

Self Regulation and The Interface Between Consumer Protection and Antitrust

by Thomas B. Leary*

This topic is of great personal interest to me because we are dealing with perceived tensions between the missions of the Bureau of Competition and the Bureau of Consumer Protection at the Federal Trade Commission. At a macro level, there is no tension at all. Both arms of the Commission are tasked with the preservation of consumer sovereignty and a free market process. The Consumer Protection arm deals with false and misleading practices that distort the demand side of the equation, because they give people the impression that what they are buying is worth more than it really is. The Competition arm deals with distortions on the supply side of the equation, because price-fixing or exclusionary practices will restrict supply and elevate prices. So, consumer protection law and competition law are really sisters under the skin (which I believe is a good reason to have an agency with responsibility for both). However, it has also become increasingly obvious that there are some tensions between the two.

A good example of potential tension is the California Dental¹ case, which was decided by the Supreme Court in 1999. The dentists had an ethical code that, at least facially, appeared to aid what we think of as consumer protection objectives. They had code language that, for

* Commissioner, Federal Trade Commission. This is a slightly modified version of informal remarks delivered at a lunchtime seminar hosted by the Dewey Ballantine law firm on January 28, 2004, in Washington, D.C. The views are my own and not necessarily shared by any other Commissioner.

¹ California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

example, prohibited “false or misleading” claims about prices or competence. That sounds a lot like what the Federal Trade Commission’s Consumer Protection Bureau does. On the other hand, the Commission’s opinion concluded that the code, as enforced, violated competition norms because it effectively prohibited even accurate advertising of prices and quality, to the detriment of consumer welfare.²

It is not unusual, of course, to have legal principles that ultimately serve the same objective but clash at the margins. Consider the interface between antitrust and intellectual property law. Both antitrust and intellectual property law are intended to enhance innovation, yet we all know that in certain specific applications there can be conflicts between the two. Consumer protection law and competition law are no different, and they are in good company.

Why then do I say that the competition/consumer protection interface is an issue of increasing significance? Let me mention three recent FTC initiatives. The first involves our response to the special problems of e-commerce. This commerce is more anonymous than commerce in the “old” economy, and therefore it is more difficult for consumers to have confidence in the reliability of someone on the other end - - who may be unknown and not subject to the discipline of anticipated repeat business. The FTC, as you well know, has advocated increased self-regulation in this area, including so-called “seal” programs. A trade association that is not anonymous can confer a seal that will vouch for the integrity of a more

² *See Id.* at 121 F.T.C. 284, 303 (1996).

anonymous seller. This kind of verification necessarily implies an internal monitoring process and an internal process to enforce whatever the norms may be. An association cannot vouch for something unless it has the ultimate power to investigate, to discipline those who are non-complaint, and in extreme cases take the “seal” away from them. That means that the association has to have a system of private law, which of course gives antitrust lawyers heartburn. We usually counsel that compliance be “voluntary.”

The second recent FTC initiative is the series of reports that the agency has issued on the distribution of violent material to children. We have reported on how the motion picture industry, the video game industry, and the music industry comply with their own rating systems. In order to determine whether or not a rating system is effectual, it is necessary to monitor what retailers do. If the retailers are undercutting a rating system, the ultimate sanction may be to cut them off or otherwise engage in activity that will prod them into adherence. To antitrust lawyers, supplier sanctions not only look like vertical restraints, but they also might involve a collective boycott.

The third recent FTC initiative is our request that the media screen out blatantly fraudulent advertising of weight-loss products. We are not asking media people to be rocket scientists; we are not asking them to have complicated substantiation programs. We are saying that certain claims are so false on their face that the media ought to screen them out in the same way they screen out statements that are unacceptable because they are obscene or inflammatory.

We have made this appeal to groups of media people and obviously anticipate that there may be a collective response.

If you are an antitrust advisor to an association that may be importuned by the government to enforce these various norms, how do you advise your client? I think that there undoubtedly are antitrust issues here, but I also have no doubt you can reconcile superficially conflicting demands. Let me suggest a number of propositions that you can rely on.

First, a credible claim that a self-regulatory program is focused on fraudulent marketing will not be summarily rejected. That is one of the lessons of the California Dental case. You are entitled to explain. Collective action aimed at fraud is not the same thing as the activity condemned in a case like Professional Engineers.³ In Professional Engineers, the trade group did not focus on dishonesty, it prohibited price competition altogether. That is a very important difference. We are not asking the media to suppress competition. We are not even asking the media to prohibit a class of product claims. We are simply asking the media to screen out advertising claims that are blatantly false - - not because we want to supplant consumer sovereignty, but because we want to enhance it.

Second, you might emphasize that when an association imposes restrictions on its members, they should be tailored specifically to the intended purpose. One problem in the

³ National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

California Dental case, as reflected in the Commission's opinion, was that the actual enforcement of the code restrictions was not tailored to the expressed purpose.

Third, as always, any ethical code (or product standard) should be based on objective criteria. The code cannot be framed to benefit the insiders at the expense of the outsiders or to benefit the entrenched members of the industry at the expense of the people who might have a new idea. We are comfortable asking the media to screen out the most obviously bogus weight-loss claims because we have actually identified what they are, on the basis of scientific evidence.

Another essential element of objectivity is a credible process for resolving disputes. This may not require full "due process" in the judicial sense but it is important that similarly situated people be treated in a similar way. One way to do that is to avoid a situation where direct business rivals sit in "judgement" on their peers. For example, if you have a multi-industry group that has adopted a common code, you might recommend that the internal decisionmakers be representatives outside the industry directly affected. We are looking right now at a request for an advisory staff opinion from an association that wants to build on our media initiative for weight-loss products and extend the idea to patently false advertising in other areas as well. One of the things that the association will do to ensure non-discriminatory enforcement is provide that disputes will be resolved by a third party that has absolutely no economic interest in the ultimate outcome.

Antitrust counselors usually are concerned about the “market share” of the association that enforces a code or standard. Traditional antitrust advice suggests that you are safer if there is ample opportunity for non-compliant sellers to compete in the marketplace. We have not stressed this factor when we talk about fraudulent advertising in the media because our objective is to have a big market share of compliant media outlets. We are not interested in preserving competitive opportunities for people who are selling weight-loss products with fraudulent appeals.

The difference between self regulation to combat fraud and standards that preclude perfectly legal conduct is the fact that standards of the latter kind, however objective, do substitute the private judgement of a group for a market judgement. Assume hypothetically, for example, that members of a trade group believe organic produce is better for people, based on objective criteria, and require their members to maintain standards consistent with that belief. There still may be a lot of people out there who are not particularly interested in buying organic produce. Therefore, an antitrust analysis might consider whether a noncompliant competitor can be viable. However, an ethical code that seeks to screen out patently fraudulent claims does not interfere with consumer sovereignty. You are not substituting trade association values for the values of consumers. What you are trying to do is let consumers make their own choices, but make their own choices on the basis of accurate information. I think there is a distinction between the two, and I would therefore not worry if our appeal to the media on fraudulent advertising got an overwhelming response. I am not overly concerned about the “market share”

of various media groups that may reduce competitive opportunities for people who sell weight-loss earrings.

I believe this view is consistent with even an expansive view of Professional Engineers, namely, that any association's ethical code must be based on a pro-competitive economic rationale. The effort to eliminate deceptive advertising can be justified purely on economic grounds, if necessary, even though it obviously can serve other objectives. As indicated above, deceptive advertising distorts the demand side of the market equation. Beyond that, deceptive advertising contributes to a pervasive consumer cynicism that, in effect, imposes a tax on honest advertisers - - even in industries unrelated to those directly affected. This is a classic example of a negative economic externality.

Consider, however, issues raised by the FTC's recommendations in its study of marketing violent entertainment to children. The advertising may not be deceptive and it is not illegal to sell these products to minors (unlike alcohol or cigarettes). The FTC is really advocating industry self-regulation in aid of a value that is hard to justify in economic terms. Some people might say that Professional Engineers forecloses self-regulation that is not justified purely on economic grounds. I think that argument goes too far, and reads Professional Engineers too broadly. When you have a compelling social concern, when the alternative to private regulation may be even more heavy-handed government regulation, when you are actually asking your members to do something that is against their immediate economic interest -

- not in aid of it - - I think there is a narrow window for consideration of non-economic values in trade association codes and standards.

My favorite example actually is an old one that I used in counseling twenty years ago, when I thought that clients were overreacting to Professional Engineers. Think of the professional codes that we all adhere to as lawyers. It has been obvious since Goldfarb⁴ that we enjoy no special antitrust dispensations. We are supposed to act like competitive businesses do in many respects, but there are still some ethical obligations for lawyers that go well beyond the obligations of a competitive business. For example, there are restrictions on a lawyer's ability to fire a client. Suppliers of services normally can stop serving a particular customer if they want to, but ethical codes inhibit lawyers from doing so. I think it is hard to argue that this kind of code fosters efficient competition. It reflects a non-commercial value that, to my knowledge, has *never* been attacked. I would argue, and I think you will win if you argue, that private restrictions on the sale of violent material to children reflect a non-economic value that the courts would uphold.⁵ The same argument could apply to similar private initiatives that restrict the sale of other harmful products.

⁴ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

⁵ *Compare* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993)(agreements on student aid that the court believed were non-commercially motivated).

Notice that tolerance of self-regulation in this area is not the same thing as the FTC's "Kid-Vid" initiative that caused such controversy twenty-five years ago.⁶ I am not saying that it is unfair to sell legal, but potentially harmful products to children. What I am saying is that I believe it is unlikely that we will interfere with appropriately tailored industry efforts to restrict these sales.

In conclusion, this is a timely meeting on a timely subject. There can be tensions between antitrust and consumer protection, but I think you can resolve them when you counsel your clients.

⁶ See FTC: Watch No. 627, "Were Engman and Pertschuk right? Obesity issue raises spectre of regulation" p. 5, March 8, 2004.