

Complaint

113 F.T.C.

IN THE MATTER OF

## R.J. REYNOLDS TOBACCO COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9206. Complaint, June 16, 1986—Decision, May 8, 1990*

This consent order prohibits, among other things, a Winston-Salem, N.C. tobacco corporation from misrepresenting the results, design, purpose or content of any scientific test or study concerning any association between cigarette smoking and health effects.

*Appearances*For the Commission: *Judith D. Wilkenfeld.*For the respondent: *Judith Oldham, Collier, Shannon, Rill & Scott*, Washington, D.C. *Floyd Abrams, Cahill, Gordon & Reindel*, New York, N.Y. and *W.A. Copenhauer, Womble, Carlyle, Sandridge & Rice*, Winston-Salem, N.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that R.J. Reynolds Tobacco Company, Inc., a corporation, (R.J. Reynolds or "respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. R.J. Reynolds is a New Jersey corporation, with its offices and principal place of business located at 401 North Main Street, Winston-Salem, North Carolina.

PAR. 2. Respondent manufactures, advertises, offers for sale, sells and distributes cigarettes and other tobacco products.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has disseminated or caused the dissemination of an advertisement entitled "Of cigarettes and science," attached hereto as Exhibit A.

PAR. 5. In this advertisement respondent has represented, directly or by implication, that:

(a) The Multiple Risk Factor Intervention Trial (The MR FIT study) was designed and performed to test whether cigarette smoking causes coronary heart disease;

(b) A major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe; and

(c) The MR FIT study, a major government study, tends to refute the theory that smoking causes coronary heart disease.

PAR. 6. The representations set forth in paragraph five are false or misleading.

PAR. 7. In light of the representations made in the advertisement, and because of the way in which the advertisement describes the MR FIT study and its results, respondent's failure to disclose:

(a) That men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or

(b) That the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality,

renders the advertisement deceptive.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

## EXHIBIT A

# Of cigarettes and science.

This is the way science is supposed to work.

A scientist observes a certain set of facts. To explain these facts, the scientist comes up with a theory.

Then, to check the validity of the theory, the scientist performs an experiment. If the experiment yields positive results, and is duplicated by other scientists, then the theory is supported. If the experiment produces negative results, the theory is re-examined, modified or discarded.

But, to a scientist, both positive and negative results should be important. Because both produce valuable learning.

Now let's talk about cigarettes.

You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them.

Much of this evidence consists of studies that show a statistical association between smoking and the disease.

But statistics themselves cannot explain *why* smoking and heart disease are associated. Thus, scientists have developed a theory: that heart disease is *caused* by smoking. Then they performed various experiments to check this theory.

We would like to tell you about one of the most important of these experiments.

## A little-known study

It was called the Multiple Risk Factor Intervention Trial (MR FIT).

In the words of the *Wall Street Journal*, it was "one of the largest medical experiments ever attempted." Funded by the Federal government, it cost \$115,000,000 and took 10 years, ending in 1982.

The subjects were over 12,000 men who were thought to have a high risk of heart disease because of three risk factors

that are statistically associated with this disease: smoking, high blood pressure and high cholesterol levels.

Half of the men received no special medical intervention. The other half received medical treatment that consistently reduced all three risk factors, compared with the first group.

It was assumed that the group with lower risk factors would, over time, suffer significantly fewer deaths from heart disease than the higher risk factor group.

But that is not the way it turned out.

After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths.

## The theory persists

We at R.J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point.

Despite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions.

They continue to believe these factors cause heart disease. But it is important to label their belief accurately. It is an opinion. A judgment. But *not* scientific fact.

We believe in science. That is why we continue to provide funding for independent research into smoking and health.

But we do not believe there should be one set of scientific principles for the whole world, and a different set for experiments involving cigarettes. Science is science. Proof is proof. That is why the controversy over smoking and health remains an open one.

R.J. Reynolds Tobacco Company

## DISSENTING STATEMENT BY CHAIRMAN DANIEL OLIVER

I respectfully dissent from the Commission's decision to issue a complaint challenging R.J. Reynolds' paid "editorial" titled "Of Cigarettes and Science." The challenged statement, as I read it, engages an issue that is a subject of public concern, and expresses a point of view that is unlikely to be articulated elsewhere. I believe that, as a matter of public policy, it is valuable for the public to hear all sides of an issue, and I am concerned about taking any action that may inhibit free expression of views that might not be popular to government regulators. Although, after reviewing the evidence presented to the Commission, I cannot conclude that issuance of this complaint is in the public interest, I, of course, express no view on the underlying legal and factual issues raised by this case.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent, R.J. Reynolds Tobacco Company, with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, R.J. Reynolds Tobacco Company, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by R.J. Reynolds Tobacco Company of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedures prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent R.J. Reynolds Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of New Jersey, with its office and principal place of business located at 401 Nottingham Street, Winston-Salem, North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of R.J. Reynolds Tobacco Company, and the proceeding is in the public interest.

#### ORDER

##### I.

*It is ordered,* That respondent, R.J. Reynolds Tobacco Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising or promotion of cigarettes that constitutes commercial speech under the First Amendment of the U.S. Constitution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that the MR FIT study was designed and/or performed to test whether cigarette smoking causes coronary heart disease.

B. Representing directly or by implication that the MR FIT study is credible scientific evidence that cigarette smoking is not as hazardous as the public or the reader had been led to believe.

C. Representing directly or by implication that the MR FIT study tends to refute the theory that smoking causes coronary heart disease.

D. Failing to disclose, in any discussion of the MR FIT study that questions the relationship between smoking and smokers' risk of coronary heart disease, that: (a) men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or (b) that the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality.

E. Misrepresenting in any manner, directly or by implication, in any discussion of cigarette smoking and chronic or acute health effects, the results, design, purpose or content of any scientific test or study explicitly referred to concerning any claimed association between

cigarette smoking and chronic or acute health; *except that* this paragraph shall not apply to: (i) any scientific test or study concerning the amount of tar and nicotine in any cigarette; or (ii) claims phrased as opinions unless (a) they are not honestly held, (b) they misrepresent the qualifications of the holder or the basis of his opinion, or (c) reasonable consumers are likely to interpret them as implied statements of fact.

## II.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

## III.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with this order.

Commissioner Azcuenaga dissenting and Commissioner Owen not participating.

## DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The consent order the Commission issues today against R.J. Reynolds Tobacco Company ("Reynolds") is unusually and conspicuously weak. It provides less protection for consumers than the Commission sought when it issued the complaint in this proceeding, less protection than the Commission ordinarily would seek in a deceptive advertising case, particularly one with serious public health implications, and less protection than is justified under the circumstances. The order to which the majority has acceded conveys to me the troubling message that when a major cigarette company boldly runs an advertisement that misrepresents important scientific evidence about the relationship between smoking and health, this Commission will do precious little in response. I dissent.

Beyond its weakness, a more serious peril lurks within this order. The order implicitly represents that the Commission is protecting consumers from deceptive cigarette advertising, even in the guise of a paid-for editorial. Consumers may be lulled by this message into a false sense of security that they can trust what they read in cigarette ads. In recent years, the federal government had displayed an increasingly high degree of care and concern about the relationship between smoking and health, and consumers reasonably may assume from this order that the Federal Trade Commission is guarding their interests with the same high degree of care. In fact, the public health protection this order affords is so illusory that consumers might very well be better off if the Commission issued no order at all.

Nothing in the record or the litigation posture to date suggests a need to accept a weak, compromise order. Yet the remarkable concessions that the majority is willing to make to settle this case suggest a certain squeamishness about the Commission's authority to regulate deceptive advertisements that look like editorials, which is the only defense that Reynolds has asserted. Reasonable people may disagree about whether the First Amendment protects a deceptive advertisement that looks like an editorial, such as the so-called "MR. FIT" ad that Reynolds ran, but we can do more to protect consumers if we take a firm position one way or the other. If we announce that the Commission will not challenge advertisements that are designed to masquerade as editorials, we will warn consumers to be on guard and to exercise any natural suspicion they may have regarding the truth of a paid-for editorial advertisement.

On the other hand, if we intend to regulate such ads, we should do so decisively and demand remedies that are as rigorous as in any other deceptive advertising matter. By accepting this pared-down order, the majority implicitly asserts that the order is adequate and signals to the public generally that the Commission is protecting consumers.<sup>1</sup> At the same time, however, it signals to cigarette companies and other advertisers, through the specifics of the order, which will be studied by their legal experts, that they may shade the truth, or even deceive consumers outright, if they choose to try the advertising "editorial" approach in the future. Although certainly the Commission does not intend this result, in a very real sense the Commission itself is

<sup>1</sup> One of my colleagues has ventured so far as to say this is a "strong" order and a "victory for consumers." Statement of Commissioner Andrew J. Strenio, Jr., Concurring in the Commission's Acceptance of the Order for Public Comment, September 20, 1989 ("Strenio Statement") at 1, and Concurring Statement of Commissioner Andrew J. Strenio, Jr. ("Strenio Concurrence") at 1.

