Federal Trade Commission

Bob Pitofsky and Public Policy: The Early Years

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at the

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I've been asked to say a few words about Bob Pitofsky's contributions to the consumer protection and antitrust bars from 1970-73 when he was the BCP Director and from 1978-81, when he was a Commissioner. In a word, they were immeasurable.

As you know, Bob's contributions to the Commission predated his tenure as BCP Director. More specifically, they followed the Nader report on the FTC.[1] That Report was based on an investigation by Nader's Raiders that began in 1968 and culminated in publication of the Report in 1969. In the wake of that Report (some might call it a screed) Bob was asked by Miles

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance in preparing this paper.

[1] Edward F. Cox, Robert C. Fellmeth & John E. Schultz, *The Consumer and the Federal Trade Commission* (1969).

Kirkpatrick to write a more dispassionate, but critically important, Report on the FTC for the ABA's Antitrust Section.[2] That Report focused for the most part on the FTC's consumer protection mission. For his troubles, Bob was asked by Miles to head up that mission, and he became BCP Bureau Director in 1970.

I was having a wonderful time trying antitrust cases in San Francisco at the time. All I knew about what was happening in D.C. was what I read in the *San Francisco Chronicle*, which I doubt even knew what was happening in Washington. But in the Fall of 1973, I came back to Washington as the "new" BCP Bureau Director, succeeding Jim Halverson and Jodie Bernstein, who had served as Acting Bureau Directors. I quickly came to realize what Bob had done.

First, I think he (and Jodie as Acting) were the first to really understand advertising. That was probably because they took the time to travel up to Madison Avenue in New York. There they met with advertisers and their agencies (and focused not on the antics of the agencies that we see portrayed on Mad Men today, but on what these folks could really do with advertising.) To be sure, the famous "shaving cream" ad, portraying the shaving of sandpaper, predated those travels.[3] But so did the Commission's insistence that each advertising statement be literally true.[4]

Second, based on what Bob and Jodie learned from these travels, there emerged a completely different "deception" paradigm, to which we should adhere today.[5] To begin with,

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[2] Report of the American Bar Association Commission to Study the Federal Trade Commission (1969)

[3] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

[4] *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944).

[5] Although I would suggest we do not always as in the Commission's recently published privacy report. *See* Fed. Trade Comm'n, Protecting Consumer Privacy in an Era of Change: Recommendations for Businesses and Polymakers (Mar. 2012), *available at* http://ftc.gov/os/2012/03/120326privacyreport.pdf.

the Commission held that before disseminating an advertisement, marketers must have a reasonable basis for all express and implied claims that the advertisement conveys to consumers; otherwise the ad may be deceptive.[6] We routinely require prior substantiation today. But think how revolutionary it must have seemed in 1970. By the time I became BCP Director in 1973, marketers, their agencies, and broadcasters made sure that an advertisement's principal message was substantiated beforehand.

Additionally, instead of requiring that each statement be literally true, the Commission held that it would look to the "net impression of the advertisement, evaluated from the perspective of the audience to whom the advertising is directed."[7] The first part of the "net impression rule" substituted a more flexible approach to determining an advertisement's meaning (based on the testimonials and typeface that were used, for example) for the "one size fits all" approach that had theretofore been used. The corollary to the second part of this rule was that "the audience to whom the advertising is directed" was substituted for the rule that focused exclusively on the "most credulous consumer." And, the practical consequence of the "net impression rule" was that by the time I got here, the staff (and I think marketers) were doing more copy-testing to determine an advertisement's meaning.

The "net impression" rule, however, did not focus exclusively on what was said in the advertisement; it also took into account the failure to disclose material facts which, if disclosed, might prevent the advertisement from being deceptive. For example, as Bob later clarified when he was a Commissioner, a failure to disclose qualifying information of the limited nature of a

[6] *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973).

[7] *Pfizer Inc*., 81 F.T.C. 23, 58 (1972).

product (or service's) claimed benefits may also be deceptive.[8] I reflect on this standard of deception now when I see a "privacy disclosure" that is a half-truth like "X collects your private data to serve you relevant advertising" instead of disclosing that X's principal use of your data is to attract advertising that supports its business model. I have to ask myself whether, in view of the way that the Commission has interpreted "deception," we need a new paradigm respecting privacy that contradicts what we told Congress in the early 80s about how narrowly we would interpret the consumer protection prong of "unfairness."

This does not mean that Bob's contributions to the consumer protection mission were confined to developing the law of deception. *FTC v. Sperry & Hutchinson Co.* was decided in 1972.[9] In the wake of that decision, Bob established a Special Projects Division of the Bureau whose sole mission was to define the extent to which Section 5 applied outside the contours of the Sherman and Clayton Acts. That Division, under Mort Needelman's leadership, developed the Holder In Due Course and Funeral Rules, among others. As I said, the Commission described "limiting principles" applicable to consumer protection "unfairness" in a series of letters it sent to Congress in the early 1980s.[10] I don't think we've adequately described "limiting principles" for our Section 5 jurisdiction over "unfair methods of competition" though.

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[8] *Litton Indus.*, 97 FTC 1, 70 (1981) (failure to disclose that survey reflected only Litton-trained repairmen may be deceptive).

[9] 405 U.S. 233 (1972).

[10] Letter from FTC to Wendell Ford and John Danforth, Committee on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984); Letter from the FTC to Bob Packwood and Bob Kasten, Committee on Commerce, Science and Transportation, U.S. Senate, *reprinted in* FTC Antitrust & Trade Reg. Rep. (BNA) 1055, at 568-570. See also 15 U.S.C. § 45(n), which seamlessly unifies these limiting principles in consumer protection cases.

When Bob came back to the Commission as a Commissioner in 1978, his restless mind turned largely to restraining Chairman Pertschuck. Possibly his most significant contribution was not participating in the Kid-Vid Crusade, which the Chairman, following Chairman Engman, waged. I only wish that Jodie and I had been so prescient in the 1973-75 period. You all will recall that that crusade ended up in an editorial in the *Washington Post*, excoriating the Commission for trying to act as a "National Nanny" in trying to police Saturday morning television. But arguably a more significant, if comparatively unnoticed, achievement was his opinion in *Borden, Inc.*,[11] where he departed from Chairman Pertschuck's view that compulsory licensing of the Real Lemon trademark was the appropriate remedy for monopolization. Bob found in that case that restrictions on monopoly pricing of the product were sufficient.

That said, I consider Bob's main contributions to the agency to be unsung. They started with mentoring. Within a few weeks after I got back here in 1973, he called and introduced himself, and he was a maker of ever so soft suggestions about how the consumer protection mission might be improved. As time went on, my wife, Kitzi, and I were entertained royally by Bob and Sally in their suburban Maryland home. And I won't soon forget the "pickle parties" that Bob and Sally and Jodie began hosting just before Kitzi and I and the kids left to go back to San Francisco in 1975.

I'm supposed to cover only the "early" Pitofsky years, but I'd be remiss if I didn't mention that Bob told me they'd have to "carry him out" when I told him in 1983 that I planned to retire early. And then there's Sally's giggles at a NERA conference in 1994 about our then four-year-old granddaughter's declaration that she wanted her hair "messy."

[11] *Borden, Inc.*, 92 F.T.C. 669 (1978).

But maybe Bob's greatest contribution to the Commission was that he bequeathed Jodie to me as my Deputy in 1973. She had a mind like a steel trap. And she could strategize like no one else. I remember our trip to the Hill to see Senator Stone of Southern Florida. He had taken his door off its hinges to show how "open" he was. I whispered to Jodie that he was going to try to micromanage the consumer protection mission. She just whispered back that that would be no problem; we'd just "out last" him. And we did.

Jodi once introduced me as the "penultimate" Bureau Director with whom she worked in the early years. I didn't even know what the word meant at the time. But as time went on, I realized she'd paid me a high complement – because we both know who the "ultimate" Bureau Director was.

Thank you Bob (and Sally and Jodie).