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Book Review of Honesty and Competition: False Advertising Law and Policy Under FTC Administration

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BOOK REVIEWS

HONESTY AND COMPETITION: FALSE ADVERTISING LAW AND POLICY UNDER FTC ADMINISTRATION. BY GEORGE J. ALEXANDER.¹ Syracuse, N.Y.: Syracuse University Press, 1967, Pp. 368. \$10.00.

The appearance of this work as a critical study of the Federal Trade Commission is long overdue. There are many celebrated names in the pantheon of anti-trust works, but the author's approach in this, his recent work, demonstrates a freshness and analytical depth that is unequivocal in its usefulness for research purposes. To be sure, other works have been written with special reference to the F.T.C., but they are severely dated.² Organizational and procedural treatment abound, but Professor Alexander's contribution to the literature addresses itself to a particularly thorny problem—the dual goals of increasing or encouraging competition and preventing consumer deception arising from fraud and advertising abuses. This is by no means a problem lending itself to easy solution. Any professional group of scholars today interested in the effects of advertising on competition and the effects of competition on advertising cannot afford to dismiss the enormously complex interrelationships discussed in *Honesty and Competition*.

Some contemporary authors, such as D. F. Pegrum, feel that the dual task of the F.T.C.—protecting consumers *and* dealing with anti-trust problems—is too mammoth a task for one governmental agency to undertake. Alexander disagrees at least in principle with this view. He feels the F.T.C. is more than adequately empowered to accommodate these two functions. To date, however, in the opinion of the author, the F.T.C. has concentrated its efforts, with some exceptions, in the direction of false advertising thereby encouraging a one-faceted rather than a dual-faceted approach. Not enough attention has been given to the anti-competitive effects of complex advertising cases. Alexander focuses his attention on the thesis that there is a conflict in the Commission's action of enhancing competition and avoiding consumer de-

1. Professor of law, Syracuse University.

2. T.C. BLAISDELL, *THE FEDERAL TRADE COMMISSION* (1932); G.C. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1925). There are, of course, critical studies of more recent vintage, including H.R. 3236, 81st Cong. (1951), and the well-known T.N.E.C. monographs.

ception. This topic is considered in Chapter Two, where the author really gets at the heart of the problem.

The book, in some respects, misses that fine balance between economic and legal avenues of approach as to how to maintain competitive conditions in the economy. It could have brought more clearly to the reader's attention the relationship between legal and economic policies.

In the opening chapter Alexander briefly sets forth the genesis of the F.T.C.'s standard of deception, ranging all through the checkered history of court reactions to the Commission's Congressional authorizations. He duly recognizes the decline of Caveat Emptor and the significant and yet dormant statutes that Congress has given the F.T.C.—dormant in the sense that the F.T.C. has been highly reluctant to use its power fully, reserving its authority for simple cease and desist orders. This, in effect, is implying that the F.T.C. has been more successful in policing unethical business and advertising policies than in preserving competition. In the reviewer's opinion, here is one area that could have been given somewhat more emphasis—*how* to strengthen F.T.C. jurisdiction in anti-trust activity. Alexander is more concerned with the proposition that the possible lessening of competition by product differentiation through advertising is subject to dispute, and further, that this dispute is possible because of the extreme difficulty in defining equivalence in goods. One might argue, he says, that a good that is advertised is not equivalent to a non-advertised good at all because the consumer values the product that is advertised more than a product that is not advertised. But this has been the problem of "competitive pricing" even since Chamberlin's and Robinson's works on imperfect competition appeared. The so-called "wastes of competition" are precisely those wastes associated with a successfully differentiated product that is otherwise of like grade and quality. It is the reviewer's opinion that no amount of legal definition is going to correct this problem. Only an attack on advertising policies per se is going to be effective. The problem, in other words, is in the structure of industry. It may well be that one can assert that measuring the "bad" effects as between advertised and unadvertised products is difficult because of the evaluation by the consumer of "trade dress," but this assertion fails to recognize the effect that differentiated products have on the formal structure of contemporary industry.

Alexander finds further that very little comparative advertising is undertaken by product manufacturers. Hence, precise identification of

the product is one approach to formulating an effective anti-monopoly policy by the F.T.C. Now here it is important to note that the economists' cross-elasticity of demand concept is the legally recognized tool for determining the extent of market power enjoyed by a given product. Anti-trust law, it is offered, has not traditionally been concerned with the definition of a single product per se, but with the definition of a "product market." Thus to provide a minimal solution to the imperfect market dilemma, "truthful representation of *product interchangeability ought* to be encouraged."³

It is in this area that Professor Alexander goes into a discussion of product-naming problems and regulation proposals. Of particular interest is the author's contention that F.T.C. suppression of certain types of informative advertising may be injurious to promoting higher cross-elasticities and hence to providing more effective competitive pressures. Moreover, the Commission has taken a position that has unfortunate consequences for new process manufacturers. If they are not allowed to name their new-process product in a functional way, then new process development can be seriously impeded. Clear cut false advertising can be interdicted, but the F.T.C. must recognize the relationship of so-called deceptive assertions to information that may be required for a competitive economy. The crux of the problem is this—consumer deception cases which have been interdicted have more often than not resulted in the suppression of important truths. This is the main message of the book—how to keep the F.T.C. within the spirit of traditional anti-trust legislation.

In scope, the book also encompasses product description and claims, price information, trade marks and firm names, testimonials, and sales promotions. These chapters are really just elaborations on the principle theme set forth in Chapter Two. Problems concerned with claims associated with assertions of uniqueness of product, ambiguity of meaning in advertised products, comparative merits of products, how quality standards should be approached, "puffing," uses of the word "free," and price information requirements. In discussing trademarks, the author emphasizes the probability that more and more consumers will have to rely upon trade names and trademarks due to the mushrooming of new products. Misdescription of product rather than producer will probably be where the F.T.C. will focus its attention. The remedies that Professor Alexander offers for deceptive trade symbols is simply for the F.T.C.

3. G.J. ALEXANDER, HONESTY AND COMPETITION 50 (1967).

to stop treating trademarks in an inconsistent manner; numerous cases are cited to sustain this position.

Testimonial advertising and sales promotion gimmicks are given extensive treatment. Here as in other sections of the book a fair explanation is given to contemporary F.T.C. policy with respect to paid endorsements and the rationale for "legitimate" sales. Tests of credibility more rigorously applied would help to balance out standards of legitimacy in the case of testimonials. In the case of sales promotions the Commission ought to intervene against lures, baiting devices and illegitimate "game" gimmicks.

The thesis of the whole book in the final analysis is to suggest that the Federal Trade Commission has an unswerving duty to examine all the implications its interventions into economic activity may have, thus providing guidelines for appropriate business conduct. To date the F.T.C. has failed dismally to recognize its impact on business and advertising procedures that are truly of national interest. It must be more considerate of its judgments—just policing false advertising in a rather rigid framework is not adequate. It is doctrinally sound, but in practice shows great instability which of course would call for a basic re-evaluation of its whole approach in the future. Finally, the book has a 73-page appendix section providing a ready reference to guides adopted by the Commission to aid business conduct.

There are minor shortcomings in the book, but these would be variously appraised depending upon the personal outlooks and professional affiliations of the reader. It is a legal discussion although the economic problem is always implicit. The book could serve as a supplementary reading for a better conducted senior or first-year graduate level course in Government and Business. Some discussion has been omitted that could have been included without increasing the size of the book unduly: The F.T.C.'s work in the past has been in the light and middle-weight category and not often in the heavyweight division. It has not sought the role of a biblical David; it has handled very few cases against the true behemoths of the business stage and has concentrated its efforts on small and medium sized businesses. How to strengthen its effectiveness against truly huge concentrations of market power would be a welcome addition to an already well-written and clearly reasoned book.

To attack the giant firms' advertising policies or what commercial bribes may be extant might require that the powers of the F.T.C. become punitive and not primarily preventive. If the Commission is to be-

come what Professor Alexander seems to be implying—not simply a champion of the consuming public, but an actual force in helping to maintain a competitive economy, then its staff and funds must be increased. Moreover, this would require the use of a larger number of specialists than now is used to help unravel the complex interrelationships between competition and false advertising. The problem of determining the amount and quality of information needed for insuring rational consumer decisions is going to require a broader perspective on the part of the F.T.C. than now exists. Be this as it may, Professor Alexander's book should go far to help bring order out of the confusion that is now apparent in false advertising cases. Private and public interests demand a reading of this work.

WILLIAM W. GILLIES*

PRELUDES TO GIDEON. BY DANIEL JOHN MEADOR. Charlottesville, Virginia: The Michie Company, 1967.

As a trial and appellate attorney of many years experience in federal courts and as a professor of law, this reviewer found Dean Meador's *Preludes to Gideon* an intensely fascinating and thought-provoking exposé of the frustrations, in both trial and appellate advocacy, experienced by counsel assigned to represent indigent convicts in the assertion of the denial of their 6th Amendment right to counsel in state court criminal proceedings and in the procurement of relief through federal habeas corpus. The narrative impressed this reader with the futility of the expenditure of so much time and effort, physical and mental, by eminent legal scholars on behalf of those so unworthy thereof and with results so disproportionate to the efforts expended. Surely, the need is thus demonstrated for the establishment of a more efficient system of indigent representation instead of the random selection of outstanding legal scholars with their resultant divergence from the field of legal education in which their profound knowledge is more usefully employed for the best interests of the nation in its entirety.

While the book has been written with law students primarily in mind, this reviewer deems it to be most instructive and of extreme practical significance to experienced trial and appellate advocates as well. It abounds in practical examples of proper pleadings at the trial level,

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