

Consumer Protection

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The Consumer Protection Seven: The Seven Questions We Asked Bill MacLeod

William MacLeod is Chair of the Antitrust and Competition practice group of Kelley Drye. He served as Director of the FTC's Bureau of Consumer Protection from 1986 to 1990. Bill focuses his practice on competition law, trade regulation, advertising, privacy and security. Bill has devoted decades of service to the ABA Section of Antitrust Law, including terms as Vice Chair, Program Officer, and Consumer Protection Officer, and as member of the American Bar Association House of Delegates.

1. Given your inside experience at the FTC, what do you see as clients' biggest misconception about the Bureau of Consumer Protection?

Many people think of Washington as the home of agencies that regulate different industries – FCC, FDA, etc. They don't appreciate that FTC is less a regulator and more a prosecutor and an advocate. The FTC also is active in policy development. And, BCP does all of this.

That's bad news and good news for clients. You can't go to the CFR or the USC to find the answers to most questions about FTC law and policy. You have to consult cases, statements, speeches, guides – and seasoned veterans with long memories. Not knowing what's in the obscure and unwritten records can be hazardous to your business.

What those records tell you is that BCP is much more than its counterparts. With a few limited exceptions, BCP has jurisdiction over most of the economy. It can address business practices that clients might think are regulated by no agency – and practices that may not even exist today except in fertile imaginations. If you were to have asked twenty years ago who was the principal privacy and

security cop in the United States, hardly anyone would have known. Today, that sheriff's badge belongs to the FTC. It's no coincidence that the President chose the FTC to explain the Administration's initiatives in the area.

2. And what do you wish FTC staff understood about your clients?

A company counsel once shared with me a booklet he gave to new employees. On the cover was the title *The Law of Advertising*. Inside was a single page with a single sentence, "Tell the truth." I often tell new clients that they can go far with that maxim, and if they can remember two more phrases they can cover much of the law that BCP enforces: "Know what you're talking about, and don't hurt anyone out there." These are of course very simple versions of deception, substantiation and unfairness policies, and it's amazing well they can guide you through the BCP rapids.

But the simple rules don't go as far as they used to because the applications and interpretations have become increasingly complex and because it's easier than ever to get into trouble for things you didn't do. In the marketplace, it's tough enough keeping up with competitors and consumers. It's even harder knowing when the rules change or when your client may be called to account for practices engaged in by another company your client deals with. There can be a tension between the tools of consumer protection and goals of competition policy.

Still, by the time an investigation has finished, there shouldn't be serious questions about the facts at issue. If at the end the staff doesn't understand something I wish they did, I didn't do my job very well. The only question that should remain open is the application of the law.

3. The Commissioners have recently debated the application of the FTC's use of unfairness authority in a variety of contexts. Do you feel that the FTC has applied the right standard in recent cases?

I hope so, but it's nearly impossible for us on the outside to know. The public, including the bar, seldom has access to enough information to second-guess an enforcement decision. That's one reason why the most controversial cases and issues are often the most revealing for the public, even if they take the greatest toll on the Commission and the respondent. When we see debates, dissents and concurrences, we get a much better glimpse into the analysis that the Commission applies when it handles unfairness policies and cases. The typical complaint and order are often too opaque to tell whether the underlying facts met the standard that the Commission has set for itself. Because the standard is based on a cost-benefit analysis, evidence is critical. So is an ongoing conversation about the elements of unfairness, how they have been applied and how they will be applied. Maybe it's time for BCP and its constituents to benefit from a retrospective like those on the Competition side.

4. How has consumer protection changed over the twenty years since you returned to private practice?

That's kind of you. It seems like yesterday, but it might have been a bit more than twenty. As far as the scope of CP is concerned, the biggest changes have probably occurred in finance, privacy and security. The Bureau had a robust presence in these areas, thanks to enforcement of the Fair Credit Reporting Act, Fair Debt Collection Practices Act, Equal Credit Opportunity Act and related laws. But with technology moving and erasing traditional industry borders, these niches have become hallmarks of BCP jurisdiction.

Within the traditional provinces of BCP, remedies have probably seen the biggest change. In the

debates over the Commission's equitable powers back in the eighties and nineties, I don't remember anyone predicting the enforcement tools the Bureau would use and sums of money the Commission would be collecting in advertising cases today. There's no question that the stakes in CP cases are far greater than they were.

5. What do you see as your legacy as Director of the Bureau of Consumer Protection?

That's for someone else to write. My favorite assessment so far comes from Professor and now Irish Trade Commissioner, Steve Calkins, who called my term the pinnacle of unfairness at the FTC. He does so with a twinkle in his eye, which makes me wonder about some double entendre lurking somewhere, but I'll accept the explanation he gives. One of the things we did during my tenure at the Bureau was to show that we could bring and win cases under the unfairness policy that the Commission had articulated at the outset of the eighties.

More broadly, I've heard references to my time there as the Bureau's return to enforcement of national advertising standards. We managed the transition from a focus on rulemaking to a concentration on cases. The most prominent cases involved national advertisers, progressed through trials and appeals, and showed how the Deception and Substantiation Policies supported robust enforcement. Every Commission and court decision that we won disproved the predictions that policies based on objective factors and reasonable consumers would be too hard to enforce.

6. What do you consider your most lasting achievement as Bureau Director?

Fortunately for the Commission, the most lasting achievement a Bureau Director can have is to hand an effective and active Bureau to his or her successor. The other thing a Director can do is to help shepherd cases, policies and interventions that

stand the test of time and criticism. It is always gratifying to see citations to the decisions of my time at the Bureau. The *POM Wonderful* decision that just came down from the D.C. Circuit relied on *Removatron* for the proper application of Substantiation Policy, which we refined and applied in the eighties. We struggled to get it right back then, and you can see effects of those efforts in the law today.

7. And on the other side, what if you had a mulligan? Based on your experience since then, what would you do differently?

I would have tried to generate more news and attention for the Bureau's mission. I would have opened a Twitter account and a Facebook page. You can't do enough to get the message out there. On second thought, thank goodness those tools were not around back then. Our mistakes didn't need an authority to establish a right to be forgotten. We just had to wait for memories to fade.

Enforcers Begin to Opt-In to ROSCA Enforcement

By Shahin Rothermel and Matthew Farley

Shahin Rothermel and Matthew Farley are associates in Venable's Washington, D.C., office.

The Restore Online Shoppers' Confidence Act (ROSCA) became law in December 2010. The law was introduced by Senator Jay Rockefeller – Chairman of the Senate Committee on Commerce, Science, and Transportation – to combat aggressive sales tactics on the Internet. ROSCA contains two primary prohibitions, both of which have potentially far-reaching consequences for online marketers. First, ROSCA imposes specific requirements on membership and subscription-based goods and services (referred to as “negative option features”).¹

Second, ROSCA restricts sharing customer information in certain Internet-based sales; this is sometimes referred to as the “data pass” prohibition.²

Both ROSCA's regulation of negative option features and its prohibition on data passing between online merchants have been largely ignored by regulators and online marketers alike—until now. The Federal Trade Commission filed a ROSCA complaint against a dietary supplement company in October 2014,³ then quickly doubled down by announcing a ROSCA settlement with an online dating service the same month.⁴ States are likewise warming up to ROSCA. In late September, the Washington Attorney General filed suit against Internet Order,⁵ a company that offers language-learning products online, pursuant to a provision in ROSCA that authorizes enforcement by state attorneys general.⁶ All three cases focus on negative option features, a clear message that regulators are highly focused on online continuity and subscription plans. With this shot across online marketers' collective bow, it is worthwhile to refresh on the requirements of ROSCA, both its negative option restrictions and its data pass prohibition.

Negative Option Restrictions

Section 4 of ROSCA, 15 U.S.C. § 8403, prohibits charging a consumer for goods or services over the Internet through a negative option feature, unless the seller: (1) clearly and conspicuously discloses the material terms of the transaction before obtaining

² *Id.* § 8402.

³ *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-JAD-GWF (D. Nev. filed Oct. 7, 2014), available at <http://www.ftc.gov/enforcement/cases-proceedings/132-3159/health-formulas-llc-doing-business-simple-pure-nutrition>

⁴ *FTC v. JDI Dating, Ltd.*, No. 14-cv-8400 (N.D. Ill. filed Oct. 27, 2014), available at <http://www.ftc.gov/enforcement/cases-proceedings/132-3179/jdi-dating-limited>

⁵ *State of Washington v. Internet Order LLC*, No. 2:14-cv-01451 (W.D. Wash. filed Sept. 22, 2014), available at <http://www.atg.wa.gov/uploadedFiles/Internet%20Order.pdf>.

⁶ See 15 U.S.C. § 8405.

¹ 15 U.S.C. § 8403.