

COMPETITION LAW AND CONSUMER
PROTECTION LAW: TWO WINGS
OF THE SAME HOUSE

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It is increasingly evident that the competition and consumer protection missions of the Federal Trade Commission are more closely related than people have been accustomed to think. In the early years of the Commission's existence, the link between deception of consumers and adverse competitive effects was taken for granted, although it was not clear which was the primary and which was the secondary concern.¹ The Supreme Court ruled in *FTC v. Raladam Corp.* that "the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be lessened."² The *Raladam* case provided the impetus for the 1938 Wheeler-Lea Amendments,³ which added the "deceptive acts or practices" language to Section 5, in order to make clear that proof of injury to competitors⁴ was not an essential element of the offense.

Since the Wheeler-Lea Amendments, competition jurisprudence and consumer protection jurisprudence seem to have evolved along different paths, but this divergence was not inevitable. The mere fact that competitive injury is no longer a necessary element of a consumer protection case does not mean that consumer protection offenses are matters of no competitive significance.

Both competition law and consumer protection law deal with distortions in the marketplace, which is supposed to be driven by the

* Commissioner, Federal Trade Commission. The ideas in this article are my own and not necessarily shared by any other Commissioner.

¹ Compare, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922) ("misbranded goods attract customers . . . from the producer of truthfully marked goods"), with *FTC v. Klesner*, 280 U.S. 19, 27 (1929) ("the purpose must be protection of the public. The protection thereby afforded to private persons is the incident.").

² 283 U.S. 643, 649 (1931).

³ Codified in 15 U.S.C. § 45(a).

⁴ At that time, the distinction between injury to competitors and injury to "competition" was not appreciated.

interaction between supply and demand. Antitrust offenses, like price fixing or exclusionary practices, distort the supply side because they restrict supply and elevate prices. Consumer protection offenses, like deceptive advertising, distort the demand side because they create the impression that a product or service is worth more than it really is. In other words, both sets of offenses can be analyzed in economic terms, and appreciation of this nexus will help to resolve some apparent tensions.

Consider, for example, the issues in a case like *California Dental*.⁵ Assume hypothetically that the respondent Association had adopted an advertising code that was more narrowly tailored to address information disparities between professionals and their customers, and assume further that the code had been enforced consistently as written. The conflict between what have long been considered competition law objectives and consumer protection law objectives would then have been squarely presented. After all, the code was facially directed at “false or misleading” advertising, which is hardly an objectionable standard, and various advisory opinions addressed matters like the misleading potential of partial disclosures and the need for substantiation, which continue to be a predicate for Commission complaints on the consumer protection side.⁶

There is, however, nothing unusual about the need to balance objectives that tug in opposing directions. When deciding antitrust cases today, we take it for granted that it is appropriate for a fact finder to consider the potential for greater interbrand competition when evaluating a vertical restraint on intrabrand competition. Why should it be any less appropriate to consider the potential for more accurate demand-side responses when evaluating a supply-side restraint?⁷ A balancing test of this kind could, for example, justify a collective response to the Commission’s recent suggestion that the media reject advertisements of blatantly false weight-loss claims.⁸ An appreciation of the economic nexus between

⁵ *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

⁶ *Id.* at 760–61.

⁷ In fact, the analogy to intrabrand restraints is particularly apt because one objective of these restraints is to increase the amount of consumer information that retailers provide—which has demand-side effects.

⁸ See FTC STAFF, DECEPTION IN WEIGHT-LOSS ADVERTISING WORKSHOP: SEIZING OPPORTUNITIES AND BUILDING PARTNERSHIPS TO STOP WEIGHT-LOSS FRAUD (Dec. 2003) (encouraging the media to refuse to publish advertising with certain false weight loss claims), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>. See also Letter from Alden F. Abbott, Assistant Director for Policy & Evaluation, Bureau of Competition, FTC, to Jerald A. Jacobs, Shaw Pittman LLP (Jan. 29, 2004), available at <http://www.ftc.gov/os/2004/01/040129eraopinion.pdf> (stating that, in the staff’s opinion, no challenge is warranted against the Electronic Retailing Association’s proposal to review infomercials and other advertising that contain claims that appear on their face to be unreasonable or incapable of substantiation).

competition and consumer protection objectives should allay concern that this broad balance is necessarily in conflict with *Professional Engineers*.⁹

It may not be possible to balance the supply-side effects and the demand-side effects in a rigorous way, but we also do not know how to balance interbrand and intrabrand effects rigorously. (In fact, courts simply assume that interbrand effects are more important.¹⁰) And, in some cases, the balance should be easy to strike because the sale of patently worthless products confers no economic benefits whatever. It does not take much to outweigh a zero.

There is another interesting parallel between competition law and consumer protection law. In competition law, there is the traditional distinction between “per se” cases and “rule of reason” cases.¹¹ In a per se case, the only issue is whether the conduct occurred; in a rule of reason case, it is necessary to prove adverse market effects, and conduct may be defended on the ground that adverse effects are outweighed by beneficial ones. Agreements that are illegal per se could also be condemned under a rule of reason, of course, but it is unnecessary to plead them that way when adverse effects can be conclusively presumed.

Consumer protection law has a similar structure. A practice is deemed “deceptive” if it misleads reasonable consumers and is likely to affect their purchase decision.¹² This definition, however, goes principally to the nature and immediate impact of the conduct at issue, not to the overall market effects of the harm. In this respect, deception offenses are treated like per se offenses, because the initial characterization can be outcome-determinative. On the other hand, a practice can be prohibited as “unfair” only if the resulting consumer injury is “substantial,” the injury is not reasonably avoidable, and it is not offset by countervailing benefits.¹³ This looks like a rule of reason inquiry into such matters as the magnitude of the impact, the availability of alternatives, and offsetting efficiencies. If we pursue the parallel further, we could conclude that

⁹ This balance is not “based on the assumption that competition itself is unreasonable” and is not unrelated to competitive effects. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 696 (1978).

¹⁰ See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 (1977).

¹¹ Actually, I believe this traditional distinction has become blurred, and today it is more accurate to refer to the contrast between cases that focus on the nature of the *restraint* and cases that focus on the nature of the *market*. See Thomas Leary, A Structured Outline for the Analysis of Horizontal Agreements (Mar. 2004), available at <http://www.ftc.gov/speeches/leary/chairshowcasetalk.pdf>.

¹² See Deception Policy Statement (in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 168–70 (1984)).

¹³ See 15 U.S.C. § 45(n).

deceptive practices are unfair practices, as well, but it is not necessary to plead them that way when a simpler line of proof is available.¹⁴

Consumer protection law also reflects a special concern about sales to children or to other people who, for one reason or another, are particularly vulnerable buyers. This particular solicitude may originally have been prompted by paternalistic sentiments, but it is not inconsistent with the structure outlined above. The Commission takes particular vulnerabilities into account in its determination of whether a message is likely to deceive—and thus to cause a demand-side distortion. This is simple economics.

A very different question would be presented if the Commission attempted to attack under its unfairness authority the non-deceptive promotion of perfectly legal transactions that some may nevertheless believe are socially undesirable. There is no chance that the Commission will go down this road at the present time.¹⁵ There is a difference, however, between an affirmative use of the Commission's unfairness authority and toleration of collective industry actions to address various social problems. For example, we have recently encouraged collective action to help ensure that minors are not exposed to adult films or recordings that the industry rates as unsuitable, even though sales to minors are not illegal.¹⁶

If the promotions are not deceptive, there is no demand-side distortion and, therefore, it is not possible to employ the economic balancing tests outlined above. There may, however, be negative economic externalities¹⁷ associated with transactions of this kind. Examples might be the burden of increased health care expenditures, even if "unhealthy" foods are advertised non-deceptively, or the consequences of possible antisocial behavior by minors exposed to unsuitable entertainment. Normally, anti-

¹⁴ I am indebted to Howard Beales, recently Director of the Bureau of Consumer Protection, for this insight. See J. Howard Beales, Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present (Mar. 2004), available at <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>. See also *FTC v. Int'l Harvester Co.*, 104 F.T.C. 1050, 1064 (1984) ("deception is one specific but particularly important application" of unfairness).

¹⁵ Commission initiatives in this area twenty-five years ago created the famous "Kid Vid" controversy and led to a hasty retreat. See Beales, *supra* note 14, at 5 et seq.

¹⁶ See FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES: A REPORT TO CONGRESS* (July 2004), available at <http://www.ftc.gov/os/2004/07/040708kidsviolencrpt.pdf>.

¹⁷ I believe that there also are negative externalities associated with deceptive advertising in our society. It not only diverts sales from honest competitors but also contributes to a pervasive consumer cynicism that affects the credibility of all advertisers, whether they are direct competitors or not.

competitive industry action cannot be justified on the ground that it will reduce negative externalities, but there may be a narrow exception for precisely targeted restraints that reduce negative externalities and that do not appear to be commercially motivated. A price-fixing agreement on R-rated films could not be defended on the ground that it would price minors out of the market. Such an agreement is not targeted and it has an obvious commercial purpose. On the other hand, a collective agreement not to advertise these films in certain venues, or to require that exhibitors more closely monitor admissions, could pass muster, even if a spillover effect was higher prices. Similarly, an agreement among competitors not to promote or sell junk food in school settings might be defensible.¹⁸

In conclusion, this brief note is intended to emphasize the common roots of competition law and consumer protection law. Both can be analyzed in economic terms—which is not to say that the “right” answer can always be derived with the confidence of a Euclidian solution. The more modest objective here is to suggest that, in some cases, the procompetitive effects of collective efforts to reduce consumer deception can appropriately be weighed in the balance.

¹⁸ In *United States v. Brown University*, 5 F.3d 658, 677 (3d Cir. 1993), the court called for a rule of reason analysis of agreements fixing the amount of student financial aid, notwithstanding the anticompetitive effect of such agreements, where the benefits of such agreements could be described as “procompetitive,” rather than purely in terms of “social welfare,” and the universities did not have “a strong economic self-interest.” Compare *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990), which condemned a boycott *per se*, when the participants hoped to gain financially, even though they also advanced other non-commercial objectives.