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The Federal Trade Commission: Progress and a New Profile

An Address by the Honorable Caspar W. Weinberger*

IT IS INDEED a great honor to be asked to appear before such a distinguished body as the Ohio State Bar. What I wish to speak to you about today is the steps the Federal Trade Commission (FTC) is taking to assure that its authority under section 5 of the Federal Trade Commission Act,¹ and the additional power we are hopeful that Congress will give to the Commission, are properly and efficiently wielded to protect the American public from market abuses.

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Section 5, under which the Commission is empowered to bring a halt to unfair methods of competition and unfair or deceptive acts or practices in commerce, is a double-edged broadsword which, when finely sharpened, can act to protect the consumer in two ways. Not only is section 5 the source of the Commission's basic power to act in deceptive practice matters, but also the Supreme Court has held in numerous instances that under this statute the Commission can act to stop practices in their incipiency, if those practices, when full-blown, would constitute violations of the Sherman Act.²

Accordingly, the Commission of this decade will be dedicated to assuring that fairness in the marketplace prevails. It will act swiftly, not only to prevent unfairness in what have traditionally been viewed as deceptive practices, but also to prevent unfair acts in attempts to monopolize.

In the summer of 1969 the American Bar Association Commission to study the Federal Trade Commission found that the FTC of the 1960's was probably superior to most of its predecessors, but

* This address was delivered before the Fourth Annual Antitrust Institute of the Ohio Bar Association, May 14, 1970, in Akron, Ohio.

¹ 15 U.S.C. § 45 (1964).

² 15 U.S.C. §§ 1-7 (1964). See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *FTC v. Motion Picture Advertising Co.*, 344 U.S. 392, 394-95 (1953).

still failed to live up to the promise of its creation.³ Specifically, the ABA Commission found that, through a lack of effective direction, the FTC had failed to establish goals and priorities, to provide necessary guidance to its staff, and to manage the flow of its work in an efficient and expeditious manner. Without fully endorsing all that is contained in this report, I do not think it rash to admit that the Commission *can* do better, and in this decade our constituency has already indicated that "better" will not be sufficient. Excellence will be demanded in order to meet the challenge of improving the quality of life for all our citizens. Mismanagement of resources at the FTC or elsewhere in our society can no longer be tolerated.

It is thus no wonder that a great deal of my time during my first 4½ months at the Commission was spent studying the organizational chart of the Commission in hopes that the FTC's performance could be improved. I also spent a great deal of time searching for the very best men to fill the many vacant positions at the senior staff level, insuring that, once the Commission is efficiently organized, the promise of the Commission's founding will be kept during the 1970's.

Considerable progress has been made in solving the manpower problems at the senior staff level, and the new profile of the Commission is now being closely considered by the Commission members. I am hopeful that after the members act the shape of the new Commission can be fully disclosed. Although the reorganizational plans are incomplete, I can bring you up-to-date on the progress which has been made.

Shortly after becoming Chairman, I asked the attorneys in charge of the 11 field offices to submit their views on improving their effectiveness in the area of consumer protection. In a meeting held with the full Commission, it became clear that we should expand this topic to consider more generally the full role of the Commission's field office attorneys. Why, for example, should the field office attorneys not be able to act promptly in response to consumer complaints without reference to Washington, except for actions which only the Commission itself could take? Obviously the field offices should be able to respond swiftly, and the Commission is aware that it can no longer fail to fully utilize the untapped legal skills of the field office attorneys.

³ REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

Needless to say, the field offices did not merely accept, but enthusiastically welcomed, this opportunity for increased participation. As a result of the meeting with these representatives of the field offices, they have been given the authority to conduct investigations in regional and local deceptive practice matters on their own initiative, without reference to Washington except for the routine house-keeping chores required by good management principles. This authority has been delegated as well to the field offices in all restraint of trade matters except mergers. In order to make implementation of this new policy practical, the Commission has also delegated to the attorney in charge of a field office, and to his assistant, the power to issue investigational subpoenas. Field office attorneys will also prepare their own complaints and trial memoranda, and they will try their own cases.

Although these changes appear minor, they will hopefully bring major results. First, delay and duplication of effort should be reduced because one attorney will handle both investigation and trial. Second, we now hope that promising law school graduates of law review caliber who are interested in trial work will be attracted to careers in the field offices. Most important, however, we feel that this change assures that local and regional problems will be given prompt and effective attention.

Further indicative of the Commission's and the field offices' new vitality is the creation of consumer protection committees in major metropolitan areas. One such committee has already been established in Chicago, and the creation of such committees in the 15 largest population centers is our goal for the immediate future. These committees, composed of federal, state, and local agencies, have as their target consumer fraud in all of its most virulent forms. As part of the one-step complaint service provided by these committees, a consumer complaint that may have been filed with the wrong agency will be automatically forwarded to the appropriate destination. No longer will frustrated consumers face the depressing aggravation of being shunted from one agency to another until they give up in their attempts to achieve redress, totally disillusioned with all levels of government.

As another part of this cooperative effort to give effective consumer protection, modern data retrieval methods will be utilized to keep track of emerging problems of consumer fraud.

We feel that these steps which have already been taken will go a long way toward erasing the image of a somnolent Federal Trade

Commission. Obviously the increased responsibility of the field offices makes it of the utmost importance that our attorneys in charge bring the aggressive spirit of a public defender to their responsibilities.

The steps outlined above vastly improve the service that the field offices can provide both in antimonopoly and deceptive practice work. We will not rest on this improvement, however, nor do I wish to give the impression that the trial staff in Washington will be downgraded. All merger and acquisition matters will continue to be handled by them, as well as all problems which are national in scope. Also, as need dictates, skilled trial attorneys on the Washington staff will be made available to assist the field office personnel in the trial of their cases.

Another prime responsibility of the Commission's Washington staff must be planning. Clearly our resources are not sufficient to investigate every potential violation of section 5. We cannot waste time on relatively trivial matters. What matters are trivial, however, may be hard to determine, yet this determination must be one of the Commission's first tasks if it is to carry out its responsibilities in a coherent fashion. As part of this determination, the Commission must have empirical data showing how effective its cease and desist orders really are. Currently we are engaged in a major study of the Commission's Robinson-Patman orders with just that end in mind. We are also taking a hard, critical look at the way in which the Commission's Rules of Practice and Procedure work in an effort to insure that adjudicative matters will be handled with fairness and dispatch. In stressing the need to improve the rules, I am not unmindful that justice delayed is indeed justice denied.

To help in its attempt to improve the rules as well as to insure fairness to all parties, the Commission has sought the most capable and energetic men it could find, from both the private and academic sectors, to serve on a 15-member Advisory Council which will thoroughly study the rules. As the Commission enters this era of enlarging responsibility, the Council, in addition to its efforts to eliminate delay, will turn its attention to newly emerging procedural problems. We fully intend that the Council, in addition to giving the Commission the benefit of its view on specific matters referred to it by the Commission, will generate its own suggestions with respect to the Commission's Rules of Practice and Procedure. In short, it is our intent, with the assistance of the new Advisory Council, to make the

Commission's rules a model of efficiency and fairness. Hopefully this will be achieved by the beginning of 1971.

I have spoken a great deal about planning. In doing so I do not wish to give the impression that, while these studies go forward, the Commission will decrease or retard its efforts to enforce the statutes for which it is responsible. To the contrary, I believe you will find that the Commission is about to increase its efforts to enforce section 7 of the amended Clayton Act,⁴ the so-called "big buyer" provisions of section 2(f)⁵ of that Act, and section 5 of the Federal Trade Commission Act.⁶ In addition, the recently delegated authority to the field offices should result in increased activity in consumer protection matters.

All of us are consumers and thus have a stake in the success or failure of the Commission's efforts to do the job required of it in a consistently better way. However, no one should take my comments here as indicating an antibusiness sentiment on the part of the Commission. Everyone at the Commission realizes that our democracy and our economic system are interdependent and have produced the highest standard of living known to the world. We also realize that the vast majority of businessmen are affirmatively trying to make our system continue to flourish by obeying the law. For this vast majority, the Commission will always be a source of support and advice. In situations where affirmative regulation is required, we will seek as much as possible to do so in an industry-wide manner which is equitable for all. The Commission has no wish to unduly interfere with the private sector. Its increased activity will be directed toward those who would willfully violate the laws, thus threatening the continued success of our economic system. In its efforts the Commission will fully use all the powers at its disposal, and I am quite confident that Congress will increase these powers as requested by the President.

Under a broadened and modern definition of interstate commerce, the Commission should soon have the power to attack abuses of the consumer which merely affect commerce. Hopefully the Commission will also be given the power to seek preliminary injunctions so that unfair practices will not continue while hearings on the merits are pending. This will eliminate the benefit of delay and encourage expeditious hearings, thus reversing an unfortunate

⁴ 15 U.S.C. § 18 (1964), *formerly* ch. 25, § 7, 38 Stat. 631 (1914).

⁵ 15 U.S.C. § 13(f) (1964).

⁶ 15 U.S.C. § 45 (1964).

aspect of proceedings which has rewarded those who could succeed in delaying Commission action by procedural devices.

I am also hopeful that the Commission will in appropriate cases be given the right to assess civil penalties for violations when initially found or for violations of orders on the books. We have also asked that the Commission be empowered to award damages where consumers have been injured by acts or practices found to be in violation of the law.

Though I have not been able to fully disclose the profile of the new Commission, I think you will agree that it more closely resembles the middle linebacker of the Cleveland Browns than the "little old lady of Pennsylvania Avenue" that we have been reputed to be. Although I do not as yet think of myself as Vince Lombardi or Paul Brown, I have noticed that several of my staff assistants have on occasion been answering my requests with a rather athletic sounding, "yes, Coach."

Before ending I would like to thank you for your invitation to appear here today and assure you, should we next meet from opposite sides of the bench, that 15 yards will be the penalty for clipping, whether engaged in by you or complaint counsel. As always, the referees are scrupulously fair and impartial.