In January 1989, the three airlines filed suit to enjoin the Attorney General of Texas from enforcing the Texas Deceptive Trade Practices Act against their advertisements. The District Court for the Western District of Texas granted an injunction. Subsequently, 10 other airlines were allowed to intervene as plaintiffs and the court broadened the preliminary injunction to include the attorneys general of the other 33 states. The 34 state attorneys general appealed the order of the district court.

The Court of Appeals for the Fifth Circuit examined the circumstances in which federal law preempts state regulation. A preemption question requires an examination of congressional intent. Congress may explicitly define the extent to which its enactments preempt state law. In the absence of explicit statutory language, Congress may indicate implictly an intent to occupy a given field to the exclusion of state law. Such a purpose may be inferred if the pervasiveness of federal regulation precludes supplementation by the states or if the federal interest in the field is dominant. Finally, state law is preempted when it actually conflicts with federal law—that is, "when it is impossible to comply with both state and federal law."

In a brief overview of regulation and deregulation, the court of appeals noted that under the Federal Aviation Act, the Civil Aeronautics Board (CAB) had been given the power to regulate commercial aviation. With the advent of deregulation and the demise of the CAB, the CAB's role with respect to unfair or deceptive practices of the airlines was transferred to the Department of Transportation.

State laws proscribing deceptive advertising were expressly preempted by the Federal Aviation Act, as amended by the Airline Deregulation Act, when applied to advertising of fares by interstate and international airlines. According to the court of appeals, the history of federal legislation regulating airlines demonstrated the intent of Congress expressly to preempt state regulation of airline fare advertising. This decision left no right of action arising solely under state law. Though state laws were not aimed specifically at airlines and clearly did not attempt to set rates, the conclusion was inescapable that such laws did relate to rates when applied to airline fare advertising.

The appellate court's decision affirmed a preliminary injunction against the Texas Attorney General and subsequent expansion of the injunction to cover the other 33 states that had adopted the NAAG guidelines. The court noted that the preliminary injunction acts prospectively only and has no bearing on deceptive advertising suits against the airlines that have already been filed by state attorneys general.

3. In re Enforcement of National Advertising Regulations, CCH Trade Regulation Report No. 97 (Mar. 20, 1990), p. 1; BNA ATRR No. 1458 (Mar. 22, 1990), 415; BNA ATRR No. 1464 (May 3, 1990), 666. [Cohen]

In an effort to overcome the perception that the Federal Trade Commission has abandoned the regulation of national advertising, FTC Chairman Janet D. Steiger, speaking to the Consumer Federation of America, declared that the Commission's staff is aggressively pursuing several important cases against national advertisers. She also highlighted "some specific areas for the future."

Targeted areas include (1) promotional practices of the tobacco and alcohol industries, (2) health claims in food advertising, (3) children's advertising including toy advertising as well as "900" telephone services to "Dial-A-Santas," (4) advertising directed to the elderly on matters of health, safety, and financial security, and (5) environmental "green claims" such as those asserting a product is "biodegradable" or "environmentally safe." In relation to the latter claims, the FTC and eight states have asked several companies to substantiate their environmental claims. This joint effort on "green claims" is one of a number of cooperative undertakings between the states and the FTC.

Combating fraud continues to be a prime priority and, according to Chairman Steiger, nearly 50 cases have resulted in almost $100 million in judgments and more than $6.5 million in redress awards being paid to thousands of consumers. However, Steiger observed that telemarketing fraud remains a widespread problem, as do health fraud and credit issues.

4. In re Twin Star Productions, Inc., et al., CCH ¶22,821, FTC No. 882 3199 (Apr. 1990), BNA ATRR No. 1462 (Apr. 19, 1990), 579; in re TV Inc., et al., CCH ¶22,827, FTC No. 902 3037 (May 1990). [Cohen]

The Federal Trade Commission has sent a signal to the booming commercial information (the new jargon is "informercial") industry that deceptively formated programming will not be tolerated. The FTC has charged a television company and six of its officers with falsely representing that their program-length commercials are something other than paid commercial advertising. It has also charged them with making false and unsubstantiated claims about curing weight loss, baldness, and impotence.

This FTC consent agreement requires Twin Star Productions and five of the six named individuals to pay a total of $1.5 million in consumer redress. The company and the six individuals also agree not to disseminate the three "informercials" or another 30-minute advertisement for the book *How to Make Money By Doing Business With the Government*. In any commercials of 15 minutes or longer, they must include one or more disclaimers noting that the program is a paid advertisement for the particular product or service being advertised.

In another FTC complaint, marketers of bee-pollen products promoted for their therapeutic benefits not only misrepresented the curative powers of their tablets, jells, and capsules, but also misrepresented the television format used to advertise the items. In a consent order, TV Inc. and Thompson, one of its chief executives, agreed that they will not make any commercial that misrepresents that it is an independent program and not a paid commercial. If they produce any commercial in the next 10 years that runs 15 minutes or longer, they must display a notice informing consumers that the program is a paid advertisement. This disclosure must be made within the first 30 seconds of the commercial and also must be made immediately before instructions for ordering the product or service are given each time such instructions are provided. In addition, the order prohibits claims for the bee-pollen product that are not substantiated with competent and reliable scientific evidence. TV Inc. and Thompson are required to send all consumers who purchased the bee-pollen products a letter notifying them of the FTC order.

6.0 PROCEDURAL AND MISCELLANEOUS DEVELOPMENTS

1. *John F. "Jack" Walsh, et al.* v. *Ford Motor Co.*, CCH ¶69,043; CCH ¶69,044 (DC DC, Mar. 1990). [Axe]

If marketers' products have defects serious enough to cause problems with potential legal liability over a wide range of distribution, marketers nevertheless may avoid nationwide federal class actions suits seeking to attach liability to them. The District Court for the District of Columbia denied certification

to a class of owners of automobiles with defective transmissions that slipped from park to reverse. The court issued the denial because all members of the class might have had to rely on different factors to prove the cause of the transmission breakdowns as well as establishing different legal bases for their suits.

Many models of Ford automobiles built from 1976 through 1980 had automatic transmissions that resulted in defective park-to-reverse movement (i.e., sudden reverse movement occurred after the operator put the gear selector in "park" position). Ford owners from various states attempted to join as a single class in a federal court action against Ford. The question of this case was whether those owners could proceed legally as a class in a single action.

Federal procedural rules allow class actions if (1) fact and legal questions common to the entire class predominate over questions affecting only individual members or groups and (2) a class action is a legally superior device for action over other available methods. On the requirement of common fact issues the District Court for the District of Columbia found that though each owner experienced the common problem of transmission slippage, the owners did not show that a common defect was the cause. In fact, a multiplicity of causes might have produced a park-to-reverse incident in any given vehicle, including the unique driving and service history of each automobile and the particular circumstances of each incident. Thus, common fact issues did not predominate.

On the question of common legal issues, the court said state law governs breach of written warranty and implied warranty of merchantability claims. In this case, members lived in many different states and many different legal issues would be involved because standards of law of different states apply different requirements in warranty cases. Such varied standards included a diversity of interpretations of the implied warranty's "fit for ordinary purpose" standard, affirmative defenses, damages available, and the scope and content of the breach of warranty standard. So the automobile owners failed to meet the requirement of both common fact and legal questions that most predominate to sustain a class action suit.

The owners also failed to meet the second requirement that a class action is superior to other settlement procedures. The court noted that the various state interpretations of the warranty standards would affect significantly judges' wording of instructions to juries, the standards for a directed verdict, and even the outcome of the case. Difficulties in managing the case as a class action suit were inevitable and insurmountable. The court concluded that smaller scale actions on statewide bases were a more practical and efficient way of resolving the claims.

The claimants, in a second case, contended that if a class action could not be used to bring all the cases into a single action, joinder (joining the various classes into a single joint action) would be defensible. However, a legal requirement for joinder is that each plaintiff's claim must arise from the same transaction or event. The court on this issue said that there was no common defect or cause of the park-to-reverse phenomenon. So joinder was dismissed as an inappropriate method of legal redress.

Marketers of products with large sales and wide distribution, should their product be found to be defective and hence to subject them to possible breach of warranty actions, are in an improved position if this decision is sustained. Requiring a potentially large and widespread class of claimants to assemble and sue in multitudes of groups rather than in one single nationwide class might substantially lessen the filing of claims of a class action nature.

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2. "United States Obtains Asset Freeze in Japanese Court in Bid Rigging Case," *CCH Trade Regulation Report Newsletter*, No. 108 (June 5, 1990); BNA ATRR No. 1468 (May 31, 1990), 853. [Axe]

A Japanese court has frozen the assets of a Japanese company, Hosaka Engineering, after the United States sued several Japanese companies for rigging bids on contracts with the United States Navy.

The United States Department of Justice charged in the Kawasaki District Court in Japan that 140 Japanese construction companies were involved in a three-year scheme that rigged 250 contracts for construction at a U.S. naval base in Japan. Bid rigging (or, in Japan, "dango") is a long entrenched business practice and, until this suit, had never been challenged by the United States government. The United States Naval Investigative Service's investigation revealed that construction costs were inflated by as much as 25% by this bid-rigging scheme. The Japanese Fair Trade Commission, which is charged with enforcing Japan's antitrust laws, also investigated the complaint by the U.S. government. Since December 1989, 124 Japanese companies have been required to pay a total of $33.8 million to settle charges made by the Department of Justice. When Hosaka Engineering refused to settle charges as the others did, the United States sued. In a landmark decision, the Japanese court froze $1.6 million of Hosaka Engineering's assets.

This proceeding may prove to be an important step in leveling the international playing field by holding marketers of all nations to a developing international code of business and legal conduct.

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