

release upon delivery at 10:00 A.M.
Friday, May 24, 1968

"The Federal Trade Commission
and the Fourth Estate"

Remarks

of

James M. Nicholson, Commissioner
Federal Trade Commission

Before

Spring Meeting

of the

Allied Daily Newspapers of Washington

and the Publishers of

Daily Newspapers in Oregon and Idaho



Vancouver, Washington

May 24, 1968

The Federal Trade Commission
and The Fourth Estate

"The security, the success of our country,
what happens to us tomorrow -- rests squarely
upon the media which disseminate the truth
on which the decisions of democracy are made."

President Lyndon B. Johnson
(in an address to National
Association of Broadcasters,
Chicago, Illinois, April 1,
1968.)

Having been raised in the newspaper profession, this recognition by the President of the great responsibility of the news media struck me with special impact. But it is more than recognition . . . it is a charge and a challenge to work with even greater energy and dedication to meet that responsibility.

I believe that the decisions of democracy are more greatly influenced by the printed media - particularly newspapers - than all other forms of media and communication.

In our present society, which is characterized by increasing interruptions and busyness, the newspaper's availability assures us that we will know what is happening in the world, our country and our community - in far greater depth than the news program we might miss.

More able and informed speakers than I have discussed the different functions and responsibilities of the news media . . . hot news, news in depth, news interpretation . . . fairness, editorializing, position . . . and I would not presume to speak to you of those matters, important and significant though they are. But I would like to share with you some thoughts with respect to my agency, the Federal Trade Commission, and the newspaper industry.

As you know, the Federal Trade Commission enforces a variety of statutes. In fact, there are nine different statutes within our purview. Our jurisdiction ranges from furs to flammable fabrics; from export trade associations to false advertising; and from price fixing to anticompetitive mergers. Our principal missions, as reflected in the problems encountered, the money spent, and the importance to the economy, are the prevention of unfair trade restraints and the policing of unfair and deceptive marketing practices.

The prevention of unfair trade restraints has, through the years, been recognized as "promotion of competition". Our activities in policing unfair and deceptive marketing practices have lately been labeled as "consumer protection".

Both areas involve the consumer, the businessman and competition, and both are of great importance to our economy. To a large extent we share jurisdiction with the Department of Justice in promoting competition, and with many agencies in the field of consumer protection.

The Commission, in the pursuit of these two primary missions, recently has been giving attention to the printed media. In unfair trade restraints, we are in the process of examining various practices in the newspaper industry which may have an adverse effect upon competition. In regard to consumer protection, we are very interested in securing your assistance for we feel that it is a requisite for our successful administration of the statutes in this area.

The Newspapers and Consumer Education

Last year, President Johnson advocated and subsequently signed into law four statutes, protecting consumers against undisclosed product hazards and requiring manufacturers to provide their customers with information essential to rational purchasing decisions. This year, in his State of the Union message, the President observed that "when we act to advance the consumer's cause . . . we help every American." He proposed further consumer legislation and urged the Congress to complete its "unfinished work" on such bills as the Truth-in Lending bill, the Fire Safety bill and the Pipeline Safety laws.

This emphasis by the Executive and Congress on consumer legislation has led columnists to label 1968 "The year of the Consumer." Certain articles I have read have implied that the emphasis on consumer protection is pure politics -- a sleeping pill, a red herring, or a pacifier for John Q. Public to divert him from other issues. Well, the drive to protect and educate the consumers is politics, but politics of the best kind. It is government's response to the desires of the people.

Complaints of our agency concerning false advertising and deceptive representations have been increasing each year. Complaints to the Congress and its committees about product hazards, failure to disclose essential product information, and deceptive marketing constitute a growing volume of consumer dissatisfaction.

Ask your Better Business Bureau about its mail. Ask one of the nation's leading newspapers, The Washington Evening Star, about the response it has been receiving to its "Action Line" column, a service it offers to the public to adjust consumer complaints. Check with your local and national business leaders about their inquiries into consumer concern with adequate product safety and product quantity, quality and performance disclosures. (Recently, I was informed by a top executive of one of our leading corporations that a company-commissioned survey demonstrated that the American public's concern with the quality of present day business practices and products greatly exceeded

that projected by the Company's marketing experts).

The recently enacted laws and the pending legislation will hopefully educate the consumer and upgrade the quality of American marketing. They should require little in the way of enforcement because, for the most part, they concern requirements of product information, product safety and disclosure of terms and conditions of sale that most manufacturers and sellers are willing to disclose . . . if their competition must do the same. The great majority of American businessmen operate under the creed, "give the customer what he wants". However, when the consumer "expresses" his desires by purchasing from the sharp operator, competition, unfortunately, and sometimes of necessity, tends to follow.

There are certain areas, however, where laws that place businessmen on a fair and equal competitive footing, despite diligent enforcement efforts, have been largely unsuccessful. I refer to the hard core areas of consumer deception--the unfair business practices that have been with us since the establishment of the rule of caveat emptor. These old standbys continually make the National Better Business Bureau's list of the ten most prevalent and serious consumer frauds and are continually causes for investigation and enforcement actions by the agencies empowered to prevent them.

Some of these hard core areas, to mention a few are:

Bait and Switch Advertising: Phoney offers of attractive bargains in goods and services are made to obtain "leads" that will be switched to higher priced products.

Home Improvement Frauds: Materials and performances are misrepresented and exaggerated. Deceptive representations of bargains lead to hidden trust deeds executed by home owners without knowledge.

Health Frauds: Consumers are sold phoney reducing pills, virility pills, cancer cures, arthritis cures, hair restorers and bust developers.

Debt Consolidated Gouging: In these areas, we run into substantial "extras" such as "placement" fees, "appraisal" fees, "searches", etc., which sometimes mean more debt.

Business Opportunity Schemes: Franchise propositions designed so that the promoter wins regardless of whether the opportunity is worthless or the investor realizes any return.

Fraud Directed at the Aged: Appeals made to the insecurity, dwindling mental alertness and loneliness of the aged, to separate them from their life savings, retirement and insurance income. 1/

1/ See O'Connell, Consumer Protection in the State of Washington, 39 State Gov't 230, 231-32 (1966)

The National Better Business Bureau's estimates of losses to the American consumer from such practices run well over two billion dollars a year. In my opinion, this startling figure may well represent a conservative estimate.

What can be done to improve the present situation? To begin with, let me explain why I believe that federal efforts alone can never be successful. Then, let me suggest how the states in cooperation with the federal government may combat the problems in these areas with your assistance.

In most areas of its jurisdiction, the Federal Trade Commission's policy is to emphasize voluntary compliance over prosecution. This approach which is geared to the reputable businessman who inadvertently violates the law, to date, has had little effect in the hard core areas of deception. Some practitioners of bait and switch, health quackery, and home improvement gyps may know of our activities. But it seems clear they dare not follow the principles, for obedience means financial ruin.

Therefore, in areas of hard core deception, the Commission must resort to the mailed fist. We sue and we hang on until we win. While heroic, the effect is minimal when one considers the big picture. For every one we nail down, two others are ready to take his place. Entry into the markets of hard core deception

is easy; all that is necessary is a minimum of capital and a willingness to prey upon the desires of unfortunate people to better their health, station and income. Moreover, under our procedures, skillful or expensive appeal will prolong deception for years beyond its discovery.

Our jurisdiction is limited to acts within commerce and does not cover acts affecting commerce. The bulk of hard core deceptive marketing practices originate within a state and affect only the citizens of that state. To illustrate, it has been estimated that 40% of all advertising is placed by firms transacting business in one locality. 2/

Senator Magnuson, who has been a leading proponent of federal consumer legislation recognizes that federal action does not provide all the answers. In his recent book "The Dark Side of the Marketplace" (which I commend to your careful consideration), he points out: "To the states falls the primary task of curtailing consumer deception. The states possess the greatest potential for quickly detecting and halting the unscrupulous." 3/

2/ The World of Advertising, Advertising Age, Jan. 15, 1963, at 24. See also Note, State Consumer Protection: A Proposal, 53 Iowa L. Rev. 710 (1967)

3/ Magnuson, The Dark Side of the Marketplace, 63 (Prentice-Hall, 1968)

Only last year, the Harvard Law Review noted that:

"The need for state regulation is accentuated by the greater prevalence of deceptive advertising and selling practices among local merchants than among the interstate businesses with which the FTC is concerned. Yet despite the critical need for non-federal regulation, until the recent establishment of consumer fraud bureaus in several states there was virtually no attempt to enforce state and local statutes dealing with commercial deception." 4/

The State of Washington was one of the first to enact consumer protection legislation and support it with vigorous enforcement. Under the guidance of the Attorney General, Washington's program has been recognized by the federal government and legal critics as one of the most advanced of the state programs now operating in the field of consumer protection. Along with the program developed by Hawaii, the Federal Trade Commission uses Washington as an example in proselyting the furtherance of state actions against hard core deception. However, the hard fact is that, despite the Commission's efforts to offer assistance to the states in developing their own programs against consumer fraud, progress to date has been slow.

4/ Note, Developments - Deceptive Advertising, 80 Harv. L. Rev. 1005, 1120 (1967)

The encouragement of this type of legislation, and the encouragement of its vigorous enforcement, merits your support. Action by those closer to the people directly affected has obvious advantages over an accelerated federal expansion.

The Commission has already received assistance in its fight against hard core deception from the newspaper industry in another way. Diligent inquiry by newspaper reporters has exposed consumer frauds on a state-wide basis. For example, last Fall two reporters from the Washington Post wrote a thoughtful series of articles on home improvement rackets. They focused attention on deceptive practices by certain companies that ruthlessly fleeced property owners of their investments and even their homes to pay for minor improvements. This series has led to a joint congressional resolution sponsored by the President and Senator Magnuson to conduct a penetrating inquiry into home improvement frauds. Also, not too long ago a paper in your state exposed the fraudulent marketing practices of mail order insurers. This series of articles has been generally credited with renewed efforts by both federal and state authorities to combat insurance sales deception.

The value of such articles, however, is not in spurring legislation, but in educating. The newspaper enjoys the trust of its neighbors. What you write carries an immensely greater impact than litigation by the government.

I suggest that you might offer further aid in combating consumer deception, but giving some space to the guides and opinions of the Commission. For the most part, press articles focus upon our antitrust activities. "The conglomerate merger between X company and Y company has been cancelled because of anti-competitive reciprocity considerations." Such articles have appeal only to reputable businessmen who wish to know the boundaries of the law. You all serve a broader readership than this. The great majority of your readers are not investors in corporate stocks and bonds, but investors in the essentials of modern living--health preparations, home improvements, appliances, food, clothing, automobiles and housing.

Another way in which you can make a further contribution to the education of your readers is in the advertising which you publish. Encourage the Better Business Bureaus in the communities you serve to report their complaints to you. If one of your advertisers is misleading or defrauding the public, you want to know about it. You can't be expected to put a "seal of approval" on all products advertised, but you surely recognize your responsibility not to promote the deception of your subscribers.

Unlike the bureaucratic caricature which constantly seeks to expand its empire, I'm asking you, on behalf of

the Commission, to help take business away from us. The consumer, with your help, can make an informed investment in the essentials of modern living.

This is not to advocate front page treatment for our proceedings. I reiterate that there are certain hard core deceptive marketing practices prevalent in the United States and that regulation without public education will not eradicate them. The Commission distributes press releases other than those relating to significant financial transactions. We publish guides and instructional manuals for consumers that are based upon many years of experience in dealing with false advertising and deception. Some space, on the homemakers page, devoted to these activities of the Commission and those of your state consumer fraud bureau, will greatly assist in the education of your readers to pursue thoughtful buying habits.

Newspaper and Antitrust

Now, let us talk about antitrust and your industry.

The antitrust agencies have brought relatively few proceedings against newspaper business practices since the Times-Picayune Publishing Company matter in 1953. ^{5/} In that case, the Department of Justice challenged a unit advertising plan of a morning and evening newspaper. Under the plan, an advertiser could purchase space only in both papers. The trial court condemned the plan as an illegal "tying arrangement". It viewed the papers as separate and distinct and held that the publisher used his dominant position in the morning news field to "restrain general and classified advertisers from making an untrammelled choice" between the publisher's evening paper and a competing paper. ^{6/}

Upon appeal, the Supreme Court ordered dismissal. In a five-to-four opinion, it concluded that the essential requirements of a tying arrangement--the use of power or leverage in one product market to appreciably restrain competition in the sale of another product--were not present. According to the majority, (1) the papers could not be viewed as separate and distinct; (2) the sole market involved was advertising and not both advertising and readership; and (3) the publisher's morning paper did not occupy a dominant position in the advertising market.

^{5/} Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)

^{6/} 105 F. Supp. 670,678 (E.D. La. 1952)

The position of that opinion today is in considerable doubt. A number of critics have expressed the conviction that such unit arrangements will not prevail in view of more recent Supreme Court antitrust opinions on tying arrangements. Circuit Courts, beginning in 1957, have struck down similar arrangements. ^{7/} Moreover, the Assistant Attorney General, Antitrust Division, in recent testimony expressed his opinion that the Times-Picayune case was "wrongly decided" and indicated that the time had come for a test case challenging compulsory joint rate programs as per se unlawful. ^{8/} The Tucson case ^{9/}, decided in January, may be that case although it involves other issues.

Unlike the Assistant Attorney General for Antitrust, it would not be proper for me to express my opinion on such matters. He is a prosecutor while the Commission may some day have to act as judge.

Nevertheless, the antitrust agencies have received complaints concerning joint arrangements between newspapers under single ownership and joint arrangements between competing publishers. These complaints, when coupled with recent court decisions, constitute cause for the government to inquire

^{7/} See Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957) cert. denied 354 U.S. 923 (1958); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.1965)

^{8/} National Publisher, April 27, 1968, p.3.

^{9/} United States v. Citizen Publishing Co., 280 F. Supp. 978 (D.C. Ariz. 1968)

into the workings of joint newspaper arrangements and evaluate their impact upon competition. Furthermore, there seems to be increasing concern with the mounting concentration in news media ownership. This was also involved in the Tucson case.

The study and evaluation of tying arrangements and media ownership concentration should be accomplished with the cooperation of the newspaper industry. The arrangements, I understand, are varied as are the reasons for them. With the cooperation of the industry there is greater likelihood that they will be examined in reference to the realities of the business framework. Some may be justified, some may be anti-competitive devices, I don't know - only you can assure that the facts are known when the judgments are made.

Government study of newspaper business practices is not confined to joint arrangements and mergers. There are also complaints asserting that newspaper lineage contracts and rates pose problems of anti-competitive discrimination. It is to this area that the Commission is devoting special attention.

In the Budget Justification for the Bureau of Restraint of Trade, the Federal Trade Commission reported in part:

"Newspaper Industry: A full scale investigation of alleged discriminatory rates structures, advertising rates, and the practice of "double billing" in the newspaper industry was initiated in fiscal year 1967. Twenty companies are presently under investigation and these investigations are expected to be completed in fiscal 1968.

In addition to the twenty companies discussed above, an investigation against another newspaper publishing company was recently completed involving discriminatory advertising rates to various categories of advertisers." 10/

In fairness it should be pointed out that this study is not limited to the newspaper industry for the report goes on to point out:

"TV Advertising: This Division in conjunction with the Bureau of Economics is presently studying alleged discriminatory advertising rates charged by TV networks throughout the country. It is expected that this study will be completed sometime during fiscal 1968." 11/

The question of newspaper advertising rates and contracts involves both alleged discriminatory discounts and arbitrary classifications of advertisers. Assuming such practices are discriminatory, investigative concern would be focused on the effect upon the primary level -- publishers -- and the secondary level -- advertisers. In view of the degree of concentration in the industry, I would assume that effects at the secondary level are being emphasized.

10/ Independent Offices and Department of Housing and Urban Development Appropriations for 1969, Hearings before a Sub-committee of the Committee on Appropriations, House of Representatives, Ninetieth Congress, Second Session, P.98.
11/ Id. at 99

Another aspect of advertising rates falls within the category of joint arrangements. I have reference to voluntary combination discounts. An advertising customer of a morning paper may secure a special discount if he also purchases space in an evening edition or a week-end "shopper". Whether such plans result in adverse competitive consequences on the primary and secondary levels and, if so, whether they are otherwise justified, are questions to be explored.

Another practice, known as "double billing", has also been questioned. This is a new one to me. It has been alleged that advertisers are issued current invoices at the maximum rate, then, at the end of the month, they receive a second statement based on their contract rate. This device is allegedly used by the retailer to submit a higher invoice to a manufacturer or supplier for reimbursement under a cooperative advertising allowance program. Such practices, if true, would seem highly questionable. They may have an adverse impact upon competition among retailers and among newspapers.

The Commission, as pointed out, has pending a number of investigations involving various newspaper industry trade practices. In addition, the staff has been handling various newspaper matters on an informal basis, rendering advisory opinions to publishers on advertising and marketing practices,

and collecting information on industry circulation and advertising. As you know, we have requested Bureau of the Budget approval to include newspapers in our quarterly profit reports on national industry.

At this stage, our over-all approach to the newspaper industry is best described as fact gathering. We are in the process of building expertise in the business aspects of publishing.

There is little doubt that the industry is subject to the antitrust laws. The prospect of government examination under these laws can be viewed either as a frightening specter or as a healthy influence. Let me assure you, as one directly concerned with the enforcement of those laws, they should not, in my view, and I believe in the view of all antitrust agencies, be used to penalize economies and innovations. These pro-competitive seeds are to be nourished and encouraged.

You are a highly sophisticated group. You must certainly recognize that the government does not seek to punish or destroy the guardians and trustees of our freedoms.

I was disappointed to read the editorial in the May 4 issue of Editor and Publisher, a magazine which I have read and respected since I was a child. It assumes that the FTC rate study will end frequency and volume contract rates which will be followed by an end to all retail sales specials . . .

and the end of consumer bargains. Let me assure you that there has been no pre-judgment of the media rate structures by the Federal Trade Commission, or by any Commissioner. This kind of scare technique is not in keeping with the traditions of the Fourth Estate. I urge you to reject this approach and adopt instead a program of cooperation.

Our expertise is built upon the facts being gathered. If we do not have a full understanding of the facts . . . if those facts are not developed in the context of business realities . . . then surely the Commission is more likely to err in any decisions it reaches. I plead with you to consider your courses with great care and not to fall into the thoughtless pit of belief that the government and its agencies are your enemies and natural opponents. Suspicion and distrust breed misunderstanding.

I would like to give you an encouraging report based upon my short experience in government. There is no doctrine of antipathy of government toward business. In this short period, I have learned, and come to believe, that there is a sincere desire, at least within the Federal Trade Commission, to approach problems with a dedication to avoid pre-judgment, a dedication to examine and evaluate fairly, and a dedication to solicit cooperation and to work cooperatively . . . all to the end that any conclusions are reached with knowledge and understanding.

If action seems to be called for as a result of our studies, a decision will have to be reached on how to proceed. For the first fifty years of our agency, the answer to that question would have been clear and simple -- file suit. In recent years the validity of that approach has been seriously questioned. Under the leadership of our Chairman, Paul Rand Dixon, and with the infusion of some new and able minds on the Commission, there have developed new, and, I'm convinced, desirable approaches.

We have recognized that we cannot be slaves of the mailbags which bring us complaints. We should not unnecessarily pursue the case-by-case method if there are viable alternatives. To these ends, we have encouraged the use of our voluntary procedures -- advisory opinions, voluntary assurances of compliance and consent orders. When the problems raised are industry-wide, we have proceedings available for the establishment of industry guides and trade regulation rules. The Commission encourages their use.

In the industry-wide context, the case-by-case method frequently penalizes the initial parties charged by placing them at a competitive disadvantage. They bear the brunt of long and expensive litigation, while their competitors continue the same practices without challenge. The test case furthermore delays enforcement. The industry guide approach is utilized to establish bench marks of good conduct. The

Trade Regulation Rule proceeding offers an opportunity for formal determinations of these questions, again on an industry-wide basis.

In mentioning these alternative approaches, I do not assume that some form of action will be required. That is a conclusion which has not yet been reached at the Federal Trade Commission. However, if some action is appropriate, I hope that you will assist us in its disposition in the most equitable and in the fairest manner possible. At this point, you know far better than I, what the future is likely to hold.

In considering the attitudes and approaches you should take in connection with these activities of government, let me urge you to consider the words which Howard H. Bell, the new President of the American Advertising Federation, used in counseling his association:

"Based upon some twenty years there (Washington), my own conclusions about the Washington environment, the government and the people who run it are these: Government people are generally accessible; most of them are reasonable. They respond to well-made cases, quietly presented, based on facts and research. They are interested in explanations of the unanticipated affects of some of their proposals. Often they accept suggestions designed to correct, limit, or make more precise those actions."

To play up instances when government is heavy-handed, obtuse, and even inane is a vital function of our free press. I wonder if it is not equally necessary to encourage responsible and effective government through intelligent reporting of constructive programs.

We are asking for your understanding cooperation in our examination of your industry, so that, working together, we can assure it is not burdened by the heavy hand of bureaucracy without demonstrated need or justification.