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Report to Michael Pertschuk, Chairman, Federal Trade Commission; by Philip A. Bernstein (for Gregory J. Ahart, Director, Human Resources Div.).

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The Congress granted the Federal Trade Commission (FTC) injunctive authority to enable it to quickly stop violations of the laws it administers. The FTC adopted no formal policies for use of its injunctive authority under section 13(a) of the Federal Trade Commission Act, but in 1974 it adopted the following policies for use of section 13(b) of the act: (1) challenged practices should be immediately and clearly harmful; and (2) application should not raise novel issues of law or remedy. The FTC also adopted the following guidelines: the clearer the violation, the less the need to demonstrate the public injury, and vice versa; avoid cases where private actions will be taken; and avoid cases where issuance of a complaint has historically stopped the practice. From November 16, 1973, to June 30, 1978, the FTC issued complaints in 171 cases and filed for injunctions 21 times--3 times pursuant to section 13(a), 17 times pursuant to section 13(b), and once pursuant to both sections. Interviews with staff members revealed that they did not generally know what the policy was for using the injunctive authority, what the guidelines were for selecting injunction cases, or what legal standards were applicable under the injunctive authority. Although injunctions are not appropriate for every case, there have been cases where use of the authority may have better protected consumers or maintained competition. The FTC should clarify and restate its policy on seeking injunctions and direct that every staff memorandum recommending that a complaint be issued contain a discussion on whether an injunction should be sought. (RRS)

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

HUMAN RESOURCES
DIVISION

B-180229

AUGUST 24, 1978

The Honorable Michael Pertschuk
Chairman, Federal Trade Commission

Dear Mr. Pertschuk:

We have reviewed the Federal Trade Commission's use of its injunctive authority under sections 13(a) and 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(a) and (b)). The Congress granted the Commission this authority to enable it to quickly stop violations of the laws it administers. We found that the Commission has made some use of its injunctive authority, but that it has not used the authority as fully as we believe the Congress intended because the Commission's administrative policies and procedures do not insure that injunctions are considered in every case. As a result, the Commission has not sought injunctions in some cases where, in our opinion, use of the authority would have been in the public interest.

BACKGROUND

In 1938 the Congress gave the Commission authority to regulate and to seek injunctions under section 13(a) of the Federal Trade Commission Act against false advertising of foods, drugs, devices, and cosmetics. This authority was granted because of many cases in the 1930s in which medicinal products widely distributed to the public proved to be dangerous and sometimes fatal. The Congress was also concerned that the Commission had to take so long to stop violations.

As consumer consciousness developed in the 1960s, more attention was focused on the Commission as the principal consumer protection agency of the Federal Government. In 1968 the President's Message on Consumer Interests asked the Congress to grant the Commission the power to get

> "* * * Federal court orders to stop fraudulent and deceptive practices immediately while the case is before the Commission or the courts."

HRD-78-161
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In hearings on the "Deceptive Sales Bill" later that year, proponents of the legislation, including the Commission Chairman, argued that

> "* * *[companies] whose practices were challenged continued to do substantial business with the public using practices which were found to be misleading and deceptive."

In 1969 a group sponsored by Ralph Nader and a commission of the American Bar Association appointed at the request of the President studied the manner in which the Commission carried out its legislative mandates. Both groups criticized the Commission's inability to respond promptly to violations of the laws it administered and recommended that the Congress strengthen the Commission's powers to deal with law violations, including giving it authority to seek an injunction against any act or practice unfair or deceptive to consumers. The Commission had also repeatedly requested injunctive authority applicable in consumer fraud cases. Despite this, the Commission's injunctive authority was limited by statute to enforcement of specific laws until 1973.

Legislation first passed by the Senate in 1968 would have given the Commission broader injunctive authority in consumer protection matters. By 1973, however, the Congress had not given the Commission the broader injunctive authority it was seeking when, in connection with a study of national fuels and energy policy, the Senate Interior Committee posed questions to the Commission regarding the petroleum industry. In response, the Commission pointed out that broader injunctive authority would aid it in dealing with the industry's alleged anticompetitive conduct, but that current proposals for such authority dealt only with deceptive practices.

As a result, the legislation which became the Trans-Alaska Pipeline Authorization Act (Public Law 93-153), included a provision which added section 13(b) to the Federal Trade Commission Act granting the Commission injunctive authority to deal with violations of any law it enforces.

GENERAL POLICIES AND USE

The Commission adopted no formal policies for use of its injunctive authority under section 13(a), but, on January 22, 1974, it adopted the following policies for use of section 13(b):

--Challenged practices should be immediately and clearly harmful.

--Application should not raise novel issues of law or remedy.

The Commission also adopted the following guidelines:

--The clearer the violation, the less the need to demonstrate public injury, and vice versa.

--Avoid cases where private actions will be taken.

--Avoid cases where issuance of a complaint has historically stopped the practice.

Initially, the Commission wanted to move deliberately, bringing strong cases to set favorable precedent. Then it planned to become "more aggressive."

From November 16, 1973 (when the Commission received its section 13(b) authority) to June 30, 1978, the Commission issued complaints in 171 cases. As shown in the table below, during that period, the Commission filed for injunctions 21 times--3 times pursuant to section 13(a), 17 times pursuant to section 13(b), and once pursuant to sections 13(a) and (b).

Date of complaint	Number of complaints issued	Number of injunction applications filed
11/16/73 to 6/30/74	32	3
7/ 1/74 to 6/30/75	67	4
7/ 1/75 to 9/30/76	48	4
10/ 1/76 to 9/30/77	15	a/ 6
10/ 1/77 to 6/30/78	9	a/ 4
	171	21

a/In three of these cases--one in fiscal year 1977 and two in fiscal year 1978--the Commission did not issue a complaint. In another case in fiscal year 1978, the Commission issued a complaint prior to June 30, 1978, and authorized filing for injunctive relief. The injunction application, however, was filed after June 30, 1978, and is not included in the table.

We reviewed over 100 cases, including all 72 in which complaints were issued between July 1975 and June 1978. During that period the Commission filed for injunctive relief 11 times (excluding the cases discussed in footnote a). In the remaining 61 cases--where the Commission issued a complaint but did not seek an injunction--over 85 percent of the staff memorandums recommending issuance of a complaint contained no mention of injunctions. There is no indication in these memorandums that the staff gave any consideration to whether the Commission should seek injunctions--even though the act or practice appeared to be continuing in at least 50 percent of the cases.

If the staff evaluated these cases for their injunction potential, they apparently made the decision that the cases were not suitable for injunctions. From our interviews with some of the Commission's professional staff, we found that they did not generally know what the Commission's policy was for using its injunctive authority; what the guidelines were for selecting injunction cases; or what legal standards were applicable under the Commission's injunctive authority. Additionally, several attorneys expressed the opinion that staff were not aggressively seeking to use the authority because of the Commission's policy of having its General Counsel staff, rather than its bureau or regional office staff, represent the Commission in injunctive proceedings.

CASES WHERE INJUNCTIONS MAY HAVE BETTER PROTECTED CONSUMERS OR MAINTAINED COMPETITION

Although injunctions are not appropriate for every Commission case, there have been cases where we believe use of the authority may have better protected consumers or maintained competition. In some cases in which the Commission issued a complaint, an injunction request would have been precluded under the Commission's case selection policies and guidelines--the respondent had stopped the practice in question before the Commission issued a complaint, the case involved a novel theory of law, etc. In others, however, where the act or practice continued and none of the Commission's other criteria precluded taking action, we believe the Commission should have sought injunctions.

For example, the Commission issued separate complaints against six hearing aid manufacturers charging each with making false, unsubstantiated, and unfair performance claims. In supporting the issuance of the complaints, the Commission staff pointed out that:

> "* * * consumers are in fact being injured every day in this industry. The product costs hundreds of dollars and it is sold to a target population which is vulnerable not only because it very much wants to believe the claims which are made * * * but also because it is comprised largely of the elderly."

None of the memorandums recommending issuance of the complaints contained a discussion on whether injunctions should be sought. Twenty months after the complaints were issued, all six cases were settled by consent agreements. According to Commission staff, the practices continued virtually unchanged until the orders were final. None of the orders provided restitution for consumers injured during that period.

In another case, the Commission alleged that a snack food manufacturer was engaging in price discrimination in violation of the Robinson-Patman Act (15 U.S.C. 13). Staff recommending that a complaint be issued advised the Commission

> "* * * the price concessions discriminate against smaller grocery store customers and weaken their competitive condition, vis-a-vis the major chain buyers. Furthermore * * * this injury is occurring without any significant countervailing benefits accruing to the consumer."

Staff told us the practice was continuing at the time the complaint was issued, but that they did not seriously consider an injunction because they believed the courts required the Commission to meet a standard of proof beyond that required by the law. The case was settled by consent agreement 17 months after the complaint was issued.

In two more cases, the Commission alleged existence of interlocking directorates in violation of section 8 of the Clayton Act (15 U.S.C. 19). Staff recommending that complaints be issued in both cases pointed out that the interlocking directorates provided the corporate respondents who were competitors with the opportunity to eliminate competition by

fixing prices, dividing territories, or taking other actions in violation of the antitrust laws and that the goal of section 8 is to

> "* * * nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates * * *."

In both cases, the Commission issued complaints, but did not seek injunctions. Neither memorandum recommending issuance of a complaint contained any mention of an injunction. In one of the cases, the staff said they never really considered an injunction because the interlocks had been in effect for some time. Both cases were settled by consent agreements 15 months after the complaints were issued.

CONCLUSIONS

Because the Commission did not seek injunctions in any of the cases discussed above, from the time the complaints were issued until the Commission issued the final cease and desist orders the respondents involved were under no legal obligation to stop or change behavior which the Commission believed was an unfair or deceptive act or practice or an unfair method of competition--yet no restitution was provided for consumers or competitors injured by the behavior subsequently stopped or changed by the consent agreements. We believe the Commission may have been better able to protect consumers or maintain competition if it had sought injunctions in these cases.

The ultimate decision on whether to seek an injunction is made by the Commission, based on staff recommendations and case analyses. As discussed earlier, however, in cases where the Commission did not seek an injunction, over 85 percent of the staff memorandums recommending issuance of a complaint contained no discussion on whether the Commission should seek an injunction. In order to make an informed decision, we believe the Commission needs answers to questions such as:

- --Is the act or practice continuing?
- --Historically, has issuance of a complaint stopped the act or practice?
- --Will private action be taken in the case?

--Does the case raise novel issues of law or remedy?

--Is the challenged practice immediately and clearly harmful?

The Commission's revised operating manual contains a discussion of the Commission's injunctive authorities, court interpretations of the Commission's burden of proof, and restatement of the January 1974 policies and guidelines for using the authority. When it is distributed to the staff, the revised operating manual should aid the staff in evaluating cases for their injunctive potential, but it does not indicate that the staff should include in every memorandum recommending issuance of a complaint a discussion on whether the Commission should seek an injunction. Further, the Commission's operating manual is only advisory and does not constitute a directive to the staff from the Commission. Because of the perceptions of some staff regarding the Commission's injunctive authority and its policy for seeking injunctions, we believe a clearer policy statement is needed.

RECOMMENDATION

We recommend that the Commission clarify and restate its policy on seeking injunctions and direct that every staff memorandum recommending that a complaint be issued contain a discussion on whether the Commission should seek an injunction.

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We would appreciate receiving your comments on the above recommendation. As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

We are sending copies of this report to the Chairmen of the House Committee on Government Operations; Senate Committee on Governmental Affairs; the House and Senate Appropriations Committees; the House Committee on Interstate and Foreign Commerce; the Senate Committee on Commerce, Science, and Transportation; and the House and Senate Judiciary Committees.

We are also sending copies to the Commission's Executive Director, and the Directors of the Bureaus of Competition and Consumer Protection.

Sincerely yours,

Gregory J. Ahart
Director