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test. The Court criticized the Third Circuit for adopting a standard that amounted to a mere potential for supervision rather than a stricter standard of active supervision. The Court held that a state must play a substantial role in determining the specifics of the state policy and not merely rubber stamp an agreement among the private parties. Moreover, because a negative option regulatory program setting the prices and the rates the private companies proposed became effective unless expressly vetoed by the state, the Court placed the burden of proof on the companies to show that the states adequately supervised the rate-setting process.

In light of this strict standard, the Court examined the programs established in the two states that lacked adequate supervision. Based on the factual findings of the ALJ, the Court noted that in both states, the rate-setting programs lacked any supervision whatsoever. Thus, the Court found that the level of supervision for these two states could not support a grant of immunity.

Additionally, the Supreme Court offered grounds to distinguish this ruling in future applications. First, the Court noted that the gravity of the offense here was extreme: horizontal price fixing is the most "pernicious" antitrust offense. Second, the Court pointed to the dominating role of the private companies in the rate setting process. Third, the Court cited the clear lack of state supervision, not merely a temporary lapse.

Dissent Fears Increased Litigation

The three dissenting justices noted that the controversy concerning the application of the state-action immunity doctrine is far from finished. They regarded the strict standard adopted by the majority as ambiguous, untenable, and as litigation-breeding. Also, the dissenters stated that previous applications of the *Midcal* test examined whether a state had the power to reject or control the proposed uniform rates. The dissent also stated that the strict active supervision standard adopted by the Court required close scrutiny into whether the states played a substantial role in the rate setting process. However, since the Court neither defined this standard nor established any benchmarks, the dissent reasoned that its application would be arbitrary at best.

Furthermore, the dissent reasoned that companies would now be less likely to participate in negative option regulatory programs because the burden is on them, under penalty of antitrust treble damages, to prove that the states substantially performed their duties. ❖

— ***Marc V. Richards***

FTC Not Required to Rely on Extrinsic Evidence to Determine Fraudulent Implied Claims in Advertising

In *Kraft, Inc. v. Federal Trade Commission*, 970 F.2d 311 (7th Cir. 1992), the Seventh Circuit Court of Appeals held that a manufacturer violated the Federal Trade Commission Act when it misrepresented the content of its cheese slices. Furthermore, the court stated that its own reasoned analysis, rather than extrinsic evidence, may be used in determining the implied claims contained in the challenged advertisements.

Kraft Singles Advertisements Fraudulent

In the early 1980's, Kraft, Inc. ("Kraft") began losing market share in the sliced cheese market. The loss of market share resulted from the introduction of imitation cheese slices, which were advertised as less expensive but equally nutritious as Kraft's Singles, a processed cheese slice. Kraft responded with an advertising campaign to inform consumers that Singles cost more because they are made from five ounces of milk rather than cheaper ingredients. The advertisements also focused on the calcium content of Singles.

Although Kraft used five ounces of milk to make each Single, roughly 30 percent of the calcium was lost in processing. Additionally, the vast majority of imitation slices sold in the United States contained about 15 percent of the U.S. daily recommended allowance of calcium per ounce, approximately the same amount as in Singles.

The Federal Trade Commission ("FTC") complaint alleged that Kraft's advertisements made two implied claims that violated the Federal Trade Commission Act ("the ACt"), which makes it unlawful "to engage in unfair or deceptive commercial practices or to induce consumers to purchase certain products through advertising that is misleading in a material respect." The FTC complaint charged that Kraft's advertising campaign violated the Act by materially misrepresenting the calcium content and relative calcium benefit of Singles by implying that a Single contains the same amount of calcium as five ounces of milk ("Milk Equivalency Claim") and that Singles contain more calcium than imitation slices ("Imitation Superiority Claim").

One of the two advertisements at issue in this case featured a young girl eating a Single as a narrator said "... Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow ..." Later, in the same ad, milk was poured into a glass until it reached a mark denoted five ounces. In January 1986, Kraft revised the script of the advertisements from "Kraft has five ounces per slice" to "Kraft is made from five ounces per slice." In March 1987, Kraft added the disclosure "one 3/4 ounce slice has 70 percent of the calcium of five ounces of milk" as a subscript on the television ad and as a footnote in the print ad.

The second ad in controversy, emphasized the milk and calcium content of Singles. However, this ad did not make an express comparison to imitation slices as the previous ad had. Both ads had a similar disclosures.

Trial Court and FTC Differ on Implied Conveyance

The Administrative Law Judge ("ALJ") held that both advertisements made the Milk Equivalency Claim. The ALJ found the advertisements' juxtaposition of references to milk and calcium, as well as their failure to mention the loss of calcium in processing, implied that Singles contain the same amount of calcium as five ounces of milk. Furthermore, the court ruled that the altered audio copy and disclosure were confusing and inconspicuous and therefore insufficient to dispel the impression that Singles actually include five ounces of milk.

Additionally, the ALJ held that both advertisements made a Superiority Claim, leading reasonable consumers to believe Singles contained more calcium. Therefore, the court ordered Kraft to cease and desist making from these claims.

The FTC affirmed the ALJ holding with some modifications. The FTC found elements of both the Milk Equivalency and Imitation Superiority of Singles claims in the first advertisements. Like the ALJ, the FTC based its findings on its subjective impression of the ad, but noted that extrinsic evidence was consistent with its determination. The FTC supported the finding of the ALJ on the Milk Equivalency Claim in the second ad. However, again without relying on extrinsic evidence, the FTC rejected the finding that a Superiority Claim was made because the ad made no express comparison to imitation slices and had no visual images to prompt a comparison.

Seventh Circuit Uses Substantial Evidence Standard

The Seventh Circuit adopted the traditional substantial evidence test as the standard of review. Kraft argued that the court should have applied a de novo test because Kraft's first amendment rights were implicated. However, the court rejected Kraft's appeal, reasoning that FTC findings are well-suited to a deferential review because they may require resolution of exceedingly complex and technical factual issues.

Kraft's Arguments Rejected

Kraft based its appeal on four grounds. In Kraft's first argument, it contended that the FTC erred in not requiring extrinsic evidence to determine what claims were conveyed by the ad. Furthermore, Kraft asserted that extrinsic evidence was required by the Lanham Act to prove an implied claim.

The court rejected Kraft's first argument because the United States Supreme Court and other appellate courts have found that the FTC may rely on its own impressions to determine what claims, express or implied, are made reasonably clear from the face of the ad. The Seventh Circuit cited two reasons for rejecting Kraft's argument. First, Kraft relied on the faulty premise that implied claims are inescapably subjective and unpredictable. The court ruled that implied claims can range from obvious to barely discernable and that common sense and administrative experience were adequate tools for the FTC to make its findings. Kraft's Lanham Act argument failed because not all courts using the provisions of the Lanham Act rely on extrinsic evidence; however, courts that rely on extrinsic evidence do so because they are ill-equipped to detect deceptive advertising. In this case, the court ruled that the FTC was sufficiently equipped to detect deceptive advertising.

In its second argument, Kraft asserted that the FTC's approach of relying on subjective judgment to determine that an ad was misleading hampered nonmisleading, constitutionally protected speech because advertisers could not determine whether the FTC would find an ad misleading. The Seventh Circuit Court relied on the United States Supreme Court holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 645 (1985), to deny this claim. In *Zauderer*, the Supreme Court ruled that "no first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence." Because the Court held that the FTC did not need to examine extrinsic evidence, it did not review the extrinsic evidence offered by Kraft.

Kraft's third contention was that the evidence did not support the FTC's finding of the Milk Equivalency Claim in the second ad. Kraft maintained that only one of the four elements of the first ad was present in the second ad. Kraft also asserted that the literal truth of the advertisements makes a ruling that they are deceptive illogical.

The court supported the FTC because it found that the ad visually and verbally linked milk and a slice of Singles. Also, the court stated that not all four elements needed to be present for an implied claim; the presence of one was enough. The court ruled that even literally true advertisements may be misleading. The issue in this case was not that an average consumer would believe that a Single contains five ounces of milk, but that it contains the calcium in five ounces of milk.

Kraft's last argument was that, even if the Milk Equivalency and Imitation Superiority claims were made, they were not material to an average consumer. A claim is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product." The court stated, however, that the FTC can apply, within reason, a presumption of materiality with three types of claims: express claims; implied claims where there is evidence the seller intended to make the claim; and claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned.

The court found Kraft's claims material because Kraft surveys found 71 percent of respondents rated calcium content to be an extremely or very important factor in their decisions to buy Singles. Furthermore, evidence existed that Kraft designed the advertisements with the intent to capitalize on consumer concerns about calcium deficiency.

Kraft further claimed that the cease and desist order issued by the FTC was overly broad and should have been modified or set aside because it banned constitutionally protected commercial speech and was not rationally related to Kraft's violation of the act. Kraft asserted that the advertisements were potentially misleading and, therefore, the FTC should have chosen a less restrictive method to sanction Kraft. The court held the advertisements to be actually, not potentially, misleading and that the order was sufficiently narrow by banning only the advertisements as currently designed and requiring that future nutrient claims be based on reliable scientific evidence.

Kraft finally argued that the scope of the order was not reasonably related to Kraft's violation because it included in products that were not part of the challenged advertisements. The court, however, supported the broad order because of the size and duration of the ad campaign and the ready transferability of the violation in question to other Kraft cheese products. Therefore, the court found the FTC's order justified despite Kraft's clean record in the past.

Concurrence Advocates Guidelines for Advertisers

The concuring judges, while agreeing with the opinion of the court, expressed concern that the FTC procedure allowed it to avoid extrinsic evidence merely by concluding that a deceptive, implied claim was facially apparent. Because consumers were the ultimate beneficiaries of the FTC's actions, the FTC should consider consumer surveys to make objective determinations about potential violations of the FTC Act.

The concurrence also argued that the current FTC procedure threatened to chill nonmisleading, protected speech. They stated that the flow of information from producer to consumer was jeopardized by allowing FTC commissioners to make subjective interpretations of whether an ad, while literally true, implied a false message. As a result, not only would advertisers be unable to predict whether the FTC will find a particular ad misleading, surveys taken to prove that ad is not misleading might be disregarded by the FTC.

Instead, the concurrence suggested that the FTC develop a consumer methodology which advertisers may use to determine whether their advertisements contain implied, deceptive claims. ❖

— ***B. James Slater, Jr.***

Tampering with Satellite TV Decoders to Steal Scrambled Shows Violates Federal Wiretap Law

In *United States v. Lande*, 968 F.2d 907 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit held that modification of satellite descrambler units to receive scrambled subscription television programming without payment of a subscription fee violated the Electronic Communication Privacy Act of 1986 ("the Wiretap Law"), 18 U.S.C. §§ 2510-2521.

All For One, One For All

Jack Lande ("Lande") modified commercially available satellite descrambler units to receive scrambled subscription programming without paying a subscription fee. Lande changed the descramblers by placing a clone of a paid subscriber's computer chip with a new chip in the nonsubscribing descrambler. This difference allowed the people with Lande's units to receive all satellite stations, not just those of the cloned subscriber, for free. This method of duplication is called the "Three Musketeers" technique due to its "all-for-one and one-for-all" nature of modification.

Lande's modification practice was discovered, and he was charged with violating three separate provisions of the Wiretap Law. Lande moved to dismiss the charges, arguing that Congress did not intend the Wiretap Law to apply to satellite television piracy. The district court of Montana, however, denied the motion.

Lande then pleaded guilty to violating three sections of the Wiretap Law: § 2511(1)(a), which prohibits intentional interception of "any wire, oral or electronic communications;" § 2512 (1)(a), which covers commercial dealings in devices whose design renders them primarily useful for surreptitiously intercepting such communications; and § 2512(1)(b), which prohibits the manufacture, assembly, possession, or sale of such devices. Lande was sentenced to thirty-five months in prison.

Lande's guilty pleas, however, gave him the right to appeal the denial of his motion to dismiss to the United States Court of Appeals for the Ninth Circuit. On appeal, Lande claimed that Congress did not intend to apply the Wiretap Law to satellite television piracy; and therefore, his motion to dismiss the charges should be granted.

The Court of Appeals, however, affirmed the denial of Lande's motion to dismiss. It reasoned that the plain language of the Wiretap Law applied to the interception of satellite television signals and that contrary legislative intent was ambiguous at best.

What Did Congress Say?

The Court of Appeals for the Ninth Circuit first considered the language of the Wiretap Act to determine whether Lande's acts were included within the statute. The court of appeals found that