Boston College Law Review

Volume 6 | Issue 1 Article 12

10-1-1964

Trade Regulation

Barry Ravech

TRADE REGULATION RULES

On January 11, 1964, the report on the health hazards of cigarette smoking by the Advisory Committee to the Surgeon General was made public. After exhaustive studies, a group of distinguished doctors and scientists concluded, "that cigarette smoking contributes substantially to mortality from certain diseases and to the overall death rate."[1] The gravity of the health problem and the call by the Advisory Committee for some "remedial action" prompted the Federal Trade Commission (hereafter referred to as FTC) to act. The FTC, pursuant to its Rules of Procedure and Practice[2] gave notice and held hearings giving all interested parties an opportunity to participate in the formulation of a Trade Regulation Ruling.[3] Subsequently, a Ruling was promulgated which requires that by January 1, 1965, all labeling and advertisements of cigarettes fully disclose in a conspicuous fashion the health hazards of cigarette smoking.[4]

The FTC has jurisdiction to prevent unfair or deceptive acts or practices in commerce,[5] and to prevent the dissemination of false advertising.[6] It also has the power to make "rules and regulations for the purpose of carrying out the provisions . . . of this title."[7] It has been said that the broad Congressional mandate to the FTC in the area of unfair trade practices was granted to allow for changing conditions in industry.[8] Cigarette advertising has been

---

[1] Smoking and Health—Report of the Advisory Committee to the Surgeon General of the Public Health Service (hereafter cited as ACR) (Jan. 11, 1964).

[2] 16 C.F.R. §§ 1.61-1.67 (Supp. 1964). The FTC did not promulgate the method by which Trade Regulation Rules would be formulated until 1963. See 28 Fed. Reg. 7080 (1963).

[3] See 29 Fed. Reg. 8324 (1964). Other Trade Regulation Rulings apply to: Sleeping Bags, 28 Fed. Reg. 10900 (1963); Dry Cell Batteries, 29 Fed. Reg. 6535 (1964); and Binoculars, 29 Fed. Reg. 7316 (1964). These latter Trade Regulation Rules were the first promulgated by the FTC.

[4] 29 Fed. Reg. 8373 (1964).

[5] Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(6) (1958), provides:

> The Commission is empowered . . . to prevent persons . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[6] Federal Trade Commision Act § 12, as amended, 52 Stat. 114 (1938), 15 U.S.C. § 52(b) (1958), provides:

> The dissemination or the causing to be disseminated of any false advertising within the provision of subsection (a) [which declares false advertising unlawful] of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title.

Section 15, as amended, 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1) (1958), provides:

> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) . . . the extent to which the advertisement fails to reveal facts material . . . with respect to consequences which may result from use of the commodity to which the advertisement relates. . . .

[7] 38 Stat. 722 (1914), 15 U.S.C. § 46(g) (1958).

[8] See Jacob Siegal Co. v. FTC, 327 U.S. 608, 612 (1946) (dictum); FTC v. R. F. Keppel & Bros., Inc., 291 U.S. 304, 312 (1934); Comment, 5 B.C. Ind. & Com. L. Rev. 715 (1964).

under FTC scrutiny before,[9] but this is the first attempt to impose restrictive rulings on the entire cigarette industry.[10] The FTC based its findings in the hearings on medical and scientific evidence, statutes and precedent, and a judicious mixture of its own expertise.[11]

The FTC, in view of the Advisory Committee's Report, is of the opinion that present advertising policy constitutes false advertising, and is thus an unfair or deceptive practice within the terms of the Act. Its case is stated thusly:

> It is a deceptive act or practice for an advertiser to make representations concerning the satisfactions to be derived from using so hazardous a product as cigarettes without, at the same time, disclosing the dangers to health involved in its use. . . . To avoid giving a false impression that smoking, because it may be pleasant and satisfying, is therefore innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertisement must also disclose the serious risks to life that smoking involves.[12]

The Commission is implying a misrepresentation, constituting an unfair trade practice, in the absence of affirmative statements by the manufacturers pertaining to benefits derived from smoking. It relies heavily on cases which do not directly support this implication when applied to cigarette advertising.[13] It also cites cases dealing with medicines and drugs for the principle that "if the actual consequences of normal use of the advertised product are different from the expected consequences, they should be disclosed. . . ."[14]

---

[9] See cases cited at 29 Fed. Reg. 8325 n.3 (1964). The normal procedure followed by the FTC since its inception is set out in section 5(b) of the Act. It calls for the issuance of a complaint, and the requirement to show cause why a cease and desist order should not be entered against the respondent. If the Commission is satisfied that there is a violation of the Act, it states its findings and issues a cease and desist order. This adjudication is all done within the bounds of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958).

[10] Congress has given the FTC power to make substantive rules, having the force and effect of law, in the four truth-in-products statutes enacted between 1939 and 1960. In order of their passage, these statutes are: Wool Products Labelling Act of 1939, 54 Stat. 1128 (1940), 15 U.S.C. §§ 68-68j (1958); Fur Products Labelling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1958); Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (1959); Textile Fiber Products Identification Act, 72 Stat. 1717 (1960), as amended, 15 U.S.C. §§ 70-70k (1963).

[11] The Commission resolves all conflicts in medical and scientific testimony. See Justin F. Haynes & Co. v. FTC, 105 F.2d 988 (2d Cir. 1939).

[12] 29 Fed. Reg. 8356 (1964).

[13] The Commission cited, at 29 Fed. Reg. 8352 n.78 (1964), cases which it suggested involved no affirmative representations by the seller. The FTC required informative elucidation in these cases because the products, as labeled, could be easily confused with a higher grade or quality of the same product. See Mohawk Ref. Corp. v. FTC, 263 F.2d 818 (3d Cir. 1959); Kerran v. FTC, 265 F.2d 246 (10th Cir. 1959). The labeling of cigarettes as "cigarettes" would not appear to confuse a purchaser as to what he is receiving. The purchaser gets no more or less than the brand name he requests.

[14] 29 Fed. Reg. 8353 (1964). The case of Ultra-Violet Prods. Inc., v. FTC, 143 F.2d 814 (9th Cir. 1944) is particularly instructive. In that case, affirmative representa-

No one would seriously contend that cigarette advertising has attempted to attribute positive health benefits to the use of cigarettes. Smoking is generally caused by a desire for pleasure, and not for health reasons. Cigarette advertisers promise only momentary enjoyment, without any hygienic affirmations.

A good deal of emphasis is placed on the deleterious effects of smoking on the youth of the nation. The "attractive nuisance" doctrine is used by the Commission to illustrate the dangers of emotional and psychological forces that interfere with good judgement and reason. The availability of cigarettes and the greater incident of health defects among those persons who began to smoke at an early age provide some support for this position.[15] Many thousands of people will die prematurely because of youthful immaturity, when, according to the FTC, this could have been avoided had an informative advertising program been used by the cigarette industry. The "dangerous-products" doctrine, cited by the FTC,[16] imposes a duty to inform consumers of any hidden or latent defects. To the defense of "knowledge,"[17] the FTC blandly asserted that it, "cannot rely on the public's vague, . . . unspecific and merely *transient* awareness of advertising falsehoods. . . ."[18] (Emphasis supplied.)

The Hearing, which preceded the rule-making, was attended by a representative of the tobacco industry, who contended that the entire proceeding was ultra vires.[19] The problems involved in this contention do not lend themselves to simple analysis. An important question is whether the FTC can legally formulate "substantive" rules, and, if so, their effect.

Trade Regulation Rulings are the culmination of proper[20] hearings before the FTC. They impose standards on an entire industry. They are not legislative in the sense of adding new substantive rights or obligations at the time of the hearing, but may be so categorized since the facts found at the hearings may be utilized at subsequent adjudicative proceedings.[21] The FTC contends that these facts will be officially noticed at the subsequent proceeding. It also asserts, that by the use of this method countless hours will be saved by not having to "find" the same facts over and over again.[22]

---

tions were made concerning the benefits to be derived from the use of a sunlamp, and the case was cited for the "expected-consequences" principle. Cf. Alberty v. FTC, 182 F.2d 36 (D.C. Cir. 1950), where at 39, Prettyman J., said, "We think that neither the purpose nor the terms of the act are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond . . . it exceeds its authority."

[15] See 29 Fed. Reg. 8358 n.112 (1964), citing ACR 36.

[16] 29 Fed. Reg. 8356 (1964). The Commission cited, Restatement, Torts § 388 (1934).

[17] See generally Restatement, Torts § 388, comment i (1934).

[18] 29 Fed. Reg. 8360 (1964).

[19] 29 Fed. Reg. 8327 (1964).

[20] These hearings are held in conformity with rulemaking provisions of the Administrative Procedure Act § 4, 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1958).

[21] The manner of such utilization is set out in the FTC's Procedures and Rules of Practice, 16 C.F.R. § 1.63(c) (Supp. 1964).

[22] Official notice was used in a recent FTC decision dealing with the non-disclosure of the origin of watches by foreign manufacturers. Manco Watch Co., 1961-1963 FTC

The authority to formulate these rules is said by the FTC to be derived from the general regulatory clause, section 6(g).[23] In addition, it cites the concededly legal [24] use of the Trade Practice Conference Ruling procedure; its belief that neither of these rule-making proceedings is as drastic as the authorized cease and desist procedure; and the broad scope of Section 5(a)(6) of the Trade Commission Act. It is arguable that the "cease and desist" and rule-making proceedings are quite different, particularly with respect to the final factual determinations made in a Trade Regulation Ruling hearing. The rule-making proceeding does, in effect, adjudicate guilt or innocence, and without the procedural safeguards of a trial-type hearing.[25] The FTC has general precedent supporting its right to choose a remedy and type of procedure. In *SEC v. Chenery Corp.*,[26] the Supreme Court declared that such choice, "lies primarily in the informed discretion of the administrative agency."[27] Stronger support for its rule-making power exists in the pronouncements of the Supreme Court pertaining to the Federal Communications Commission and the Federal Power Commission. In *United States v. Storer Broadcasting Co.*,[28] the Court specifically allowed the making of substantive multiple-ownership rules citing the FCC's general rule-making clause.[29] More recently, the Court passed favorably on the rule-making authority of the FPC,[30] and although it arguably could have relied on a specific clause of the act involved, it preferred to cite *Storer* and a general rule-making authorization.[31] The Court also extolled the virtues of rule-making, saying that continual adjudicative hearings on the same facts crippled the "process of regulation."[32]

The effect and validity of these rules seemingly depends on whether they are legislative or interpretive.[33] If they are legislative, they have the force

Complaints, Orders, Stipulations ¶ 15871 (1962). The facts noticed were based upon experience reflected in countless records and proceedings, as opposed to the novelty of the instant situation. See generally Davis, Administrative Law §§ 15.03-.05 (1958).

[23] 38 Stat. 722 (1914), 15 U.S.C. § 46(g) (1958) provides: "The Commission shall have the power . . . to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title."

[24] See "Trade Rules and Trade Conferences," 62 Yale L.J. 912, 918 n.45 (1953).

[25] The "cease and desist" proceeding provides such safeguards as the guaranteed separation of functions between hearing, investigative, and prosecuting officials. The presence of an impartial hearing examiner, who oversees effective cross-examination under established rules of evidence is also required. See Administrative Procedure Act §§ 5, 7, 60 Stat. 239 (1946), 5 U.S.C. §§ 1004, 1006 (1958).

[26] 332 U.S. 194 (1947).

[27] Id. at 203.

[28] 351 U.S. 192 (1956).

[29] Communications Act of 1934, 48 Stat. 1082, as amended, 47 U.S.C. § 303r (1958). This section provides that the Commission shall:

> Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, . . .

[30] FPC v. Texaco Inc., 377 U.S. 33 (1964).

[31] Id. at 39–41.

[32] Id. at 44. This position is generally supported. See Woll, Administrative Law: the Informal Process 5-7 (1963). But see Handler, Recent Antitrust Developments, 71 Yale L.J. 75, 95 (1961).

[33] The FTC contends that Trade Regulation Rulings fit neither pigeon hole exactly.

and effect of law[34] and require more authority to enact than it has been stated the FTC now possesses.[35] The FTC does not claim to be making substantive rules, but they intimate that since, in effect, substantive rules are made in adjudicative proceedings, they can also be made in rule-making proceedings.[36] Whether it is admitted or not,[37] the FTC intends that these rules will have substantive prospective effect. The Commission insists that it can rely on the facts as resolved at the rule-making hearing. It avers that since these facts were not "adjudicative" but rather general "legislative" questions,[38] they lie well within the agency's extensive expertise. This, for all practical purposes, accelerates the time at which facts are to be found, much to the detriment of the manufacturers. The procedural safeguards guaranteed by the Administrative Procedure Act[39] are skirted with the bland assertion that a fair hearing was provided.

This rule-making procedure, as adopted in the FTC's Rules of Practice seems to run contrary to the legislative history of the Act, particularly with respect to the cease and desist procedure.[40] The argument that the statutory procedure for cease and desist orders is not exclusive, is not very convincing in light of the procedural consequences involved, and the fact that the FTC had never attempted to enact such Rules prior to 1963. Another possible indicia of exclusiveness is the form of the statute, *i.e.*, the declaration that unfair trade practices are unlawful, followed by the cease and desist procedure with the concomitant appellate course to be followed. It seems more correct to view this new procedure as a break with the past rather than a natural culmination of events. The whole tenor of a Trade Regulation Ruling Procedure is one of compulsion as contrasted with the noticeably more cordial attitude of the Trade Practice Conference Rules.[41]

On August 19, 1964, the House Commerce Committee requested the FTC to postpone the enforcement of its rules for six months.[42] It was an-

[34] See 29 Fed. Reg. 8371 (1964), where the FTC in speaking of both the Trade Regulation and Trade Practice Conference Rules said, "But where a rule correctly expresses the requirements of the law, one who disobeys the rule is, for all practical purposes, *disobeying the law.*" (Emphasis supplied.)

[35] Auerbach, Federal Trade Commission, 48 Minn. L. Rev. 457 (1964); 51 Cong. Rec. 14932 (1914) (remarks of Judge Covington, a member of the conference committee considering the FTCA); Final Report of the Attorney General's Committee of Administrative Procedure, 77th Cong., 1st Sess., 98 n.18 (Comm. Print 1941).

[36] See 29 Fed. Reg. 8366 (1964).

[37] Compare 29 Fed. Reg. 8365 n.131 (1964), with 29 Fed. Reg. 8369 n.143 (1964).

[38] See generally Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193 (1955). Professor Davis distinguished "adjudicative" from "legislative" as follows:

> Adjudicative facts are facts about the parties and their activities, . . . usually answering the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to the jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion. Id. at 197.

[39] See SEC v. Chenery Corp., supra note 26.

[40] Supra note 9.

[41] Compare 16 C.F.R. § 2.29 (1960), with 16 C.F.R. § 1.63(a) (Supp. 1964).

[42] The request is for a moratorium due to the number of bills pending on the

nounced five days later that the FTC would, indeed, suspend its rules to allow Congress time to consider the problem.[43] If Congress fails to act, the procedure adopted here will more than likely be accepted by the courts. Despite the arguments presented here and at the Hearing by the cigarette industry, a judicial deference for the "procedural" actions of administrative agencies will likely prevail, as it has done in the past.[44] Coupling this deference with recent Supreme Court pronouncements in related areas leaves little doubt that the "fourth branch" will not have its newest burgeon excised.

BARRY RAVECH

FTC's authority in this matter. Since Congress will not have time this session to act on these bills, the suspension of the rule was called for so as to enable proper consideration of the entire subject. Wall Street Journal, Aug. 20, 1964, p. 3, col. 3.

[43] Wall Street Journal, Aug. 24, 1964, p. 1, col. 1.

[44] See FPC v. Texaco, Inc., 377 U.S. 33 (1964); SEC v. Chenery Corp., supra note 26; Yakas v. United States, 321 U.S. 414 (1944); FTC v. R. F. Keppel & Bros., Inc., supra note 8.