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ADDRESS

by

COMMISSIONER A. BUREAU OF CONSUMER PROTECTION

on

FTC PROMOTES FREE AND FAIR COMPETITION

Before the

ADVERTISING CLUB OF CHARLOTTE

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...

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

growth of imaginative and creative advertising which

the consumer observes its absence.

* * *

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

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,

reach a mass market of consumers. And this could

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

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

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

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

might reasonably be expected to have upon the general public." 13/ The Commission, therefore, in the deceptive advertising area, in enforcing the Federal Trade

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

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

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

regulatory function. It is a crucial factor in implementing

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

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

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

~~restriction on the publication of advertisements when the~~

Allied to the problem of misrepresentation by

19 product could perform in accordance with 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

particular as to TV commercials generally even if in

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 Fertilizer and Food

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

We have created in the Federal Trade

litigation. For example, the Commission's former Trade Practice Conference procedure served to interpret the law and to advise businessmen about the illegality of

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

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

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 necessary to prove only that the term "leakproof"

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

1