Federal Trade Commission

RIP VAN WINKLE AWAKENS: SOME REFLECTIONS ON REMEDIES

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Bill Baer remarked to me a couple of months ago that I must feel like Rip Van Winkle in returning to the Commission after a 31-year hiatus. That's not entirely true – as an antitrust and consumer protection practitioner for those 31 years, I tried to keep close track of what the Commission was doing. In fact, my clients were on the receiving end of some of the Commission's most notable orders – the order against Eli Lily for inadvertent disclosure of email addresses in connection with termination of its Prozac reminder service being the one that sticks out in my mind. But there is no doubt that things are radically different than what they were (or what I thought they would be) when I left the Commission in the Fall of 1975. And nowhere is change more evident than in the remedies that the Commission is seeking and getting.

[1] These comments are my own, and do not necessarily reflect the views of the Commission or of any individual Commissioner. I would like to express my gratitude to Beth Delaney, my att439 0 TdF16missi279 ossiionend ses rs,buermisurningssiopeech.ting.

Let me take a brief walk down memory lane, focusing primarily on the Bureau of Consumer Protection because that is where I resided for the two years from 1973-1975. During that period we targeted national advertising that we thought was either false or unsubstantiated. The respondents were both major advertisers and their advertising agencies. The remedies we sought were "all product" orders that would serve as a basis for civil penalties if the respondent ever engaged in false or unsubstantiated advertising in the future. The case the Commission brought against General Electric based on its claims respecting the "reliability" of its color television sets – a challenge that resulted in an "all products" consent decree – was illustrative of these cases.[2]

Our thinking in bringing these cases was twofold. First, these were high profile cases that communicated the message that the cops were on the beat. Second, at the time, the only trigger for civil penalties was the violation of an outstanding order. The respondent thus generally got two bites of the apple – the wages of sin when it took the first bite consisted solely of an order; it was only after the order was violated that it faced penalties.[3] An "all products" order was a broad order that put a large multi-product organization under threat of civil penalties.

The consumer protection landscape changed in this respect with the enactment of the

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[2] *In the Matter of General Electric Company*, 89 F.T.C. 209 (Apr. 7, 1977). *See also ITT Continental Baking Co. v. F.T.C.*, 532 F.2d 207 (2d Cir. 1976).

[3] This is not to say that the first bite at the apple was always costless. In *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), for example, the court upheld a Commission order requiring corrective advertising where the respondents' claim was shown to have resulted in lingering consumer misperceptions.

violation, and the method of calculating the number of violations is generally left undefined. Although the courts are ultimately the decision-makers with respect to the amount of the civil penalties to be assessed, the Commission has struggled – and continues to struggle – with the criteria to be used in determining what level of penalties to seek (without turning the civil penalty into what courts will consider to be impermissible punishment). And, beyond that, the Commission is trying to "do the right thing" in setting the level of civil penalties in consent decrees.

Finally, a number of recent Commission consumer protection and antitrust decrees contain provisions requiring monitoring, auditing, operation and divestiture of assets by managers and trustees, including but not limited to crown jewel divestiture provisions, that are remedial in nature and that Jim Halverson and I could not have imagined in our wildest dreams when we were at the enforcement Bureaus in the early 70s.

After this walk down memory lane, I guess I *do* feel a little like Rip Van Winkle after all. And the changes that have occurred raise a host of questions. The ones that come most immediately to my mind are the following:

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the cops were definitely on the beat.

Second, is the Magnuson-Moss Act a dead letter? On the one hand, it's easy to say it is because of the smashing success of 13(b). On the other hand, the remedies available under Section 13(b) are limited to equitable remedies. There may be some cases on the margin where civil penalties rather than those remedies are appropriate – for example when the amount of consumer injury is hard on quantify. In these cases, it may be that the cumbersome rulemaking procedures imposed by the Act are worthwhile in order to define – and subject to civil penalties – conduct that is unfair but not necessarily deceptive. Or, it may be advisable to use some synopses of litigated decrees in order to subject certain enterprises not covered by special statutes to civil penalties for engaging in patently unfair kinds of conduct. These are possibilities in both the consumer protection and antitrust arenas.

Third, is Section13(b) really a basis for disgorgement in antitrust cases? *Mylan* says so, but it is the subject of ongoing controversy. Frankly, I can't see the Commission voluntarily ceding that remedy unless and until other courts say it lacks the power to obtain it, but I can't rule out the possibility that other courts may say that either.

Fourth, what are the criteria for selecting the civil penalty that is appropriate for violations of the various special statutes? Should those criteria always include an amount that will achieve complete disgorgement? When does the amount slip over into punishment instead of deterrence?

Finally, is the Commission sufficiently mindful of the burdens and expense that frequently attend the ancillary provisions of its regulatory and quasi-regulatory decrees? To what extent should that burden and expense be considered in determining what the limits on monetary relief – be it consumer redress, civilre