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"At The Crossroads"

Remarks

of

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Federal Trade Commission

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"At The Crossroads" *

My assigned topic is the "Consumer Concerns of the Federal Trade Commission." The general topic of the program is "Consumer Protection Laws, Federal and State -- Possible Conflicts in their Administration." The two topics blend. One of the Federal Trade Commission's greatest concerns in implementing its assigned duties to the consumer and the general public policy aimed at his protection, is obtaining the cooperation and the assistance of State consumer agencies.

There are some thirty-three Federal agencies that enforce some type of consumer protection statute. There are fifty states enforcing consumer protection laws. There are overlaps or areas of dual jurisdiction. In some areas, state law is stronger than the corresponding federal statute. In other areas, the federal act is more pervasive or has higher standards. Under at least one federal statute, state jurisdiction is expressly preempted. We do not know now how the courts may deal with the problems of jurisdiction.

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* While this text forms the basis for the writer's oral remarks, it should be used with the understanding that paragraphs of it may have been omitted in the oral presentation and, by the same token, other remarks may have been made orally which do not appear in this text.

But let's not forget that the statutes of both the federal government and the state governments derive from the same general policy -- protection of the consumer. Their specific means for effectuating this policy, however, are as divergent as they are numerous. Now the last two Congresses have passed a number of very important statutes that call for further pervasive federal regulation in areas previously regulated or reserved to the states.

Accordingly, the areas of possible conflict between federal and state authorities are numerous, and the possibilitites for such conflicts would seem high. However, I doubt that there will be much conflict between us -- if conflict means the engagement of two groups with opposing views and purposes. History would indicate that rather than quarrel, it is more likely that we will plod our separate ways. This history has been unsatisfactory and we must not permit it to continue.

The "travel your own path" -- "look after your own garden" -- relationship presents the greatest possible danger to the effectuation of common policy by federal and state administrators of consumer legislation. It can lead to petty differences, confusion over enforcement, inadequate enforcement, and the absence of enforcement to the detriment of consumer protection, and the subversion of public policy.

Today's meeting offers an appropriate opportunity for examining the status of federal/state cooperation on consumer matters, and the outlook for the future. We can use three statutes as examples: (1) the Federal Trade Commission Act; (2) the Fair Packaging and Labeling Act; and (3) the new Consumer Credit Protection Act (or Truth-in-Lending).

I.

The Federal Trade Commission Act is one of the oldest consumer protection statutes on the books. It has been in force for over fifty years. However, it was not until the Wheeler-Lea Amendment in 1938 that the Act was given an effective potential for the curbing of deceptive marketing practices and false advertising. Until this amendment, the Commission was empowered to halt deception only if it involved an unfair method of competition.

You are all familiar with what the Commission has done to prevent fraud in the market place and the dissemination of false representations through advertisements since enactment of the Wheeler-Lea amendment. Its successes, however, have come principally in the policing of national practices. It has failed, and failed miserably in my opinion, in protecting the consumer from what has lately been known as the "hard core frauds". But this failure arises from the nature of the problem.

Anyone concerned with the protection of the consumer knows the hard core frauds. The Better Business Bureau annually prepares a hit parade of the forms of consumer deception. Bait and switch, health quackery, exploitations aimed at the poor and the aged and the lonely, and home improvement swindles continue to account for the great bulk of the complaints received from the public.

These practices were with us prior to the enactment of the Federal Trade Commission Act. They are still here today -- and in even greater numbers. Why? To a degree because the Commission has not done what it might have done. It did not set up field offices in the main streets of Providence and Pasadena -- of Kalamazoo and Keokuk. However, to a much greater degree the fault lies with the failure of the states to recognize and carry their burden. Even where the states have begun to act, federal and state administrators have been slow in establishing effective cooperation and communication to deal with a common problem.

The courts have held that the Federal Trade Commission Act applies only to activities "in commerce" and not to those merely "affecting commerce." Although advertising itself can establish the necessary commerce, the Federal Trade Commission has largely refrained from regulating advertising where there has been no interstate or only minimal

interstate sale of goods. Because of budgetary restrictions and an interpretation of our principal mandate under the Federal Trade Commission Act, we have tried to adhere to a concern with fraudulent practices that have a national impact and to the policing of advertising in the national media. However, over forty per cent of all advertising is placed by businesses that sell within only one locality, so our complaints do come from the main streets of our country. The purveyors of hard core deception are frequently migrants, operating within a restricted area and ready to move on to a new area as knowledge of abuses dry up opportunities. They are here today, gone tomorrow. When their practices have been limited by decree, others take their places. Entry into the "art" is easy. All one needs is a minimum of capital, a willingness to travel and a willingness to exploit the hopes of consumers for self-improvement and bargains.

It is to the Congress' and the Commission's credit that they concerned themselves with these matters. For if they had not, few states would have provided relief. Twenty-three years ago, an eminent commentator on unfair marketing practices, Rudolf Callman, suggested (and his words have considerable relevance today) "[t]he inadequacy of [state] control is mirrored by the great volume of work before the

Federal Trade Commission." * In 1950 most states had laws of the so-called "Printers' Ink" type which declare false advertising and certain deceptive practices to be misdemeanors. However, as Callman has pointed out: "[t]hough these statutes generally obviate the necessity of proving scienter, the few reported cases reveal their inadequacy. They are applicable only to categorical misrepresentations of fact and, therefore, are easily circumvented and practically incapable of outlawing any but the most blatant falsehoods." **

Two years ago, Chairman Dixon, on behalf of the Commission, publicly urged the states to adopt legislation similar to the Commission's own authority to prevent deceptive

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* 1 Callman, Unfair Competition and Trademarks, 252 (1945).

** Id. at 249. Recently, the Chairman of the American Advertising Federation, in urging the adoption of effective state legislation governing deceptive practices, observed: "Deceptive advertising and selling practices are far more prevalent intra-state than interstate. And more than half of our states have no adequate laws to control the intra-state operator of vicious ... selling rackets or the businessman who deliberately employs dishonest advertising to bilk the public." Address of Kenneth Laird before First National Convention of the American Advertising Federation, Portland, Oregon, July 8, 1968.

acts and practices and false advertising. By so doing, it was urged, the States could draw upon the Commission's 50 odd years of experience and the 800-plus court decisions interpreting the unlawfulness of advertising and marketing practices. To this end, the Commission proposed a program of cooperation with other interested federal agencies and with the relevant departments in the several states.

On the Commission's part the Office of Federal-State Cooperation has been formed. Its purpose is to serve and facilitate cooperative effort with state and local officials and, in that manner, increase protection of the consuming public from unfair and deceptive commercial practices. It seeks to accomplish this objective in three ways: (1) by supplying information to state and local officials and assisting in the implementation of state legislation; (2) by referring complaints to them; and (3) by standing ready to aid, when requested, with proposals for new legislation against unfair practices.

The results of this program have been encouraging. Communication has been achieved and cooperation is being accomplished. Such progress is due, in very large measure, to the efforts of the National Conference of Commissioners on Uniform State Laws, the Council of State Governments and the various Attorneys General. At least four states have enacted laws coextensive with Section 5(a) of the Federal

Trade Commission Act. In 1967 alone, eight states adopted legislation pertaining to unfair trade practices and consumer protection. At least three states, on the suggestion of the Federal Trade Commission and the Council of State Governments, have adopted licensing laws whose purposes are to protect consumers from practices long matters of concern to consumer agencies. Again through the efforts of the National Conference of Commissioners on Uniform State Laws, a number of states have enacted the Uniform Deceptive Trade Practices Act, a statute providing a needed civil relief for the consumer against the injuries inflicted by hard core frauds.

Thus, the inability of the Federal Trade Commission to police deception in every neighborhood of the nation is leading to the passage of creative and effective state statutes and the responsibilities and solutions lie closer to the people affected. A beginning, but only a beginning. More must be done.

II.

While state action and federal/state cooperation in matters of "hard core" deception were virtually non-existent for a long period of time and have only recently been developing, the same is not true with respect to regulation of packaging and labeling. With the enactment of the Fair Packaging and Labeling Act in 1966, the federal government entered the field. Cooperation has been outstanding -- so

thorough that we look with great confidence to early effectuation of the statute's purposes.

When the Commission assumed jurisdiction over the Fair Packaging and Labeling Act, it reasonably expected an unfavorable response from state authorities. After all, state officials, who had long experience in the field, had openly expressed dissatisfaction with the statute because of its preemption provision. The Commission, however, realized that it needed the expertise of State weights and measures agencies, and realized that the staffs of such agencies could greatly contribute to the implementation of the new statute. We asked for their help and we received it.

Through the offices of the National Association of State Departments of Agriculture (whose members supervise enforcement of packaging - labeling laws in thirty-eight states), and other bodies, the Commission's staff received valuable assistance in the drafting of proposed regulations. When the Commission and the staff were preparing to finalize the regulations, the Commission conferred with an ad hoc committee of State Weights and Measures officials. Greatly impressed with State experience on the matters to be covered by the new Packaging and Labeling statute, the Commission unanimously adopted every major suggestion of the State advisers. In addition, we laid the ground work for a future working agreement on the implementation of the new law.

Together with the Food & Drug Administration, we have already embarked upon a series of regional conferences with state officials so that they could begin the task of reevaluating state law and regulations to conform with the federal statute. Together we are seeking to arrive at the best methods of enforcing the new packaging and labeling requirements. The accomplishments to date surely mark the high point of federal-state cooperation which must be the hallmark of all consumer protection efforts.

III.

The Commission is now planning and preparing for enforcement of the recently enacted "Consumer Credit Protection Act." A part of our knowledge and experience with credit practices is derived from a comprehensive study of consumer credit transaction within the District of Columbia. We are well acquainted with the national advertising of credit and the various forms of credit deception practiced on a national or broad regional scale. Prior to enactment of Truth-in-Lending we had been developing proposed guides covering a large number of credit practices. However, the new law gives us plenary jurisdiction over a far more vast area of American credit transactions. It brings us into areas that have previously been reserved to state and local authorities. While I can see ready implementation

of the statute with respect to national merchants and finance companies, I see great difficulty in meaningfully implementing the statute with the corner jeweler and loan company.

In terms of scope, purpose, and a reasonable route to enforcement, there is a recognizable similarity between the Fair Packaging and Labeling Act and the "Truth-in-Lending" statute. Both laws delegate to the Commission an extensive jurisdiction. Both are designed to provide essential trade information to the consumer. Both should be more effectively implemented through a program of federal/state communication and cooperation.

But, unlike Fair Packaging, the disclosure technique of Truth-in-Lending is essentially new to the state experience in regulating credit. Because of this, there is no existing state expertise and no state agency prepared and ready to assist in enforcement. To date, we have had very few contacts with state authorities, but the statute is new and its ramifications require careful study. However, a reasonable opportunity for federal/state cooperation is being developed through the proposal of the National Conference of Commissioners for Uniform State Laws of a uniform credit statute.

While there are some who say that consumer credit protection is now the sole concern of the federal government, I disagree. I see the new statue not as one that excludes, or discourages state participation, but rather as one that offers a stimulant for effective state regulation -- if not one whose purposes require such action.

To some it may sound either strange or heretical that a federal administrator seeks a sharing of jurisdiction. To these people the federal government is always on the march. To an extent, this is true. We are always moving. But, thank fortune, so are state and local governments beginning to move in areas of consumer protection legislation. We can only reach our joint destination through communication and informed cooperation.

In the implementation and enforcement of Truth-in-Lending, the Federal Trade Commission stands at the crossroads. We have unique and challenging opportunitites and alternatives. In essence, the choices lie between a massive enforcement program and a smaller, flexible, but more daring approach. The initial selection rests with the Commission, but the eventual direction will be determined by the states. Frankly, I am apprehensive.

A mature society tends to rely more readily on an organization that is more massive and elaborate - with numbers and solidarity and power. But, at times, the

price paid can be cumbersomeness and lack of adaptability. With this in mind, I am inclined to urge a smaller, more simple and manageable effort in the field - perhaps trying different methods and approaches in different communities and utilizing the assistance of state agencies and local business groups. In this way we can build mobility, flexibility, speed and imaginative approaches - at substantial savings in funds and personnel. During such a period of modest but imaginative enforcement the states could consider statutes to effectuate a cooperative effort.

In the end, however, the extent of participation of the Federal Trade Commission in enforcing Truth-in-Lending on the main streets of America will be determined by the action of the states to require credit information disclosure to the consumer.

IV.

Certainly, as a number of pundits have claimed, consumer protection is politics. But, it is the best form of politics -- the response of elected officials to the demands of the people. If you are unconvinced, ask your wives whether they are satisfied that there is a "consumer ethic" in America. Ask yourselves whether you are confused from time to time about trade representations.

Ask the poor about their day-to-day dealings for goods which most of America consider day-to-day necessities. Ask your Congressional representatives, the Federal Trade Commission and state officers about their mail. Finally, ask our prominent manufacturers and retailers, who have recently conducted public opinion surveys, whether they think "consumerism" is just politics.

There are possibilities for conflict in a number of areas between federal and state authorities entrusted with the enforcement of consumer protection legislation. These possibilities may not become realities if there is an adequate effort at communication and cooperation. However, cooperation must, in the long run, entail the enactment of additional state legislation. While I realize that in such matters the diplomatic history of federal/state legislation calls for a suggestion instead of a plea, I believe that the present situation is such that protocol should be ignored and pragmatism should be served. The consumer needs effective local legislation, and administration.

The federal agencies administering consumer legislation must have assistance from counterparts on the state and local levels, or, of necessity, massive, elaborate and cumbersome federal growth will follow.