■ incentives for operators' compliance with the guidelines are effective; and

■ whether the guidelines provide adequate means for resolving consumer complaints.

Privo's safe harbor application and all public comments will be posted at http://www.ftc.gov/privacy/safeharbor/shp.htm — on the FTC's Web site.

The commission's vote to publish the Federal Register notice was 5-0.

The Federal Register notice is available at http://www.ftc.gov — the FTC's Web site — and from the Consumer Response Center, Room 130, 600 Pennsylvania Ave., N.W., Washington, DC 20580; (202) 382-4357.

Unfair Practices

Panel Probes Revival of Unfairness Doctrine In FTC or States' Consumer Protection Cases

The increased efforts to reform and use the Federal Trade Commission's unfairness authority were examined on March 31 by a Consumer Protection Committee program during the 52nd Annual Spring Meeting of the American Bar Association's Section of Antitrust Law in Washington, D.C.

The program also compared and contrasted the approach taken by the FTC with the uses of the unfairness doctrine under state consumer protection laws and the impact on both consumer protection enforcement and competition policy.

John E. Villafranco, with the Washington, D.C., office of Collier Shannon Scott PLC, moderated a panel that included Professor Stephen Calkins of Wayne State University Law School; J. Howard Beales, III, Director of the FTC's Bureau of Consumer Protection; Attorney General Thomas H. Miller of Iowa; and Robert M. Langer, of the Hartford, Conn., office of Wiggin & Dana LLP.

Unfairness Business. Calkins, providing a history of the FTC's use of the unfairness doctrine, reminded attendees that the FTC "has been in the business of unfairness from the beginning." Congress gave the agency a very broad mandate and, after suffering defeat in the antitrust area, the agency focused on "morality."

In 1964, the FTC crafted the Cigarette Rule, which established an unfairness test—based on a public policy standard of whether a practice is immoral, unethical, oppressive, or unscrupulous and whether it causes substantial injury to consumers. The cigarette rule was largely unused until 1972, when the Supreme Court, in the *S&H* case, cited the Cigarette Rule unfairness criteria with apparent approval of the "elusive but congressionally mandated mission" of the FTC. Emboldened, the FTC attempted to take on all advertising directed to children, based on generalized public policies to protect children according to Calkins, who formerly served as the FTC's General Counsel.

After suffering ridicule and being termed the "national nanny," the FTC responded by crafting an unfairness statement in 1980, which declared unjustified consumer injury as the primary focus of the FTC Act. The statement established that the FTC would not "rely on a morality and ethics standard." The statement included a three-part test for gauging unfairness and was codified in 1983 in the FTC Act, he pointed out.

Calkins noted that, while codified, the unfairness test "was not explained satisfactorily." There was no rulemaking or formal litigation, leaving practitioners with a "variety of consent orders and anecdotal" evidence for guidance.

Expanding Use of Doctrine. Beales noted that, since the current commission has "criticized the past use of unfairness," it may seem odd that it is trying to expand the use of the unfairness doctrine.

The doctrine reemerged in 1994's publication of FTC guidelines. He contended that, as a practical matter, using the unfairness doctrine makes sense. As a doctrine, it "is more creative and flexible than deception." Such flexibility "is attractive to economists," and Beales observed that an appropriate use of unfairness "helps to preserve the legal underpinnings of deception."

In particular, the use of unfairness is "very appropriate in the context of the Internet." Beales explained that, if enforcers look at bad practices on the Internet through deception only, "we run the risk of creating per se rules that stifle innovation, and other practices are just left alone." In these instances, he posited, unfairness "can be useful."

By way of example, Beales discussed a recent FTC case using unfairness against an Internet operator engaged in "mousetrapping." This operator used "pop-up windows in an abusive way. But not all pop-up windows are a harmful practice." In this case, unfairness was triggered by the misuse of an otherwise benign technology.

Unfairness, Beales insisted, allows the FTC "to distinguish between harmful conduct and unharmful conduct using the same technologies." Because of this, the FTC has begun "aggressively pursuing unfairness cases." Beales predicted that the agency would begin to use the unfairness doctrine more in the privacy area.

While the use of unfairness is on the rise, Beales assured attendees that "deception will remain the main theory used by the FTC." But, since the unfairness doctrine "allows the FTC to provide strong consumer protection without denying the benefits of similar technologies or practices that are benign," the agency plans to continue increasing its use.

Beales pointed out that the decision whether to use unfairness "is case-by-case. In close cases, cases too close to the 'line,' we shouldn't be using unfairness." The attraction of unfairness, he suggested, is that it requires regulators to "think about the line, rather than using deception and creating per se violations and just picking and choosing" defendants.

States' Use of Unfairness. Of the 27 states that have unfairness statutes, Miller explained, several are modeled after the older definition of unfairness.

Furthermore, the FTC's 1994 guidelines explicitly provide that the FTC's unfairness standard does not apply to states. "This could lead to some confusion," Miller acknowledged.

Miller pointed out that, as on the federal level, "unfairness has been dormant for some time" but is reemerging on the state level. He attributed the doctrine's dormancy to the facts that states often follow the lead of federal agencies and that unfairness often "is subsumed under fraud statutes."

  ATRR ISSN 0003-6021

As on the federal level, Miller suggested that the emphasis on deception is shifting. While deception remains as the lead theory, "we are seeing unfairness as a stronger theory" in certain areas, including privacy and tobacco. "I think what you may see emerge is that 'basic' limited cases are expanded using unfairness," according to Miller, who has chaired the Consumer Protection Committee and Antitrust Committee of the National Association of Attorneys General.

Miller opined that there is a great deal of potential for states using unfairness and that states "are more and more interested in using this doctrine." Since the states do not share "this somewhat painful history" of the FTC, they will make greater use of the unfairness doctrine in consumer protection cases, Miller predicted. However, while states are eager to use unfairness, they "don't want to use it indeterminately in an unfair way," according to Miller, a past president of NAAG.

Varying Definitions. Langer echoed Miller's observation that, due to different unfairness standards among states with little FTC Acts, confusion could increase. Of the 27 states with unfairness statutes, "16 apply the cigarette rule," not the FTC's 1994 statement.

Langer also pointed out that, of the states with unfairness statutes, a majority of them have a substantial amount of case law. Connecticut uses unfairness more than any other state and has over 5,000 cases applying and interpreting the Connecticut Unfair Trade Practices Act (CUTPA). Most of the law on unfairness, he stated, is at the state level.

Langer noted that many states have incorporated the cigarette rule into their unfairness statute. In turn, many states incorporate unfairness into other regulations. For example, "in Connecticut, 60 statutes incorporate CUTPA by reference."As a result, differences in standards have emerged. Some states use a "substantial injury test, while others use a but-for standard." Also, many states have only a uniform deceptive trade practices act, which does not define unfairness but tracks consumer fraud.

It does not surprise Langer that states are basing their unfairness statutes on the cigarette rule as opposed to the 1994 statement. But he queried whether, "if this continues, does it make sense to have some limited right of action in federal court, maybe by state attorneys general, as a way to stop this divergence of state and federal application of unfairness?"

Obesity Case. Villafranco asked the panelists to explain how they might prosecute an "obesity case." How does one argue that "advertising causes obesity in children?"

Noting that he is not aware of any state planning on bringing such a case, Miller suggested that an "obesity case" is not as ridiculous as Villafranco and others might think. In such a case, he observed, the issue is "not only the marketing fast food but [also] the marketing of super sizing."

One could argue, Miller projected, that the conscious decision by a company to super size its portions and to market super sizing to a "young, vulnerable group with a knowable outcome—these are good arguments."

Monopolization

Court Dismisses Antitrust Claims In Gaming Industry Within Colorado

Casinos in Black Hawk, Colo., accused of conspiring to block competition from Central City casinos and of attempting to monopolize the gaming industry in Gilpin County in violation of federal and state antitrust law, persuade the U.S. District Court for the District of Colorado to dismiss these antitrust claims (*Gaming Corp. v. Black Hawk Casino Owners Ass'n,* D. Colo., No. 01-D-0964 (MJW), 3/25/04).

Judge Wiley Y. Daniel decides that the Second Revised Third Amended Complaint (SRTAC) challenges conduct that is protected by the *Noerr-Pennington* doctrine to immunize lobbying activities and that the plaintiffs lack standing to sue.

Challenged Conduct. The SRTAC alleged that consumers must pass through Black Hawk to access the plaintiffs' casinos in Central City, which are about one mile to the west, and that the defendants—agents of the City of Black Hawk, private casino owners, and private landowners in Black Hawk—conspired to interfere with the construction of a road that would give gamblers direct access to Central City (Southern Access Road).

The plaintiffs specifically alleged that Black Hawk city officials directed the city to purchase certain land (the Emerson land) to prevent Central City from acquiring the land for use in building the Southern Access Road. Central City responded by filing condemnation proceedings against the Emerson land. The ensuring litigation was settled, with the cities allegedly agreeing to cooperate on the Southern Access Road.

Nevertheless, Black Hawk continued to block construction of the Southern Access Road, the SRTAC alleged. Black Hawk allegedly triggered the defeat of an effort by Central City to annex certain land (the Proland land) for use in constructing the Southern Access Road. Black Hawk is accused of buying mining claims located on the land (the Thomas mining claims) and selling 1 percent interests to numerous residents, named as defendants, in order to increase the number of voters eligible to consider the annexation question and thereby to defeat the proposed annexation.

The SRTAC further alleged that a second parcel of land, owned by H. Thomas Winn, was necessary to construct the Southern Access Road and that Winn petitioned Central City to include his land in the proposed Proland annexation. At the time, Winn allegedly was negotiating with Black Hawk officials to open a casino in Black Hawk. These Black Hawk officials allegedly conditioned the grant of a certificate of occupancy for the new Winn casino upon Winn's withdrawal of his petition to be included in the Proland annexation.

Winn withdrew his land from the Proland annexation, and the voters defeated the annexation proposal, causing Proland to withdraw its offer to partially fund construction of the Southern Access Road. As a result, Central City was required to pursue the alternative of selling about $45 million in municipal bonds to fund construction of the Southern Access Road.

Judge Daniel stresses that the SRTAC did not name the City of Black Hawk as a defendant to the antitrust claims and does not include allegations that access to