ANTITRUST AND CONSUMER PROTECTION — EXPLORING THE COMMON GROUND

Caswell O. Hobbs*
Washington, D.C.

Prepared Remarks for the
Panel Discussion on
"Under One Unbrella: Integrating the
Comptetition and Consumer Protection Missions"
at the
Federal Trade Commission
90th Anniversary Syposium

September 22, 2004

I. Early Explorations — The Past as Prologue?

The Federal Trade Commission Act authorizes the Commission to exercise jurisdiction over both "unfair methods of competition" and "unfair practices." The first of these statutory provisions enables the FTC to extend the reach of its antitrust beyond the bounds of the Sherman and Clayton Acts, and the second to extend its consumer protection jurisdiction to non-deceptive practices which are nonetheless unfair to consumers.[1] Often the FTC's exercise of these two mandates reaches toward, and occasionally meets on, the same middle ground in efforts to improve consumers economic well being.

The rejuvenation of the Federal Trade Commission in the late 1960s and early 70s triggered a period of innovation and exploration of the scope, limits and appropriate focus of these two unfairness doctrines in both antitrust and consumer protection matters. Significantly, many of the consumer protection initiatives of this period were based in

---

* Mr. Hobbs, a partner in the Washington, D.C., office of Morgan, Lewis & Bockius LLP and a past Chair of the ABA Section of Antitrust Law, served at the Federal Trade Commission in various positions, including Director of the Office of Policy Planning and Evaluation and Assistant to the Chairman, from 1967-1973.

1 The Supreme Court, in *FTC v. Sperry & Hutchinson Co.,* held that Section 5 of the FTC Act empowers the Commission "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws" and "to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." 405 U.S. 233 (1972).

significant part on explicit competition considerations. The Commission's *Pfizer*[2] decision, for example, which established an advertiser's responsibility to possess a reasonable basis for affirmative product claims made in consumer advertising, was premised on the rationale that:

> "fairness to the consumer, as well as fairness to competitors, dictates this conclusion. Absent a reasonable basis for a vendor's affirmative product claims, a consumer's ability to make an economically rational product choice, and a competitor's ability to compete on the basis of price, quality, service or convenience, are materially impaired or impeded."

The *Pfizer* decision went on to lay out an economic cost-benefit framework for determining when, and what level of, advertising substantiation would be required.

The interplay of competition and consumer protection doctrine is also nicely illustrated by the Supreme Court's 1972 *Sperry & Hutchinson* decision, which not only serves as the traditional benchmark for exploring the modern era of the FTC's unfairness doctrine, but was also a pioneer in legal cross-dressing — the case was litigated before the Commission on the antitrust theory that *Sperry & Hutchinson* was engaged in an unfair method of competition, but on appeal the FTC restyled its case to a consumer protection/unfair practices case, utilizing the unfairness criteria of the Commission's 1964 cigarette rule[3] as to whether the practice (1) offends established public policy, (2) is immoral, unethical, oppressive or unscrupulous, or (3) causes substantial injury to consumers (or competitors or other businessmen).[4] The Supreme Court's 1972 endorsement of the FTC's unfairness jurisdiction served as the launching pad, over the following years, for a rather remarkable array of FTC cases and rulemaking proceedings.[5]

The Commission's now infamous breakfast cereal case also involved an interesting interplay of consumer protection and antitrust issues. Although the case was conceptualized as a problem of "shared monopoly" which lead to supra-competitive prices and profits over a sustained period of time, a key focus of the complaint was on "intensive product differentiation and brand proliferation" — the result of which, the

---

2 *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

3 Unfair or Deceptive Advertising of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (1964).

4 To give history its due, however, it should be noted that one of the earliest FTC cases to reach a Court of Appeals, *Sears Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919), involved a challenge to false advertising on the basis that it injured competition.

5 Over time, however, it became apparent that the *S&H* precedent and cigarette rule criteria of unfairness were inadequate to provide sufficient rigor to FTC actions, and led to what were, in hindsight, overreaching and excessively regulatory initiatives. *See, e.g.*, Caswell O. Hobbs, Unfairness at the F.T.C. — The Legacy of *S&H*, 47 Antitrust L.J. 1023 (1978). As a consequence, the FTC developed a policy statement to focus and guide its application of the unfair doctrine, and this policy statement was thereafter incorporated into adjudicated legal standards, and ultimately codified into law. *See* 15 U.S.C. § 45(n).

Commission alleged, was to impair or subvert the ability of consumers to make product decisions based on the nutritional benefits and prices of the competing products, while simultaneously raising barriers to entry so as to exclude potential new competitors. Concern with "spurious product differentiation" was in vogue during that period, and focused on advertising which promotes products on the basis of attributes which would be considered trivial or meaningless by the "economically rational" consumer. One commissioner suggested that such advertising, while probably not deceptive, should be challenged as unfair. The cereal case, in addition to challenging intensive product differentiation in advertising, also contained a number of fairly traditional false advertising challenges. Ultimately, as is well known, the economic underpinnings of the FTC's case against the cereal manufacturers were significantly eroded, and the case was dismissed by the Commission.

During these early years, as frequently happens when exploring *terra incognita*, mistakes were made and lessons were learned. The economic underpinnings of some of the antitrust initiatives were found to be insecure,[6] while many of the consumer protection initiatives were later abandoned as overly-regulatory or otherwise misguided. These mistakes are properly regarded as learning experiences, however, and not as a basis for abandonment of these two useful unfairness provisions. Some significant consumer protection problems do not easily lend themselves to challenge under a "deception" based standard,[7] but can be challenged on an economically-anchored unfairness approach. Similarly, market failures not readily reached under the standards of Section 1 or Section 2 of the Sherman Act might well be amenable to an economically sophisticated challenge under an "unfair methods of competition" analysis.[8]

---

[6] In the early 1970s, the FTC and its economists still relied upon the Joseph Bain structure/conduct/performance model for antitrust enforcement, and many of the Commission's innovative cases were premised on this model. By the 1980s, of course, Bain had been replaced with considerably more nuanced models. Professor Scherer provides a fascinating review of the *Cereal* case and its economic underpinnings in "FTC History: Bureau of Economics Contributions to Law Enforcement, Research, and Economic Knowledge and Policy," transcript of Roundtable of Former Directors of FTC Bureau of Economics, September 4, 2003, available at *www.ftc.gov/opa/2004/08/bewebsite.htm.*

[7] Use of the unfairness jurisdiction in *Pfizer,* for example, permitted the FTC to avoid adopting a highly strained, and arguably unsupportable, construct of "implied representations" — a practice which, in the larger context, can adversely impact the flow of useful, truthful information. The unfairness approach also avoided the problem of using consumer expectations as the touchstone for determining the nature, quantity, and caliber of "substantiation" required, and permitted the FTC to use its expertise to establish a cost-benefit based hierarchy of levels of substantiation, and to make this determination as a matter of agency expertise unconstrained by ill-formed or unformed consumer expectations.

[8] Parallel behavior by oligopolists resulting in sustained supra-competitive prices and profits, for example, has been the target of various FTC forays against "facilitating practices" under § 5. In the author's view, this remains an area in which there is a useful role for the FTC to play in shaping and guiding the development of the law, although perhaps more through amicus participation in private litigation than adjudication under § 5. The FTC could bring a much needed economic focus and rationality to private litigation challenging "tacit collusion" and

These early explorations of the common ground of antitrust and consumer protection, which were often based on the FTC's "unfairness" jurisdiction, may provide a valuable platform for future FTC initiatives.

II. Consumer Information — A Shared Competition/Consumer Protection Concern

Beginning in the 1970s, the Commission used its unfairness authority (as well as its deception jurisdiction) to explore a significant consumer/market failure problem, the unavailability of material product information to consumers. The Commission brought innovative cases and rulemaking proceedings, which resulted in both successes and setbacks. The difficult policy issue, of course, is how much information should the Commission require to be provided to consumers in order to move toward the competitive/consumer protection ideal of the "informed consumer."

The "informed consumer" stands on the common ground between the goal of antitrust — the maintenance of an efficient, innovative competitive economy — and the goal of consumer protection — the avoidance of consumer deception or ignorance concerning the material features of products or their terms of sale. The FTC of the 1970s was aggressive in exploring these relationships in such initiatives as "counter-advertising" and comparative advertising, advertising substantiation, and corrective advertising — these all shared the common objective of communicating relevant product information to consumers both to improve the consumer's position in the marketplace and to improve the competitive functioning of that marketplace. For example, the Commission's resolution on its advertising substantiation program listed two objectives for the program:

- Public disclosure can assist consumers in making a rational choice among competing claims which purport to be based on objective evidence and in evaluating the weight to be accorded to such claims;

- Public disclosure can enhance competition by encouraging competitors to challenge advertising claims which had no basis in fact.

Similarly, at a later point, when promulgating its insulation efficiency disclosure rule, the FTC emphasized that this rule would advance both consumer protection and competition objectives:

"conscious parallelism." *Compare, e.g., Stone Container Corporation*, FTC Docket No. C-3806 (consent order, 1998) (§ 5 challenge to single actor; conspicuously omitting a conspiracy allegation) with *Linerboard* settlement (follow-on class action § 1 conspiracy case resulted in $200 million settlement); *In Re Linerboard Antitrust Litigation*, 2004 U.S. Dist. Lexus 17160 (E.D. Pa., 2004); *see generally,* Hobbs, *Cooperation vs. Conspiracy – The Antitrust Plus Factors* (Morgan, Lewis, 2000); Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory,* 71 Antitrust Law Journal 719 (2004).

> "Market imperfections that impede the process of providing such material information in the regular flow of commerce discourage consumer consideration of salient product features, diminish comparison shopping, and create unwarranted competitive parity or advantage for inferior products. Thus, a market that functions in this way not only harms consumers but also lessens fair and open competition."[9]

Likewise, in promulgating its franchise rule, the FTC indicated that:

> "By establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings."[10]

Many of the FTC's consumer protection rulemaking proceedings in the 1970s focused on providing consumers with particular aspects of product performance — octane rating for gasoline, "R" values for home insulation, the care and cleaning of wearing apparel, llumins for light bulbs, tar and nicotine levels in cigarettes, etc. Other proceedings were far more expansive.

These early competition/consumer protection initiatives proceeded without the benefit of the kind of sophisticated economic models available today.[11] When the 1970 Director of the Bureau of Economics was asked for economic guidance on how the advertising substantiation doctrine should be formulated, the answer was, "sorry, we don't have a model to analyze advertising and consumer protection problems." (Now there are those who say he should have given the same answer when asked about the economic underpinnings for a shared monopoly case, but that's a different story.) Thus, the Commission was left to its own devices and, in the *Pfizer* case for example, you see an antitrust lawyers' attempt to construct a "rule of reason" approach to a consumer protection matter, premised on a multi-factor economic cost/benefit analysis, to address the question of what levels of substantiation, and in what circumstances, should be required.

---

9 Statement of Basis and Purpose, 44 Fed. Reg. 50,218, 50,223 (1979).

10 Statement of basis and Purpose, 43 Fed. Reg. 59,614,59,638 (1978).

11 An interesting, and unanticipated, interaction of competition and consumer protection issues arose in the early 1970s with regard to the FTC's Deceptive Pricing Guideline. This guide was promulgated to avoid deception of consumers through pricing claims which were unfounded, exaggerated or otherwise misleading. After some experience with enforcement of this guide, however, the Commission became concerned that it had the unintended effect of chilling competition and rigidifying discount pricing, to the detriment of consumers who would otherwise benefit from such lower pricing. As a consequence, the FTC de-emphasized enforcement of this guide, preferring to let market forces and consumer self interest sort out, over time, the legitimacy of low-price claims. *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harvard Law Review 661, at 687 (1977).

Since the 1970s, of course, economists have focused their attention on the consumer information, and the state of learning is considerably advanced.[12] But, while we now have an economic framework for analyzing market failures which result in a deficiency of consumer information, it is not clear what circumstances cause the FTC to require that relevant product information be provided to consumers. There are two general circumstances in which the FTC mandates that sellers provide product information to consumers: (1) the "affirmative disclosure" requirement — *i.e.*, when the Commission finds that a particular advertiser has, by failing to provide material information related to its advertising claims, deceived consumers, the Commission will, to remedy that deception, impose on that advertiser the obligation to make an "affirmative disclosure" of the relevant information;[13] (2) material product information — the Commission (almost always proceeding by rule) has required entire industries to disclose specific product information. While "affirmative disclosure" is essentially a consumer protection concern,[14] the product information issue has significant consumer protection and competition ramifications.

When there exist sales practices which, while non-deceptive, nonetheless impede the consumers' ability to make economically informed product choices, the Commission can exercise its jurisdiction to challenge such practices as unfair.[15] Thus, even if sellers are simply not making available information about their products' performance[16] which

---

12 *See e.g.*, Beales, Craswell, & Salop, the Efficient Regulation of Consumer Information, XXIV Journal of Law & Economics, 491 (December 1981).

13 *See e.g., Chrysler Corp.*, 87 F.T.C. 719 (1976), *enforced* 561 F.2d 357 (D.C. Cir. 1977) (advertisement that Chrysler's small cars (referring to 6 cylinder) were more fuel efficient than GM's small (*i.e.*, 6 cylinder) cars was deceptive for failure to disclose that GM's 8-cylinder cars were more efficient than Chrysler's 8-cylinder cars).

14 This doctrine is well established, but rather loosely defined and relatively infrequently applied. As a consequence, it can be an unsprung bear trap for the unwary advertiser, and even for the wary advertiser can impose a considerable burden in copy testing proposed ads to determine whether an unanticipated consumer perception should trigger the need to include additional information. This burden can be particularly great in advertisements which make health, safety, or environmental claims — and even after copy testing is completed, there frequently remains the difficult judgments as to how many confused consumers does it take to require additional disclosures, how should the materiality of the missing information be evaluated, are consumers acting reasonably in their perceptions, etc. This is an area where the Commission might explore whether this doctrine may be creating more burden (in the form of added costs and chilled advertising) than benefit. More specifically, the Commission could consider whether this is a doctrine in need of more definition, or additional limiting factors (or perhaps even expansion now that the Internet makes it far easier for sellers to provide information to consumers).

15 The Commission's objective, of course, is to make such information available to those consumers who choose to use it, not to mandate its use by all consumers.

16 The Commission's focus is properly on the price of products, their performance characteristics, and potential adverse consequences of product use, rather than more general concerns such as a company's employment, tax, or environmental track record. *See, e.g., International Harvester*, 104 F.T.C. 949 (1980).

would be useful to consumers, the failure to provide such information can be challenged as unfair:

> "It is a basic tenet of our economic system that information in the hands of consumers facilitates rational purchase decisions; and, moreover, is an absolute necessity for efficient functioning of the economy. If consumers have access to good information on the facts significant to their purchase decisions, then the normal forces of the market are likely to induce sellers to improve those characteristics of the product or service that are most important to the consumer.[17]

Thus, utilizing its unfairness jurisdiction, the Commission has promulgated rules requiring sellers (not just advertisers) to provide consumers with, for example:

- The octane rating of gasoline, measured pursuant to an FTC determined mode of testing.[18]
- The insulating effectiveness of home insulation, measured as an "R-value" pursuant to FTC requirements.[19]
- The washing and dry cleaning instructions for clothing and textiles.[20]
- The placement success rate, and the drop-out rate, for vocational schools.[21]

At one point, the FTC had a systematic approach to identifying and addressing market failures caused by the lack of important consumer information, and many of its existing rules resulted from that initiative.[22] In recent years, however, the Commission has been relatively inactive in this area.[23]

Given the importance of informed consumers to the efficient functioning of competitive markets, and the benefits to consumers from being able to make, in an

---

17 Proprietary Vocational and Home Study Schools, Statement of Basis and Purpose, 43 Fed. Reg. 60796, 60805 (1978). *See also Katharine Gibbs School (Inc.) v. FTC,* 612 F.2d 658, 665-66 (2d Cir. 1979).

18 Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, Trade Regulation Rule, 36 Fed. Reg. 23871 (1971).

19 Labeling and Advertising of Home Insulation, Trade Regulation Rule, 44 Fed. Reg. 50218 (1979).

20 Care Labeling of Textile Wearing Apparel, Trade Regulation Rule, 36 Fed. Reg. 23883 (1971).

21 Proprietary Vocational and Home Study Schools, Trade Regulation Rule, 43 Fed. Reg. 60796 (1978), *rev'd and remanded, Katharine Gibbs School (Inc.) v. FTC,* 612 F.2d 658 (2d Cir. 1979).

22 *See* Analytical Program Guide Concerning Disclosures of Consumer Product Information, (FTC, 1972).

23 Perhaps understandably — in a time of rapidly expanding Internet and related fraud, consumer information is not the highest priority.

efficient manner, well-founded product choices, should not the Commission consider reinvigorating this program? Not only would consumers benefit in terms of improved decision-making, and more efficient and confident decision-making, but the marketplace functioning should also improve in terms of product improvements geared to identified performance measures as well as price movements which reflect more closely product performance. Significantly, the ubiquity of the Internet now makes such information disclosure requirements far less burdensome and potentially far more effective. With Commission guidance, much of this information could be provided voluntarily. Much can be accomplished, for example, by informational hearings, industry-oriented guidelines, or direct dialog with particular industries (designed to explore what information consumers would find most useful and how such information could be provided in the most usable format.[24] Focused encouragement to trade associations, for example, would undoubtedly have a significant effect.

Effective consumer information programs, however, will in most cases probably require standardized definitions, or standardized testing, or standardized formats for disclosure, and possibly all of the above. Absent this kind of framework for making effective comparisons among competing products, the imaginative product differentiation strategies devised by marketers can be expected to frustrate all but the most determined comparative shopper.[25] And, to be effective — *i.e.*, to improve consumer welfare and market price/quality performance — information programs must be designed to be user-friendly for the representative consumer.

Granted there must be some threshold of materiality to justify direct Commission action in this area[26] — perhaps the kind of internal judgment brought to bear on merger cases, *e.g.*, a Bureau of Economics estimate that — considering the number of sellers in the market, the competitive behavior in the market, the barriers to entry — consumer prices would be likely to fall by five percent if certain product performance information were required to be disclosed. A host of other factors, of course, would have to go into

---

24 Rulemaking, even of an informal non-Magnuson-Moss variety, for a variety of reasons seemingly inherent in the rulemaking process, probably does not pass a cost/benefit test in many circumstances.

25 While there is a vast amount of product information already available to consumers, the search cost to each consumer involved in finding that informtion is significant. The difficulty of then making "apples to apples" comparisons based on the product information obtained is likewise significant. These problems are made manageable by the kinds of information disclosure initiatives the FTC has undertaken in the past.

26 "Whatever the benefits of 'informed consumers,' it is clear that public policy considerations are served only when the costs of producing such information are justified by the economic harm and injury to consumers which would occur without such information." *See* Advertising of Ophthalmic Goods and Services, Statement of Basis and Purpose, 43 Fed. Reg. 23994 (1978). The FTC has also established, since the promulgation of many of these rules, a more disciplined framework for utilizing its unfairness jurisdiction in its Unfairness Policy Statement. *See* 104 F.T.C. 949 (1984) and FTC Act Amendments of 1994, codified at 15 U.S.C. § 45 (n).

the Commission's analysis of what industries should be targeted for these kinds of initiatives.

The Commission would presumably start by looking for markets characterized by significant information disparities between sellers and consumers. (There is relevant BCP literature that distinguishes between advertised goods, experience goods, and credence goods.) It would then correct for markets where third-party players like rating services are being effective in providing the information for consumers. The Commission will of course want to ensure that improving information will actually improve the competitive situation. In other words, would the market in question actually be driven by the missing information, rather than driven by other factors? This may be an area where BE can assess the sensitivity of prices to various factors.

The nature of the information to be provided should be carefully focused and oriented to direct improvement in marketplace performance — useful examples from the past are the price disclosures mandated by the funeral rule, the earnings disclosures required by the franchising rule, and the placement/drop-out statistics required by the vocational schools rule. Other useful examples of past rifle-shot market-oriented interventions by the FTC — while not strictly "information disclosure," but still relevant to such initiatives — are the mail order rule, the door-to-door sales/cooling off rule, the negative option rule, and the eyeglasses rule.

The Commission's 1980 *International Harvester*[27] decision is, of course, relevant to any exercise of the FTC's unfairness jurisdiction to mandate disclosure of information by sellers. While starting at the same point as the *Harvester* analysis, i.e., the requirements of the Commission's Unfairness Policy Statement that any actionable consumer injury must be (1) substantial, (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces, and (3) one which consumers could not reasonably have avoided, I find the language of the *Harvester* decision more confining and limiting as to information disclosures than necessary. I suspect, however, that this was a consequence of the context, *i.e.*, an adjudicatory proceeding which would become a precedent which would define disclosure obligations applicable to all sellers in all circumstances. When the Commission proceeds by the promulgation of guidelines or informal rulemaking, however, this concern is largely eliminated — by definition, the guide or rule defines with particularity the information disclosure requirements applicable to the specific industry in question.

Thus, the *International Harvester* concern that "the number of facts that may be material to consumers — and on which they may have prior misconceptions — is literally infinite" and that "since the seller will have no way of knowing in advance which disclosure is important to any particular consumer, he will have to make complete disclosure as to all" does not exist in a guideline or rulemaking context. Nor is there any need to focus, as did *Harvester*, at one point, on the difficulty of knowing the mindset of

[27] 104 F.T.C. 949 (1980).

"any particular consumer" since, as *Harvester* indicated at an earlier point, the touchstone for information disclosures should be whether the information would be useful to "the broad range of ordinary or average people." A related concern expressed in *International Harvester* that overly broad information disclosure requirements would place an inappropriate cost and burden on advertising communication, pre-dated the availability of the Internet as an information disclosure mechanism which greatly reduces the costs and burdens on sellers and advertisers.

In its unfairness analysis, the *International Harvester* decision seemed to focus unduly on consumer misperceptions, rather than lack of material information. The appropriate focus, I would suggest, is on the lack of information which "the broad range" of consumers would find useful their purchase decisions and which would lead them to make different product choices than they might otherwise have made. Thus, as opposed to the *International Harvester* suggestion that the Commission's objective should be "to ensure simply that markets operate freely, so that consumers can make their own decisions," my view is that the Commission should seek to maximize the extent to which consumers are able to make decisions in an effective and efficient manner which best achieve their purchasing objectives, and which thereby improves marketplace responsiveness to consumer choices. Similarly, when *International Harvester* suggests "the Commission may require that consumers be given the information that is critical to an informed choice," (emphasis added), I find that the word "critical" too confining. In the context of guidelines or rulemaking, *i.e.*, in a context where we are not constrained by the concern raised by *Harvester* that "virtually any piece of information may be useful to some consumers," it would seem that as long as a particular piece of information is useful (*i.e.*, not necessarily critical) in assisting consumers to make more efficient and knowledgeable purchasing decisions, it is a candidate for information disclosure. While I agree with the *Harvester* decision that the focus should be on the "core aspects of the transaction" (which *Harvester* defines as (1) information bearing on fitness for intended use, and (2) information bearing on significant hidden safety hazards), I again find *Harvester* too limiting when it suggests that information disclosure should be limited to those core aspects "that virtually all consumers would consider essential to an informed decision" (emphasis added). In the guidelines or rulemaking context, it would seem appropriate to focus on information that the "broad range of ordinary or average people" would find to be "useful to an informed decision."[28]

[28] In pointing out these differences, however, I again want to emphasize that they may be totally dependent upon context —the restraint appropriately shown by the Commission in rendering an adjudicatory decision which will have prospective effect for all sellers in all circumstances, is not present when the Commission encourages or requires information disclosures through guidelines or rulemaking. In the latter context, as long as the benefits to consumers of information disclosures outweigh the costs to sellers, and the costs are not unduly burdensome on any particular category of sellers, I would find the unfairness jurisdictional test to be met.

III. Lack of Consumer Responsiveness — Market Failures in Particular Industries

Many of the FTC cases and rulemaking proceedings in the 1970s and 80s were targeted at what were perceived to be "problem" industries — industries where common industry practices were commercially "unfair" to consumers and competitive forces in the market were not remedying the situation, *e.g.*, funeral homes, hearing aids, mobile homes, and the like.

Many of these proceedings, as we now know, became far too overreaching and regulatory in their approach, attempting in essence to develop comprehensive codes of conduct for the industries involved. The fact that these proceedings overreached, however, does not indicate that there is no role at all for the FTC in "problem" industries which are unresponsive to consumer needs or concerns. In many cases there might be a focused remedy available which would both improve consumer economic wellbeing as well as improve competitive performance in the industry.

Further, I think we can take some useful lessons from some of the largely unsung heroes of the past — a significant number of FTC rules and guides have had a major impact on both the competitive and consumer dimensions. The list of unsung heroes can be divided into three categories: industry-oriented guides; practice-oriented guides (*i.e.*, guides that implicate several industries); and advertising guides. In each of these areas, the Commission can learn from some of its significant successes of the past, successes such as the following:

1. Practice-Oriented Guides:

   (a) Cooling off / door-to-door sales guide
   (b) Negative option guide
   (c) Holder in Due Course rule
   (d) Mail order rule
   (e) Credit Practices rule

2. Industry-Oriented Guides:

   (a) Funeral Rule (price disclosures)
   (b) Used Car (warrantees)
   (c) Opthalmologic (copy of prescription)
   (d) Home Insulation (R value)
   (e) Franchising (earnings disclosures)
   (f) Care Labeling
   (g) Vocational Schools (drop out / placement disclosures)

3. Advertising:

(a) Endorsements and Testimonials Guide

(b) Green Guidelines

The Green Guidelines provide a particularly useful example of how a consumer protection oriented initiative, undertaken on an industry-wide basis, can generate both consumer and competition benefits. These guidelines provided a framework for competition which prevented a potential outbreak of advertising anarchy, and also provided a level playing field for advertisers — thereby encouraging the provision of useful advertising. These guidelines further prevented a mass of confusing/contradictory claims going out to consumers, and provided consumers with a meaningful flow of information.

There have, of course, been industry-wide rules and guides which have not been particularly successful in benefiting consumers and competitors. Thus, as a predicate for future initiatives, there should be a retrospective evaluation to identify the "success" factors, and to determine what didn't work and why.

A common "success" factor in these industry-wide consumer protection initiatives was an economic/competitive type focus on the cause(s) of the market failure and the identification of focused, market-oriented remedies. That is the learning we can take from rules such as vocational schools, franchising, and funeral homes. Abusive practices which were unfair to consumers have been eliminated, and the competitive performance of these industries improved.

IV. Conclusion

Based on the foregoing, I would advance four propositions for the Commission's consideration:

(1) The Commission should make greater use of its unfairness authority to address market failures which cause economic harm to consumers. In this regard, while understanding the reasons for restraint, I believe the Commission should be more ready to take action under the now economically-tethered unfairness jurisdiction.

(2) The Commission should place greater emphasis on guidelines, rather than individual cases, both industry-oriented guidelines, *e.g.*, vocational schools, franchising, and practice-oriented guidelines, *e.g.*, cooling-off rule, HDC, mail order. This is not a criticism of individual cases, just a belief that guidelines get you further, faster.

(3) The Commission should resume putting emphasis on consumer information disclosure initiatives. Providing key performance-oriented

product information in a standardized format will improve the functioning of the markets in question, and improve consumer economic well-being in the form of

- Lower prices
- Prices better calibrated to important product performance characteristics
- Innovation better focused on performance characteristics

(4) The Commission should initiate more consumer protection activities on an industry-wide basis where industries are unresponsive to consumer interests, based on a competitive/economic type analysis of the market failure which leads to the unresponsive performance, and the availability of a focused remedy.

Obviously, these four propositions are interrelated in significant ways. Further, this approach has much in common with the "consumer choice" model put forward by Bob Lande and Neil Averitt,[29] which defines the objective of consumer protection law as being to ensure that consumers "are able to make a reasonably free and rational selection from [the options in the marketplace] unimpeded by artificial constraints such as deception or the withholding of material information." Or, as former FTC Chairman Tim Muris has put it, "consumer protection policy . . . helps ensure that consumers can make well informed decisions about their choices."[30]

---

[29] Averitt and Lande, *Consumer Choice: Operationalizing a New Paradigm of Antitrust Law* (Draft, June 2004).

[30] *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, Remarks by Timothy J. Muris, Chairman, Federal Trade Commission, at the Aspen Summit, August 19, 2003. This speech provides a careful delineation of market failures, including unresponsive sellers and information asymmetetries, the scope and limits of private rights, and the role of the Federal Trade Commission.