

Consumer Protection Update

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The years teach much which the days never know. If Emerson had it right, Chief Administrative Law Judge James P. Timony must be a pretty smart guy. His career at the FTC has spanned 43 years and ten presidents dating back to the Eisenhower Administration. While he has been at the FTC, many important principles of consumer protection and competition law came into being. Judge Timony's contribution to this body of law has been substantial and he will be missed when he retires in January 2003 and begins as an adjunct professor at the Catholic University's Columbus School of Law. This issue of *Consumer Protection Update* is dedicated to him. We are also honored to include his article regarding the past, present, and future role of FTC administrative adjudication of consumer protection cases.

While the administrative process provides one option, the Commission continues to bring cases in federal court. Lesley Fair, Senior Attorney for the FTC's Bureau of Consumer Protection, summarizes a year in which the Commission has obtained some of the biggest judgments and settlements in its history, including a \$505 million settlement with the companies that brought you Miss Cleo and a \$215 million settlement with Citigroup. Also in this issue, August Horvath writes on state laws as barriers to e-commerce (should state auction laws requiring 80 hours of coursework on subjects such as "bid calling" and "public speaking" apply to eBay?) and I write about the theoretical FTC unfairness case against the fast food industry.

We are also happy to build on the success of this summer's *Privacy Newsletter*, a joint effort between the Consumer Protection Committee and the Internet Committee. The second issue of *Privacy Newsletter* will be in your inbox sometime in February. In the meantime, Julie Brill, Assistant Attorney General for the State of Vermont provides a comprehensive review of the states' efforts in enforcing privacy and security principles, including discussion of five high profile matters: Doubleclick, Ziff Davis, Amazon, Eckerd, and Eli Lilly. In addition, Elisa Nemiroff summarizes recent remarks made by J. Howard Beales, Director of the FTC's Bureau of Consumer Protection, in which Mr. Beales discussed the FTC's privacy initiatives over the past year and provided important insight into what lies ahead. -- *Editor*

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Tribute to James P. Timony

By Glenn Mitchell*

When you consider James P. Timony's long and distinguished career at the Federal Trade Commission, his success is easy to explain. He possessed uncommon determination, independence, and a positive, unconventional approach to life and the law.

Jim was a dedicated jogger long before marathons were popular. Every day, either at dawn with his wife, Joan, or at the noon hour near the mall and Potomac River, you could find Jim pounding away at a break-neck pace that belied his age. In fact, rumor has it that he jogged so hard and so fast for so long that he ultimately had to switch to long distance swimming where he again excelled.

His determination and tenacity were apparent to anyone who had dealings with Jim as a lawyer. Early in his career, the Director of the Bureau of Restraint of Trade (as it was known in the 1960s) assigned to him a complex, one might say, unusually sticky case, *Topps Chewing Gum, Inc.* The complaint charged *Topps* with monopolizing baseball picture cards in the sale of its bubble gum by exclusive agreements with major league baseball players. Jim slugged it out for three years with former FTC Chairman, Earl Kintner, as opposing counsel. The Hearing Examiner upheld the complaint, but the Commission, in an opinion by the quixotic Commissioner Elman, reversed holding that the cards were not a separate product market. Jim's attention to detail, long hours, and resilience as a trial lawyer, were an inspiration to his colleagues at the FTC. He didn't whine or blame anyone for the loss. Instead, he worked harder and longer on his other cases and posted an impressive streak of victories that did not escape the attention of the private bar.

After a few years in private practice, Jim returned to the challenging work of the FTC. He served many years in the General Counsel's office arguing some of the most important FTC cases in numerous circuit courts. In 1976, he was appointed Administrative Law Judge where he distinguished himself. He was elevated to Chief Administrative Law Judge in 1998.

One case that shows Jim's independence and innovative thinking was *Detroit Auto Dealers Association (DADA)*. DADA and its dealer members were charged with an unfair method of competition by agreeing to close on Saturdays and most evenings. The dealers defended on the grounds that they should have the same rights as unionized employers to respond collectively to the uniform demands of their non-union salesmen for shorter work hours. Judge

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Timony agreed with the dealers on the basis that such arrangements were protected by the nonstatutory labor exemption. He dismissed the complaint. Although the case was reversed by the Commission, the U.S. Court of Appeals for the Sixth Circuit in two decisions refused to rubber stamp the FTC's final decision and twice remanded the case to the Commission. In both decisions, much of ALJ Timony's novel application of the non-statutory labor exemption was, in effect, sustained.

When he retires from the FTC in January 2003, Judge Timony will be missed. The mark he has left on consumer protection and antitrust law, however, will continue on for many years to come.

Administrative Adjudication of Consumer Protection Cases As An Alternative to Litigation in Federal Court

By James P. Timony*

In its enforcement of consumer protection cases, the Federal Trade Commission ("FTC") has essentially abandoned administrative adjudication under Part 3 of the FTC's Rules of Practice in favor of litigation in federal court. While this change in policy has resulted in large awards of consumer redress, it ignores the substantial benefits provided by the administrative process. This article surveys the evolution of consumer protection enforcement, beginning with early cases brought by the Bureau of Litigation, the policy changes following the issuance of the Nader and ABA Reports in 1969, Congress's provision of Section 13(b) authority, and the Commission's reliance on that authority in seeking a full range of equitable remedies available in federal court. This article will conclude that the Commission's mandate can be best achieved through use of the administrative process to decide cases of first impression and to test the limit of the Commission's Section 5 authority.¹

Early Years in the Bureau of Litigation

My first job as a lawyer was with the FTC's Bureau of Litigation in the summer of 1959. I was one of approximately 50 trial attorneys trying both antitrust and consumer protection cases from investigative files developed by the Bureau of Investigation. We were like "barristers," trying "briefs" developed by "solicitors." We tried a lot of cases, and were given responsibility early. There was very little supervision, with only four titled managers in the Bureau. Within months of joining the Bureau, I faced 35 lawyers representing 17 respondents in a case alleging a price fixing conspiracy in the rubber tire industry.² Some of the new lawyers in the Bureau of Litigation, a year or two out of law school, would

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have 20 or 30 false advertising cases assigned to try, often by themselves.

In 1959, the Commission employed 20 hearing examiners, and issued 346 complaints and 289 cease and desist orders involving allegations of deceptive practices.³ These cases involved allegations of false advertising, delivering short measure, falsely disparaging competitors and their products, passing off one's merchandise as that of another, removing law-required markings, using contest schemes unfairly, failing to disclose that products previously had been used, and supplying lottery devices for use in the sale of merchandise.⁴

Hearings were by peregrination, traveling from one place to another for the convenience of witnesses, with little formal discovery.⁵ Despite the reputation for delay associated with this process, a survey of deceptive practices cases litigated about that time indicated that most had been tried and finally decided by the Commission in little over a year after issuance of the complaint.⁶ The Commission issued complaints unsystematically, exercising little independent discretion and relying heavily on the recommendation of investigating counsel.⁷

This system produced lots of cases, which seemed to have a beneficial self-policing effect on advertising.⁸ Every year the Bureau lost many young lawyers who were hired by law firms or as in-house counsel to help industry with their advertising and other business practices or to defend suits brought by the Commission. This welter of administrative litigation that occurred during these early years produced principles that formed the bedrock of consumer protection law.⁹ Some of these principles included the following:

- A misrepresentation of any fact that materially induces a purchaser's decision to buy is a deception prohibited by Section 5.¹⁰
- A practice is deceptive under Section 5 when it has the "tendency and capacity" to mislead and actual deception need not be shown.¹¹
- Affirmative disclosures may be required to remedy what would otherwise be a misleading ad.¹²
- Consumer testimony and surveys and expert testimony on consumer perception are matters for the Commission to decide.¹³
- The "puffing" defense applies to claims not capable of measurement.¹⁴
- The meaning of claims in advertising is committed to the discretion of the Federal Trade Commission.¹⁵

By any measure, the Commission enjoyed great success during this period. This success did not escape notice. One commentator

stated "[i]n its . . . struggle to protect consumers and business concerns against false advertising and deceptive practices, the Federal Trade Commission has produced a massive record of investigative and enforcement that probably dwarfs that of any other administrative agency."¹⁶

Administrative Adjudication During The 1960s

In 1961, the difference between investigative and trial attorneys was eliminated and two new Bureaus were created: one to prosecute antitrust violations and the other to prosecute deceptive practices. The Rules of Practice were also changed to provide for continuous hearings and pretrial discovery. The theory was that interval hearings caused delay and administrative litigation should be modeled after federal district court practice. The changes took place shortly after the appointment of Commissioners Paul Rand Dixon (Chairman), Philip Elman, and Everette MacIntyre. A few weeks after Commissioner Elman's appointment in 1961, he delivered the following comments in a speech to the American Marketing Association:

I have been dismayed to find . . . that at the Federal Trade Commission there has developed the practice of so-called "peripatetic hearings" and "hearings at intervals." A hearing is treated as a kind of continuing investigation which sometimes proceeds at a relaxed, even languorous pace, interrupted from time to time by recesses lasting weeks, months, or even years. Perhaps I am only revealing my own inexperience in the ways of agency practice, but I am bound to say that this seems to me an Alice-in-Wonderland way to try a lawsuit. . . . A hearing is not a contest between opposing counsel to determine the "winner," but an inquiry for the ascertainment of the truth.¹⁷

Despite Commissioner Elman's best intentions, strong will and conflicting view of the public interest prevented systematic improvements.¹⁸ The new discovery practice caused delay. Now, counsel supporting the complaint, wanting to use discovery to prepare their case, joined with respondent's counsel in seeking delay in the commencement of the trial so that all of the facts could be developed before they had to speak for the record. Endless depositions and discovery fights took time. The result: case disposition actually took longer under the new system.

At around this time, the Commission also began looking at the effect of its deception cases on consumers rather than on competitors. Much of this new thinking fomented from the provocative ideas of Commissioner Elman and his law clerk, Richard Posner. Mr. Posner, now the Chief Judge of the Court of Appeals for the Seventh Circuit, argued that government had little role in the regulation of advertising since there are adequate market incentives for sellers to provide accurate information and to

challenge their rivals' false claims through their own advertising.¹⁹

Robert Pitofsky later responded to this criticism by arguing that, in oligopolistic markets, sellers shy from competition and are as likely to advertise specific product characteristics:

Until the government intervened and required or induced disclosure, accurate information was not available in the market concerning the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel. At present, there continues to be little accurate information available to determine the comparative prices of life insurance policies, funeral services, eyeglasses sold at retail, and legal services; the relative efficiencies of air conditioners and other electric appliances; the performance characteristics of tires; and the nutritional content of foods. Moreover, while in many of these product categories there is a record of particular sellers exaggerating the qualities of their own product or service, rarely is there an instance of rivals explicitly challenging those questionable claims.²⁰

Mr. Pitofsky's view was to prevail and the Commission's focus during administrative adjudication shifted from fictitious pricing²¹ and phony mock-ups in television advertising,²² to more complex cases challenging substitution for product quality claims. The standard for case selection became more stringent and the number of cases dropped dramatically. The annual report for 1965 shows that in that year, the Commission issued 29 complaints compared to the 376 filed in 1959.²³

While the number of cases may have dropped, important developments in Consumer Protection law continued to occur.

- The Commission started to rationalize the proof required in administrative adjudication of advertising cases to explore the extension of its unfairness theory into other business practices.²⁴
- In an early application of its developing advertising substantiation theory, the Commission held that "One who affirmatively advertises a product to be safe, in a context in which the prospective user's health or safety may be adversely affected if the claim is false, implicitly represents that he has a reasonable and substantial foundation in fact for making the claim."²⁵
- The Commission continued to require affirmative disclosures of particular product facts where silence or

implications from other express advertising would be reasonably certain to lead to misconceptions about the product in the minds of average consumers.²⁶

Change, however, did not come fast enough to keep pace with the turmoil across the country, for as Bob Dylan foretold, the times were a-changing.

The 1969 Nader and ABA Reports

In 1969, Ralph Nader and the American Bar Association issued separate reports that were highly critical of the agency's performance.²⁷ These reports increased the pressure for more rational, rigorous enforcement of consumer protection. The ABA Report found that "in the field of consumer protection, the agency has been preoccupied with technical labeling and advertising practices of the most inconsequential sort. This failing derives in large part from a detection technique which relies almost exclusively on the receipt of outside complaints."²⁸ The ABA Report also found that, "for an agency employing over 400 lawyers to initiate a grand total of 23 contested cases in [1968] is disturbing."²⁹

Specifically, the ABA Report analyzed FTC programs for deceptive labeling, false advertising, wool and fur textile labeling, and marketing schemes³⁰ and found that, while the FTC asserted it did not have sufficient manpower and funds to monitor advertising, it was focusing its attention on such inconsequential cases as a failure to disclose on labels that "Navy shoes" were not made by the Navy, that Indian trinkets were not manufactured by American Indians, and that "Havana" cigars were not made entirely of Cuban tobacco.³¹

The Report also stated that the FTC did not have a single person with responsibility for monitoring national and local magazine, radio, newspaper, and television advertising while it had nearly 100 employees assigned to culling wool and fur labels to detect slight differences from the percentages stated, and checking on the minimum size of labels and size of type, fictitious price comparisons, claims of value, and bogus going-out-of-business sales.³² One of the ABA's suggested remedies for these deficiencies was new legislation in the field of fraudulent and deceptive practices creating the right in the FTC to seek preliminary injunctions against deceptive practices, pending the final administrative cease and desist order.³³

In 1969, the two men considered most responsible for the ABA Report, Miles W. Kirkpatrick, and Robert Pitofsky, became Chairman of the Commission and Director of the FTC's Bureau of Consumer Protection, respectively. Soon thereafter, the Federal Trade Commission reacted with a large number of proceedings challenging major advertising campaigns as false, misleading, or unfair.³⁴ Vigorous prosecution of the consumer protection laws has continued ever since.

Through cases adjudicated during this period, the Commission raised the burden on advertisers for claims made for all products

and services, and not just those dealing with health or safety.³⁵ Advertisers were required to show a substantial foundation in fact for claims.³⁶ Through administrative adjudication, the Commission also began to require “corrective advertising” — an affirmative disclosure intended to correct a misleading impression,³⁷ and developed a separate category for “unfairness” violations through its Policy Statement on Unfairness, which summarized fifty years of its own administrative adjudicative common law, citing some twenty of its administrative cases in footnotes to the Policy Statement.³⁸

Perhaps most significantly, the Commission enunciated the modern view of the law of deception in its 1983 Policy Statement on Deception, stating that it would find deception “if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment.”³⁹ The Deception Statement was based on the common law growing out of the Commission’s enforcement of Section 5 through administrative adjudication, citing 63 adjudicated cases in footnotes to the Deception Statement.

On March 11, 1983, the Commission, in the best tradition of its duty to define the law of consumer protection assigned to it by Congress in the Federal Trade Commission Act, released its Policy Statement Regarding Advertising Substantiation. This Policy Statement elaborated on the procedure alluded to in *Pfizer, Inc.*,⁸¹ FTC 23, 64 (1972), shifting to the advertiser the burden of showing evidence supporting its claims.⁴⁰ In a series of cases involving the advertising claims of analgesics, the Commission found that comparative efficacy claims were made and that they were not substantiated by the evidence.⁴¹

Throughout the 1980s and the 1990s, the Commission, through the administrative process, continued to develop its substantiation policy, analyzing at length clinical studies of the claims of product efficacy to determine whether they were well-designed, randomized, double blind, and placebo-controlled.⁴² Administrative adjudication was also the forum in which the Commission developed important principles relating to consumer perception studies and the use of extrinsic evidence to determine the meaning of implied claims.⁴³

Despite this unmitigated success, many continued to criticize the lack of enforcement impact of the FTC’s cease and desist order.⁴⁴ As a result, the Commission started claiming inherent authority under Section 5 to order consumer redress in administrative adjudication⁴⁵ and sought legislative support in the FTC Improvements bill which was introduced in 1972. These were the first important steps on the road upon which we find ourselves today.

The Rise of Injunctive Relief

In 1973, Congress passed Section 13(b) of the FTC Act to authorize the Commission to seek injunctions in federal district court. That power came from a floor amendment, offered with no debate that was attached to the unrelated Trans-Alaska Pipeline Act and

passed as emergency legislation to meet the shortage of domestic oil.⁴⁶ Section 13(b) empowers the FTC to sue in district court to enjoin violations of any of the laws it enforces pending resolution of an administrative complaint.⁴⁷ The provision added the fateful addendum that “in proper cases the Commission may seek . . . a permanent injunction.”⁴⁸ The committee report gave two purposes for the permanent injunction: for use in “routine fraud” cases and where a court might feel reluctant to issue preliminary relief without control of the timetable for permanent relief.⁴⁹

In 1974, Congress passed Section 19 of the FTC Act, giving power to the Commission in the Magnuson-Moss FTC Improvements Act to seek redress from district courts for consumers injured by unfair or deceptive acts or practices that were the subject of an FTC rule or cease and desist order.⁵⁰ The standard redress would be available in circumstances where a reasonable man either knew or should have known that the act was dishonest or fraudulent. Congress also imposed a statute of limitations on redress actions.⁵¹

Some have argued that Congress intended to limit consumer relief in an injunction issued under Section 13(b) to meet the criteria (dishonest or fraudulent and brought within the time limitations) of Section 19.⁵² Courts construing Section 13(b) have not agreed. In *FTC v. Southwest Sunsites, Inc.*,⁵³ the Fifth Circuit held that Section 13(b) granted a full range of equitable remedies, and in *FTC v. H.N. Singer, Inc.*,⁵⁴ the Ninth Circuit decided specifically that Section 19 did not restrict equitable powers granted by Section 13(b).⁵⁵ Many courts have followed this precedent.⁵⁶ These cases have involved substantial amounts in consumer redress. Most recently, *Access Resource Services, Inc.*, and *Psychic Readers Network, Inc.*, agreed to forgive \$500 million in outstanding consumer charges and pay \$5 million in a 900-number scheme to call “Ms. Cleo” for psychic help.⁵⁷ The FTC has realized other significant financial settlements and judgments in cases brought in U.S. District Court:

- *FTC v. Citigroup, Inc* — \$200 million in redress in the settlement of a predatory lending case.⁵⁸
- *FTC v. First Alliance Mortgage Co.* — \$65 million in redress in the settlement of a predatory lending case.⁵⁹
- *FTC v. H.G. Kuykendall* — \$39 million judgment for violations of the Telemarketing Sales Rule.⁶⁰
- *FTC v. The Crescent Publishing Group, Inc.* — \$30 million in redress in the settlement of FTC and state cases alleging unauthorized charges to credit cards for unordered services.⁶¹
- *FTC v. BigSmart.com, L.L.C.* — \$5 million in redress in the settlement of charges against pyramid scheme promoter.⁶²

- *FTC v. Enforma Natural Products, Inc.* —\$10 million in redress in the settlement of deceptive claims for weight loss products.⁶³
- *FTC v. Smolev* —FTC obtained \$9 million in redress in settlement of FTC and state charges that marketer of a buying club made unauthorized charges to consumer's credit cards.⁶⁴
- *FTC v. Equinox Int'l* —\$40 million in redress in the settlement of FTC and state charges against a pyramid scheme promoter.⁶⁵
- *FTC v. Lane Labs USA, Inc.* —\$1 million in redress in settlement of charges that Lane Labs made deceptive cancer treatment claims about their shark cartilage and skin cream products.⁶⁶
- *FTC v. J.K. Publications, Inc.* —\$37.5 million judgment against adult web site operators for unauthorized charges to consumer credit cards.⁶⁷
- *FTC v. Automated Systems & Concepts Int'l, Inc.* —\$11.8 million judgment against Automated Systems & Concepts Int'l Inc., a marketer of a deceptive business opportunity scheme.⁶⁸
- *FTC v. Slim America, Inc.* —\$8.3 million judgment against a marketer of purported weight loss product.⁶⁹
- *FTC v. American Urological Corp.* —\$18.5 million judgment against marketer of "Väegra," a purported impotence product.⁷⁰

These cases make quite clear that the FTC now looks to the federal courts to resolve virtually all contested consumer protection cases. In fiscal 2002, for example, the Commission approved 84 consent orders in cases brought for permanent injunctions in district court. The majority of those consent orders involved consumer protection concerns.

The effect of the FTC's action is not only limited to the cases it has actually brought in federal court. Often the *threat* of litigation in federal court is enough to encourage settlement. In fiscal 2002, the Commission approved 17 consent orders on consumer protection matters prior to a district court filing. In these cases, the FTC has obtained significant financial settlements. The following are three examples:

- *Weider Nutritional Int'l, Inc.*, — \$400,000 redress in the settlement of charges that a company made deceptive

safety and efficacy representations about purported weight loss product.⁷¹

- *Gateway 2000* —\$290,000 in redress in the settlement of charges that Gateway made false and misleading claims about its refund policy and on-site warranty service.⁷²
- *Synchronal Corp.*, —\$3.5 million in redress in settlement of charges that Synchronal Corp. made deceptive representations about their baldness and cellulite products.⁷³

It should come as no surprise that the FTC's success in these cases and the dazzling amounts of redress that are reported have shifted the focus toward federal court and away from administrative adjudications. But the question remains: is this a good or bad thing?

Administrative Adjudication to Protect the Consumer

There is a direct connection between the increased activity in the federal courts and the decrease in administrative adjudication. Since 1998, only two consumer protection cases have been litigated under Part 3 of the Commission's Rules of Practice,⁷⁴ six have been settled,⁷⁵ and one is pending.⁷⁶

Perhaps the most important recent consumer protection complaint involved the Joe Camel advertising campaign conducted by R.J. Reynolds Tobacco Company.⁷⁷ In that case, which went to trial in 1998, complaint counsel relied on an unfairness theory in alleging that the advertising campaign appealed to adolescents under 18, inducing many young people to begin smoking and causing substantial injury to their health and safety. The proposed order would have barred Reynolds from using the Joe Camel campaign to advertise to young people and required the company to conduct a public education campaign discouraging youth smoking. This was, in my opinion, just the sort of case the Commission should be bringing administratively: a case that explored evidence needed to establish causation under the Commission's unfairness authority. It is the type of case that Congress had in mind when it created the Federal Trade Commission.

There is no written policy that determines whether the Commission will use administrative adjudication or its Section 13(b) authority to protect consumers. In bringing cases in federal court, the Commission appears to be motivated by the speed with which an injunction can be obtained, the belief that the large consumer redress awards have a deterrent effect, and the power of the courts to remedy violations through the use of equitable powers ancillary to the authority to issue a permanent injunction under Section 13(b). This ancillary authority includes asset freezes, TROs, appointment of receivers, and immediate discovery and access to books and records. For example, if a receiver has been appointed on a TRO, the receiver, local law enforcement officers, and FBI agents can go to a defendant's place of business, announce that the receiver is assuming control of the business, and ask all

customers and employees to leave without taking anything with them or touching computers or records of electronically stored data. Sometimes the local law officers also ask to see drivers' licenses and make arrests on the spot for unrelated charges such as outstanding DWI offenses. This kind of draconian law enforcement is hard to resist for those enforcing the consumer protection laws but seems far from the cool, reasoned approach envisioned by Congress in writing the FTC Act. In 1924, Gerard C. Henderson summarized the applicable legislative history that underlies the creation of the Federal Trade Commission:

The cases which the Commission is in my opinion peculiarly fitted to handle are those involving . . . trade "tricks" of a deceptive character . . . Courts of law cannot do complete justice in such a controversy. The Commission is in a position to study the problem as a whole . . . to institute test cases where advisable, and where the practice is demonstrably unfair to file complaints in sufficient number to compel adherence to the prescribed standard of truthfulness. . . . It is necessary to return for a moment to the discussion . . . of the difference between judicial and administrative procedure. Administrative action of the kind provided in the Federal Trade Commission Act was valuable for two reasons: because it offered facilities for expert decision in specialized fields, and because it ensured uniformity of decision as to matters of importance in the business world. . . . The Federal Trade Commission was intended to explore and develop a field of the law in which much pioneer work was needed. It was expected to establish precedents by which business men and attorneys could be guided in the conduct of affairs.⁷⁸

Perhaps anticipating the proliferation of consumer redress and injunction cases brought by the Commission later in the century, Mr. Henderson had this to say:

[T]he trust-busting fervor of the first decade of this century and the crusades of the Middle Ages were signs of immaturity. . . . A crusade is more spectacular than a scientific inquiry It is precisely for this reason; however, that the enforcement of the new laws was entrusted to a non-partisan commission, to be composed of men of training and experience whose tenure would not depend upon political considerations. It seems to me that from this point of view the Commission has a great and important opportunity. I conceive it to be, potentially, an expert tribunal, of steady tenure and scrupulous judicial poise, firm in the public interest but impartial as between the private economic groups affected by the action. I do not look upon it as a prosecuting agency, at war with the forces of evil. Where a

crusade is necessary, as of course it may be at times, the matter should be left to the political branch of the Government. The Commission's procedure should be such that a trade practice of a method of competition, deemed by some to be injurious and defended by others, could be brought before it for calm and impartial study, the facts and arguments developed in a formal procedure, and an order issued which, if confirmed in the courts, would settle for the benefit of the business world whether or not the practice was consistent with the letter and spirit of the law.⁷⁹

Some have argued that abandonment of Part 3 administrative adjudication suggests a declaration of war with the "forces of evil." But this should not be the case, particularly in consumer protection cases other than routine fraud.⁸⁰ There, the Commission should use administrative cases "to study the problem as a whole," especially where there are unfair practices in sufficient number to compel adherence. The Commission's decisions in administrative adjudication demonstrate that expert experience in specialized fields will ensure uniform rulings, so that business advisors may be guided in the conduct of their affairs to be consistent with the letter and spirit of the law. Injunction cases — tried in haste by judges who may be unfamiliar with consumer protection law — will produce conflicting and unfortunate precedent.⁸¹

In 1996, to speed completion of administrative adjudication, the Commission revised its Rules of Practice so that they conform more closely to federal practice.⁸² The Rule amendments require that the administrative law judge's initial decision be filed within one year from the date of the issuance of the complaint, except upon a showing of extraordinary circumstances.⁸³ Litigants must also exchange information without waiting for a formal discovery requests, engage in simultaneous discovery, provide supplemental discovery responses, submit written direct expert testimony whenever possible, and limit their number of interrogatories. Whether these revisions had their desired effect is not known. There have been too few cases brought under the revised Rules to reach any conclusion.

Despite its success in its injunction cases, the Commission would be well-advised, I believe, to bring administrative complaints attacking unfair or deceptive advertising or other marketing practices. Through administrative adjudication, the Commission could explore the lawfulness of a new business practice. The Commission's present emphasis on issues involving combating internet fraud, identity theft, and protecting consumers' privacy in new technologies would seem to be especially suited for the exercise of its expertise and thoughtful analysis in administrative adjudication. Available expertise could also be used to consistently interpret implied claims in the absence of extrinsic evidence such as copy tests and to determine the adequacy of complex

substantiation relied on for a scientific claim. There also may be circumstances where the Commission would want to resolve a case through the administrative process but seek a preliminary injunction to prevent harm to the public while it analyses complex substantiation evidence.⁸⁴

In sum, the Commission should rely on the administrative adjudicatory process to set policy, define the boundaries of its Section 5 authority, and exercise its expertise in painstaking examination of scientific evidence. The historical record and my forty-one years of observation make quite clear that the process is ideally suited to accomplish these goals. ■

2002: A Record Year for FTC Consumer Protection Enforcement

By Lesley Fair*

You don't have to be psychic to know that recent Federal Trade Commission law enforcement actions have resulted in some of the biggest judgments and settlements in Commission history. With redress and civil penalties closing in on a billion dollars this year, the FTC has sent the unmistakable message that, when the nature of the violations warrants, the Commission will seek strong remedies for consumers. Just ask Miss Cleo, late night TV's charismatic clairvoyant, or any number of other defendants whose allegedly deceptive practices have been challenged in recent FTC law enforcement actions.

Access Resource Services

On November 14th, the FTC announced a \$505 million settlement with Access Resource Services, the Psychic Readers Network, and other companies and individuals involved in the massive 900 number scheme known to the public as the Miss Cleo psychic lines.¹ Consumers were lured in by ubiquitous infomercials, 30-second spots, and print ads offering psychic advice on love, fortune, and success. But her cadre of fortune tellers saw something else in callers' futures that they failed to mention: hefty bills for services deceptively advertised as "free."

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According to the FTC, the defendants engaged in a host of illegal advertising, billing, and collection practices. The complaint alleged that the defendants violated the Pay-Per-Call Rule by failing to disclose the cost of the calls in their ads.² In addition, the FTC charged that the company misrepresented that consumers would receive psychic reading at no charge and would not incur costs when they remained on the telephone with the psychic readers.

Even after the phone calls ended, the deceptive practices continued. According to the complaint, the defendants harassed consumers with repeated, unwanted, and unavoidable telemarketing calls. The FTC also alleged that the defendants often responded to consumers' inquiries with abusive and vulgar language, falsely told consumers that they were obligated to pay for calls for which they weren't legally responsible, and threatened consumers with adverse credit reports before investigating purported billing errors.

To settle the FTC's charges, Access Resource Services, Psychic Readers Network, and other defendants agreed to stop all collection efforts on accounts or claims from consumers who purchased their services, forgive an estimated \$500 million in outstanding charges, and disgorge an additional \$5 million to the Commission. In a provision that has become common in recent FTC cases, the order permanently enjoins the defendants from selling, leasing, transferring, or otherwise disclosing their customer lists, including the name, address, phone number, credit card number, or other personal information about any of the thousands of consumers who used their services. Also routine in Commission actions is the "right to reopen" provision entered by the Court. Should the Court find that the defendants made a material misrepresentation or omitted information concerning their financial condition, it will hold them jointly and severally liable to the Commission for an additional \$250 million – the amount that the Commission stipulated for the purposes of settlement reflected the consumer injury inflicted in this case.

Bottom Line for Practitioners: *The Commission is continuing its policy of serious financial remedies for serious violations of the law. When there's been substantial injury to consumers, a slap-on-the-wrist order won't cut it.*

Blue Stuff

Challenging unsubstantiated health-related claims remains a top FTC priority, as demonstrated by the \$3 million settlement the Commission reached on November 18th with the marketers of Blue Stuff, a topical cream advertised to treat severe pain.³ Containing menthol, capsaicin, emu oil, methylsulfonylmethane (MSM), and a variety of herbal ingredients, an eight-ounce jar of Blue Stuff sold for \$59.95 and was advertised primarily via infomercial and online.

Blue Stuff and Super Blue Stuff were advertised as offering virtually instant relief for many kinds of severe pain. According to one ad, "90% of our customers report Super Blue Stuff gives exceptional relief for osteo, degenerative, and rheumatoid arthritis. Super Blue Stuff also relieves lower back pain, carpal tunnel syndrome; knee, hip, shoulder, hand, and foot pain; automobile and sports injuries,

post-surgery pain, shingles, fibromyalgia, and peripheral neuropathy pain,” with many receiving relief “within five to fifteen minutes.” As one endorser claimed, “Over the past five years, I’ve had many surgeries on my legs. I had eight doctors want to amputate my left leg, and I’m just, in the past two months, coming through another surgery on my right leg. And about three weeks ago, I [came] across Blue Stuff . . . I took it and I rubbed it on, and before I could get the cap back on the jar, the pain was gone instantly.”

The Commission also challenged allegedly deceptive representations for two other products: Essential Stuff, an emu oil and Vitamin E dietary supplement advertised to reduce cholesterol, and Her Stuff, a topical cream containing yam and natural progesterone extracts advertised to reverse bone loss in women.

In addition to establishing a \$3 million redress fund for consumers, the order requires the defendants immediately to notify all Blue Stuff distributors and resellers of the FTC’s action and to stop doing business with companies that continue to disseminate ads or promotional materials that contains any of the representations alleged in the complaint as unsubstantiated. Like the order in the Miss Cleo case, the Blue Stuff settlement also includes a tough right to reopen provision, should the defendants’ financial statements and tax returns prove to contain any material misrepresentations or omissions.

Bottom Line for Practitioners: *A guaranteed way for your clients to find themselves on the FTC’s radar screen: make treatment claims for serious medical problems without having the science to back them up. The Commission gives high priority to fighting dubious health and safety representations and will continue to challenge questionable claims for drugs, dietary supplements, and other health-related products.*

Diversified Marketing Service Corp.

Companies already under order would be wise to consider that the FTC doesn’t look kindly on recidivism and will do what it takes to enforce existing judgments. That’s what Diversified Marketing Services learned when the FTC went to court to enforce a 1996 order and obtained the largest judgment ever for violations of the Telemarketing Sales Rule – \$39 million.⁴

The FTC filed suit in 1996, charging that the defendants sold magazine subscriptions by placing “cold” telemarketing sales calls to consumers and misrepresenting the terms and costs of their \$500 to \$800 subscription packages. In addition, the Commission alleged that in some cases, the defendants obtained consumers’ checking account information under false pretenses and then used the account numbers to process unauthorized demand drafts, which, unlike conventional checks, do not require a consumer’s signature on a printed document. According to the complaint, Diversified refused to cancel consumers’ subscriptions despite promises that consumers could change their minds and falsely claimed that consumers were bound by contract for multi-year subscriptions. The court issued a permanent injunction ordering

the defendants to comply with the Telemarketing Sales Rule and the FTC Act and awarded \$1.5 million in consumer redress.⁵

The FTC filed suit on January 28th of this year, alleging that the company and its officers were again engaging in the kinds of deceptive practices that resulted in the 1996 injunction. According to the Commission’s court filings, “As shown by consumer complaints to state attorneys general, local branches of the Better Business Bureau, private attorneys, the FTC, and to the defendants themselves, the scope of the defendants’ contempt is widespread. It is almost as though defendants erased from their minds that they had been sued, agreed to be bound by a federal Court order, and are obligated to comply with the law and the permanent injunction.” Agreeing that the FTC had proven that the defendants’ latest tactics in selling magazine subscriptions clearly violated the 1996 injunction, the court ordered \$39 million in consumer redress,⁶ the largest penalty in the history of the Telemarketing Sales Rule.

Bottom Line for Practitioners: *Once companies are under order, the Commission staff stands ready to assist them in developing in-house systems to prevent future violations. But the FTC has a long memory and a short fuse when it comes to hard-core recidivists who flout existing orders.*

Citigroup and First Alliance Mortgage Company

The business practices of subprime lenders – companies that specialize in loans to higher risk borrowers – have been a major FTC law enforcement target in recent years. In one of the largest consumer protection settlements in Commission history, Citigroup agreed to pay \$215 million to resolve charges that Associates First Capital Corporation and Associates Corporation of North America (companies Citigroup acquired in 2000), engaged in systematic and widespread deceptive and abusive lending.⁷

The FTC’s complaint charged that Associates engaged in deceptive practices designed to induce borrowers unknowingly to purchase optional credit insurance products, a practice known as “packing.” According to the complaint, if consumers noticed that the credit insurance products were being added to the loan, employees used various misleading tactics to discourage them from removing the insurance. The settlement provides \$215 million in redress to consumers who bought credit insurance in connection with loans made by Associates. This amount is in addition to \$25 million obtained in a private class action on behalf of consumers whose mortgage loans were refinanced, or “flipped,” by Associates during the same time period. The FTC’s settlement also requires the defendants to provide annual reports to the Commission detailing its practices with respect to the sale and marketing of credit insurance and other add-on products.

The Citigroup agreement came on the heels of a settlement of as much as \$60 million for approximately 18,000 customers of another subprime lender, First Alliance Mortgage Company (FAMCO).⁸ According to the FTC’s complaint, FAMCO marketed its loans

through a sophisticated campaign of telemarketing and direct mail solicitations, and consumers were subjected to lengthy sales presentations that failed to disclose that loans required the payment of loan origination fees – points – that typically amounted to 10 to 25 percent of the loan amount. The FTC also charged that FAMCO misled consumers about increases in the interest rate and the amount of monthly payments on adjustable rate mortgages. The settlement, reached in cooperation with six state attorneys general, established a redress fund that includes all assets in FAMCO's bankruptcy estate and \$20 million from the company president and his wife, who served on FAMCO's board of directors, and banned the pair from the residential mortgage loan origination business in the states that settled the case.

Bottom Line for Practitioners: *Even in the most complicated litigation involving concurrent class actions, bankruptcy, and other ongoing proceedings, the FTC won't be afraid to wade in to ensure that consumers are protected under Section 5. And don't expect "divide and conquer" strategies to work when there are ongoing investigations by the FTC and the state AGs. The Commission and the states continue to work cooperatively to protect consumers' interests.* ■

Perspectives on State Laws as Barriers to E-Commerce

By August T. Horvath

The Federal Trade Commission held a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet" at its Washington offices on October 8-10.¹ The workshop is the latest manifestation of the attention being paid throughout 2002 to this issue by lawmakers, regulators, consumer groups, and, of course, firms engaged in e-commerce. The workshop saw representatives of all of these groups, in addition to commentators from academe and the private bar, convene to exchange perspectives and discuss various alleged barriers to the free flow of commerce on the internet. By design, the most-discussed "efforts" to restrict competition on the internet were state laws and regulations, many of them enacted in the cause of consumer protection and often many years before the development of the internet.

The FTC workshop came on the heels of Congressional hearings prompted by proposed legislation (H.R. 2421) that would effectively strip the States of most of their power to regulate the flow of

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products and services entering their borders by means of the internet. The FTC, conscious of the limitations of its own authority in this area, stressed that the workshop was being conducted in a "learning mode." FTC Chairman Timothy J. Muris, in his introductory remarks, outlined the purposes of the workshop as enhancing understanding of the competitive issues, educating lawmakers and private parties as to potentially problematic practices in both the governmental and private sectors, and learning ways in which competition may be promoted in the face of differing interests.

At the heart of most of the disagreements voiced in the workshop was conflict between the objectives of increased competition and of protection for consumers – specifically, the extent to which such conflict is real or imagined with respect to each industry or allegedly anticompetitive practice under discussion. Robert Atkinson of the Progressive Policy Institute took an extreme form of the perspective most commonly voiced at the workshop, depicting barriers to e-commerce as the latest episode in an age-old history of campaigns for "revenge of the disintermediated" – efforts by occupants of a level of distribution rendered obsolescent by advancing technology to erect barriers, using consumer well-being as a "smokescreen for protectionism."²

Representatives of companies engaged in e-commerce argued that the true purpose of state laws governing e-commerce is often evident from the fit, or lack thereof, between the requirements or enforcement of the statutes and the nature of the businesses being regulated. According to eBay Associate General Counsel Tod Cohen, Indiana auction licensing law requires "auctioneers" – which may be interpreted to include individual sellers in eBay transactions – to complete 80 hours of coursework initially, and a further 12 hours on renewal, on subjects such as "bid calling" and "public speaking" – topics irrelevant to online auction sellers who never meet buyers face-to-face.³ Perhaps more significantly, Mr. Cohen stated, several States require the auction house to guarantee the quality of items sold and/or the truth of sellers' representations about these items – a workable requirement only where the auction house takes possession of the item, and perhaps appropriate only where the auction house is involved in formulating the representations. Representatives of online vendors in the wine and optical sectors argued that, if consumers may order alcoholic beverages or contact lenses through the mail from within their own state, but not from other states, then it is doubtful that the state laws are helping to prevent underage liquor purchases or false prescriptions – their purported policy goals – and more likely that they are merely favoring in-state vendors.

The counterattacks by representatives of traditional businesses depicted e-commerce as a lawless frontier in need of more, not less, regulation. National Auctioneers Association President Larry Theurer asserted that "high incidences of theft and fraud" occur on online auction markets, citing a National Consumer League finding that 41 percent of online auction users have reported "problems" with their transactions. The National Association of

Optometrists and Opticians, in its position paper for the workshop, asserted that “most stand alone dealers of contact lenses have shirked [the] important responsibility” of ensuring that their customers have valid prescriptions.⁴ These participants sometimes sought to turn the tables on e-commerce by arguing that internet businesses have been unfairly advantaged by evading existing state regulations, whose enforcement against online vendors has been lax or difficult.⁵

At times, disagreements between established and online entrepreneurs reached the level of fundamentally different ways of perceiving consumers, markets, and the roles and value of traditional versus online channels. Bill Wolters, Executive Vice-President of the Texas Automobile Dealers association, asserted that “franchised car dealers are essential to the fabric of our state,”⁶ comparing their role in the community to those of schools and churches, while the National Automobile Dealers Association considered it “highly unlikely that everyone will boot-up their PCs and buy online – without as much as a test-drive.”⁷ Other panelists pointed to the growing frequency of sales of cars, including used cars, on eBay and other internet transactions as evidence that automobiles have been commoditized to the point where consumers will purchase them sight-unseen. Dr. Fiona Scott Morton of Yale University presented the results of research indicating further that certain types of consumers may not find interacting with a conventional auto dealer an enjoyable or economically efficient experience.⁸

Participants agreed that whether State laws are motivated primarily by consumerism or protectionism may vary by jurisdiction as well as by area of commerce. Laws prohibiting the shipment of alcoholic beverages directly to consumers from outside the state in New York may reflect different motivations than similar laws in Utah. Often, different states undertake divergent regulatory measures. Participants representing e-commerce businesses persistently called for “consistent” regulatory approaches and requirements across states, but state officials retorted that the “patchworks” of which they complained are not always an unintentional by-product of different jurisdictions seeking to achieve the same ends. At times, the appeals of e-business reached a pitch that might have offended some sensitive federalists, such as the assertion of Clint Bolick, of the Institute for Justice, that “the internet cannot easily abide arbitrary political boundaries.”⁹ James S. Gilmore III, former Governor of Virginia, was more cautious, observing that “The states often assert very legitimate policy concerns and goals they seek through regulation – temperance in alcohol sales, protection for unscrupulous internet business not subject to state control, preservation of the state sales tax base, among others.”¹⁰

Of the specific business sectors discussed at industry-specific panels at the FTC workshop, the contact lens market, by consensus, provided the best case for continued, diligent state oversight based on a vivid specter of consumer harm: the possibility that consumers may damage their eyes and ultimately lose their sight by using internet and mail-order vendors of replacement lenses to avoid

regular contact with an eye-care practitioner. Paradoxically, it was in this same area that traditional sellers and state governments were accused of some of the most nakedly anticompetitive conduct. All parties agreed that contact lenses should be dispensed only to patients with valid prescriptions. But Jonathan Coon, CEO of 1-800 Contacts, depicted a “conflict of interest” in optometrists’ reliance on revenue from the sale of glasses and contact lenses that they prescribe, unlike other areas of medicine where the prescribing and sales functions are separated. According to Coon, this has led not only to optometrists’ refusal to cooperate with mail-order vendors’ attempts to verify prescriptions – sometimes in violation of binding settlements that their State Boards have entered into with Attorneys General – but also to the perpetuation by the Boards, acting through “captive regulators,”¹¹ of restrictions such as Connecticut’s rule that “obtaining contact lenses requires the supervision of ‘a licensed optician and in a registered optical establishment, office, or store.’”¹² Counterarguments that state regulation applies equally to established and internet competitors, and is therefore non-discriminatory, appeared to fall short when the explicit effect of such regulation is that a contact lens vendor cannot *be*, at least exclusively, an internet or mail-order business, but must have an in-state physical office.

Online wine sales attracted the greatest public attention of any industry sector discussed at the FTC workshop. Ironically, because the Twenty-First Amendment explicitly delegates to the states broad authority to regulate importation of alcoholic beverages, this was also the area where, it was agreed, any prospective federal challenges to state regulation face the greatest obstacles. Twenty-six states have exercised this authority to prohibit any direct-to-consumer shipping of alcoholic beverages from out-of-state. Wine & Spirits Wholesalers of America counsel the Hon. C. Boyden Gray went so far as to state that “I don’t believe the FTC should be inserting itself into this debate.”¹³ But Tracy Genesen of Coalition for Free Trade retorted that the Twenty-First Amendment “does not insulate state laws from other constitutional constraints, including those imposed by the Commerce Clause.”¹⁴ Ms. Genesen described an ongoing legal campaign by CFT to declare “facially discriminatory statutes, which obviously favor in-state manufacturers and wholesalers over out-of-state manufacturers, ...are unconstitutional barriers to interstate commerce.”¹⁵

Internet sites popularly known as online auctions comprise an area of commerce in which online developments raise basic questions about the definition of the commercial space that State laws regulate. eBay, the largest player in this field, states on its web site and reiterated at the workshop that it does not regard itself as an auctioneer or auction house, but rather an “online trading community” in which some transactions use a “quasi-bidding process” incorrectly confused with auctions. eBay Associate General Counsel Tod Cohen asserted that in most cases, “state auction laws...cannot be interpreted” as regulating eBay.¹⁶ Nevertheless, Robert Hamilton, Executive Director of the North Carolina Auctioneer Licensing Board, and other state officials,

expressed no qualms about their states' determinations that online auctions qualify for regulation under their States' laws.¹⁷ Larry Theurer, President of the National Auctioneers Association, characterized the differences between conventional and online auctions as "minimal. The only significant difference between the two is the choice of medium."¹⁸

Internet auction sites often resemble traditional auctions in some ways, such as the selection of a buyer through sequential bidding, but not others, such as the auction house's traditional services of taking possession of the goods on consignment, authentication, and guarantees to buyers.¹⁹ The relevance of each of these factors depends on the purpose of the definition. An economist studying market behavior may unhesitatingly brand eBay transactions as auctions if he or she is centrally concerned with the bidding process and largely indifferent to other factors, but it is not necessarily competitive bidding *per se* that creates the felt need for State regulation of auctions. State auction laws often inadequately define their subject matter, especially when applied to new forms of exchange that meet some, but not all, of these traditional elements of auctions. States interpreting whether their auction laws encompass marketplaces such as eBay (or amending them to do so) are likely to be guided, not by whether the sites meet all defining criteria of traditional auctions, but whether the sites share the specific traits of auctions that raise consumer protection concerns.²⁰ This was essentially Illinois' approach in concluding that, while online auctions did not meet many of the qualifications of auctions as its laws had defined them, the clear legislative intent was to regulate such transactions – prompting Illinois to "expand" its auction laws to cover eBay and similar entities.²¹ Of course, this flexible process is not inherently immune from influence by the entrenched commercial sectors whose perceived interests lie in stifling increased competition from auction-like online marketplaces.

In a number of sectors, challenges to State regulations by e-businesses are only the latest in a series of assaults on these regulations by vendors that have experienced difficulty entering and competing against traditional sellers. The requirements of some states that eyeglasses and contact lenses can be dispensed only with an original written prescription, in the physical presence of an optometrist and/or optician licensed by that state, and/or in an optometrist's office having a separate street entrance, have been assailed by mail-order vendors, national brick-and-mortar optical chains, and mass merchants. Would-be auto dealers and auto manufacturers have long opposed state dealer franchise laws protecting the territorial exclusivity of franchised new-car dealers. Restrictions on mail-order wine sales have always been problematic for small vineyards and for consumers whose taste runs to specialized or low-output wineries. The FTC's workshop and related political initiatives have provided these businesses, and their new internet brethren, with opportunities to unite their causes under a fashionable banner with a higher public profile than initiatives in their individual industries could achieve. To some extent, defenders of State and local regulation play into this strategy

by appearing at venues such as the FTC workshop and making closely parallel arguments about the dire consequences to consumers of not "restricting" internet competitors in their unique industry. But each industry *is* unique in both the risk and gravity of consumer harm that can be caused by unregulated vendors, and the different forms of state and local regulation vary greatly, as do their purposes and effects. Although the basic issues addressed by the FTC's workshop are echoed from one market sector to another, a sweeping, cross-industry bill such as last session's H.R. 2421 seemed to be a blunt instrument for addressing the problem, given the variety of specific allegedly anticompetitive measures undertaken by states and the diversity of their legitimate purposes.

For the practitioner with one foot in antitrust and another in consumer protection law, the FTC workshop had its uncomfortable moments. There was ample rhetoric in favor of an almost Hobbesian approach to consumer protection in cases where regulation might restrict competition in particular markets. This was counterbalanced by statements that seemed dismissive of competitive concerns. What appears certain is that the debate is only beginning. The sponsors of H.R. 2421 have promised to reintroduce similar legislation in future Congressional terms, accompanied by follow-up hearings. On November 12, the U.S. District Court for the Southern District of New York ruled unconstitutional that state's ban on shipping wine to consumers from out-of-state, in a case brought by an internet wine vendor,²² the latest in a series of District Court decisions on this issue that, so far, are split 3 to 2 in favor of unconstitutionality. The issue of state regulation of interstate e-commerce thus promises to increase in prominence as a consumer protection issue in coming months.

■



The Double Cheeseburger as a Weapon of Mass Destruction? The Regulation of Fast Food Under the FTC's Unfairness Authority

By John E. Villafranco*

Ralph Nader's characterization of the double cheeseburger was more than an attention grabber. It reflects the increasing focus on our nation's midsection following the issuance of the December 2001 Surgeon General's report, which concluded that obesity rates in the U.S. have reached "epidemic" levels.¹ That report also commented that obesity may soon pass tobacco as the leading preventable cause of death, with 300,000 Americans dying of obesity-related causes in 2000.

Not surprisingly, the Surgeon General's report spurred all sorts of activity: lawmakers introduced legislation promoting physical fitness and improved nutrition, litigators considered strategies that focus on deceptive marketing to children, and consumer groups urged the Federal Trade Commission to exercise its authority to regulate unfair acts and practices.

How would the FTC prove that a fast food advertisement is unfair? Would it be sufficient to show that the advertisements *appeal* to children and that some children become obese and suffer health problems later in life? Would it be enough to allege that advertisements *contribute* to obesity? If so, would the contribution have to be "substantial" and how would that contribution be measured? Would expert opinion, by itself, be sufficient to establish that the advertisement was a substantial contributing factor in causing obesity or would empirical findings be required? Would constitutional considerations establish a higher hurdle, demanding clear and convincing evidence that banning fast food advertising practices or requiring some form of warning on fast food packaging would have a direct, material, and significant impact on children's eating behavior?

This article considers the theoretical unfairness case against advertisers of fast food in the context of the FTC's most recent attempt to litigate an unfairness allegation — the controversial Joe Camel case. While the FTC dismissed that complaint mid-trial following the global settlement of the states' Medicaid reimbursement lawsuits, it did so only after it articulated its theory of unfairness. Analysis of this theory suggests that any attempt to use the FTC's unfairness authority to regulate the fast food industry through advertising bans or warning labels will almost certainly fail.

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The FTC's Theory of Unfairness

Section 5 of the FTC Act prohibits "unfair or deceptive acts and practices." An act is unfair if it causes substantial injury, that is not reasonably avoidable, and not outweighed by countervailing benefits to consumers and/or society. But what proof is needed to show that the challenged advertisement actually caused, or was likely to cause, substantial injury?

The issue of causation, in the context of unfairness, has been a vexing issue for the FTC. For example, in 1994, three of five FTC Commissioners voted to close an investigation of the Joe Camel campaign, concluding that the evidence did not establish "a link between the Joe Camel advertising campaign and increased smoking among children . . ."² Despite this conclusion, in 1997, with pressure mounting to take action against cigarette advertising, the FTC staff proposed a new Joe Camel complaint. From the outset, the FTC acknowledged it would be making new law in attempting to prove that Joe Camel caused kids to smoke.³ At the press conference announcing the complaint, an FTC attorney stated that it is not the Commission's burden to prove that Joe Camel caused underage smoking.⁴ Instead, the FTC staff attorney contended that all that needed to be shown, was that "the [Joe Camel] campaign was a substantial contributing factor" in the decisions of many kids to smoke.⁵

The "substantial contributing factor" theory of causation was heretofore unknown to FTC jurisprudence. "Substantial contributing factor" theory is found in tort law, which holds that two or more factors may contribute to cause injury. To establish liability, however, each factor must by itself be at least a cause in, or act undertaken towards, the alleged injury. A plaintiff must prove that "but for" the act, the injury would not have occurred. The "contributing factor" must by itself, have been capable of causing the injury, or it must be a necessary link in a chain of events leading to the injury.⁶ Whether the factor is "substantial" or not is a question considered only after but-for causation has been satisfied.

By employing "substantial contributing factor" causation instead of standard causation, the FTC in Joe Camel also circumvented court precedent that required a scientific basis for a plaintiff's causation theory. In *Daubert v. Merrell Dow*, the Supreme Court held that expert scientific opinion must be based upon scientifically valid reasoning and methodology.⁷ In *Brock v. Merrell Dow Pharmaceuticals*, the Fifth Circuit held that causation must be proved by statistically significant evidence.⁸ Courts require this level of scientific support to demonstrate that the result is not the product of mere chance.

"Just Cause There's Bullfrogs After It Rains, Don't Mean It's Raining Bullfrogs"

With this broader and relaxed theory of causation, the Joe Camel trial commenced in November 1998. The government's chief causation witness was Dr. Michael Eriksen, the Director of the Centers for Disease Control's Office on Smoking and Health. Dr.

Eriksen testified that not even one definitive study existed, much less could be considered statistically significant, linking the Joe Camel campaign with any increase in youth smoking. Although he and other government experts insisted on employing the word “substantial” or “significant” when describing the effect Joe Camel had on youth smoking decisions, none of these experts could prove the existence of this alleged effect by scientific method and, even assuming its existence, none could measure it. Without quantitative measurement, the court could only speculate as to whether advertising had an effect, let alone a substantial one.

Advertisers will concede that their advertisements influence brand selection, because otherwise their industry would not exist. Such a question is different, however, from asking whether the ad causes injury. Where is the proof that any underage non-smoker started smoking because Joe Camel appeared in *People Magazine*? How can we be certain that another societal force was not the culprit? For example, increases in the number of female smokers in the 1960s seem more attributable to changes in social mores than to any Virginia Slims advertisement.

The same would apply to the fast food industry. How could one determine that advertising featuring Shaquille O’Neal, and not the demands of modern family life where both spouses work and do not have sufficient time to prepare meals nightly, caused the increase in fast food consumption by children? And how do we know that consumption is not merely related to the most obvious reason of them all: it’s cheap and it tastes good.

Where’s the Beef?

On cross-examination, it became clear that the FTC’s evidence not only failed to support, but that it actually contradicted the central proposition of the FTC’s case. In theory, the government set out to ban Joe Camel advertising because the ban would supposedly have substantially decreased youth smoking rates. But the FTC’s experts testified that they would not expect regulatory intervention against cigarette advertising generally, let alone against Joe Camel, to have any significant effect on youth smoking rates. Dr. Eriksen’s testimony on this issue follows:

Q: Do you have an opinion on where in importance you would rank advertising amongst those lists of influences [that cause children to start smoking]?

A: Yes, sir, and I have to be consistent with my Congressional testimony here where I was asked the same question, and my answer was that we have to be comprehensive in our approach, that you can’t take out any one intervention and think that’s going to make the difference.⁹

This admission would have proved central to Joe Camel’s constitutional defense, as it would if a case were brought against the fast food industry. The Supreme Court’s commercial speech

decisions have established that proof is required by convincing evidence that a proposed ban will directly, materially, and significantly advance the government’s interest.¹⁰ In order to make this showing, the FTC would have to prove that “but for” the fast food advertising campaign, the injury (obesity-related health effects) would not have occurred. For if the advertising campaign did not cause a discernible increase in the harmful activity (here, health effects from obesity), banning the campaign could not directly, materially, and significantly advance the government’s asserted interest (decreasing obesity among youth and thereby improving their health).

Indeed, one wonders how the FTC could ever prohibit an advertising campaign under its unfairness theory without violating the First Amendment, considering the difficulty it would have in establishing that the ban, by itself, would prevent injury. The same applies for warning labels. For it to withstand scrutiny, one would have to show that the warning label would advance a substantial government interest to a material degree. How would one prove that warning labels on french fry containers would have an appreciable effect on preventing consumption, let alone heart disease? Perhaps this thinking was central in the restraint demonstrated in the FTC’s July 1, 2002 report concerning the marketing of violent entertainment to children. In a concurring statement, Commissioner Swindle stated,

[T]he First Amendment appropriately limits what the government can do. Despite our scrutiny, the music industry continues to target young people explicitly in its advertising and, for the most part, refuses to provide content-based information that could help consumers. The motion picture and electronic game industries have acted far more responsibly in improving their self-regulatory programs, yet continue to allow advertising of R-rated movies and M-rated games in venues that attract large numbers of teens. . . . What becomes clear as we continue with our series of reports is that if the public wants a change in these marketing practices, the public must demand that change and express its wishes in the currency of the marketplace.

In other words, or at least in the words of Commissioner Swindle, this is not the FTC’s fight.

Conclusion

Twenty Five years ago the FTC provoked a heated debate over the meaning of unfairness. The struggle, which earned the FTC the title of ‘National Nanny,’ was about the need to prove injury before finding a practice unfair. Subsequently, the Commission announced in a policy statement that the agency would henceforth insist on proof of injury, rather than beliefs about public policy, to condemn conduct as unfair. And for years thereafter, the Commission reaffirmed its commitment to proof of injury as an essential element of unfairness.

The Joe Camel case demonstrated an attempt to extend the boundaries of unfairness. The result was a record upon which one could conclude that there is no basis under Section 5 of the FTC Act for obtaining an unfairness conviction by proving anything less than that the defendant's actions *more probably than not* caused consumer injuries. The controlling law, history of the FTC's unfairness jurisdiction, and the U.S. Constitution make this clear. A showing that fast food advertising more probably than not caused obesity would be quite a reach. It is for this reason that activity in this area is not likely to come out of the FTC. ■

State Attorney Generals Continue Internet Privacy and Security Enforcement

By Julie Brill*

The State Attorneys General continue to be active in enforcing consumer protection privacy and security principles with respect to both offline and online businesses. Although various State Attorneys General have recently announced resolutions of a wide variety of privacy and security matters, this column will focus on five recent matters of widespread interest: Doubleclick, Ziff Davis, Amazon, Eckerd, and Eli Lilly.

Doubleclick

Doubleclick provides a variety of advertising services to online businesses. Its most typical service is similar to an advertising agency's service: Doubleclick provides business's web site with banner ads that a consumer sees when the consumer visits the business's site. Sometimes the selection of the ad is based on "profiling," which is the practice of looking at the websites the consumer has visited before, both in the current Internet session and in previous sessions. At other times the selection of the ad is not based on profiling information; rather it is based on other criteria selected by the business. Doubleclick maintains that, in all events, it does not base its ad selection services on personally identifiable information about the consumer.

The national controversy surrounding Doubleclick began with the company's announcement, in 1999, that it was going to acquire Abacus, an offline direct mail company that creates profiles of consumers for magazine subscriptions and catalogs.¹ Doubleclick announced that it would merge its information about consumers' Internet viewing habits (called "clickstream data") with Abacus's previously collected personally identifiable information. Public reaction was quite strong, as consumers and advocates objected to merging personally identifiable information with information that consumers had always assumed was anonymous.²

The merger of the databases of the two companies was abandoned, but policymakers and regulators began to focus more closely on issues surrounding the use by Doubleclick of consumers' clickstream data. The FTC worked with a network advertiser industry self-regulatory group called Network Advertisers' Initiative ("NAI"). The NAI Principles, endorsed by the FTC,³ require NAI members to obtain affirmative consumer consent before merging personally identifiable information ("PII") with previously collected clickstream data. The NAI Principles also require "robust notice and opt out choice" before a company can commence merging personally identifiable information with clickstream data collected after the date of the notice.

The class action bar also became involved. A New York federal class action against Doubleclick was settled in May 2002 with terms extending to the potential merger of offline and online information. The class action settlement requirements, which sunset in two years, include the following:

- Restrictions on employee and third party access to consumer data;
- A five-year expiration requirement on a consumer's Doubleclick cookie;
- Compliance with the NAI Principles on merging PII with non-PII;
- Service of 300 million privacy public service banner ads; and
- Payment on \$1.8 million in attorneys fees.⁴

While the NAI Principles as well as the class settlement focused on the merger of PII with non-PII clickstream data, the states' investigation focused on issues relating to the adequacy of the notice that Doubleclick gave consumers regarding its practices of collecting non-PII data. In particular, the States alleged that Doubleclick misrepresented the scope of its non-PII data collection across websites, misrepresented its ability to vouch for the privacy practices of the websites with which it did business, and misrepresented the types of non-PII that it stored regarding consumers.

Ten states, led by New York Attorney General Eliot Spitzer, announced their settlement with Doubleclick on August 26, 2002.⁵ The settlement addressed the states' concerns by, among other things, requiring Doubleclick to,

- Post a specific online privacy policy;
- Abide by that policy;
- Contract only with websites that post specific online privacy policies regarding Doubleclick's services;
- Allow users to opt-out of Doubleclick's data gathering regimen;

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- Not use PII in its consumer profiles; and
- Give notice and choice consistent with the NAI principles before Doubleclick ever merges PII with its other databases.⁶

Significantly, the agreement with the States required Doubleclick to submit to outside audit review of its compliance with the Assurance. DoubleClick also agreed to develop a “cookie viewer,” a first in the e-commerce world, in the event that it reinstates web-based profiling. This tool will allow a consumer to see the profiled interest categories DoubleClick uses in selecting ads for that consumer. Finally, Doubleclick agreed to pay the states \$450,000.

Ziff Davis Media, Inc.

On August 28, 2002, right on the heels of the states’ announcement about the Doubleclick settlement, the Attorney General of New York, along with the Attorneys General of California and Vermont, announced resolution of an investigation of high-tech publisher Ziff Davis Media Inc. over an Internet security breach that, according to the three Attorneys General, exposed the personal information of thousands of magazine subscribers.

The investigation stemmed from a promotion for Electronic Gaming Monthly Magazine that Ziff Davis ran on its website last October. Due to faulty design of the promotion web page, a computer file of approximately 12,000 subscription requests became accessible over the Internet. Ziff Davis was first notified of the problem by subscribers who had received email warnings from web-surfing good Samaritans. In response, the company temporarily disabled the web page and contacted subscribers who had paid by credit card.

As a result of this security breach, the three Attorneys General alleged that some subscribers incurred fraudulent credit card charges, and others were forced to cancel their credit cards when they learned of the data exposure.

Under the terms of the settlement,⁷ Ziff Davis agreed to pay \$500 to each U.S. consumer who provided credit card information in the October online promotion, and suffered potential exposure of this financial information, even if the consumer incurred no fraudulent charges.

The settlement also required Ziff Davis to implement security practices that include the following:

- System access controls through authentication and monitoring;
- Data protection through transmission encryption and storage formats;
- Application review procedures;

- Risk identification and response protocols, and
- Management oversight and employee training.

The settlement further requires Ziff Davis to revise these security practices to keep pace with evolving industry standards. The company must also report to the states with independent certification that its e-commerce security fulfills the settlement terms. As part of the settlement, Ziff Davis paid the three states a total of \$100,000 to partially cover their investigative costs.

Amazon

State Attorneys General and the Federal Trade Commission have enforced companies’ privacy policies, even in the bankruptcy context.⁸ Against this background, Amazon.com announced, on August 31, 2000, that it was changing its privacy policy to indicate it might transfer personally identifiable information in the event that it sold its business.⁹

Amazon’s announcement generated criticism among some consumer advocates.¹⁰ A group of seventeen states and the District of Columbia,¹¹ led by Massachusetts Attorney General Tom Reilly, were concerned that Amazon’s new privacy policy could be interpreted to allow for the sale of personally identifiable information, including book purchasing and browsing activity, outside the context of a sale of Amazon’s entire business. For instance, it was not clear whether the new privacy policy would allow Amazon to sell lists of consumers’ book purchasing and browsing activity. In addition, the Attorneys General were concerned that the privacy policy did not clearly articulate that the new privacy policy would not apply to previously collected information about consumers’ book purchasing, browsing, and other personally identifiable information.

On September 24, 2002, the States announced that they had entered into an agreement with Amazon clarifying that it would not sell lists of its customers based on their personal information to marketers, and that its new policy would not apply retroactively. In announcing the settlement, Attorney General Reilly noted that the states’ settlement followed a review of Amazon’s changed privacy policy by the Federal Trade Commission in which the FTC did not seek any changes in the new policy, despite widespread consumer concerns that the new policy could put consumer book purchasing and browsing information at risk.

Eckerd

In an investigation involving use of medical information by pharmacies and pharmaceutical companies that has widespread impact, Florida Attorney General Bob Butterworth announced this summer a resolution of his concerns over pharmacy giant Eckerd Corporation’s practice of using its customer’s medical information in marketing programs paid for by pharmaceutical companies. In December 2001, it was disclosed that Eckerd had pharmacy customers sign a “Prescription Counseling and Pick Up Verification” log that not only acknowledged receipt of a prescription and the offer of drug use counseling, but also authorized the store

to release prescription information to Eckerd for future marketing purposes.

The Florida Attorney General's investigation focused on the failure of the log to adequately disclose that Eckerd could use prescription drug information for marketing purposes.¹² The investigation also focused on "compliance, persistency, education and therapeutic intervention programs pursuant to contracts with pharmaceutical manufacturers," in which Eckerd apparently provided marketing and other informational literature paid for by pharmaceutical manufacturers to select groups of Eckerd's customers.¹³

In a settlement announced on July 10, 2002, Attorney General Butterworth said that his office would require Eckerd to,

- Cease using the prescription pick up logs to obtain consent from consumers for using their prescription information for marketing purposes;
- Provide consumers with clear and conspicuous notice that it might use prescription information and other medical information for marketing purposes; and
- Provide consumers with clear and conspicuous notice whenever marketing information that was distributed by Eckerd was in fact paid for by pharmaceutical manufacturers or some other third party.¹⁴

Significantly, the settlement also required Eckerd to pay \$1 million to Florida A&M University for the purpose of creating an endowed chair in pharmaceutical ethics at the University's School of Pharmacy.¹⁵

Eli Lilly

On July 25, 2002, eight Attorneys General¹⁶ announced that they had reached a settlement with Eli Lilly & Co. resolving allegations that the manufacturer of Prozac and other psychotropic medications failed to protect consumers' privacy. According to the Attorneys General, when Eli Lilly determined to end its "prozac.com alert" service, it sent an email to all of the service's subscribers. Although Eli Lilly had promised to maintain the confidentiality of information provided by consumers online, when the terminating email was sent, approximately 670 subscribers' email addresses were visible at the top of the email. Eli Lilly attributed the exposure of this confidential information to a programming error.¹⁷

Both the FTC and the states investigated the exposure of consumers' confidential information by Eli Lilly. Settlements reached by federal and state authorities were similar, although not identical.¹⁸ Both settlements require Eli Lilly to strengthen its internal standards on privacy protection, training and monitoring. Both settlements also require Eli Lilly to institute automated checks of its software that accesses consumer information databases. The states' settlement went farther and included additional provisions requiring Eli Lilly to undergo annual compliance reviews over the next five years and report the findings of those reviews to the states, and to implement "[a]utomated barriers in its databases to ensure that only those applications that have been tested and

pre-authorized by designated personnel, and that are being executed by designated personnel, can gain access to personally identifiable information." In addition, the states required Eli Lilly to pay \$160,000 to the settlement states, whereas the FTC resolution required no payment by the company. ■

FTC Bureau of Consumer Protection Director J. Howard Beales Provides Privacy Update

By Elisa A. Nemiroff*

In October, J. Howard Beales, Director of the FTC's Bureau of Consumer Protection, was the featured speaker at a privacy breakfast briefing.

Mr. Beales summarized the FTC's privacy initiatives over the past year. These initiatives included a proposal for a national do-not-call registry, a GLBA workshop designed to assist financial institutions in writing effective financial privacy notices, release of the FTC's Safeguards Rule and related compliance guide to help ensure financial institutions are properly securing customer records and information, creation of the Identity Theft Affidavit to simplify the process of reporting incidents of identity theft, and a "systematic attack" on unsolicited commercial email.

Mr. Beales discussed enforcement actions that took place during 2002. On the second anniversary of the FTC's COPPA Rule, the FTC announced the settlement of its sixth COPPA-related action involving The Ohio Arts Company, maker of the Etch-A-Sketch. The FTC charged the company with violating the COPPA Rule by collecting children's personal information on its web site, www.etch-a-sketch.com, without parental consent. As part of the settlement, The Ohio Arts Company agreed to pay a civil penalty of \$35,000. Settlements were also reached this year with Eli Lilly & Company and Microsoft Corporation for alleged misrepresentations regarding the level of security afforded personal information collected from online consumers. As part of both settlements, the companies are required to implement a comprehensive information security program.

Mr. Beales discussed settlement of the FTC's first offline privacy case, which involved The National Research Center for College and University Admissions, Inc. ("NRCCUA") and American Student List, LLC ("ASL"). The FTC charged the companies with violating Section 5 of the FTC Act by claiming that they would only share information collected through surveys from high school students with colleges, universities, and other education-related organizations, when, in fact, the companies shared the information

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with other commercial marketers. NRCCUA and ASL had stated on the surveys that the information would be used by “colleges, universities, and *other organizations* to assist students and their families by providing them with valuable information.” (Emphasis added.) Despite the use of terms that would seem broad in scope, the FTC interpreted “other organizations” to have a narrow educational context and did not recognize an expansive interpretation that would have allowed “other organizations” to include commercial marketers. Under the terms of this settlement, NRCCUA and ASL are barred from using the previously collected student information for commercial marketing purposes. In light of this settlement, the use of general, catch-all type language such as “other organizations” in privacy policies may not be as broadly construed.

In closing Mr. Beales provided important insight into what lies ahead on the privacy horizon. He indicated that the FTC is very interested in pursuing investigations into the list industry in order to learn more about how the industry works and identify key issues. Although the list industry has not been the focus of FTC activity in the past, Mr. Beales’s words should serve as effective warning. ■

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If you are interested in joining the Consumer Protection Committee or if you would like to receive its daily email service "*Privacy & Security Law Update*," please contact any of the Vice-Chairs listed above. The leadership of the Consumer Protection Committee would like to thank Hunter Clary & John Harbison of Collier Shannon Scott for the design and formatting of *Consumer Protection Update*.

Endnotes

Administrative Adjudication of Consumer Protection Cases As An Alternative to Litigation in Federal Court

¹ For a far more detailed history of the FTC than is presented in this article, see Steven Calkins, *Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1942 n.27 (2000); see also Dee Pridgen, *Consumer Protection and the Law* § 8 (2002).

² *Rubber Mfgs. Ass'n, et al.*, 60 F.T.C. 89 (1962). One of the young lawyers on the other side was Tom Leary, who is now Commissioner.

³ Carl A. Auerbach, *The Internal Organization and Procedure of the FTC* at 71-73 (1962) (Ad. Conf. of the U.S.; FTC library). From 1957 through 1960, the FTC issued 1,175 complaints and 1,049 cease and desist orders involving deceptive practices. Note, *Federal Trade Commission and Reform of the Administrative Process*, 62 COL. LAW REVIEW 671, 707 (1962).

⁴ 1959 F.T.C. ANN. REP. 45.

⁵ The Administrative Procedure Act does not require formal discovery, and some other agencies, like the National Labor Relations Board, do without it.

⁶ Glen E. Weston, *Deceptive Advertising and the FTC: Decline of Caveat Emptor*, 24 FED. BAR J. 548, 561-62 (1964).

One study at that time asserted "FTC law enforcement policy is formulated largely by the vicissitudes of the daily mail." Note, *Federal Trade Commission and Reform of the Administrative Process*, 62 COL. LAW REVIEW 671, 685 (1962).

⁸ David Ogilvy, *Confessions of an Advertising Man*, 158 n.1 (1st ed. 1963). A client told Mr. Ogilvy that, if the FTC questioned his firm's advertising, he would hire another ad agency.

⁹ See, e.g., *FTC v. Brown Shoe, Inc.*, 384 U.S. 316 (1965) (Incipient violations of other statutes may also violate the FTC Act); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 890-91 (6th Cir. 1967); *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963); *United States Retail Credit Ass'n v. FTC*, 300 F.2d 212, 221 (4th Cir. 1962); *Ward Labs. Inc. v. FTC*, 276 F.2d 952, 954-55 (2d Cir. 1960); *Keele Hair & Scalp Specialists, Inc.*, 275 F.2d 18, 23 (5th Cir. 1960); *Alberty v. FTC*, 182 F.2d 36, 37 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 818 (1950); *FTC v. Colgate-Palmolive Co.*, 590 F.T.C. 1452 (1961), 326 F.2d 517 (1st Cir. 1963), *rev'd*, 380 U.S. 374, 387 (1965).

¹⁰ See, e.g., *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

¹¹ See, e.g., *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957).

¹² See, e.g., *Ward Labs. Inc. v. FTC*, 276 F.2d 952, 954-55 (2d Cir. 1960).

¹³ See, e.g., *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1950).

¹⁴ *Bristol-Myers Co.*, 46 F.T.C. 162, 175-76 (1949), *aff'd*, 185 F.2d 58 (4th Cir. 1950) (claim that toothpaste will "beautify the smile" is puffery).

¹⁵ *Zenith Radio Corp. v. FTC*, 143 F.2d 29 (7th Cir. 1944).

¹⁶ Weston, 24 Fed. Bar J. at 548 n. 4.

¹⁷ Commissioner Elman's speeches are collected in the FTC library.

¹⁸ In 1961, the Commission issued 177 deceptive practice complaints. In 1968, the Commission issued 45. American Bar Association, 1969 REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 20.

¹⁹ See American Bar Association, 1969 REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *Separate Statement*

of Richard Posner, Professor of Law, Chicago University Law School, at 92.

²⁰ Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 664-65 (1977).

²¹ *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 52 (1965) (Justice Harlan's dissent pointed out that no consumer complained about 2 for 1 rules).

²² *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

²³ Pitofsky, *supra* at 691-92.

²⁴ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 at 244 n. 5 (1972).

²⁵ *Henry W. Kirchner*, 63 F.T.C. 1282, *aff'd*, 337 F.2d 751 (9th Cir. 1964).

²⁶ *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (requiring disclosure in ads that Geritol would not benefit most tired people); *All-State Indus., Inc.*, 75 F.T.C. 465, 493-94 (1969), *aff'd*, 423 F.2d 423 (4th Cir. 1970) (requiring disclosure that debts could be assigned to third parties).

²⁷ Edward F. Cox, et al., *The Nader Report on the FTC* (R.W. Baron 1969); Report of the American Bar Association to Study Federal Trade Commission (1969) ("ABA Report").

²⁸ ABA report at 2.

²⁹ *Id.* at 26.

³⁰ It was estimated that these programs accounted for 90 percent of the FTC consumer protection work. *Id.* at 37 n. 52. The remaining 10% comprised games of chance, warranties, audience rating claims by broadcasters, or the unsolicited mailing of credit cards. *Id.*

³¹ *Id.* at 39.

³² *Id.* at 41-43.

³³ *Id.* at 62.

³⁴ Pitofsky, *supra*, 90 Harv. L. Rev. at 679-701; see e.g., *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973), *modified*, 83 F.T.C. 1105 (1973); *Bristol Myers*, 1970-73 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 20,263 (1973); *Lorillard, Inc.*, 80 F.T.C. 455 (1973).

³⁵ *Henry W. Kirchner*, 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964).

³⁶ The Commission opined in *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972), that "the making of an affirmative product claim in advertising is unfair to consumers unless there is a reasonable basis for making that claim."

³⁷ *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *ITT Continental Baking Co.*, 83 F.T.C. 865, 954-56 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976); *National Dynamics, Corp.*, 82 F.T.C. 488, 550 n.10 (1973), *aff'd and remanded on other grds.*, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); *American Home Products Corp.*, 77 F.T.C. 726 (1970); *Campbell Soup Co.*, 77 F.T.C. 664 (1970) (correcting ads first formally suggested by SOUP, a group of students organized by Professor John F. Banzhaf III and represented by Victor Kramer); see also *Novartis v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1051 (1994);

³⁸ This three part test for unfairness was adopted in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972); see *All-State Indus., Inc.*, 75 F.T.C. 465, 491 (1969), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970).

³⁹ Attached to its opinion in *Cliffdale Associates, Inc., et al.*, 103 F.T.C. 110, 174 (1984), and cited as authority by courts, see e.g. *Novartis Corp.*, 223 F.3d 783, 786 (D.C. 2000). Since 1983, the FTC expanded its interpretation of deception. The agency no longer needs evidence of

actual consumer injury because materially deceptive claims are presumed to cause injury. *North Am. Philips Corp.*, 111 F.T.C. 150, 188 (1988).

40 The Policy Statement is attached to the opinion in *Thompson Medical Co., Inc.*, 104 F.T.C. 684, 839 (1984).

41 *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984); *American Home Products Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers Co.*, 102 F.T.C. 21 (1983).

42 Examples of the high quality of scientific analysis can be found in the decisions of the Commission and Administrative Law Judge Montgomery Hyun in the Thompson case and the analgesics cases. *Thompson Medical Co.*, 104 F.T.C. 648, 793 (1984), *petition denied*, 791 F.2d 189 (D.C. Cir. 1986).

43 *Stouffer Foods Corp.*, 118 F.T.C. 746 (1994); *Kraft, Inc.*, 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1254 (1993); *Thompson Medical Co.*, 104 F.T.C. 648, 793 (1984), *petition denied* 791 F.2d 189 (D.C. Cir. 1986).

44 Edward F. Cox, et al., *The Nader Report on the FTC* (1969) p. 87-91; American Bar Association, 1969 REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 62.

45 *Curtis Pub. Co.*, 78 F.T.C. 1472, 1512-18 (1973) (*dicta*); *contra, Heater v. F.T.C.*, 503 F.2d 321, 322-27 (9th Cir. 1974). In *Windsor Distributing Co.*, 77 F.T.C. 204, 222 (1972), *aff'd*, 437 F.2d 443 (3rd Cir. 1971), the Commission ordered money refunds to consumers in any future violations of the cease and desist order.

46 Peter C. Ward traces the legislative history of Section 13(b) in *Restitution for Consumers under the FTC Act*, 41 AM. U. L. REV. 1139, 1174-79 (1992).

47 15 U.S.C. § 53 (2002).

48 15 U.S.C. § 53(b) (2002).

49 Ward, *supra*, 41 Am. U. L. Rev. at 1178-79 n. 206-09.

50 15 U.S.C. § 57(b).

51 15 U.S.C. § 57(b)(d) (2002). No action could be brought after three years from the rule violation or act or practice.

52 Ward, *supra*, 41 Am. U. L. Rev. at 1183 n. 240 (remarks of Senator Broyhill: “[The FTC Improvements Act] completes the FTC reform begun with the amendment to the Alaskan Pipeline Bill, and these two bills together constitute an important consumer protection measure for which we should all feel proud.”).

53 *FTC v. Southwest Sunsites, Inc.*, 655 F.2d 711, 717-18 (5th Cir. 1982).

54 *FTC v. H.N. Singer, Inc.*, 699 F.2d 1107, 1113 (9th Cir. 1982).

55 The value of legislative history is an issue of some dispute. Warren E. Burger, *Conference on Statutory Interpretation*, 1987 DUKE L.J. 361, 361-68; Michael D. Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 A.B.A. ADMIN. L. NEWS 1 (1991).

56 Dee Pridgen, *Consumer Protection and the Law* § 12:20 (2002).

57 *FTC v. Access Resource Services, Inc. et al.*

58 *FTC v. Citigroup, Inc.*, Docket No. 1:01-CV-606-JTC, 2001 U.S. Dist. LEXIS 22149, 2002-1 Trade Cas. (CCH) ¶ 73,529 (N.D. Ga. 2001) (\$200 million in redress in settlement of predatory lending cases).

59 *FTC v. First Alliance Mortgage Co.*, Docket No. SACV-00-964 DOC (EEx) (C.D. Cal. 2002) (\$65 million in redress in settlement of predatory lending case).

60 *FTC v. H.G. Kuykendall, Jr.*, Docket No. CIV-96-388-M (W.D. Okla. 2002) (\$39 million judgment for violations of Telemarketing Sales Rule).

61 *FTC v. The Crescent Publishing Group, Inc.*, 129 F.Supp.2d 311 (S.D.N.Y. 2001)(\$30 million in redress in settlement of FTC and

state case alleging unauthorized charges to credit cards for unordered services).

62 *FTC v. BigSmart.com, L.L.C.*, Docket No. 2:2011 cv 00466 (D. Ariz. 2001) (\$5 million in redress in settlement of charges against pyramid scheme promoter).

63 *FTC v. Enforma Natural Products, Inc.*, Docket No. 04276JSL(CWx) (C.D. Cal. 2000) (\$10 million in redress in settlement of charges that company made deceptive claims for weight loss products).

64 *FTC v. Smolev*, Docket No. 01-8922 CIV-ZLOCH (S.D. Fla. 2002) (\$9 million in redress in settlement of FTC and state charges that marketer of buying club made unauthorized charges to credit cards).

65 *FTC v. Equinox Int'l*, 1999 U.S. Dist. LEXIS 19866, 1999-2 Trade Cas. (CCH) ¶ 72,704 (D.Nev. 2000) (\$40 million in redress in settlement of FTC and state charges against pyramid scheme promoter).

66 *FTC v. Lane Labs USA, Inc.*, (D.N.J. 2000) (\$1 million in redress in settlement of charges that company made deceptive cancer treatment claims about shark cartilage product and skin cream).

67 *FTC v. J.K. Publications, Inc.*, Docket No. CV99-0044ABCAJWX (C.D. Cal. 2000), 2000 W.L. 33115904 (\$37.5 million judgment against adult web site operators for unauthorized charges to credit cards).

68 *FTC v. Automated Systems & Concepts Int'l, Inc.*, Docket No. 00-55319 (9th Cir.); Docket No. 98-6364 SVW(ANx) (C.D. Cal. 2000) (\$11.8 million judgment against marketer of deceptive business opportunity scheme).

69 *FTC v. Slim America, Inc.*, Docket No. 97-4494 (11th Cir.) (S.D. Fla. 1999); 97-6072 Civ. Ferguson (S.D. Fla.) (\$8.3 million judgment against marketer of purported weight loss product).

70 *FTC v. American Urological Corp.*, Docket No. 1:98-CV-2199 (JOF) (N.D. Ga. 1999) (\$18.5 million judgment against marketer of “Väegra,” a purported impotence product).

71 *Weider Nutritional Int'l, Inc.*, C-3983, 2000 FTC LEXIS 164 (2000) (\$400,000 redress in settlement of charges that company made deceptive safety and efficacy representations about purported weight loss product).

72 *Gateway 2000*, 126 F.T.C. 888 (1998) (\$290,000 in redress in settlement of charges that computer company made false and misleading claims about its refund policy and on-site warranty services).

73 *Synchronal Corp.*, 1993 F.T.C. LEXIS 316 (1993) (\$3.5 million in redress in settlement of charges that infomercial marketer made deceptive representations about baldness and cellulite products).

74 *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 153 L. Ed. 2d 199 (June 10, 2002) (a violation of the Fair Credit Act); and *Novartis Corp.*, 127 F.T.C. 580 (1999), *aff'd* 223 F.3d 783, 786 (D.C. 2000) (a comparative claim for the efficacy of Doan’s pills involving scientific evidence and corrective advertising).

75 *Monitier Lifetile, LLC. et al.*, Docket No. 9290, 5 Trade Reg. Rep. (CCH) ¶ 25,536 (May 3, 2000); *Continental Gown Cleaning Service, Inc.* Docket No. 9287, 5 Trade Reg. Rep. (CCH) ¶ 25,536 (Feb. 23, 1999); *Motor Up Comp., Inc.* Docket No. 9291, 5 Trade Reg. Rep. (CCH) ¶ 25,536 (May 5, 2000); *Dura Lube Corp.*, Docket No. 9292, 5 Trade Reg. Rep. (CCH) ¶ 25,536 (May 3, 2000); *National Organics, Inc.*, No. 9294, 5 Trade Reg. Rep. (CCH) ¶ 25,536 (Sept. 6, 2001).

76 *Lentek, Inc.*, complaint issued Aug. 28, 2002, available at <http://www.ftc.gov/os/2002/08/lentekcmp.pdf> (involving an allegation of false and unsubstantiated claims in ads for electronic mosquito and pest repellers in its air cleaning products).

77 *R.J. Reynolds Tobacco Co.*, Docket No. 9285, 1999 F.T.C. LEXIS 21 (Jan. 26,1999).

78 Gerard Carl Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* 235-36 (Yale U. Press 1968) (1924).

79 *Id.* at 335-36.

80 The commission brings consumer protection injunction cases for any violation of the FTC Act—not just the involving “routine fraud”. The commission argues in injunction cases that a “proper case” under section 13(b) is one for a violation of any of the laws it enforces—not merely for “routine fraud” cases. *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 259 (E.D. N.Y. 1998); *FTC v. Garvey*, Docket No. CV00-9358 (GAF)(CWx) (C.D. Cal.), order re: Plaintiff’s Motion to Strike Affirmative defenses, Apr. 24, 2001, at p. 5.

81 Compare the diffuse and unclear decisions written by the district court denying a preliminary injunction and the affirming circuit court (written by Judge now Justice Anthony J. Kennedy) in *FTC v. Simeon Management Corp.*, 391 F. Supp. 697 (N.D. Cal. 1975), *aff’d* 532 F.2d 708 (9th Cir. 1976). with the well written opinions by the administrative law judge and Commission upholding the charges, *Simeon Management Corp.*, 87 F.T.C. 1184 (1976), and the appellate court, *Simeon Management Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978).

82 Rules of Practice Amendments, 61 C.F.R. ¶ 50640 (Sept. 26, 1996); also see Rules of Practice, 66 C.F.R. ¶ 17622 (Apr. 3, 2001).

83 The Commission might consider lowering this limit, e.g. to six months, in consumer protection cases which normally involve much less discovery and pretrial motion practice.

84 See Stephen Calkins, *FTC Unfairness: An Essay*, 46 Wayne L. Rev. 1935, 1988-90 (2000) (“The Need for Administrative Adjudication”).

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1 *FTC v. Access Resource Services, Inc.*, No. 02-60226-CIV (S.D. Fla. Nov. 4, 2002) (stipulated final judgment and order for permanent injunction and other equitable relief), www.ftc.gov/opa/2002/11/ars.htm.

2 Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308 (2002).

3 *FTC v. Blue Stuff, Inc.*, No. Civ-02-1631W (W.D. Okla. Nov. 18, 2002) (stipulated final order), www.ftc.gov/opa/2002/11/bluestuff.htm.

4 *FTC v. Diversified Marketing Services Corp.*, No. CIV-96-388-M (W.D. Okla. Mar. 4, 2002) (order for contempt), www.ftc.gov/opa/2002/03/dmsredress.htm. See Telemarketing Sales Rule, 16 C.F.R. § 310 (2002).

5 *FTC v. Diversified Marketing Service Corp.*, No. 96-0388M (W.D. Okla. Oct. 18, 1996) (consent judgment), www.ftc.gov/opa/1996/9610/diverse2.htm.

6 On the recent fifth anniversary of the Telemarketing Sales Rule, the Commission reported that it had brought 121 law enforcement actions to date, had recovered consumer redress of more than \$152 million, and had won lifetimes bans against serious TSR offenders. See www.ftc.gov/opa/2001/03/tsranniv.htm.

7 *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606-JTC (N.D. Ga. Sept. 19, 2002) (order preliminarily approving stipulated final judgment and order), www.ftc.gov/opa/2002/09/associates.htm.

8 *FTC v. First Alliance Mortgage Co.*, No. SACV 00-964 DOC (C.D. Cal. Mar. 21, 2002) (order preliminarily approving stipulated final judgment), www.ftc.gov/opa/2002/03/famco.htm.

Perspectives on State Laws as Barriers to E-Commerce

1 This article is not a comprehensive overview of topics covered at the FTC workshop, but highlights some of the more provocative issues surrounding state regulatory frameworks. For a general overview, the reader should peruse all written comments submitted by participants, <http://www.ftc.gov/opp/e-commerce/anticompetitive/comments/index.html>, including those of the ABA Antitrust Section, <http://www.ftc.gov/opp/e-commerce/anticompetitive/comments/aba.pdf>.

2 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/atkinson.pdf>

3 http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/t_cohen_10.pdf. Mr. Cohen did not, however, state whether Indiana enforces these requirements with respect to online auctioneers.

4 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/halpern.pdf>.

5 “[T]he merchants best positioned to compete in the online sales of contact lenses cannot match the convenience and cost of a vendor that ignores prescription requirements with impunity.” *Id.*

6 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/wolters.pdf>.

7 <http://www.ftc.gov/opp/e-commerce/anticompetitive/comments/nada.pdf>.

8 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/morton.pdf>.

9 See <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/bolick.pdf>. The quoted remark is from Mr. Bolick’s oral presentation and does not appear in his written comment.

10 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/gilmore.pdf>.

11 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/coon.pdf>.

12 Economist Morris M. Kleiner, quoting the FTC, <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/kleiner.pdf>.

13 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/gray.pdf>.

14 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/genesen.pdf>

15 *Id.*

16 http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/t_cohen_10.pdf. See also <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/jordan.pdf>.

17 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/hamilton.pdf>. North Carolina has interpreted its auction laws as encompassing internet auctions, but has deferred affirmative regulatory action.

18 <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/theurer.pdf>.

19 Indeed, because sites like eBay leave many of these tasks with sellers, including the structuring of the bidding process itself, eBay has voiced the concern that each individual eBay seller may be an auctioneer under some State auction laws. http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/t_cohen_10.pdf. The NAA’s Mr. Theurer appeared to endorse this view when he stated that online auctioneers, “including individuals who offer merchandise through online auctions,” should be regulated by auction laws in the States in which they reside. <http://www.ftc.gov/opp/e-commerce/>

anticompetitive/panel/theurer.pdf.

20 This inquiry may be based on actual consumer experience with auction sites. New Hampshire's representative at the workshop, for example, cited insufficient evidence of consumer problems with eBay transactions among the reasons New Hampshire, after conferring with eBay in 2000, determined that its auction laws do not encompass eBay. <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/arnold.pdf>. Other states indicated that they found the volume of consumer complaints from auction-like online sites troubling enough to warrant regulation and, if necessary, the expansion of state auction laws to encompass such commerce.

21 <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/willoughby.pdf>. Mr. Willoughby added, however, that Illinois' requirements for online auctions are tailored to them, and are less cumbersome than those applicable to conventional auctions.

22 *Swedenburg v. Kelly*, Case No. 00 Civ. 0778 (RMB), Nov. 12, 2002. One Circuit Court, the Seventh, has ruled on this issue in favor of constitutionality, reversing one of the District Court rulings. See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 854 (7th Cir.2000).

The Double Cheeseburger as a Weapon of Mass Destruction? The Regulation of Fast Food Under the FTC's Unfairness Authority

1 See U.S. Dept. of Health & Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity*, at xiii (2001).

2 *R.J. Reynolds, No. 932-3162 (1994) (Joint Commission Statement)*.

3 *R.J. Reynolds, No. 9285 (1997)*, Complaint at ¶ 8.

4 Transcript of FTC Press Conference (May 28, 1997) at 5.

5 *R.J. Reynolds, No. 9285 (1997)*, Complaint Counsel's Trial Brief at 4.

6 RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

7 *Daubert v. Merrell Dow*, 509 U.S. 579, 592-94 (1993).

8 *884 F.2d 166 (5th Cir. 1990)*. See also *Richardson v. Richardson-Merrell Inc.*, 857 F.2d 823, 829-831 (D.C. Cir. 1988) (affirming ruling that "theoretical speculations" based upon statistically insignificant studies were insufficient to sustain plaintiffs burden of proving causation).

9 Trial Tr. at 1475.

10 *44 Liquormart v. Rhode Island*, 517 U.S. 484, 505 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

State Attorney Generals Continue Internet Privacy and Security Enforcement

1 *DoubleClick: DoubleClick Inc. and Abacus Direct Corporation to Merge in a \$1 Billion Stock Transaction*, (June 14, 1999), at <http://www.doubleclick.com/us/corporate/presskit>.

2 See, e.g., *Consumer Group to Fight DoubleClick Deal*, CNET News.Com, (June 14, 1999), at <http://news.com.com/2100-1017-227100.html>; *Net Companies Look Offline for Consumer Data*, The New York Times On The Web, (June 21, 1999), at <http://www.nytimes.com/library/tech/99/06/cyber/commerce/21commerce.html>; *Electronic Privacy Information Center (EPIC): Proposed DoubleClick/*

Abacus Merger Raises Privacy Concerns (June 30, 1999), at http://www.epic.org/alert/EPIC_Alert_6.10.html.

3 *Network Advertising Initiative: Self-Regulatory Principles for Online Preference Marketing by Network Advertisers*, Network Advertising Initiative at http://www.networkadvertising.org/images/NAI_Principles.pdf; *Online Profiling: A Report to Congress*, Federal Trade Commission, (July 27, 2000), at <http://www.ftc.gov/os/2000/07/onlineprofiling.pdf>.

4 *Settlement Agreement and Release*, No. 00-CV-00641 (S.D.N.Y. 2002), available at <http://www.epic.org/privacy/cookies/dblclkproposedsettlement.pdf>.

5 The states involved in the Doubleclick investigation were Arizona, California, Connecticut, Massachusetts, Michigan, New Jersey, New Mexico, New York, Vermont and Washington.

6 *State of Vermont: Major Online Advertiser Agrees to Privacy Standards for Online Tracking*, (August 26, 2002), at <http://www.state.vt.us/atg/press08262002.htm>.

7 *Office of New York State Attorney General Eliot Spitzer: Major Tech Publisher Reaches Agreement With Attorney General On E-Commerce Security Standards*, (August 28, 2002), at http://www.oag.state.ny.us/press/2002/aug/aug28a_02.html.

8 See, e.g., *In re Toysmart*, No. 00-11341-RGS (D. Mass. July 10, 2000) and No. 00-13995-CJK (Bankr. D. Mass. July 21, 2000); see also, *In re Essential.com* (Bankr. D. Mass. 2001) (company had promised that customer data would only be sold "as necessary to accomplish [Essential.com's] business objectives").

9 *Amazon bares its privacy policy*, CNET News.Com, (August 31, 2000), at <http://news.com.com/2100-1017-245182.html>.

10 See, e.g., *Privacy Group Drops Amazon*, Wired News, (September 14, 2000), at <http://www.wired.com/news/politics/0,1283,38753,00.html>.

11 The states involved in the Amazon investigation were Arizona, California, Connecticut, Iowa, Florida, Hawaii, Maine, Michigan, Maryland, Massachusetts, New Hampshire, North Carolina, Oregon, Tennessee, Vermont, Wyoming, and the District of Columbia.

12 *Florida Attorney General: Eckerd Endows \$1 Million Ethics Chair at FAMU, Revises Policies To Help Protect Patient Privacy*, (July 10, 2002), at <http://legal1.firn.edu>.

13 *Id.*

14 Assurance of Voluntary Compliance, *In the Matter of Eckerd Corporation*, State of Florida, Office of the Attorney General, Case No. L01-3-2412 (July 9, 2002).

15 Florida Attorney General, *supra* note 12.

16 California Attorney General Bill Lockyer, Connecticut Attorney General Richard Blumenthal, Idaho Attorney General Al Lance, Iowa Attorney General Tom Miller; Massachusetts Attorney General Tom Reilly, New Jersey Attorney General David Samson, New York Attorney General Eliot Spitzer, and Vermont Attorney General Bill Sorrell.

17 *Office of the Attorney General: Attorney General Lockyer Announces Settlement with Major Pharmaceutical Company to Provide Consumer Privacy Safeguards*, (July 25, 2002), at <http://caag.state.ca.us/newsalerts/2002/02-084.htm>.

18 *Compare id. with United States Federal Trade Commission: In the Matter of Eli Lilly and Company, Decision and Order*, Docket No. C-4047 (May 8, 2002), at <http://www.ftc.gov/os/2002/05/eliilillydo.htm>.