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False Advertising—Restrictions on Freedom of Speech and Freedom of Circulation.— Rodale Press, Inc.

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False Advertising—Restrictions on Freedom of Speech and Freedom of Circulation.—***Rodale Press, Inc.***[1]—The Federal Trade Commission (FTC) issued a complaint against Rodale Press, Inc., and Rodale Books, Inc., Pennsylvania corporations, alleging violation of Section 5 of the Federal Trade Commission Act[2] in the advertising of three of their publications, "The Health Finder," "How to Eat for a Healthy Heart," and "This Pace is *Not* Killing Us." The complaint, which dealt mainly with the advertisements for the book, "The Health Finder," alleged that respondents were representing, directly or by implication, that the ideas and suggestions contained in the book would allow readers to add years to their lives, gain more energy, effectuate savings on medical and dental bills, feel better than ever before, and gain and maintain health. It was additionally alleged that the advertising indicated that readers of the book would find therein the answers to all health problems, including how to free themselves from colds, how to prevent ulcers, and how to prevent high blood pressure; and that the ideas and suggestions contained in the publication were effective in the prevention, relief and treatment of cancer, tuberculosis, infantile paralysis, heart disease, arthritis and mental illness. The complaint stated that the ideas and suggestions contained in "The Health Finder" would not produce such advertised results, and that reliance on the assertions made in the advertisements might result in the progression of serious diseases before medical consultation was sought. The complaint charged that these practices constituted unfair and deceptive practices and unfair methods of competition in commerce, and prayed that a cease and desist order issue forbidding the respondent from making such claims.

The respondents filed with the hearing examiner a motion to dismiss the complaint, or in the alternative, to certify to the Commission the questions therein presented. This motion was denied. Respondents thereupon filed a request to file an interlocutory appeal from the ruling of the hearing examiner, under Section 3.20 of the Commission's Rules of Practice.[3] In addition, respondents submitted a memorandum in support of this latter request, contending that any order issued in the proceeding would be fruitless because the book named in the complaint was neither in general circulation nor being advertised any longer, and also that respondents' medical witnesses would endorse both the book named in the complaint and the advertising of the book, thus rendering trial of the issues unnecessary.

HELD: Request to file an interlocutory appeal denied, and proceedings remanded to the hearing examiner for a full hearing on the issues.

The Commission, Commissioner Elman dissenting, dismissed the first contention by stating that the mere discontinuance of the specific advertisements named in the complaint was not sufficient to warrant a dismissal of the hearing, since the respondents did not clearly allege that the *type* of advertising which was the subject of the complaint was no longer being used.[4]

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[1] 3 Trade Reg. Rep. ¶ 17,149 (1964).

[2] 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958).

[3] 16 C.F.R. § 3.20 (1960).

[4] It has been held that "abandonment [of the challenged advertising] will not be

As to the second argument propounded by the respondents for discontinuance of the action, the Commission noted that even assuming that the respondents' medical witnesses would testify to the medical soundness of the ideas contained in the book, this would not warrant a dismissal of the complaint. The Commission emphasized that the complaint did not allege that the ideas and suggestions set forth in the book were false and of no medical value, but rather that the advertisement created the false impression that by following the recommendations, certain specific beneficial results would follow, such as better health, freedom from disease and greater enjoyment of life. The Commission added that because of this latter consideration, the medical endorsement of the statements contained in the book would not be dispositive of the issue. The Commission further pointed out that the ultimate conclusion of whether or not respondents' advertisement of the book was deceptive was one for the Commission to decide after a full hearing, and not one which might be delegated to experts called by either side.[5]

Commissioner Elman, construing the advertisement as representing truthfully what the book is about, dissented on the grounds that the complaint in essence challenged the book and the *ideas* in it. He pointed out that while the ideas contained in the publication may be completely unfounded, still the respondents have a constitutional right to disseminate them. He concluded that the Commission was saying that while the respondents may have a constitutional right to publish "The Health Finder," they have no right to advertise the book, even truthfully, because the ideas and suggestions contained in it are not effective. He further concluded that this would amount, in effect, to a ban of all advertising of the publication.

Commissioner Elman's dissent appears to be based on a different conception of the facts. His opinion indicates a belief that the advertisement is but a repetition of the views presented in the book. However, the advertisement goes beyond the mere enumeration of the ideas contained in the publication, and states as conclusions that certain indicated results will follow from an observance of such suggestions. Thus the advertisement can be seen as making unqualified statements of fact, and if the determination be made that

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presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order. . . . There is no guaranty that the acts complained of will not be renewed if the relief prayed [in the complaint] is denied." FTC v. Wallace, 75 F.2d 733, 738 (8th Cir. 1935). See also FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257, 260 (1938); Perma-Maid Co. v. FTC, 121 F.2d 282, 284 (6th Cir. 1941).

[5] "Short of requiring a representative poll in each case to see if people actually are deceived, the question can most practically be decided as it is, by a commission, deemed to have both expertness and experience in dealing with false advertising, drawing on its experience to determine the natural and probable result of the questioned advertising technique." Comment, 5 B.C. Ind. & Com. L. Rev. 704, 726 (1964). In making such determination, the Commission has broad discretion as to what evidence it will hear. 16 C.F.R. § 3.14 (1960). The Commission, while often considering samples of public opinion as to the interpretation to be given an advertisement, can attribute to such opinion polls as much evidentiary weight as it desires. See Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 386-87 (7th Cir. 1953); accord, Gulf Oil Corp. v. FTC, 150 F.2d 106, 108 (5th Cir. 1945); Stanley Laboratories, Inc. v. FTC, 138 F.2d 388, 391-92 (9th Cir. 1943).

such conclusions are not true, the representations may be forbidden by the Commission.[6]

Commissioner Elman's dissent presents grave questions as to the permissible scope of FTC regulation with respect to constitutional mandates. These questions are made manifest by the prospect of an advertisement which merely restates the subject matter and conclusions contained in a publication, if the publication presents radical conceptions in an area of major public interest such as health. If the author of a health manual posits the view that a certain regimen will cure a serious disease, and in the advertisement for the book, several of the assertions made in the publication are reprinted without qualification, could the FTC prohibit the use of the advertising on the finding that the procedure in fact will not cure the disease? This question is basically the same as that which Commissioner Elman felt was before the FTC.

On the basis of prior holdings of the United States Supreme Court and lower federal courts on the extent to which the constitutional protection of free speech extends to advertisements,[7] it seems that it would be within the power of the FTC to restrict the publication of such advertisements. Before the validity of this position is assessed, however, it would be advisable to consider the history of the application of the Federal Trade Commission Act to the advertisement of health books and to study the decisional law which has been developed in this field.

The FTC was first empowered to regulate advertising by the enactment of the Federal Trade Commission Act of 1914.[8] Although the original act made no reference to false advertising, section 5, which limited the Commission's jurisdiction to "unfair methods of competition in commerce,"[9] was construed to indicate that Congress intended to include false advertising.[10] The original statutory provisions were buttressed by congressional enactment of the Wheeler-Lea Amendments of 1938,[11] which, in addition to providing four new sections to the original act, amended section 5, making it read

[6] See, e.g., Capon Water Co. v. FTC, 107 F.2d 516 (3d Cir. 1939), in which issuance of a cease and desist order was affirmed on the basis that there was no truth in petitioner's advertisement that its bottled water would cure 52 diseases; Charles of the Ritz v. FTC, 143 F.2d 676 (2d Cir. 1944), in which the Commission found that petitioner's advertisement represented that the product would restore the natural elements necessary for a healthy skin.

[7] In Valentine v. Chrestensen, 316 U.S. 52 (1942), the petitioner attacked a New York City sanitary code provision forbidding the distribution in the streets of commercial and business advertising matter. The Supreme Court, in upholding the constitutionality of the provision, said that while the Constitution restricts the states and municipalities from unduly burdening the freedom of communication of information and the dissemination of opinion, still it "imposes no such restraint on government as respects purely commercial advertising." Id. at 54. In American Medicinal Products v. FTC, 136 F.2d 426, 427 (9th Cir. 1943), the court said "petitioners have no constitutional right to disseminate false advertisements by the United States mail or by any means in commerce. . . ."

[8] 38 Stat. 717 (1914), 15 U.S.C. §§ 41-58 (1958).

[9] 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958).

[10] Barnes, False Advertising, 23 Ohio St. L.J. 597, 605 (1962). The first two cases decided under this statute dealt with false advertising. FTC v. Abbott & Co., 1 F.T.C. 16 (1916); FTC v. Circle Cilk Co., 1 F.T.C. 13 (1916).

[11] 52 Stat. 114 (1938), 15 U.S.C. §§ 52-58 (1958).

"unfair methods of competition in commerce, and unfair deceptive acts or practices in commerce, are declared unlawful."[12] This latter change was prompted by the Supreme Court's holding in *FTC v. Raladam Co.*[13] that, before the FTC could take jurisdiction of an alleged unfair practice in commerce, there must be a showing not only of an unfair practice, but also that a substantial segment of competition was injured or threatened to be injured by the unfair methods.[14] The amendments removed the requirement of proving injury to competition, and shifted the emphasis from practices unfair to competition to those injuring the general public, thus enabling the FTC to protect the consumer directly.[15]

The Commission has often exercised its regulatory power within the field of false advertising of health books, and has ordered publishers to cease and desist from making factual and unqualified claims as to the prevention, treatment, and cure of various diseases and conditions, and the promotion of long life and health which could be obtained by following various diets,[16] exercises,[17] and treatments[18] contained in publications if the Commission found, after a full hearing, that observance of such procedures would not produce the claimed results.

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[12] 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958).

[13] 283 U.S. 643 (1931).

[14] Id. at 648.

[15] Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941); Pep Boys—Manny, Moe and Jack v. FTC, 122 F.2d 158 (3d Cir. 1941).

[16] Farrar, Straus, & Cudahy, Inc., 3 Trade Reg. Rep. ¶ 16,866 (1964) (advertisement claimed that suggestions contained in the book "Mirror, Mirror on the Wall" would allow the reader *inter alia* to lose weight without reducing calories, to protect and help his heart, and to increase his sexual potency); Holt, Rinehart, & Winston, 57 F.T.C. 1192 (1960) (representations were made that the ideas in the book "Folk Medicine" would cure sickness, maintain good health, and promote life span); The Health Guild, 56 F.T.C. 140 (1959) (advertiser claimed that the regimen set out in his health book provided a treatment for heart disease and cancer of all kinds); Natural Foods Institute, 50 F.T.C. 434 (1953) (representations were made that the consumption of certain foods could prevent disease and promote long life and health); Harvest House, 41 F.T.C. 319 (1945) (representations were made that the respondent's book "The Complete Guide to Bust Culture" contained diets and exercises which would change the size and shape of the bust).

[17] Parker Publishing Co., 56 F.T.C. 899 (1960) (respondent represented that the methods in his book "How to Live 365 Days a Year" was a reliable treatment and cure for many ailments, and an effective means of achieving healing without medicine or surgery); National Institute for Physical Advancement, 29 F.T.C. 1008 (1939) (advertisement represented that a beautiful bust could be achieved by following the exercises set out in the book "Bust Culture").

[18] Robert Holmes, Inc., 24 F.T.C. 712 (1937) was an early case in which the FTC issued a complaint challenging the veracity of the advertisement of a health book. Here, respondent claimed that those following the program set out in his home psychology course would be cured of shyness, nervousness, and embarrassment, and would be relieved of various ailments. In addition, respondent represented that his recommendations would "eliminate poisons from the body." The FTC found that the ideas contained in the book could not produce such results, and ordered the respondent to cease and desist from making such unqualified statements. See also Excelsior Laboratory, Inc. v. FTC, 171 F.2d 484 (2d Cir. 1948) (advertisement stated that petitioner's garlic tablets were effective for the treatment of high blood pressure); Associated Laboratories, Inc. v. FTC, 150 F.2d 629 (2d Cir. 1945) (petitioner claimed its tablet would cure a number of human vitamin deficiencies and physical ailments); Dannon Milk Products, Inc., No. 8232, FTC, September 28, 1962

The most celebrated of the health book cases is *Witkower Press, Inc.*[19] Respondent, the author and publisher of a book entitled "Arthritis and Common Sense," made factual and unqualified claims in his promotional material both as to his personal qualifications and as to the effectiveness of the treatment and cure which could be enjoyed by people suffering from arthritis and rheumatism by following the suggestions in his book. The Commission found, on the basis of extensive medical testimony, that such cure and treatment could not be effected by compliance with the schema outlined in the publication, and issued an order requiring respondent to refrain from making such representations in advertising. The Commission differentiated between respondent's right freely to express himself as guaranteed by the First Amendment and the standard to which he must adhere in advertising this expression, concluding that the order requiring respondent to cease and desist from representing his unsupported theories and opinions as proven scientific fact was within the power of the FTC and not an invasion of any fundamental liberties protected by the Constitution.[20]

Although such FTC regulation is to some extent restrictive of the *circulation* of ideas, which has been viewed by the Supreme Court as being as important a part of freedom of speech as publication itself,[21] this regulation has been condoned by the federal courts. While under the First Amendment the public is entitled to every man's views and every man has the right to express them,[22] the Circuit Court of Appeals for the Second Circuit, in a decision upholding the constitutionality of Section 15 of the Wheeler-Lea Amendments,[23] succinctly stated "There is no constitutional right to disseminate false and misleading advertising."[24] The argument that freedom of speech is being impinged upon by subjecting the publishing industry to such federal regulation of advertising could similarly be rejected in view of the Supreme Court's statement that the business of publishing is in no different position by virtue of the First Amendment from that of other businesses so far as the commerce clause is concerned,[25] and that people engaging in such pursuits are not free of the ordinary restraints and regulations of the modern state.[26]

(complaint alleged that advertisements represented that yogurt is "nature's perfect food" and has therapeutic properties); Welsh Foundation, 24 F.T.C. 976 (1937) (representation was made that the methods contained in the book "The 7 Essentials of Health" would prevent and cure all bodily ailments and diseases regardless of their nature or origin).

[19] 57 F.T.C. 145 (1960).

[20] Id. at 204.

[21] As early as 1877, the Supreme Court said, "Liberty of circulating is as essential to that freedom [of speech and press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte Jackson, 96 U.S. 727, 733 (1877). See Winters v. New York, 333 U.S. 507, 510 (1948); Lovell v. City of Griffin, 303 U.S. 444, 452 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1935).

[22] American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 395 (1950).

[23] 52 Stat. 114 (1938), 15 U.S.C. § 55 (1958).

[24] E. F. Drew & Co. v. FTC, 235 F.2d 735, 740 (2d Cir. 1956).

[25] Breard v. Alexandria, 341 U.S. 622, 637 (1951).

[26] Id. at 641. The position that a business is not immune from regulation because it is an agency of the press was first expressed in Associated Press v. NLRB, 301 U.S.

Thus it would appear that the FTC has the power to require any advertisement of a health book to indicate clearly that the views expressed therein are matters of opinion, if it be found that such suggestions and ideas are not based on scientific fact. This would be true whether the advertisement merely repeats some of the ideas suggested in the book or consists of testimonials as to the merits of the publication, notwithstanding the fact that these latter can be seen as mere statements of opinion. This latter point was stressed in *Murray Space Shoe Corp. v. FTC*.[27] There, the respondents were manufacturers of shoes which were specially made from moulds of customers' feet. Respondents' mode of advertising consisted of circulating reprints of articles about their product which appeared in newspapers and magazines. Such articles contained testimonials by wearers of the shoe that the product had cured a wide variety of foot and back ailments. The Commission found that the shoes in fact had no therapeutic value, and that such representations constituted unfair and deceptive practices. Respondents contended that the advertisements consisted of *opinions* expressed by consumers as to the merits of the product, and that to prohibit the dissemination of such opinion would be an infringement of the right of free speech. The Second Circuit Court of Appeals held that the Commission, in deciding whether petitioners' advertisements were false and misleading, did not look to a literal interpretation of each phrase, but rather considered the overall impression the circular would make on the public.[28] The court concluded that the claims in the advertise-

103, 132 (1937), where the Court said "The publisher of a newspaper has no special immunity from the application of general laws." In Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951), the Supreme Court upheld the constitutionality of the application of § 1 of the Sherman Act to the activities of publishers, saying that it contains no restrictions on "any guaranteed freedom of the press," and that it "applies to a publisher what the law applies to others." Id. at 155-56.

[27] 304 F.2d 270 (2d Cir. 1962).

[28] Id. at 272. As was said in Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73 (2d Cir. 1910), "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." Id. at 75. The FTC itself determines whether an advertisement is false and misleading, and may reach such conclusion if it finds that "deception may result from the use of statements not technically false or which may be literally true." United States v. 95 Barrels of Vinegar, 265 U.S. 438, 443 (1924).

The interpretation of advertisements favored by the Commission and the courts is the over-all impression that the advertisement makes upon the prospective purchaser. The Fourth Circuit Court of Appeals has said that "in determining whether or not advertising is false and misleading . . . , regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public." P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950). So too, in Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942), the court said "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied. . . . Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal."

The FTC has broad discretion as to the standards to which it may insist that advertisers conform in making representations. In General Motors Corp v. FTC, 114 F.2d 33, 36 (2d Cir. 1940), the court said "It may be that there was no intention to mislead and that only the careless or the incompetent could be misled. But if the Commission,

ments could be construed by the casual reader to be unqualified assertions of therapeutic worth, and that the Commission could order petitioner to rephrase his advertisement so that this impression would not be created.[29]

Therefore, notwithstanding that an advertisement merely restates what the book is about, as Commissioner Elman believed to be the case in *Rodale*, still the FTC has the power to restrict the publication of the advertisement should it have a tendency to mislead. Such restriction, although to some extent inhibitory of freedom of speech and circulation, would not be forbidden by the First Amendment in view of the major public interest involved. Regardless of the form of an advertisement—that is, whether it be found to contain expressions of opinion or excerpts from the publication being advertised—the FTC may insist on the most literal truthfulness of such representations if they are found to create the impression that the ideas and suggestions contained in a publication will unqualifiedly produce a given result. Such advertisement may be prohibited upon a finding that the results apparently claimed in the advertisement in fact will not occur. While this result would not effect a ban on legitimate advertising of the publication as Commissioner Elman seemed to fear, it would provide for the protection of the public from the danger of deceptive advertising in this crucial area.

MARK D. SHUMAN

Government Contracts—Disputes Clause—Judicial Review—Extent of Finality under the Wunderlich Act.—*Utah Constr. & Mining Co. v.* United States.[1]—Plaintiff had a contract with the Atomic Energy Commission for construction of an assembly facility. Plaintiff made various claims against the government for increased costs and for damages, some of which claims arose under the contract, and some of which arose on alleged breaches of contract. Plaintiff sought administrative decision on these various claims pursuant to the standard "disputes" clause of the contract.[2] The Advisory

having discretion to deal with these matters, thinks it best to 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,' it is not for the courts to revise their judgement."

[29] This decision should be compared with that in Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941), where the court of appeals said "the publication, sale and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice within the contemplation of the Federal Trade Commission Act, as amended, if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief. . . . Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion, however, may become material to the jurisdiction of the Federal Trade Commission and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public. . . ." Id. at 644. Cf. Koch v. FTC, 206 F.2d 311 (6th Cir. 1953).

[1] 339 F.2d 606 (Ct. Cl. 1964).

[2] The "disputes" clause involved in *Utah* read:

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting