



# Federal Trade Commission

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## **RIP VAN WINKLE AWAKENS: SOME REFLECTIONS ON REMEDIES**

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**ABA Antitrust Section Spring Meeting**  
**Federal Trade Commission Remedies: Consumer Protection and Antitrust**  
**Federal Trade Commission Committee**

**March 30, 2006**

Bill Baer remarked to me a couple of months ago that I must feel like Rip Van Winkle in returning to the Commission after a 31-year hiatus. That's not entirely true – as an antitrust and consumer protection practitioner for those 31 years, I tried to keep close track of what the Commission was doing. In fact, my clients were on the receiving end of some of the Commission's most notable orders – the order against Eli Lilly for inadvertent disclosure of email addresses in connection with termination of its Prozac reminder service being the one that sticks out in my mind. But there is no doubt that things are radically different than what they were (or what I thought they would be) when I left the Commission in the Fall of 1975. And nowhere is change more evident than in the remedies that the Commission is seeking and getting.

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<sup>1</sup> These comments are my own, and do not necessarily reflect the views of the Commission or of any individual Commissioner. I would like to express my gratitude to Beth Delaney, my attorney advisor, for her contributions to this speech.

Let me take a brief walk down memory lane, focusing primarily on the Bureau of Consumer Protection because that is where I resided for the two years from 1973-1975. During that period we targeted national advertising that we thought was either false or unsubstantiated. The respondents were both major advertisers and their advertising agencies. The remedies we sought were “all product” orders that would serve as a basis for civil penalties if the respondent ever engaged in false or unsubstantiated advertising in the future. The case the Commission brought against General Electric based on its claims respecting the “reliability” of its color television sets – a challenge that resulted in an “all products” consent decree – was illustrative of these cases.<sup>2</sup>

Our thinking in bringing these cases was twofold. First, these were high profile cases that communicated the message that the cops were on the beat. Second, at the time, the only trigger for civil penalties was the violation of an outstanding order. The respondent thus generally got two bites of the apple – the wages of sin when it took the first bite consisted solely of an order; it was only after the order was violated that it faced penalties.<sup>3</sup> An “all products” order was a broad order that put a large multi-product organization under threat of civil penalties.

The consumer protection landscape changed in this respect with the enactment of the

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<sup>2</sup> *In the Matter of General Electric Company*, 89 F.T.C. 209 (Apr. 7, 1977). See also *ITT Continental Baking Co. v. F.T.C.*, 532 F.2d 207 (2d Cir. 1976).

<sup>3</sup> This is not to say that the first bite at the apple was always costless. In *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), for example, the court upheld a Commission order requiring corrective advertising where the respondents’ claim was shown to have resulted in lingering consumer misperceptions.

Magnuson-Moss Warranty Act at the end of 1974. Among other things, that Act provided for consumer redress when the Commission was able to demonstrate that the respondent had engaged in dishonest or fraudulent conduct. It also provided for civil penalties in the event that the respondent's conduct violated a trade regulation rule promulgated in accordance with special rulemaking procedures described in the Act (rather than the shorter notice and comment procedures) or if the respondent committed a knowing violation of an outstanding decree against a third party (by engaging in the conduct proscribed in the decree.)

A host of problems and potential problems beset this legislation. Among other things, Magnuson-Moss rulemaking proceedings are very cumbersome, and frankly, the BCP staff has hated them. There was uncertainty about whether and in what circumstances civil penalties could constitutionally be recovered for a violation of a third party decree – for example, whether they could be recovered for violation of a fencing-in provision and whether there was a right to a jury trial and, if so, on what issues; and whether consumer redress would foreclose consumers from seeking additional redress in private class actions.<sup>4</sup> Ironically, in the *Francis Ford* case, the Ninth Circuit questioned whether conduct could be challenged as “unfair” as a matter of first impression by the Commission or whether the conduct first had to be defined as unlawful in a trade regulation rule.<sup>5</sup> Yet despite all these shortcomings, when I left the Commission in 1975,

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<sup>4</sup> Some of this uncertainty was clarified by the 1994 amendments to the FTC Act, which provided that defendants have the right to raise in civil penalty proceedings the question whether the Commission's prior determinations are legally sustainable interpretations of Section 5 of the FTC Act. See FTC Act Amendments of 1994, Pub. L. No. 103-312, § 4(b).

<sup>5</sup> *Ford Motor Company v. F.T.C.*, 673 F.2d 1008 (9<sup>th</sup> Cir. 1981).

the Act seemed to be the wave of the future insofar as remedies in the consumer protection arena were concerned.

We were all wrong. As the shortcomings became apparent, the Commission began developing a new remedial instrument – Section 13(b) proceedings in the federal district courts. Section 13(b) was originally considered by the Commission – and, truth be told, arguably by the Congress – as a method by which the Commission could quickly get injunctive relief against mergers and acquisitions from the courts so that administrative proceedings could run their course before the parties closed the transaction. However, the statutory language was broader than that. It allowed the Commission to obtain equitable relief with respect to conduct that violated Section 5. During the 1980s, the Commission used the statute to obtain the full range of equitable relief (including rescission, restitution and asset freezes) from the courts and to do so on an *ex parte* basis whenever notice would tip off the defendant and lead to the dissipation of assets otherwise available for consumer redress. Since then, the Commission's track record in Section 13(b) cases has been virtually perfect. This success in the consumer protection arena has led the Commission to seek disgorgement in the antitrust arena; and in the *Mylan* case, the court held that Section 13(b) could serve as a predicate for such relief in non-merger antitrust cases.<sup>6</sup>

Additionally, a number of special statutes, such as the Fair Credit Reporting Act and the Telemarketing Act, have given the Commission the power to seek civil penalties for violations of those statutes. The statutory maximums are extremely high – for example, up to \$11,000 per

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<sup>6</sup> *F.T.C. v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

violation, and the method of calculating the number of violations is generally left undefined. Although the courts are ultimately the decision-makers with respect to the amount of the civil penalties to be assessed, the Commission has struggled – and continues to struggle – with the criteria to be used in determining what level of penalties to seek (without turning the civil penalty into what courts will consider to be impermissible punishment). And, beyond that, the Commission is trying to “do the right thing” in setting the level of civil penalties in consent decrees.

Finally, a number of recent Commission consumer protection and antitrust decrees contain provisions requiring monitoring, auditing, operation and divestiture of assets by managers and trustees, including but not limited to crown jewel divestiture provisions, that are remedial in nature and that Jim Halverson and I could not have imagined in our wildest dreams when we were at the enforcement Bureaus in the early 70s.

After this walk down memory lane, I guess I *do* feel a little like Rip Van Winkle after all. And the changes that have occurred raise a host of questions. The ones that come most immediately to my mind are the following:

First, is there any role today for the kinds of national advertising cases we used to bring? It's arguable that there isn't, given the arsenal of remedies that the Commission has at its disposal; given the readiness of rivals whose oxen are being gored to bring Lanham Act cases; and given the self-regulation that occurs. On the other hand, those cases were useful in underscoring that

the cops were definitely on the beat.

Second, is the Magnuson-Moss Act a dead letter? On the one hand, it's easy to say it is because of the smashing success of 13(b). On the other hand, the remedies available under Section 13(b) are limited to equitable remedies. There may be some cases on the margin where civil penalties rather than those remedies are appropriate – for example when the amount of consumer injury is hard on quantify. In these cases, it may be that the cumbersome rulemaking procedures imposed by the Act are worthwhile in order to define – and subject to civil penalties – conduct that is unfair but not necessarily deceptive. Or, it may be advisable to use some synopses of litigated decrees in order to subject certain enterprises not covered by special statutes to civil penalties for engaging in patently unfair kinds of conduct. These are possibilities in both the consumer protection and antitrust arenas.

Third, is Section 13(b) really a basis for disgorgement in antitrust cases? *Mylan* says so, but it is the subject of ongoing controversy. Frankly, I can't see the Commission voluntarily ceding that remedy unless and until other courts say it lacks the power to obtain it, but I can't rule out the possibility that other courts may say that either.

Fourth, what are the criteria for selecting the civil penalty that is appropriate for violations of the various special statutes? Should those criteria always include an amount that will achieve complete disgorgement? When does the amount slip over into punishment instead of deterrence?

Finally, is the Commission sufficiently mindful of the burdens and expense that frequently attend the ancillary provisions of its regulatory and quasi-regulatory decrees? To what extent should that burden and expense be considered in determining what the limits on monetary relief – be it consumer redress, civil penalties, divestiture or compulsory licensing – should be?

I'm sure there are many more questions relating to remedies. These are the ones that are top of mind for me as I return to the Commission after a thirty-one year absence. And they are questions for which I have no ready answers. To be perfectly frank, despite the fact that I tried to stay abreast of the Commission's activities during that thirty-one year period, I did not have the time to consider them. The immediate needs of clients were top of mind for me then. One of the great things about returning to the Commission is that I not only can – but must – consider the answers to them now. And I welcome input from everyone as to what those answers – and the answers to other questions about Commission remedies – should be.