

*REGULATING CHARITABLE SOLICITATION*  
*AS A FORM OF CONSUMER PROTECTION*

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*I. INTRODUCTION*

This paper evaluates the wisdom of regulating charitable solicitation through federal laws designed to protect consumers from unfair trade practices.

The immediate subject of the paper is legislation introduced in Congress (H.R. 3964) to include nonprofit organizations within the jurisdiction of the Federal Trade Commission, and to impose certain disclosure and reporting requirements on charitable solicitation. However, that legislation is simply the launching point for my paper. Because FTC regulation of deceptive practices is so closely intertwined--by both subject matter and historical evolution--with the general federal law of unfair trade practices, I must, of necessity, draw a wider circle around my subject matter. Thus, I will also address the regulation of charitable solicitation as an analogue to the federal law of unfair trade practices.

*A. The Federal Trade Commission*

Let me first provide a little background about the FTC and how it operates.

The FTC Act is not a detailed code of business conduct. The Act simply prohibits "unfair or deceptive acts and unfair methods of competition". That term is not defined in the legislation, but it has come to have some content from the opinions written by the FTC and its reviewing courts. The Commission itself is one of the so-called independent agencies. It is located in Washington with seven regional offices and with jurisdiction over any matter "affecting commerce." It may move by adopting rules defining unfair and deceptive practices, or by bringing an administrative complaint against an allegedly offending party. Complaints against one who has violated either a valid rule or the FTC Act are heard before an administrative law judge, subject to appeal to the entire five person commission, and to review by a federal court of appeals and the Supreme Court. The Commission's primary remedy is an administrative injunction--a cease and desist order--but the FTC may, under certain circumstances, also seek reparations for consumers.

In 1973, Congress added Section 13(b) to the FTC Act, thereby authorizing the Commission to petition federal district courts for preliminary injunctions, and, in some cases, permanent injunctions to enforce its statutory mandate.<sup>1</sup> This has become far

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1. 15 U.S.C. § 53 (b) (1982). My discussion of this provision is based on the report of The American Bar Association Special Committee to Study the FTC, p. 45-48 (April 7, 1989).

more than a simple injunction remedy. The Commission has successfully used it to seek ex parte asset freezes and asset escrow arrangements.<sup>2</sup> Moreover, with increasing frequency, the Commission has successfully used it to obtain affirmative relief, including monetary damages, through suits for permanent injunctions. Courts have consistently exercised their equitable authority to award monetary equitable relief in those actions.<sup>3</sup> The affirmative relief granted has included not only restitution to defrauded

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2. The Commission's authority to seek and the district court's authority to award such relief was sustained in *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir.), cert. denied, 456 U.S. 973 (1982); see also, e.g., *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1024-26 (7th Cir. 1988) (upholding asset freeze); *FTC v. Pannos Mining Co.*, Civ. No. 88-06453R (C.E. Cal. Nov. 22, 1988) (imposing asset freeze and appointing permanent receiver), noted in 5 Trade Reg. Rep. (CCH) ¶ 22,631; *FTC v. Overseas Unlimited Agency, Inc.*, Civ. No. 88-2583 (C.D. Cal. June 6, 1988), noted in 5 Trade Reg. Rep. (CCH) ¶ 22,552.

3. See *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431 (11th Cir. 1984) (appellate court held that district court has inherent equitable powers to grant ancillary monetary relief incident to its express statutory authority to issue permanent injunctions under the FTC Act); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982) (upholding authority of district court to freeze assets in a Section 13 (b) action, but acknowledging authority to order broad ancillary relief); *FTC v. Solar Michigan, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 68,339 (E.D. Mich. Sept. 27, 1988) (asset freeze under Section 13 (b) was warranted to preserve the possibility of future monetary relief; consumer redress was also appropriate); *FTC v. Cal.* 1983) (holding that district courts possess ancillary jurisdiction under Section 13 (b) to grant consumer redress, including rescission of contracts); see also Paul, The FTC's Increased Reliance on Section 13 (b) in Court Litigation, 57 Antitrust L.J. 141, 143-44 & nn. 9-11 (1988) (citing cases).

consumers,<sup>4</sup> but also contract secession and permanent asset freezes on receiverships to preserve the possibility of further administrative relief.<sup>5</sup>

In addition, although it is less used (and less useful), the FTC also has the explicit authority to seek consumer redress whenever it proves a violation of a trade regulation rule or after it completes an administrative proceeding against a challenged practice that a "reasonable man would have known under the circumstances was dishonest or fraudulent."<sup>6</sup> Finally, the FTC may, in some cases, seek civil penalties against one who has engaged in a deceptive practice that is prohibited by a rule or a previous administrative adjudication.<sup>7</sup>

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4. See, e.g., *FTC v. Schoolhouse Coins, Inc.*, Civ. No. 8705415KN (C.D. Cal. announced Sept. 28, 1988), noted in 5 Trade Reg. Rep. (CCH) ¶ 22,602; *FTC v. Rainbow Enzymes, Inc.*, Civ. No. CIV-87-1522 (D. Ariz. Sept. 2, 1988), noted in 5 Trade Reg. Rep. (CCH) ¶ 22,595; *FTC v. Amy Travel Services, Inc.*, Civ. No. 87C6776 (N.D. Ill. May 4, 1988), noted in 5 Trade Reg. Rep. (CCH) ¶ 22,546; *FTC v. Atlantex Associates*, 1987-2 Trade Cas. (CCH) ¶ 67,788 (S.D. Fla. 1987) (\$12 million in consumer redress ordered); *FTC v. Trans-Alaska Energy Corp.*, Civ. No. 84 2001 (C.D. Cal. Apr. 27, 1987) (\$2.1 million in consumer redress ordered), noted in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,446; *FTC v. New England Rare Coin Galleries*, Civ. No. 842 3144 (D. Mass. announced February 13, 1987) (restitution payment required), noted in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,431; Evans Products Co., Civ. No. 812 3222 (S.D. Fla. announced June 17, 1986) (bankruptcy court required debtor to pay \$2.4 million in consumer redress pursuant to an FTC claim), noted in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,372; *FTC v. Leland Industries, Inc.*, Civ. No. 83-3589 (C.D. Cal. announced Oct. 11, 1985) (restitution payment required by settlement), noted in [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,297; *FTC v. Kitco, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985).

5. See, e.g., *FTC v. Rare Coin Galleries of Am. Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,338 (D. Mass. 1986).

6. 15 U.S.C. § 57(b) (1982).

7. 15 U.S.C. § 45(m) (1982).

B. The Proposed Legislation

Since its passage in 1914, the FTC Act has been applicable only to for-profit organizations. H.R. 3964, introduced by Representative Luken and others, would change that by making the FTC Act also applicable to all non-profit organizations except political parties.<sup>8</sup> As a result, the broad prohibition in the FTC Act against "unfair or deceptive acts or practices or unfair methods of competition" would also be applicable to non-profit organizations.

In addition, the Luken bill contains several provisions applicable directly to charitable solicitation by professional fund raisers. The bill would prohibit interlocking directors or officers between a charity and its professional fund raising organization, require the FTC to establish uniform accounting principles for fund-raising costs by charities, and require reporting to state agencies by the fund raising organizations of the amounts they charge each charity and the funds raised.<sup>9</sup> The bill would also require notification by the professional fund raiser to any potential donor that the fund raising is being conducted by a professional fund raiser and notification of the fund raiser's name and address.<sup>10</sup> Finally, the bill would preempt inconsistent state law,

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8. This would be accomplished by amending Paragraph 3 of Section 45 of the Act to strike out the language that appears after the words "or unincorporated".

9. H.R. 3964, Section 3

10. H.R. 3964, Section 3, 1990

although states can request a waiver if their state law provides similar protections.<sup>11</sup>

The terms 'professional fund raiser' and 'solicitation' are broadly defined. Professional fund raiser is defined as a "person who engages in solicitation for a charity for compensation and who is not an employee of the charity from whom the solicitation is made."<sup>12</sup> Solicitation includes requests for anything of value to be used by or for a charitable organization. Requests may include oral or written requests, radio or television appeals, handbills and written advertisements.<sup>13</sup>

It should not escape our attention that the Luken legislation would invite the FTC to regulate all unfair or deceptive acts of nonprofit organizations--not simply fundraising practices. The implications of this expanded jurisdiction are enormous. As just one small example, if this legislation were to pass it would behoove the dean of any law school to review admissions materials to determine whether the puffery that we have come to expect from law school public relations might possibly be construed to be deceptive. It is not difficult to think of the many ways in which every attempt by a nonprofit organization to secure clients or provide services might now become subject to FTC regulation. Moreover, because the FTC may also enjoin "unfair methods of

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11. H.R. 3964, Section 4, 1990

12. H.R. 3964, Section 3, 1990

13. H.R. 3964, Section 3, 1990



competition", we could soon have a new player in the debate over unrelated business income.

I take it, however, that at this conference I need only address concerns that impact the regulation of solicitation activities--that is, to assume that the bill were more narrowly crafted to address the subject that led to its drafting.

## II. CONSUMER PROTECTION AND DONOR PROTECTION

In this paper, I want to take what we know about the federal approach to the regulation of unfair trade practices and see what lessons we can learn as we think about the federal regulation of unfair solicitation practices.

I have no trouble equating the protection of donors with the protection of consumers, and I find the analogy between consumer protection and donor protection to be compelling. Consumers, of course, give up their money in return for some good or service, while donors give up their money for something less tangible or direct. Nonetheless, an exchange takes place whether the consumer is parting with her money for a new cold remedy, or for the psychological rewards of supporting charity, or to see her name on a plaque. As one who is in the middle of a law school campaign to raise \$25 million, I know that one rarely gets a gift without identifying something that the donor feels she is getting in return.

Just as clearly, charitable gifts--like the purchase of a cold remedy--might result because of a false or deceptive statement by one seeking the gift, or because of a misperception by the donor. A solicitation by the National Lung Association that makes donors think that they are giving to the American Lung Association is analogous to garden variety trademark issues, while a claim that 90 percent of the money raised goes to its charitable purpose is not unlike the statement that 90 percent of all dentists recommend Crest.

However, the strength of the analogy does not necessarily mean that the FTC's jurisdiction should be expanded to encompass non-profit organizations. Here, I want to introduce two themes that run throughout my paper.

The first theme is that Federal Trade Commission jurisprudence has sometimes been based on a model of exchange that should not automatically be transferred to the non-profit world. I take as my orientation the notion that the relationship between donor and donee, as that between buyer and seller, is a voluntary, consensual one, and that FTC intervention into that relationship ought to be based on identifying and correcting barriers that inhibit the maximum outcome of these exchanges. The barriers, of course, are similar in the donor-donee relationship and the buyer-seller relationship, and they can be grouped by common themes, such as information imperfections and imbalances of bargaining power. They are not identical, however,

and the differences in the nature of the exchange between donor and donee may require a different outcome to any analysis.

In order to determine whether to intervene in these consensual arrangements, the FTC must understand the basis of the exchange between buyer and seller, or between donor and donee--that is, the scope of their expectations and bargain. The law of deceptive trade practices should be shaped to replicate the bargain that the parties would have struck in the absence of a misunderstanding or misperception. Because the basis of the exchange is different in sales exchanges than in donative ones, the substantive contours of the law should probably vary.

The second theme running through my paper is the issue of institutional competency. By that I mean the identification of the characteristics and resources of an institution like the FTC that govern its effectiveness as an enforcement agent, especially in contrast to other competing means of enforcement. - How we define the substantive contours of the law is often determined by the nature of the institution that is enforcing the definition, and in this area of the law there is a strong interplay between substance and procedure. When drawing analogies between protecting consumers and protecting donors, we must be mindful of the lessons that we have learned concerning the institutional competency of the legal system to deal with the substantive definitions.

My focus is thus to identify the strengths and weaknesses of the FTC both as an institution and in its role as the agency charged with establishing the substantive contours of the definition of deception, and to use that analysis to suggest what we might expect if the FTC is given a mandate over charitable solicitation. I will then suggest other federal institutions that can be brought into play.

### III. THE DEFINITION OF UNFAIR OR DECEPTIVE ACTS

Let me begin with the FTC's substantive mandate. Deceptive acts come in two packages--those that involve an allegedly false statement, and those that involve a failure to disclose something.

#### A. Deceptive Statements

When addressing statements that are expressly or impliedly false, the FTC and the courts have pushed the substantive definition about as far as it can go. A statement is actionable if it has the "tendency or capacity to deceive"<sup>14</sup> a substantial number of consumers. When evaluating that capacity or tendency, the question is not whether the consumer has acted reasonably when evaluating the statement, but whether we can expect that the average consumer, which includes "the ignorant, the unthinking and

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14. Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (footnote 6)

the credulous"<sup>15</sup>, would believe the assertion made. Further, a false claim is actionable even without a finding that it was material to the purchase, and even if there is neither intent to injure the consumer nor any showing of consumer injury. Truth is a defense, of course, and there is a privilege for puffing--that is, for broad general claims that are not thought to have content even by "the ignorant, the unthinking and the credulous".

Under this definition the FTC need not determine the extent to which the false statement was the basis of the bargain, except insofar as the "puffing privilege" allows it to find that extravagant claims or false statements would not be believed or acted on by consumers.

In my view, this broad definition stems from both a substantive and an institutional perspective. Substantively, because deceptive statements do no good in a market economy, it was believed that the equation of deceptiveness with illegality could do no harm. Equally important, however, may be the notion that because the FTC has limited resources and an unlimited series of problems to address, it would be better off with a broad mandate, which allows it to litigate cases easily and quickly and which, by the force of its breadth, deters conduct with fewer enforcement resources.

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15. Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1171-73 (Eleventh Circuit, 1985), quoting Florence Mfg. Co. v. J. C. Dowd & Co., 178 F. 73, 75 (Second Circuit, 1910)

Experience has shown, however, that the analytical underpinnings of this broad doctrine are weak. From an institutional point of view, the broad definition of deception has given the FTC the ability to wallow in triviality--that is, to attack deceptive practices that are not really harmful because consumers do not really rely on them. Many observers believe that the FTC has too often taken advantage of that opportunity.<sup>16</sup> Because there is little substantive doctrinal check on what the FTC prohibits, the FTC can move against deceptive practices that do not fundamentally impair the basis of an exchange.

My favorite example is the case in which the FTC attacked a company that created a television advertisement showing its shaving cream shaving what appeared to be sandpaper. Because the sandpaper would not film well on television, the company attached sand to plexiglass and showed the plexiglass, which on television looked just like sandpaper. The shaving cream did allow a razor to shave real sandpaper, but that is not what consumers actually saw in the commercial. Clearly, consumers believed that they were seeing someone shave sandpaper but clearly they were not. Yet one wonders why the case was never brought. On the one hand, given the "inadequacies of television transmission"<sup>17</sup>, it would have been virtually impossible to film a commercial

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16. See e.g. Report of the American Bar Association Special Committee to Study the Role of the Federal Trade Commission, 33, April 7, 1989. (" Critics respond that the Commission has failed to bring cases of consequence, and that it has devoted insufficient attention and resources to advertising enforcement.")

17. FTC v. Colgate-Palmolive, 380 U. S. 374 (1964)

showing a razor shaving sandpaper. On the other side, it is unlikely that even an incredulous consumer would have cared to know that what he was viewing was in fact sand on plexiglass and not sandpaper.

Not only are there no institutional constraints on the FTC's exploitation of its broad mandate, but several institutional factors seem designed to impel it to move in the wrong direction. The FTC's output is often measured in terms of the cases brought and won, and trivial cases may be easier to bring and win. As a so-called "independent agency", the FTC is closer to Congress, than to the executive, and is thus peculiarly susceptible to pressure from powerful members of Congress. Finally, throughout its history, the Commission itself has been a resting ground for former politicians and their staffs, making an appeal to fairness more compelling than a methodical consideration of which transactions are truly impaired by deceptive practices.

The FTC need not exploit its substantive mandate to the fullest, of course. In response to both its critics, and the analysis of the law and economics movement, the FTC appears to have been revising its enforcement strategy. Indeed, in 1984, the FTC announced a new standard of deceptiveness that included both the requirement of misleading consumers acting reasonably under the circumstances, and the notion of materiality<sup>18</sup>. Moreover, the case selection in the last decade appears to have been more mindful of the importance of the case to improving the bargain between buyer and seller.

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18. In re Cliffdale Associates, 103 FTC 110 (Dkt 9156).

B. Deceptive Omissions--The Duty to Disclose

The other part of the deception standard involves the question of material omissions. In this class of cases, a statement misleads not because of what was said or implied, but because the consumer makes a decision on the basis of an assumption that is not true. Under these circumstances, the law must address the issue of the seller's obligation to correct the misperception and volunteer missing information. If I buy shaving cream on the representation that it allows me to shave closer, but I then find that the shaving cream also causes wrinkles, does the law put the seller under an obligation to tell me that which I would have wanted to know had I thought to ask the question. Or, to put it another way, must the seller disclose defects in the product that make it substandard and inferior.

Here, one finds that the FTC has not claimed, nor been given, such an expansive substantive mandate. The FTC has imposed a duty to disclose in only a narrow class of cases. The duty arises clearly where the failure to make the disclosure impairs the health or safety of the consumer. Thus, a weight reduction clinic was found to be under a duty to disclose to consumers that the clinic's weight loss program required the use of a drug that had not been approved by the FDA for treating obesity.<sup>19</sup> A second class of cases, now quiescent, is those in which the FTC has required a seller

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19. Simeon Management Cor. v. FTC, 579 F2d 1137 (1978)



to disclose that its products were made in foreign countries or with foreign ingredients.<sup>20</sup> These cases arose at a time when "Made in Japan" was thought to signify substandard goods. They evaporated when "Made in Japan" came to signify quality, and the cases began to re-emerge when the label was thought to be useful to allow consumers to protect American jobs. Other than these two classes of cases, however, under FTC jurisprudence, a seller is generally thought not to be under a duty to disclose information that, if known, would be material to a consumer's purchasing decision.

It is instructive to understand why the duty to disclose is so narrow, while the duty to avoid false disclosures is so broad.

We saw that a broad duty to avoid false statements was perceived to be relatively costless because false statements serve no purpose in a market economy. By contrast, the costs of a general duty to disclose information, even material information, are thought to be rather high. Imposing a general duty to disclose would entail difficult line-drawing; clearly, we would not want to impose a duty to disclose any information that consumers might find interesting. Even if we could restrict the disclosure requirement to information that was truly material to the bargain, the adverse impact of such a rule on the legitimate function of advertising could be great. We rely on

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20. American Tack Co. v. FTC, 211 F.2d 239 (2nd Circuit, 1954); L. Heller & Son v. FTC, 191 F.2d 954 (7th Circuit, 1951).

advertising to improve consumer information, and thus make markets work more perfectly. This might be impaired because of the chilling effect that a general duty to disclose material information would impose. If I must disclose what consumers are unlikely to like about my product, at the same time that I tell them what they should like about my product, I am much less likely to give them any information at all. Since the premise of the law of unfair competition must be that information is important to the functioning of the marketplace, any legal doctrine that impairs the flow of information, without countervailing benefits, must be suspect.

As a result, the duty to disclose has been imposed only where the failure to disclose is material, and only where the result is significant injury to the consumer—either because it could result in bodily harm or, as in the case of foreign-labeled goods, to protect the perception that Americans are superior craftsmen or are entitled to special protection from the marketplace.

### C. Unfair Acts

Finally, while I am setting up the analytical structure of the FTC's authority, let me say a brief word about the FTC's authority to challenge "unfair" practices. Not surprisingly, every "deceptive" practice is also an "unfair" one. But the unfairness doctrine extends the FTC's substantive jurisdiction beyond those transactions in which a consumer acts because of a misperception or misunderstanding, giving the FTC the

authority to intervene in a transaction even when there has been no deception. The analytical analogue to the FTC's "unfairness" doctrine is the doctrine of "unconscionability" in commercial law; both are relatively undefined but connote over-reaching, coercion, or unfair bargaining power. The FTC has interpreted its own version of this doctrine narrowly, in part to counter exaggerated fears of how far the FTC might carry its jurisdiction, and in part to forestall a legislative effort to restrict its power to attack "unfair" practices. Thus, the FTC issued a statement in 1980 by which it promised to use its power over unfair practices only when the harm in question was significant (either in monetary terms or because of a risk of physical injury), only when the potential harm to the consumer outweighed the legitimate reasons for the practice, and only where the consumer could not be protected by the exercise of reasonable care.

Most of the FTC's "unfairness" cases on rules could also have been brought under an expanded definition of "deception". Of those that could not, virtually all are an attempt by the FTC to rewrite the law of commercial transactions. Under this notion, the FTC has interdicted coercive practices<sup>21</sup>, stopped a mail order firm from

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21. See, e.g., *Holland Furnace Co. v. FTC*, 295 F2d 302 (7th Cir. 1961) (unfair to dismantle a consumer's furnace and refuse to put it back together until the consumer made a purchase).

suing defaulting consumers in a jurisdiction far from the consumer's residence<sup>22</sup>, and revised the terms of a consumer's consent to draconian post-sale remedies.<sup>23</sup>

#### IV. ANALYSIS

An effective legal scheme against deceptive solicitation practices, like one against unfair selling practices, must take into account both the substantive definition of the violation and how enforcement is carried out. To oversimplify, in some cases, a violation is clear--the seller (or solicitor) intended to defraud, knew of the fraud, and has no reasonable claims that its practice advances any legitimate goal. In such cases, the primary issue is one of relative efficacy of various enforcement mechanisms. Where the existence of a violation is in doubt, however, the issue expands from one of enforcement to one of which agency or court is in the best position to create and apply an appropriate standard.

Paradoxically, the FTC has, in my view, had relatively greater success in bringing action against clear fraud than in using its powers to decide cases where a careful balancing of interests or policies is required.

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22. Spiegel v. FTC, 540 F2d 287 (7th Cir. 1976)

23. FTC Credit Practice Rule, 16 CFR 444 (1985)

I will proceed by making and defending a series of assertions about the role of the FTC in regulating charitable solicitations. In doing so, I will comment on the role of other institutions and enforcement mechanisms that make up the federal unfair trade practice effort.

**ASSERTION 1: THE FTC SHOULD NOT BE ASKED TO ENGAGE IN CASE  
BY CASE DEVELOPMENT OF THE DECEPTION STANDARD.**

As we have seen, the substantive standard for defining deceptive practices under the FTC Act is both too broad and too narrow. It is too narrow in the sense that the FTC has been timid in its attempts to identify information that should be disclosed to consumers because it is material and important. The Luken bill recognizes this by itself imposing the duty to disclose information relating to the use of a professional fundraiser, while relegating to the FTC only the issue of the accounting standards to be used in making the disclosure. I will leave to others the question of whether these particular disclosure requirements are appropriate. My point is the narrow one that if disclosure is to be required, it is Congress and not the FTC that must mandate the disclosure.

The FTC's substantive scope is too broad in the sense that it permits the FTC to bring cases without a showing that false statements are material or relied upon by consumers, and without an assessment of the degree of harm to consumers from the

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false statement. This gives rise to the danger that the FTC would bring cases that are not important--a danger that is exacerbated by the absence of institutional controls to help the agency set priorities. Moreover, in my view the FTC's record does not give one much confidence that the substantive doctrine could be carefully molded to recognize the differences between a buyer-seller relationship and a donor-donee relationship. If the FTC is not able to go past the notions that all false statements should be actionable, and instead really understand which false statements adversely effect the legitimacy of the donor-donee relationship, the FTC runs the risk of chilling legitimate charitable solicitation.

The FTC can provide an effective enforcement mechanism against clear fraud -- that is, when intent to deceive and concrete damage are relatively easy to prove. The powers that the FTC has been given to ask district courts to freeze assets and award monetary relief have proven to be effective where issues of liability are not substantial. In such cases, the FTC acts less like an administrative agency and more like an enforcement agency. Agency expertise becomes less important and a court, rather than the agency itself, imposes the relief. Subject only to the limitations of its budget and the fact that much of such clear fraud is local in nature, the FTC can play a positive role.

ASSERTION 2: FTC ENFORCEMENT WOULD BE HINDERED BY A LACK  
OF RESOURCES

The FTC has too broad a mandate and too few resources to engage effectively in case by case doctrinal development on a broad scale. Although the FTC budget has increased in recent years (from \$66.65 million in 1988 to \$73.615 million in 1990), in the past decade the FTC has had a 50 percent decrease in work years , without a decrease in its jurisdiction. Since 1979, Congress has provided funds for significantly fewer people: 1,719 in 1980; 1,238 in 1984; 986 in 1988; and 923 (projected) for 1989. Today, there are only 118 lawyers in the FTC Bureau of Consumer Protection, and only 115 lawyers in its regional offices (and they are involved in both the consumer protection and the antitrust work of the FTC.) This is hardly enough resources for the FTC to fulfill its current mission,<sup>24</sup> let alone to take on another one.

### ASSERTION 3: THE FTC IS NOT WELL SUITED FOR LOCAL ENFORCEMENT

The FTC is most competent to address abuses that are of regional or national scope. It is far less competent to address local abuses. Although the FTC has regional offices, investigations by regional offices introduce new inefficiencies and coordination problems. Such investigations take longer, they are harder to fit within the FTC's overall priorities, and they require difficult and time consuming coordination with the

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24. In its report in April 1989, the American Bar Association Special Committee to Study the Role of the Federal Trade Commission found that "additional resources as well as better use of its resources, would aid the FTC's mission . . . The decline in real resources should be halted, and an increase in resources provided."

Washington office. In short, the FTC has no institutional claim to be more effective in local disputes than the enforcement agencies of state and local governments.

The FTC does have a positive role to play in serving as a clearinghouse for information and local fraud and in keeping track of fraudulent schemes that move from state to state. It can also serve as a resource to help local prosecution, or to suggest state or local legislation that is designed to improve enforcement.

ASSERTION 4: PRIVATE ENFORCEMENT IS OFTEN SUPERIOR TO FTC  
ENFORCEMENT

In my view, the FTC should not be charged with enforcement responsibilities when there is an effective private remedy available. Private remedies are often available against unfair or deceptive practices, and private remedies are likely to be as effective for deceptive solicitation as for deceptive sales practices.

At one time, the FTC spent a substantial amount of its resources enforcing the trademark rights of one party against a rival. Trademark infringement and passing off were (and are) deceptive practices subject to the FTC Act, as well as common law torts and violations of state and federal trademark legislation. Any person that could get the FTC to protect its rights preferred that publicly subsidized remedy to a private one. Yet the FTC has come to recognize that effective private remedies are superior to public



ones, and that it ought not to be expending its scarce enforcement resources on litigation that can be brought by private parties. Private remedies are often amply available under both state and federal law. They are, I would claim, more efficient than litigation directed from Washington. On the one hand, private litigants have ample incentive to protect the public interest while protecting their private interest. On the other hand, the cost of litigation acts as an inherent check against litigation that will promote neither the public nor the private interest.

For similar reasons, private enforcement of unfair solicitation practices would often be more efficient and effective than public enforcement through an administrative agency. Take, for example, a complaint by the American Lung Association that another group calls itself the "National Lung Association" and deceives donors into believing that they are giving to the legitimate national organization. That complaint might be better addressed through private adjudication than through the FTC.

In this connection, nonprofit organizations should know that they sometimes have an effective remedy under Section 43(a) of the Lanham Act, which creates a federal private remedy for deceptive trade practices. That Act provides that:

"any person who shall... use in connection with any goods or services... any false description or representation... and shall cause such goods or services to enter into commerce... shall be liable to a civil action... by any person who believes that he is or is likely to be damaged by the use of any such false description or representation".

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This statute was passed as part of the federal trademark provisions of the Lanham Act, and early interpretations treated it narrowly, as if it applied only to classic cases of passing off.<sup>25</sup> More recent cases, however, have given it a more expansive reading, applying it to broader forms of deception that injure another,<sup>26</sup> whether involving a trademark violation or not. Moreover, it has been construed broadly, so that the term "goods or services" has been taken to encompass non-profit organizations, including those that do not represent a commercial interest. Under these cases, an association of Black government employees has been able to enjoin another organization from using a deceptively similar name<sup>27</sup> and the Girl Scouts have been able to challenge the use of a picture of a Girl Scout on a commercial poster.<sup>28</sup> Although I have found no case in which Section 43 (a) has been used to challenge the solicitation practices of a rival fund-raising organization, my reading of the recent cases expanding the scope of section 43 (a) suggests that such a suit would be successful.

ASSERTION 5: GIVING THE FTC POWER TO PREEMPT STATE LAW IS  
UNNECESSARY AND UNMEANINGFUL

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25. *Samson Crane Co. v. Union National Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949).

26. *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F. 2d 186 (2d Cir. 1980)

27. *Blacks in Government v. National Association of Blacks Within Government*, 601 F. Sup. 225 (1983)

28. *Girl Scouts of United States of America v. Personality Poster Mfg. Co.*, 304 F. Supp. 1228 (1969)

A great deal of confusion surrounds the issue of the preemptive effect of FTC action. Even Congress misunderstands it. When one completes the analysis of the relevant doctrine, however, one sees that preemption is not a meaningful issue when discussing the FTC's role in regulating charitable solicitations.

Unless Congress specifically authorizes it, the FTC may not adopt a rule or bring an action that challenges an act or practice of a state or local government. Congress has not authorized it. Thus, the FTC may not pass a rule, or bring an action, to enjoin a state from regulating the practice of optometry in an anticompetitive way.<sup>29</sup> Similarly, we can surmise that if a state or local government imposes a requirement on charitable solicitation, the FTC may not overturn that requirement by rule or order. By extension, the FTC may not enjoin a person or organization from complying with a rule required by a state. That conduct would be construed to be "state action" and therefore outside of the FTC's jurisdiction until Congress expressly gives the FTC authority to overrule state action, which it has not yet done.

These principles are now well settled, but I would judge them to be irrelevant to issues surrounding the regulation of charitable solicitation. As I understand it, the complaint is not that state regulation is affirmatively misguided, but that state regulation is too weak, haphazard and uncoordinated to be effective. Under these circumstances,

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29. California State Board of Optometry v. Federal Trade Commission, \_\_\_ F2d \_\_\_ (D.C. Cir., 1990)

there is no need for the FTC to challenge state action, and the Luken bill does not even suggest that they would have that power.

When a state is inactive or ineffective in its regulation, the FTC might move in and take action, subject only to its own jurisdiction and enforcement philosophy. When it does, however, a preemption issue hardly ever arises. In such cases, the FTC is imposing requirements on private parties beyond those required by the state, but it does not have to preempt state law in order to do so. As long as the FTC acts within its jurisdiction, there is no clash with state regulation and it can fill up any gaps left by state regulation without resorting to the preemption doctrine.

Preemption becomes an issue only if the FTC wants to say "You must do X" and the state says "You must not do X". When that case arises, it is helpful to know whether Congress intended the FTC to have the final word, and that is what the Luken bill would do. I do not know when that power would be exercised, however. For example, the Luken bill requires certain information to be given in solicitation. The effect of the preemption provision is to prevent a state from saying that such information may not be given, but I doubt if that would ever occur. Similarly, a charity must follow "uniform accounting principles" adopted by the FTC, but the preemption provision only interdicts requirements that are "inconsistent" with those principles. A state, in my reading, is left free to adopt additional or different requirements. All that

the preemption provision accomplishes is to prohibit a state from saying that a charity may not comply with the FTC principles--an unlikely occurrence.

In short, the preemption provision is probably meaningless. When the state has not acted, the FTC does not need the provision in order to act. Where a state has acted, the FTC can, even without the provision, impose additional requirements.

#### V. CONCLUSION

The federal role in the regulation of charitable solicitation ought not to be defined on a piecemeal basis. The federal regulatory approach can take many forms. The FTC experience represents three models of action: (1) that of administrative agency charged with defining the term "deceptive" in the context of case by case administrative adjudication; (2) the model of an enforcement agency that seeks penalties in federal court for established violations; and (3) the model of an agency that can give content to its substantive standard through rule making. In this paper I have suggested that the first and third models are not appropriate ones for the federal regulation of charitable solicitation, but that the second model is.

Other models should also be examined. Command and control regulation would open charities to direct regulatory oversight of fundraising expenses or practices. The curative power of publicity could be harnessed through an agency designed to provide

potential donors with accurate information. Federal private action remedies must be examined to see how they interrelate with various regulatory possibilities.

Moreover, all of these possibilities must be measured against the appropriate interrelationship between federal and state authority. In this connection, I have suggested that preemption is not the proper lens for examining federal-state relationships since federal and state goals and programs rarely conflict. Instead, the proper question to examine is one of comparative advantage in an institutional sense - which institution is in the best position to carry out common goals and objectives. In this paper, I have not answered that issue, but I have suggested some of the dynamics that limit the role of the FTC.