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TRADE REGULATION: MARY CARTER PAINT CO. v. FEDERAL TRADE COMMISSION

Mary Carter Paint Company marketed its product by advertising that with every can of paint sold, another of like amount would be given free. This was done through the media of newspapers, magazines, radio and television using such phrases as "Buy Only Half the Paint You Need," "Every Second Can Free of Extra Cost," and "Buy 1 and get 1 Free." [1]

In 1961 a complaint was issued by the Federal Trade Commission against Mary Carter alleging that these advertising practices were "false, misleading and deceptive." [2] The hearing examiner in his initial decision found that the statements were deceptive, and he stated:

> In truth and in fact, the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisement but was, and is now, substantially less than such price. The second can of paint was not, and is not now, "free," that is, was not, and is not now, given as a gift or gratuity. The offer is on the contrary, an offer of two cans of paint for the price avertised as or purporting to be the list price or customary and usual price of one can.[3]

The initial decision of the hearing examiner substantially reflected the opinion of the Commission, and Mary Carter was ordered to ". . . cease and desist from representing, directly or by implication . . . (b) That any article of merchandise is being given free or as a gift, or without cost or charge, when such is not the fact. . . ." [4]

Mary Carter appealed the decision of the Federal Trade Commission to the United States Court of Appeals, Fifth Circuit.[5] After reviewing the decision of the Commission, the court set aside the cease and desist order on the grounds that it lacked the precision and definiteness required of such an order, and that the advertising was not deceptive.[6] In its opinion the court said: "The evidence presented no conflict which would form the basis of such a finding [by the Commission], and the sole question presented here is a question of *law for the court,* whether the Commission's conclusions from the undisputed facts are legally supportable." [7]

The decision of the circuit court was appealed to the United States Supreme Court, and certiorari was granted.[8] On November 8, 1965, the

[1] In the Matter of Mary Carter Paint Company, 60 F.T.C. 1827, 1830-31 (1962).
[2] In the Matter of Mary Carter Paint Company, 60 F.T.C. 1827, 1829 (1962).
[3] In the Matter of Mary Carter Paint Company, 60 F.T.C. 1827, 1844 (1962).
[4] In the Matter of Mary Carter Paint Company, 60 F.T.C. 1827, 1845 (1962).
[5] Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964).
[6] *Ibid.*
[7] *Id.* at 659. (Emphasis by court.)
[8] FTC v. Mary Carter Paint Co., 379 U.S. 957 (1965).

Supreme Court reversed the decision of the circuit court and remanded the case to the Federal Trade Commission by its own suggestion, for clarification.[9] The need for clarity in orders was expressed in *FTC v. Henry Broch & Co.,* wherein it was stated:

> The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlies the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.[10]

In the instant case the Supreme Court in its opinion said: ". . . [I]t is arguable that any deception was limited to representation that Mary Carter has a usual and customary price for single cans of paint, when it has no such price. *However, it is not for courts to say whether this violates the act.*" Here the Court has reached the crux of the problem and decided that the circuit court acted outside its authority in overruling the Commission's decision that Mary Carter's practices were deceptive.

The Federal Trade Commission derives its power to regulate advertising in interstate commerce from the Federal Trade Commission Act of 1914.[12] The act states: "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."[13] The Commission is further directed that, after a proper hearing, if it finds the practices in question to be in violation of the Act, it shall issue an order requiring those practices to be ceased.[14] The functions of the Commission have been said to be both quasi legislative and quasi judicial. Mr. Justice Sutherland in *Humphrey's Executor v. United States*[15] expressed his opinion that the Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the prescribed legislative standard, and to perform other specified duties as a legislative or as a judicial aid. The avowed purpose of creating the Commission to hear these cases was to provide ". . . a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected . . ." and was organized in a manner which would ". . . give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience. . . ."[16]

Since the Commission is a body with a peculiar expertise in this area,

[9] FTC v. Mary Carter Paint Co., 86 S.Ct. 219 (1965).
[10] 368 U.S. 360, 367-68 (1962).
[11] FTC v. Mary Carter Paint Co., *supra* note 9, at 221. (Emphasis added.)
[12] 15 U.S.C. § 41.
[13] 15 U.S.C. § 45(a)(6).
[14] 15 U.S.C. § 45(b).
[15] 295 U.S. 602 (1935).
[16] S. REP. NO. 597, 63d Cong., 2d Sess. 9, 11 (1914).

much weight is given to its decisions.[17] The theory is that the members of the Commission have dealt with one specific area of conflict and are familiar with the problems involved and suitably equipped to arrive at a proper solution.

This being the avowed purpose of the Congress in creating the Commission, it is apparent that the Commission is to decide, based on its knowledge of like or similar situations, which cases violate the terms of the Act. In so doing, the Commission is placed in the position of making a determination of the facts of the case and deciding whether they fall within the Act as set forth by the Congress and interpreted by the courts.[18] This determination is within the Commission's province and cannot be altered by the courts unless certain elements are present. The court reviewing a determination or judgment which an administrative agency alone is authorized to make cannot affirm the administrative action by substituting what it considers to be a more adequate or proper basis. If it did so, it would invade the domain which Congress has set aside exclusively for the administrative agency.[19]

In the instant case the Supreme Court has limited the scope of review of decisions of the Federal Trade Commission to a determination of whether the decision was (1) arbitrary or (2) clearly wrong.[20] The circuit court opinion was not aimed at deciding if the Commission's decision fell within these limits, but was, for the most part, a reiteration of the opinion of a dissenting commissioner. The Fifth Circuit Court seems to be displeased with the present function of administrative agencies. This displeasure is reflected in such statements as ". . . the Commission, in reaching its conclusion, had devoted its efforts to tithing mint, anise and cummin, while neglecting the weightier things of the law." [21]

The circuit court opinion was not limited to a discussion of whether the Commission stayed within its proper bounds, but instead substituted the court's conclusions for those of the Commission. It stated that Mary Carter should have been able to rely on a previous Commission opinion which the court felt was on point and coincided with its view.[22] This whole approach is clearly in conflict with the opinion of Mr. Justice Brandeis in *Virginia Ry. v. United States,* wherein he stated: ". . .to consider the weight of the evidence before the Commission, the soundess of the reasoning by which its conclusions were reached, or whether the find-

[17] "While this court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair . . . in passing on that question the determination of the Commission is of weight." FTC v. R. F. Keppel & Bro. Inc., 291 U.S. 304, 314 (1934).

[18] FTC v. Gratz, 253 U.S. 421 (1919).

[19] SEC v. Chenery Corp., 332 U.S. 194 (1946).

[20] "There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong." FTC v. Mary Carter Paint Co., *supra* note 9, at 221.

[21] Mary Carter Paint Co. v. FTC, *supra* note 5, 657.

[22] In the matter of Walter J. Black, 50 F.T.C. 225 (1953).