means of enforcement was to bring administrative cases, one at a time, against offending individuals and companies. Such an approach would have had no effect whatsoever. The Commission's litigation resources were simply insufficient to address the enormous quantity of marketplace fraud.

The leadership of the Bureau of Consumer Protection, what its friends called the "Lean, Mean, Pitofsky Machine," came up with brilliant solu-

[5] Michael F. Sturley, *The Legal Impact of the Federal Trade Commission's Holder in Due Course Notice on a Negotiable Instrument: How Clever Are the Rascals at the FTC?,* 68 N.C. L. REV. 953, 954 (1990).

[6] Federal Trade Commission Act, 15 U.S.C. § 53(b) (amended by Pub. L. No. 93-153).

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tions that cut through the fog of fraud without consuming the Commission's resources. One approach was to attack the legal concept that provided the incentive for consumer fraud. A long-established commercial law doctrine, the so-called Holder in Due Course Doctrine, allowed the purchaser of a commercial instrument to enforce it free from all claims and personal defenses, so long as the purchase of the instrument had been made in good faith and without notice of any claim or defense. This doctrine, which was embodied in Section 3 of the Uniform Commercial Code (UCC), enabled fraudulent businesses to sell their receivables to third parties. The third parties were entitled to collect from the consumer regardless of any defenses the consumer had against the fraudulent business (e.g., failure to perform). As a result, the fraudulent businesses could obtain payment while defaulting on their obligations, and third-party purchasers could collect from the consumer. In short, the doctrine facilitated fraud by allowing fraudulently induced notes to be enforced by third parties.

The Commission did not set out to abolish Section 3 of the UCC or even attack the Holder in Due Course doctrine. Instead, the Commission adopted a rule that made it illegal for a seller to participate in a typical consumer credit transaction unless the instrument included a specified notice that any holder is subject to all the claims and defenses the debtor could assert against the seller.[7] Our rule applied only to consumer transactions, and did not affect commercial paper.

At the time, this was one of the most controversial rules ever enacted by the FTC. Not only was the credit industry, as it existed, opposed to the rule, but Arthur Burns, the Chairman of the Federal Reserve, informed Lewis A. Engman, the Chairman of the FTC, that the Commission's proposed rule would bring down the credit market as we knew it. Nonetheless, Chairman Engman signed the rule. The beneficial effect that the rule had in cutting through fraud throughout the country is beyond question.

This story illustrates several very important principles. First, the sheer immensity of a problem is not a valid excuse for ignoring it. Second, when the Commission's normal response—in this case administrative litigation—does not effectively address a certain problem, it is essential, if the FTC is to accomplish its goal effectively, to think creatively to identify what *can* be done to effectively deal with a problem.

This is not, by far, the only example from the 1970s of the FTC applying innovative solutions to large problems through rulemaking. A quick

[7] Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506 (Nov. 18, 1975).

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review of the table provided by MacLeod et al. in this issue of the *Antitrust Law Journal* shows several other rules that addressed consumer issues effectively.[8] For example, consumers complained about the lack of information concerning how to take care of new, unfamiliar types of fabrics that were being used in clothes in the late 1960s and early 1970s. Retailers were similarly frustrated with the large quantity of merchandise that was being returned damaged by improper care. As with consumer fraud, the FTC identified a market problem too large to address simply through individual enforcement actions. The FTC relied upon its untested power of rulemaking to design a solution: it required textile manufacturers to disclose on a permanent label how consumers should care for their products.[9] The Care Labeling Rule gave consumers valuable information they could use both before and after purchase.

A final example, too important to be overlooked due to its groundbreaking historical significance, is the Octane Rule adopted in 1979.[10] The Octane Rule required gas stations to display on gasoline pumps the quantity of octane contained in the gasoline being sold. It was this rule that led to judicial recognition of the Commission's ability to use rulemaking as a tool to help the consumer.[11]

The Holder in Due Course Rule, the Care Labeling Rule, and the Octane Rule illustrate two essential aspects of the FTC's past: its history of identifying real problems affecting consumers and its ability to use rulemaking creatively to achieve high levels of compliance while expending low levels of agency resources. Had the FTC attempted to deal with these problems using the traditional mindset of bringing individual enforcement actions, any one of these issues could have easily overwhelmed the agency's resources.

The Commission's mandate is broad—to protect consumers across an $11 trillion economy. Given the enormity of this mandate, the Commission has never had, and probably never will have, sufficient resources to accomplish its mission. The combination of such a broad mission with limited resources makes it essential that the agency use all tools at its disposal: rulemaking, law enforcement actions, consumer education, and industry guidance. Any particular problem can and should be addressed with a mixture of approaches, and the composition of that mixture should depend on the particular issues that are being faced at a particular time.

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[8] MacLeod et al., *supra* note 4, at 953–54.

[9] Care Labeling of Textile Wearing Apparel, 36 Fed. Reg. 23,883 (Dec. 16, 1971).

[10] 15 U.S.C. § 2821.

[11] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

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One of the characteristics of the FTC that has served the agency best in accomplishing its challenging mission has been the ability to honestly examine the marketplace and identify threats to consumers. New generations of individuals serving the Commission in all capacities—from Commissioner to staff attorney—should continue to work to identify the most serious issues facing U.S. consumers. Once a problem has been identified, no matter how pervasive that problem might be, the Commission should not be intimidated by the size or extent of the problem but instead should rely upon its greatest asset—the ability of its staff to design creative and innovative approaches to address problems. So long as even the newest attorneys make sure that their ideas are considered and valued, the FTC will continue to ensure that consumers are always protected—that is the legacy imparted by the Commission's use of rulemaking to address the most intractable consumer issues.

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