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ON FREEDOM OF PRIVATE ENTERPRISE
AND
DECEPTIVE TRADE PRACTICES

While the high standard of living in the United States may be attributed to a number of factors - including its natural resources, its large labor force and the industrious characteristics of the people - of greater importance, I think, is the fact that the government in the United States was founded upon the basic concept of freedom of privately owned enterprise.

The success of the free enterprise system demonstrates its suitability to the many difficulties involved in developing the great natural resources of this country, for nowhere in the world, under any system of economics has man advanced so far and so fast, and maintained such a high standard of living and personal dignity as in the United States.

I believe that open and free competition generated by the initiative and imagination of privately owned enterprises is the best regulating influence in

the marketplace. However, it was recognized near the turn of this century that overzealous businessmen, along with natural avarice and greed, quite often generated conditions which eliminated free competition in the marketplaces and compelled even the most conservative to acknowledge the need for some government assistance to protect the consumer as well as other enterprises.

For instance, it was Senator John Sherman of Ohio, the most conservative member of the Senate, who in 1890 introduced the Sherman Antitrust Act, which placed limitations upon the rights of privately owned enterprises. It is interesting to observe that the Act was generally referred to as "the law to make free enterprise free," rather than an Act to "regulate business."

It was the purpose of this Act, which was the first real effort in this nation to regulate privately owned enterprises, to restore the competition which was fading away as the giants in industry consolidated and sought to monopolize the markets, to control prices, and, thereby, restrain trade and

free competition.

It is interesting to note that the very existence of the privately owned enterprise system was in so much peril at the time that every member of Congress voted for the bill with the exception of one.

Today, we in the United States owe our position of leadership in the markets of the world, in a considerable degree, to the fact that up until the close of World War II, giant trusts and cartels, without any controls, such as the Sherman Antitrust Act, stifled and eliminated competition in the western European countries and, in fact, dictated the economy of those countries. The absence of such monopolies and economic dictation there, since the War, explains in large measure the speedy and vigorous development of trade and commerce in those countries and the fact they now are giving the enterprises of the United States their first real threat in the markets of the world.

This first serious threat to the concept of privately owned enterprises and the principle of free competition, though unfortunate at the time,

served to make us aware in this nation that the only way the concept could survive and our nation continue to grow was to assure open, free, and fair competition in the market place.

Today, we recognize that monopolies and combinations in the form of trusts, that price fixing and other conspiracies in restraint of trade are not the only threats to our system. Many responsible business and professional men, who would be aghast at such practices, are themselves gradually weakening the fibres of our system by engaging in practices which are, in many cases, unlawful or deceptive and which eliminate competition.

Three years ago, while practicing law in my hometown, Lillington, I felt that a serious threat, not only to the consumer but to the legitimate businessman as well, was the fly-by-night operators who often moved into a community and with fast-sell gimmicks defrauded the consumer and deprived the local public businessman of a sale that he was entitled to make, and then moved out of the jurisdiction of the courts and local law enforcement officers. Most prevalent in

this area were some home improvement salesmen, magazine salesmen, vacuum cleaner salesmen, and the like.

In fact, my experience as an attorney with a client who had been defrauded of a large amount of money by a cosmetic firm operating from the West Coast, and using a pyramid selling scheme, as well as my representing three young clients who had been defrauded of \$12,000 by a so-called mortgage broker, formed my belief that the consuming public and the legitimate businessman were entitled to protection from such unfair and deceptive practices - thus, my proposal during the 1968 campaign for the establishment of a Consumer Protection Division within the Department of Justice.

After assuming the duties of my office and forming the Consumer Protection Division, I soon found that these fly-by-night operators were not the only ones who constituted a threat to the privately owned enterprise system and to the consumer. I found that in many cases, the trade practices of some well-known and highly advertised companies were also threats to both the consumer and the legitimate businessman.

Bait and Switch

To illustrate, let us consider only two of the many cases of "bait and switch" advertising which have come to the attention of the Consumer Protection Division.

On a given Thursday of this year, a large full-page ad appeared in the News and Observer, a newspaper which is read daily by at least a quarter of a million people. This ad, placed by a national company, which has stores in major cities in North Carolina as well as across the country, offered automobile tires at an unusually low price. A prospective customer from a small town near Raleigh, on the morning the advertisement appeared, drove directly to that store to make a purchase. He arrived about 10:30 a.m. and was told that all of the tires as advertised had been sold, and an effort was then made by the salesman to switch the customer to a higher priced tire.

Fortunately, this customer was not taken in. Two weeks later, when the same ad appeared again, he was waiting at the door when the store opened and went directly to the tire department. Again he was told

that they had sold out and when he complained to the manager, he was advised that the store had had only seven tires.

The other case of "bait and switch" advertising, which is an even more unfair method of doing business involves the name of the business, which is in itself deceptive.

In the Greensboro Daily News and other papers around the State, the following want ads appeared along with many others from time to time.

SLIGHTLY SCRATCHED

In shipment, 7 new 1969 zigzag sewing machines. Nationally advertised brand with full factory guarantee. \$35 each or small monthly payments. These machines may be inspected in warehouse at Unclaimed Freight.

BANKRUPT STOCK

6 new 1969 zigzag sewing machines to be sold for \$35 each. Monthly payments

available. These nationally advertised machines carry a full factory guarantee. They may be inspected in warehouse at Unclaimed Freight.

The conspicuous use of the trade name "Unclaimed Freight" on its stores and in its advertisements, especially when used in conjunction with a variety of statements such as "Slightly Scratched" and "Bankrupt Stock," carried a definite connotation that such items were being sold at distressed prices because the items had been damaged in shipment or because the prior owner had become bankrupt. The fact of the matter, by admission of the operators, was that no bankrupt stock was ever sold and little if any unclaimed freight was sold, but instead prospective customers were urged to buy new and more expensive merchandise.

Now, in connection with these two illustrations, I pose these questions to you:

(1) Was it fair to the customer who drove miles to purchase tires at the attractive price advertised

when the businessman did not intend to sell at these prices?

(2) Was it fair for the lady who traveled more than 150 miles to purchase a \$35.00 sewing machine to arrive there and find no such machines but instead found herself subjected to the high-pressure sales technique of "bait and switch?"

(3) Was it fair to the merchant in the hometown of these people and hundreds of others in similar cases who could hardly afford such expensive and deceptive advertising, and who pay their taxes to support local schools and other public institutions?

Special Price and Special Deal Advertising

Before attempting to answer these questions, let me illustrate further how deceptive practices in the market place injure both the consumer and the legitimate businessman with an actual case of "Special Price" and "Special Deal Advertising."

In a major city located in the Piedmont, a business engaged in the retail sale of televisions, air conditioners and other appliances, periodically ran advertisements in the newspapers making one or more of the following misrepresentations in each ad:

They used the words "Carload Sale," when in fact our investigation disclosed the company never received a carload of appliances at any one time.

They used the words "Cost Plus 10% Sale," when a check of invoices indicated that there were only a few such sales while most sales were made at prices at least 25% above cost.

They advertised "Over a Thousand Frigidaire Air Conditioners" and "Over 800 Air Conditioners - Big

Admiral," when this business had never possessed this many air conditioners over a period of an entire year, let alone at a given time.

They proclaimed "Don't Miss This Once a Year Deal," when such "deals" were offered at least once a month.

They advertised "Water Damage Sale - 30 Color TVs and Appliances at Less than Wholesale Cost," when by their own admission, they had never had any such appliances or TVs.

These misrepresentations led the average reader to believe that because it was overstocked, or because of certain damaged merchandise he could obtain a "Special Price" or a "Special Deal." But, in fact, such prices were as much or more than one would normally pay for merchandise of the same quality.

I would pose the same questions with regard to this type of advertising as I posed before - were such advertisements fair to the consumer and to the businessmen of that community and to the commerce of the community itself?

Free Gift

Another practice used by established business concerns, which I believe constitutes an unfair and deceptive practice, is the free-gift technique.

Recently in a city in North Carolina, a woman complained that she was sold a refrigerator and an automatic washer with a promise of a free four-day vacation in Florida. On investigation, it was disclosed that these vacations were anything but free. Travel to and from Florida was at the BUYER'S expense and not free. Motel rooms were provided but even this depended on the consumer's willingness to subject himself to several hours of high-pressure sales promotion by the local land developers who subsidized the vacation.

Would the lady have purchased the appliances had she known the truth? Were such representations fair to the consumer and, again, to other appliance dealers who probably could have sold the appliances at a better price?

Bait and Switch - Services

Some deceptive practices involving "Bait and Switch" by established businesses are not related to the sale of merchandise but instead to services.

On a main North-South thoroughfare certain motel owners advertise by means of large billboards rooms at \$6 and \$7, and then place in front of various rooms of the motels old automobiles which remain there permanently. Some of them even had clothes hanging in the back seat to make them appear to be cars belonging to other travelers. When a tourist was attracted to the place and tried to rent a room at the advertised rate, he was usually told that all of the cheaper rooms were taken and that the only rooms available were much more expensive.

I pose to you again the same questions. Is such a practice fair to the traveling public? And is it fair to the other motel owners? I pose an additional question - does such practice create and build goodwill for the State of North Carolina and the free enterprise system?

Now, these illustrations I have given you are but a few of the many complaints received in our office, but I think they make it clear that the answer to all of the questions posed is an emphatic "NO" - it is not fair to the consumer, to the other businessmen and to our concept of government. We in the Consumer Protection Division are continuing our efforts to keep the market place free of unfair and deceptive trade practices and believe that in doing so, we are performing a task which cannot adequately be performed by you, the businessman, or the consumer.

It is easy to see, I think, that whenever an unscrupulous businessman advertises a product he never intends to sell in order to attract customers to his place of business, he is willfully and deliberately engaged in deception and justice is not being served. Such "bait and switch" advertising is not only intended to defraud the customer, but also the legitimate businessman as well who advertises the products he truly intends to sell.

Whenever an unscrupulous businessman deceives a customer about the true price of a product, leading him to believe it will cost less than it actually does, the customer has not been given his just due, and has not been treated fairly. Trying to sell a product at the price the traffic will bear is one thing, but deceiving the customer into believing that he is receiving a special price is something else.

Whenever an unscrupulous businessman deceives a purchaser into buying a product he would not have otherwise bought at the price charged in order to receive a "free gift," justice is not being served.

These deceptive business practices - the "Bait and Switch," the "Special Price," and the "Free Gimmicks" - form the core of deceptive business; and deceptive business practices cheat not only the customer but the honest businessman as well. Such business procedures are not only a drain on the financial sector, but also a drain on the social sector of society, for they breed contempt for law and order, loss of faith in the free enterprise system and our way of life.

The concept of free enterprise, as known to the people of our State and Nation, has never included the right to deceive through misleading or false representations. I hope that it never will and I intend to do my part to see that it doesn't.

The last Session of the North Carolina General Assembly moved in a very positive and effective way to curb unfair and deceptive trade practices in North Carolina. It gave the Attorney General's Office the legal tool we needed in G.S. 75-1.1, which reads in part as follows:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Please note with me what the Legislature stated as the purpose for this legislation. The statute says in these very words:

The purpose of this section is to declare, and to provide civil legal means to maintain

ethical standards of dealings between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

This is a commendable objective; it is vital to the preservation of the free enterprise system; it is what I have been talking about here with you today.

We have tried to use common sense in the enforcement of this law. Certainly we do not want to take action which will be injurious to the reputation of businessmen who inadvertantly have been guilty of these practices. In addition, whenever we have found businessmen who have acknowledged such practices, we have given them the opportunity to sign a voluntary cease and desist order, thereby avoiding costly litigation and unfavorable publicity.

In some few cases, we have found it necessary to go to court and seek a restraining order preventing

the continuation of such practices. Unclaimed Freight, that I mentioned a few moments ago, was such a case.

We have taken action in countless cases throughout the State since we have been in office and have succeeded in stopping many unfair and deceptive trade practices. But, frankly, I am concerned that we are not making sufficient progress toward ridding the marketplace of unfair trade practices.

I have begun to believe that because we have acted so quietly in most cases, those who deceive the public and rob their fellow businessman of honest profits have decided they are willing to take their chances on being caught. I believe that perhaps they have decided to continue dealing in the "dark side of the marketplace" until caught, knowing that they can, without fanfare, agree to stop their deceptive practices and return home to count the dollars reaped through these schemes prior to their being detected.

What I am saying is that we have done a great deal of good in those cases which have come to