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ADDRESS

by

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on

FTC PROMOTES FREE AND FAIR COMPETITION

Before the

ADVERTISING CLUB OF CHARLOTTE

Charlotte, N.C.



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FTC PROMOTES FREE AND FAIR COMPETITION

Introduction

My topic today is the relationship of the laws administered by the Federal Trade Commission to advertising. The role of the Federal Trade Commission in this area cannot be viewed apart from the national commitment to the free enterprise system based on competition. Faith in competition has always been fundamental to the American economic system, both as a guarantee of the most effective economic performance and to effectuate the country's social and political goals. Our public policy rests on the assumption that competition rather than public or private regulation will most effectively allocate the nation's resources, further efficiency, stimulate innovation and, in general, satisfy the needs of the consumer. In addition, we expect competition to assure freedom of opportunity in the economic sphere. For example, the Small Business Act of 1958 states:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the

expression and growth of personal initiative
and judgment be assured 1/

Truthful, imaginative and creative advertising which informs the consumer has a vital role to play in the functioning of the competitive system. Truthful advertising, by informing the consumer of the choices which are available to him and by enabling him to make realistic purchasing decisions, makes him the arbiter of the economy in accordance with the underlying assumptions of the free enterprise system.

The Commission, under Section 5 of the Federal Trade Commission Act, has been given the duty of preventing unfair methods of competition or unfair or deceptive acts or practices in commerce. In short, the Commission under this statute has a mandate to prevent deceptive and unfair advertising both to protect competition and the consumer. I might add parenthetically that this is not only good public policy; truthful advertising is also good business. Rosser Reeves, certainly a leading authority on this subject, has noted:

Advertising stimulates the sales of a good product and accelerates the destruction of a bad product.

To make a claim which the product does not possess merely increases the frequency with which

1/ Small Business Act, Public Law 85-536, July 18, 1959; 15 U.S.C.A. 631a.

the consumer observes its absence.

* * *

A campaign that stresses a minuscule difference, which the consumer cannot observe, in actual practice, also accelerates the destruction of the product.

Such a campaign again increases the frequency with which the consumer observes the absence of the claim. 2/

In addition, advertising demands integrity of its practitioners because of its crucial impact on the economy. As the Honorable Luther M. Hodges, former Secretary of Commerce, stated:

Advertising and marketing men have never been more important to the future of the United States and the world than they are today.

[It] is a major tool which must be used vigorously if we are to quicken the pulse and expand the scope of our economy . . . 3/

The significance of advertising to the functioning of the economy simply in monetary terms is undeniable. According to one estimate in 1950, advertising was responsible for the marketing of 233 billion dollars of products. In 1960, the estimated total was 328 billion dollars, and by

2/ Rosser Reeves, Reality in Advertising, p. 61, Alfred A. Knopf, 1961.

3/34 Advertising Age, 4 (Weekly ed. Jan. 15, 1963).

1970, advertising is expected to move some 465 billion dollars worth of goods. 4/ Development and expansion of advertising in the years following World War II was clearly vital to the development of the high consumption necessary to take advantage of America's productive capacity. In the words of one observer:

Mass production alone cannot insure high consumption; there must also be a mass market, pricing for a mass market, and advertising and merchandising techniques that can effectively reach a mass market of consumers. And this could well be the essential ingredient that moved the U.S. faster than any other nation into the most advanced stage of economic development -- the stage, in fact, of affluence. 5/

In short, by stimulating demand, creative advertising enables an economy characterized by high productive capacity to operate more effectively. 6/

The FTC's Responsibility Regarding Advertising

Recognizing advertising's vital role in matching products with consumers, 7/ those of us charged with administering

4/ Marion Harper, Jr., The National Conscience in the Decade of Incentive, in The Promise of Advertising, 134, 145, Richard D. Irwin, Inc., 1961.

5/ Roy Larsen, Chairman, Executive Committee, Time, Inc., Advertising and the Affluent Society, in The Promise of Advertising, 160, 173, supra note 4.

6/ Developments in the Law -- Deceptive Advertising, 80 Harv. L. Rev. 1005, 1016 (1967).

7/ Developments in the Law, supra Note 6, 1008.

the laws designed to foster competition in the market place, cannot be hostile to advertising as such. Rather, it is truth in advertising alone which is the regulatory objective. Honesty is a clear prerequisite to advertising's main economic function of imparting meaningful information to the consumer. In terms of economic objectives alone, there is a very real interest in preserving the integrity of advertising. False advertising by leading the customer to make his purchases on the basis of erroneous premises, therefore, necessarily results in a misallocation of resources and a lack of consumer confidence in advertising generally. 8/ In short, the economic reasons for insisting on honest advertising cannot be overlooked in a society which depends on the free market. However, the reasons for insisting on truthful promotions go beyond this. Honesty in advertising has been made the goal of law enforcement for its own sake by the passage of the Wheeler-Lea Amendment to the Federal Trade Commission Act without the consideration of any extraneous motives.

Before turning more specifically to the Commission's role, it may be pertinent to point out that this agency

8/ Developments in the Law, supra note 6, at 1026.

is not concerned with matters of taste in advertising nor with disputes over whether advertising inculcates the right or the wrong social values. Take, for example, the controversy over what share of the nation's output should go into the public, as opposed to the private, sector. As far as the content of advertising is concerned, the Federal Trade Commission's official concern is solely with its truth or falsity.

The FTC's Role in Preventing Deception

The determination of whether an advertisement is deceptive or has the capacity to deceive, however, in many instances is not a simple matter of blacks and whites as it is in the minority of cases where outright falsehood is involved. "Impressions," the courts have held, "are the primary targets of the ad-writers" 9/ and one observer has noted:

. . . effective advertising must be more than a simple communication of certain information about the product or company. It must put the facts in a context of non-rational, evocative feelings and

9/ Stanley Laboratories, Inc., et al. v. F.T.C., 138 F. 2d 388, 392 (9th Cir. 1943).

ideas appropriate for the objectives of the advertising . . . 10/

In many instances, therefore, the Commission in a false advertising case is faced with the responsibility of determining what does the advertisement really mean, and what impression is it apt to make on the consuming public. In performing this task, the Commission is aided by its status as a body presumably expert on business practices and the effect which advertisements may have on their target, the consumer. In this connection, some of the legal principles developed by the courts and the Commission over the years to aid this agency in construing advertisements may be of some interest to you. I must at this time, however, add a hasty disclaimer that my talk today cannot and does not pretend to cover the law of deceptive advertising in exhaustive fashion. The limitation of time alone would preclude it.

The Commission in evaluating advertisements has applied the principle that it is possible to mislead the consumer without mistating a single fact. In this connection, one court has held:

The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from

10/ Burleigh B. Gardner, Symbols and Meaning in Advertising, in The Promise of Advertising, 89, 106, supra Note 4.

the advertiser's standpoint than factual assertions. Facts are dull and dangerous, exaggerations are vivid, attractive and privileged. 11/

Furthermore, it is not a defense that an advertisement is literally true. Under certain circumstances, it may nevertheless have the capacity to deceive. As the Fifth Circuit has held:

To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such methods cannot excuse the deception by relying on the truthfulness per se of the partial truth by which it has been accomplished. 12/

In short, the statements in an advertisement will not be considered in isolation or in the abstract but in their actual context. It is not a defense that a statement may be literally or technically construed so as not to constitute a misrepresentation when, as a practical matter, it has the capacity to deceive. To sum up this point, the Commission, when it construes an allegedly deceptive advertisement to determine whether it is false or misleading within the meaning of the statute, must take regard "not [of] fine spun distinctions and arguments that may be made in excuse, but . . . the effect [the advertisement]

11/ Maurice J. Feil v. F.T.C., 285 F. 2d 879, 896 (9th Cir. 1960)

12/ P. Lorillard Co. v. F.T.C., 186 F. 2d 52, 58 (4th Cir. 1950)

might reasonably be expected to have upon the general public." 13/ The Commission, therefore, in the deceptive advertising area, in enforcing the Federal Trade Commission Act, has in mind not only the wary and the sophisticated, but "the trusting as well as the suspicious, the casual as well as the vigilant, the naive as well as the sophisticated." 14/ Indeed, the Second Circuit has stated that the Commission may insist "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein'."^{15/}

In this connection, the Commission has recently reaffirmed its commitment to work with other governmental agencies, the Better Business Bureaus and business associations designed to police advertising "to protect poor

13/ id. at 58.

14/ Colgate-Palmolive Co., 59 F.T.C. 1452, 1464 (1961); rev'd and remanded 310 F. 2d 89 (1st Cir. 1962); (Final Order Transfer Binder 1961-63) ¶16,403 (F.T.C. 1963); rev'd. 326 F. 2d 517 (1st Cir. 1963), rev'd. 380 U.S. 374 (1965).

15/ General Motors Corp. v. F.T.C., 114 F. 2d 33, 36 (2nd Cir. 1940); cert. denied 312 U.S. 682 (1941).

people, the aged or uneducated, and other members of the public, from that small percentage of the business community who engage in unfair and deceptive selling practices." 16/

In protecting the consumer, the Commission has developed a guideline to the effect that where silence on a material fact is deceptive in light of the claims actually made, then affirmative disclosure of the applicable limitation of an advertising claim may be required. The fact that an advertising claim may be literally true if read narrowly in isolation is immaterial under such circumstances. For example, those engaged in the sale of cures for baldness may be "required to indicate that most baldness is hereditary and untreatable." 17/ The requirement that facts of this nature be disclosed does not force the advertiser to advertise the negative aspects of his product. Rather, by giving the consumer sufficient data to determine whether the product will in fact meet his needs it presents him with the "opportunity to make an intelligent choice." 18/

This development is, I think, important for it high-

16/ Letter of the Chairman to Senator Warren G. Magnuson, July 23, 1965.

17/ Developments in the Law, supra Note 6, at 1048-1049.

18/ See J.B. Williams Company, Inc., et al. v. F.T.C., F. 2d _____ (6th Cir. 1967).

lights the fact that the Commission in determining whether an advertisement has the capacity to deceive, is not limited to looking for outright or affirmative falsehoods alone. The insistence that the consumer be permitted the opportunity to make an intelligent choice on the basis of the advertising available to him is significant both for those of us engaged in administering the law and those of you in the advertising community who are engaged in this vital economic function. It is a crucial factor in implementing the consumer's "right to know".

An interesting area where there is apparently hot debate on the extent of the consumer's "right to know" relates to the disclosure of foreign origin of imported merchandise. The courts have held that "a substantial portion of the purchasing public has a general preference for products produced in the United States by American labor and containing domestic materials, where other considerations such as style and quality are equal, and has a prejudice against imported products." 19/ In fact, it was a foreign origin case which helped to lay the foundation for the requirement

19/ L. Heller & Son, Inc. v. F.T.C., 191 F. 2d 954, 955 (7th Cir. 1951).

that there must be affirmative disclosure of material facts in certain cases if deception is to be avoided. The Seventh Circuit on this point held:

We commence our study of the instant case with the knowledge that the Commission may require affirmative disclosures where necessary to prevent deception, and that failure to disclose by mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice violative of Section 5 of the Federal Trade Commission Act 20/

Today there are those who would challenge the requirement that foreign origin be disclosed of products made in whole or in part of foreign components, on the ground that the consumer does not care or, secondly, that if in fact there is a preference on this point, the American public should not be confirmed in its prejudices. I cannot agree with that position. It contravenes the consumer's "right to know" any material fact which influences his purchasing decision. That right, I believe, should remain unqualified. Assuming, for example, that foreign made goods are sold in a context where the consumer has no reason to believe that they are foreign made, and this is an important fact to him,

20/ id. at 956.

then the failure to disclose, is, in my view, a material deception against which the Commission should proceed. On my examination of letters from the public received in the course of hearings held by the Commission on foreign origin, I am convinced that this subject is of vital and direct concern to substantial numbers of consumers. Conceding, for the moment, that many customers are "prejudiced" in favor of American goods, there is nevertheless a public interest in requiring full disclosure in this area. A blanket exemption from regulation of advertisements when the deception is intended only to circumvent consumer prejudices considered wasteful by the advertiser, would be undesirable for a number of reasons:

If consumers knew that advertisers were allowed to falsify certain facts which consumers think relevant, one important purpose of advertising regulation -- fostering public confidence in the accuracy and reliability of advertising -- would be jeopardized. Moreover, if the Commission or the courts decide that an advertisement is lawful solely because the only consumers misled are those with unfounded prejudices, officially determined standards would, within that area, replace the consumers' own desires . . . In a market economy, the objective of economic activity is not maximum aggregate production for its own sake, but satisfaction of human wants, whether rational or irrational. Given this objective, the economically "best" pattern of production is that dictated by purchasing decisions based on the 21/ actual views of consumers, including their prejudices.

21/ Developments in the Law, supra Note 6, at 1052-1053.

Allied to the problem of misrepresentation by silence and evidencing the need for keeping administrative interpretation of the law abreast of technological change are the Commission's cases dealing with the undisclosed use of mock-ups or simulated demonstrations on television. The leading case on this point is, of course, the Supreme Court decision in F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1968), the "Rapid Shave" case. In that case the Commission prohibited respondents from misrepresenting to the public that it was seeing a test, experiment, or demonstration purportedly proving a product claim when this was not the case. In this proceeding the respondents had used sand previously applied to a plexiglass surface as support for the claim that real sandpaper could be shaved quickly and easily after an application of Rapid Shave. In fact, the evidence showed that sandpaper could not be shaved with facility immediately after application of the shaving cream. However, the basic question before the Supreme Court on review was could the Commission enter an order prohibiting the use of simulated tests or mock-ups to demonstrate product characteristics irrespective of whether the product claim was true. Significantly, the Supreme Court upheld the Commission's position on this point, ruling that even

if a product could perform in accordance with the simulated demonstration, the failure to disclose the mock-up was a material misrepresentation leading the consumer to believe he had immediate proof before his own eyes of the merits of the product over and above the seller's word. The court, in short, held in effect that misrepresentations may not be used to overcome the public's initial prejudices for or against certain products or scepticism as to TV commercials generally, even if, in the last analysis, product performance and claims do coincide. To sum up, the vice in simulated demonstrations of this nature is that they give an immediate impact to the sales message, fair neither to the viewer nor to competitors of the seller. 22/ The Supreme Court decision in Colgate may therefore be construed as standing for the proposition that there is a public interest in raising the standards of commercial behavior "by unequivocal establishment of the principle that advertisements are unlawful if their central features are falsified."23/

22/ Developments in the Law, supra Note 6, at 1061

23/ id., at 1062.

The conclusion which I draw from these developments is that increasingly attention will focus on the problem of ensuring complete information to the consumer so that he will not be misled in his selection of merchandise by advertising claims unaccompanied by material facts which are crucial to his purchasing decisions in light of the promotional claims made. This I do not believe will hamper in any way truthful, creative, and effective sales messages. It should be welcomed by all who look to advertising as one of the mainsprings of the economy and who also believe the well informed consumer is vital to the proper functioning of the competitive market.

Advertising and Labeling of Textiles and Furs

Before turning to the procedures available at the Federal Trade Commission to foster government-business cooperation to facilitate compliance with the law, it will not be amiss to refer briefly in this center for the manufacture and sale of textile products to this Agency's administration of the Wool Products Labeling Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953, and the Textile Fiber Products Identification Act of 1958. Under these statutes, in addition to its

general authority to prevent false advertising under the Federal Trade Commission Act, the Commission has been given a specific mandate to deal in detail with the problems relating to the advertising and labeling of textile and fur products. In fact, the Commission maintains in this area representatives from its Bureau of Textiles and Furs engaged in inspection and industry counselling work. It is one of their principal functions to advise members of the industry with respect to the advertising and labeling requirements of the law. Counselling of this nature, we have found, has been of significant help to industry in complying with the law and in improving the labeling and advertising of textile and fur products. Working with business in this manner has been undeniably helpful to the Commission in enabling it to administer these laws effectively.

FTC Seeks Government-Business Cooperation

It is my firm belief that business desires to comply with the law and we do not look upon our task as primarily one of policing but rather as one of seeking the cooperation of the business community. In this respect, as in many others concerning the Federal Trade Commission, Woodrow Wilson set the tone when he stated:

. . . We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce . . . and to remove the barriers of misunderstanding and of a too technical interpretation of the law . . . The Trade Commission substitutes counsel and accommodation for the harsher processes of legal restraint. . . .24/

The Federal Trade Commission's Procedures

The Commission's law enforcement function is not a punitive one. Even in those cases where this agency finds it necessary to issue complaints against certain individuals and firms to prevent further violations of law on their part, the objective is not to punish, for the orders are prospective only. They merely tell the offender to cease and desist; they impose no sanction for past actions. Even in those cases, therefore, where the Commission acts to prevent individual law violations, the objective of spelling out and defining the law is also present, if not paramount.

The Commission has utilized other procedures to secure the assistance of business in preventing unfair methods of competition. Here the element of business-government cooperation is more readily apparent than in those instances where the Commission finds it necessary to engage it

24/ Messages and Papers of the Presidents, Bureau of National Literature, Inc., p. 8158.

litigation. For example, the Commission's former Trade Practice Conference procedure served to interpret the law and to advise businessmen about the illegality of specific trade practices. This method, in use since 1918, now entitled Industry Guides, has its strong points but also its shortcomings. Accordingly, the Commission has moved to remedy these deficiencies through the establishment of new and supplementary procedures providing for the simultaneous halting of unfair trade practices on an industrywide basis. The Trade Practice Conference procedure provided for interpretation and advice only; it provided no sanction, and as a result, willful violators were not deterred from continuing violations of the law to the disadvantage of their competitors who desired to abide by its requirements.

The new trade regulation rule procedures are an improvement in this respect, since they facilitate prosecution of those deliberately ignoring the law. In a trade regulation rule, the Commission gives expression to its experience based on past enforcement actions, investigations, or other proceedings as to the substantive requirements of the laws it administers. It is an equitable way of enforcing the law on the broadest possible basis with the least expense to the public. 25/

25/ MacIntyre and Dixon, The Federal Trade Commission After 50 Years. 24 Fed. B.J. 377 (1967).

For example, in the so-called leakproof battery rule, as a result of evidence adduced in hearings, the Commission found that despite the best efforts of the manufacturers no batteries currently produced are proof against leakage. Accordingly, it determined that the use of such terms as "leakproof," "guaranteed leakproof," or similar representations had the capacity and tendency to mislead the consuming public and to divert business from competitors not misrepresenting their products in this manner. 26/ The rule prohibits the use of the word "leakproof" as an unfair method of competition and an unfair or deceptive act or practice. Since the rule is based on findings of fact focusing specifically on a well-defined violation of law, this and other trade regulation rules can be readily enforced with respect to those in violation, in a manner not previously possible under the more diffuse trade practice conference procedure where the findings as to the type of acts which constitute a violation of law would have to be made over and over again in each individual litigated case. In the case of the trade regulation rule procedure on dry

26/ 2 Trade Reg. Rep. ¶7925 (1964).

cell batteries, therefore, it would merely be necessary to demonstrate that the term "leakproof" had been used by the firm proceeded against. It would be unnecessary to prove again that the use of the term is an unfair and deceptive act or practice. This is a distinct advance over sole reliance on individual suits litigated on an ad hoc basis.

Another major innovation in the Commission's procedures has been the decision to issue advisory opinions. This is a recent development not all of you may be aware of. The decision was long overdue, for if the Commission is to fulfill its purpose of providing guidance to businessmen what better time is there to provide such advice than before the law is violated? Previously, advice in the form of opinions was offered only by the Commission's staff and such advice was not binding on the Commission. Such advice was of limited value and few businessmen bothered to ask for it. Now advisory opinions do bind the Commission and in the unlikely event that such opinions would have to be changed, sufficient notice will be given to the businessman affected before adversary action is taken.

Conclusion

The new policies which have been adopted by the Federal Trade Commission provide businessmen with opportunities never before available. Now you and other representatives of businessmen are enabled to get together with representatives of your Government for the purpose of exchanging views and eliminating troublesome problems. If businessmen cooperate willingly in such undertakings, the opportunities are for you to become partners, rather than antagonists, in the development of fundamental policies and relationships between Government and business. In this way you are provided a voice in the development of sound trade regulation policies. If businessmen and their representatives evidence statesmanship in taking advantage of these opportunities, pitfalls may be avoided and you may escape the interminable legal processes inherent in the case-by-case approach of adversary litigation in the resolution of trade regulation problems.

I deeply appreciate the opportunity you have provided for me to visit and discuss these problems with you today. I say that because I sincerely believe that the better we understand each other, the better we can work together for the good of business and the public.