Address

on

THE FEDERAL TRADE COMMISSION AND ITS RELATION TO ADVERTISING

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By

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THE FEDERAL TRADE COMMISSION AND ITS RELATION TO ADVERTISING

A discussion of the relationship of the Federal Trade Commission to advertising should perhaps be prefaced by brief comment as to the conditions which were in a large part responsible for the creation of the Commission. If we view the trade policies of this country as they were and as they might be now if it were not for the restraining influence of the Commission's activities, we can more clearly understand the contribution and relation of the Commission and the laws it administers to our competitive system. Many years ago, when there was a relatively simple economic system, comparatively few commodities were bought and sold. Buyers at that time were presumed to know as much about the commodities purchased as the seller, and if the seller succeeded in convincing the buyer, for example, that a dray horse was a thoroughbred, it was considered that the buyer was vanquished in a fair trade.

During the last century, before the advent of the conditions which gave rise to nation-wide advertising and selling, a constantly increasing number of types of commodities began to flow in commerce. Due to limited communication facilities and traveling accommodations, however, trade during those times was carried on for the most part by the local artisans and merchants in a limited trade area. There were very few nationally advertised products. A buyer relied to some extent upon the integrity of the local merchant, but mostly on his own knowledge of values and quality of merchandise. It was in this era that shoppers carried magnifying glasses to enable them to count the threads in piece goods and took various other precautions so that they would not be bested in what was known as a fair trade.

The development of our industrial technique resulted in large factories, mass production and a phenominal growth of urban communities. The improvement of our communications and transport services facilitated the interchange of information and the flow of commerce. Then came an era of the traveling salesman, popularly called "drummer", carrying his line of samples - still in vogue in some industries.

New discoveries and improvements in chemistry and other fields led to numberless new and better products in the cosmetic, drug and other industries. Articles which before were considered luxuries available only to the very rich, or which were unheard of, came to be considered necessities for the workman and his family.

This new and more complex economy presented grave problems both for the sellers and consumers. It was no longer possible for the seller to procure enough customers in the vicinity of his place of business to buy the output of his larger plant. The only solution, of course, was to procure customers in other vicinities by constantly increasing and expanding his advertising field. It was no longer possible or practical for the ordinary consumer to acquire sufficient technical knowledge or skill to judge intelligently the comparative quality or value of the countless articles he purchased. The consumer purchased an article regarding which he had very little technical knowledge, and the article was manufactured by a distant concern of which he had little or no knowledge. He was, therefore, forced to rely on the advertising claims of the sellers of these articles.

Human nature being what it is, - unfortunately, a number of individuals did, and continue to, take advantage of the consumer and their competitors by misrepresenting the quality and character of their merchandise. In the hands of the unscrupulous, brass became 14 Karat gold, cotton was transformed into wool and a mixture of epsom salts and water was represented to be a cure for cancer as well as headaches. The old common law doctrine of fraud was insufficient to provide an adequate remedy. This unfair situation, in addition to a number of others which are not the subject matter of this discussion, resulted in a demand both by the consumers and the ethical business men for an adequate remedy. The consequence was the enactment by the Congress in 1914 of the Federal Trade Commission Act, upon the recommendation of President Wilson; the language employed in the Act was made broad enough to cover such unfairness as that under discussion as well as monopolistic and restraint practices generally. This Act made unfair methods of competition in interstate commerce unlawful and provided for the organization of the Federal Trade Commission for the purpose of enforcing the provisions of the Act.

The basic concept of the law may be stated as the preservation of fair competitive opportunity in trade. After its organization, the Commission proceeded in a number of cases on the theory that false advertising was an unfair method of competition. In one of the earlier Commission cases, relative to misleading advertising, decided by the Supreme Court, the Court stated:

> "The public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who mark their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition." (FTC v. Winsted Hosiery Company, 258 U. S. 483).

In a decision rendered the seventh of this month the Circuit Court of Appeals of the Seventh Circuit declared:

> "When misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." (Dr. W. B. Caldwell, Inc. vs. Federal Trade Commission).

It is obvious that those practices which prevent a competitor from selling to those customers whom his goods would ordinarily attract on their merit are uneconomic as well as unfair. Any practice which restrains the fair opportunity of the buyer to choose merchandise on its merits also restrains the fair opportunity of the seller of merchandise.

Before the enactment in March, 1938, of the Wheeler-Lea Amendment to the Federal Trade Commission Act, the Supreme Court in the Raladam case, (283 U. S. 643), held that three elements were essential to a valid order by the Commission: 1. The methods complained of must be unfair; 2. They must be methods of competition in commerce; and 3. A proceeding to prevent them must be in the interest of the public. In other words, this case held that it was necessary to show that the misleading advertising was unfair to competitors as well as prejudicial to the public interest, in order for the Commission to take corrective action. The Wheeler-Lea Act made unfair and deceptive acts and practices in interstate commerce unlawful as well as unfair methods of competition. The effect, therefore, of this provision of such Act is to afford direct protection to consumers in the same manner as the original law afforded protection to competitors of a concern using misleading advertisements. It may be generally stated that any practice which is unfair to the consuming public is likewise unfair to honest competitors who do not engage in such unfair practices, and vice versa. However, the amendment mentioned relieved the Commission of the burden of establishing by specific evidence that which was obvious but frequently difficult of specific proof - competition and injury to competitors.

At this point, it is perhaps advisable to discuss the organization and procedure of the Federal Trade Commission. The Commission is composed of five members appointed by the President by and with the consent of the Senate for terms of seven years each. The Commission has on its staff trained and efficient lawyers, medical doctors, economists, accountants, statisticians and clerical personnel. Many members of the staff have been with the Commission since its organization, and the basic policies of the Commission have been consistent. The Commission handles thousands of cases annually involving unfair practices concerning the sale of practically every type of product which moves in interstate commerce.

The procedure of the Commission is simple and effective. A case involving misleading advertising as well as other unfair practices

may originate in several ways, but the majority of such cases are initiated by complaint filed with the Commission by a competitor. Such complaints in most cases are in the form of letters addressed to the Commission by the competitor. The identity of the competitor is kept confidential. The Commission has established, in lieu of the former Special Board of Investigation, the Radio and Periodical Division in order that, for the protection of the consumer, a continuous survey may be made to discover false and misleading advertising matter published in newspapers and magazines and broadcast by radio.

Periodic calls are made for approximately one thousand editions of magazines of interstate distribution, and approximately five hundred editions of representative newspapers of substantial general circulation. The Commission examined during the past fiscal year 220,760 advertisements appearing in the aforementioned newspapers and magazines and noted 26,176 as containing representations that appeared to warrant further investigation.

Calls are issued to individual radio stations at the rate of four times yearly. National and regional networks respond on a continuous weekly basis, submitting copies of commercial portions of continuities for all programs wherein linked hook-ups are used. Producers of electrical transcription recordings submit monthly returns of typed copies of the commercial portions of all recordings produced by them for radio broadcast. During the fiscal year ended June 30, 1939, the staff of the Radio and Periodical Division read and marked 643,796 commercial radio broadcast continuities amounting to 1,384,353 pages of typewritten script.

These surveys, of course, are solely for the use of the Commission.

If the complaint filed by a competitor or the observance of advertisements by its staff indicate to the Commission a probable violation of its basic law, the Commission directs that an investigation be made. This investigation may be conducted by means of correspondence with the advertiser, or, when necessary, a field investigation is made, and the advertiser and other appropriate parties are interviewed personally. If after such investigation, which includes consultation with experts, the Commission has reason to believe that the advertiser had disseminated false or misleading advertising, one of two actions is taken by the Commission. By far the greater number of cases are settled by what is known as the stipulation procedure. If the product advertised is not such as to cause injury to health when used as advertised or under conditions that are customary and normal or when fraud or other unusual conditions are not involved, the privilege of stipulation is extended to the advertiser.

It frequently happens that the advertiser commits an offense against the Federal Trade Commission Act by reason of ignorance of

the law, or the false advertisement may have been published by an overly enthusiastic employee without the knowledge of the head of the firm, or the advertiser may have been honestly mistaken as to the efficacy of his product. In the vast majority of such cases, when the false advertisement is called to the attention of the advertiser by the Commission, he immediately states that he will discontinue making such representations and expresses his desire to dispose of the proceedings in the quickest possible way with a minimum of expense. The advertiser is then ordinarily given the opportunity to sign a stipulation as to the facts and an agreement to cease and desist from such practices. It is only in rare cases that these stipulations are subsequently violated by the advertiser. I wish to emphasize, however, that the stipulation procedure is a privilege and not a right and the extension of such privilege is a matter within the discretion of the Commission.

Some few critics have charged that coercion or oppression was employed by the Commission's staff in procuring signatures to stipulations. Any such charge is absolutely untrue - without any foundation. The Commission has received a few specific complaints to this effect and in each instance has made a searching, vigorous investigation, and in each instance found that such charges were without the slightest foundation. The Commission vigorously insists that no such coercion or oppression occurs, and challenges the production of any evidence to the contrary.

From the beginning the Commission has instructed its staff authorized to negotiate stipulations to be very careful not to do or say anything that might be considered the exercise of pressure or threats or influence to induce respondents to sign stipulations, and to make it clear to respondents that they were simply accorded the privilege of considering the signing of a stipulation, that it was entirely optional with them, etc. A form letter accompanying the proffered stipulations speaks for itself in this respect. The Commission's staff are also instructed to report to the Commission any instances of where the respondents returned the stipulations with any reservation or protest or any representation that the stipulation was not in accord with the true facts, etc. Such has occurred in a few instances, and the Commission has invariably declined to approve or receive the stipulation under such circumstances and has so advised the respondent.

With respect to the suggestion that some companies or agencies sign stipulations merely to get rid of a case, that is doubtless true in all cases. In the vast majority of cases, they see proper to sign a stipulation admitting the essential facts and agreeing to cease and desist in preference to having a formal cease and desist order issued against them. However, that is their prerogative, and they sign the stipulation of their own free will and accord. The Commission will not accept a stipulation with any written or oral reservations or mental reservations on the part of the signer known to the Commission.

It has likewise been loosely alleged that in signing stipulations, some advertisers do not really intend to agree to the statements therein contained, etc. A case is never referred to the Chief Trial Examiner or the Director of the Radio and Periodical Division with authority to accord the privilege of stipulation unless and until the Commission has reason to believe from the preliminary investigational record that the respondent in question has violated the law over which the Commission has jurisdiction. The stipulation embraces a recital of facts to the effect that the respondent has disseminated certain advertisements, and that such were untrue in the particulars set forth, and that the respondent agrees to cease and desist such practices and not to resume same. It comes in poor grace for a member of industry to claim that he signed a stipulation of misstatements. No ethical member of industry would sign such a false stipulation.

As Daniel Defoe well said long ago, -

"Justice is always violence to the party offending, for every man is innocent in his own eyes."

In cases in which the privilege of stipulation is not extended, and the Commission has reason to believe that the Federal Trade Commission Act is being violated or in which the advertiser has refused or neglected to avail himself of the privilege of stipulation or has violated the stipulation, the Commission issues its formal complaint. The complaint which contains the allegations involved in the case is served on the advertiser who is called the respondent. After the complaint is issued and served, the respondent is given twenty days within which to file an answer. Subsequently, hearings are held before a trial examiner of the Commission, at which hearings evidence in support of and, at the option of respondent, in opposition to the allegations of the complaint, is introduced. Briefs are filed and upon request of either party, oral argument is heard before the Commission. If after due consideration, the Commission finds that the evidence sustains the allegations of the complaint, the Commission issues findings as to the facts and an order to cease and desist from the unlawful practices alleged and proved.

The respondent has the unqualified right of appeal from the final order of the Commission. If the respondent, for any reason, is of the opinion that the Commission's order to cease and desist is not justified, he may appeal to the United States Circuit Court of Appeals within sixty days from date of service of the order. If the Commission's order is affirmed by the court, the court may adopt the order of the Commission, and thereafter any violation thereof is punishable as any other contempt of court. If the respondent does not appeal from the Commission's order to cease and desist within sixty days after date of service, the order becomes final. If the respondent violates the order after it has become final, respondent

is liable for a civil penalty of not more than $5,000, which accrues to the United States and may be recovered in a civil action brought in the United States District Court. These actions are brought by the Department of Justice and not by the Commission. If the Commission has reason to believe, after investigation, that its order to cease and desist, which has become final, is being violated, the facts in the case are certified to the Department of Justice by the Commission for appropriate action. The respondent, of course, has ample opportunity to defend such action in the court.

The Commission has exercised extreme care in its proceedings, and very few of its orders are successfully attacked in the courts. The record shows that from January 1, 1933 to April 30, 1939, the Commission investigated and reviewed 22,038 cases, accepted 3,379 stipulations to cease and desist and issued 1,218 cease and desist orders. Although, as stated above, any respondent aggrieved has the absolute right to appeal to the Circuit Court of Appeals, the Circuit Courts reviewed only 80 of the Commission's cease and desist orders during such period. During the years 1936 to 1939, inclusive, 60 cases involving cease and desist orders of the Commission were decided on their merits by the Circuit Courts. The decisions in 57 of these cases were favorable to the Commission. During this period, only 3 of these 60 cases were decided adversely to the Commission, and 1 of these cases did not involve the validity of its order. In numerous cases, petitions for certiorari to the Supreme Court to review orders of the Commission were denied by the Supreme Court. During the past eight years the Commission has been reversed by the Supreme Court in only 1 case and that was by a five to four decision in a Clayton Act case, in which the Commission had been previously affirmed by the Circuit Court of Appeals.

One of the important provisions of the Wheeler-Lea Act, and one which is no doubt of interest to you, is the definition of "false advertisement" of foods, drugs, devices and cosmetics. Of particular interest is its application to drugs and devices which are used in the treatment of diseases or to effect the structure or function of the body. This section of the Act provides that a false advertisement may be made not only by making an affirmative representation which is misleading in a material respect, but also by failure to reveal consequences which may result from the use of the commodity to which the advertisement relates, under conditions prescribed in the advertisement or under such conditions as are customary or usual. In other words, if the advertisement does not reveal to the prospective purchaser that the use of the preparation may be injurious to health, then there is an implied representation that the preparation is safe for use and the purchaser is entitled to rely on such representation. The manufacturers and sellers of these preparations know the ingredients contained therein and know, or at least should know, the results to be expected from the use thereof. The ordinary members of the lay public are uninformed as to these questions and must rely on the advertiser as their source of information. Is it not,

therefore, reasonable to require the advertiser to inform prospective purchasers of any potential harmfulness which may result from the use of the preparation, under ordinary conditions?

I will say here and now that the individual has the right of self-medication, and the Federal Trade Commission does not propose to interfere with that right. But as a corollary to that right, the individual also has the right to be truthfully informed as to the medicines which he purchases, and it is to the real interest of the ethical vendors of medicines that purchasers be so informed.

Another important provision of the Wheeler-Lea Act is that authority was conferred on the Commission to bring suit in the United States District Courts to enjoin the dissemination of false advertisements relative to foods, drugs, devices and cosmetics, when such proceedings are in the public interest. Such injunctive proceedings, if granted by the courts, remain in effect until the final disposition by the Commission or the courts of the Commission's complaint. The reason for this provision is that the issuance of the complaint and the trial of the case may extend over a comparatively long period of time. An irresponsible and careless person or corporation may, in the meantime, be selling and advertising a dangerous preparation which may do irreparable harm to many innocent users. This provision authorizes the courts on proper showing by the Commission to enjoin the dissemination of such advertising pending the final disposition of the Commission's complaint.

The Commission since September 1, 1938, has filed 23 suits to enjoin the dissemination of false advertising. The courts have granted injunctions in all of these cases, most of which related to medicinal preparations, the advertisements of which failed to reveal the danger to health likely to arise from the use of the preparations. These injunctions were issued by courts in widely separated districts throughout the country. One was challenged by an appeal to the Circuit Court of Appeals, which, by unanimous decision, affirmed the issuance of an injunction by the District Court. In connection with these injunctions, it may be interesting to note the types of preparations involved and some of the drugs contained in them. The preparations were: abortifacients, aphrodisiacs, and so-called cures for obesity and dipsomania. The drugs were: dinitrophenol, various hydrochlorides, desiccated thyroid, ergot, apiol, black hellebore, oil of Savin, aloes, cotton root bark and pilocarpus, or combinations thereof.

Before proceeding in cases involving medicinal preparations, the Commission obtains medical and other scientific opinion in order to be intelligently informed as to the truth or falsity of advertising claims. The Commission has established a Medical Advisory Division consisting of three trained physicians and a clerical staff. The Commission consults with the Food and Drug Administration, the National Institute of Health and other experts both within and

without the Government service. The Commission welcomes any competent data which may be submitted by an advertiser in support of his advertising claims and such data are carefully considered.

Without the helpful cooperation of members of industry, the press and radio, the task of the Commission would be difficult indeed. The bouquets received by the Commission from business men far outweigh the "brickbats."

I wish to mention two or three examples.

In a recent address on "Is the Government Against Advertising?" before the Advertising Club of Washington, Mr. Arthur Price, Advertising Representative of one of the largest advertisers in America, spoke in part as follows:

> "In 1914, probably, history's most important date, this country's business was given some of its own all-time-best protective legislation. Particularly the Clayton Anti-Trust Law which broadened the Sherman Act to cover a new zone of unfair competition, and the Act creating a great American institution known as THE FEDERAL TRADE COMMISSION.
>
> "1938 brought the Wheeler-Lea Amendment which gave real force to the policing powers of the Federal Trade Commission.
>
> "'Cease and Desist' have become well known - and powerful words - in our business life. Of all the influences ever brought to bear upon our profession to eliminate the dishonest and undesirable element - none can even remotely compare in efficacy - and in accomplishment - with the success of 'Cease and Desist.'
>
> "I have yet to see any single instance of an F. T. C. act or utterance that would suggest any radical ideas about advertising. Dishonest and harmful advertising is banned. That a reasonable and rational tolerance is allowed in its consideration is easily apparent in the functioning of the F. T. C."

I commend Mr. Price's entire address to your thoughtful consideration.

In a speech before the Advertising Club of New York, March 27, Mr. Alfred M. Corrigan, a leading advertising executive, discussed "advertising copy in the last two decades."

Referring to the Federal Trade Commission, he said:

> "We are asked often by the honestly curious what the Federal Trade Commission is going to do to advertising

copy. I think a fair answer to that is - nothing that will in any way be harmful, nothing that advertising men have not striven for themselves. If you are a law-abiding citizen you don't resent the city putting another policeman on the force. Advertising for years has maintained its own vigilantes. Occasionally though, the brunet sheep stray into advertising just as they do into the press, the pulpit or politics. Now advertising can run the black sheep out at a little faster gait.

"The year-in and year-out vigilance by advertising organizations, which dates back to the Truth-in-Advertising campaigns of thirty years ago, reached its high point in the passage of the Wheeler-Lea Act in Congress. It is to the credit of publishers and advertising men that they helped draft that law and worked for its passage. No one is more interested in driving fakers or charlatans or word-chiselers out of advertising than is advertising itself.

"We're going to be happy about the FTC. And we're going to like the Wheeler-Lea law. And our own vigilantes are not quitting.

"As the copy chief said early in this talk --

'There's always been a lot of good advertising copy and there's always been some that was pretty bad.'

"I think most business men and most advertising men agree that the major trend today is definitely towards a lot more of the good and a lot less of the bad."

My remarks have largely related to the restraints provided by law. I would now like to briefly discuss what may be a much more effective restraint on unfair practices and that is self restraint. The limited funds and personnel of the Commission make it impossible, even if it were necessary, to adequately police the competitive practices of every person selling goods in interstate commerce in the United States. If the consumer and the ethical business man had to rely entirely on the Government to expose deceit and fraud in commerce, the task would be hopeless. Fortunately there is a constantly raising of the ethical standards in industry. The old idea of "anything goes" has been discarded by a very large percentage of the business interests.

The Supreme Court recognized this in a recent Commission case decided by it in which the Court stated:

"The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less

> experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception."
> (F. T. C. v. Standard Education Society, 302 U. S. 112).

As I have many times said, the vast majority of members of industry are honest and ethical. However, unfortunately, there is a small percentage in nearly every line of enterprise who persist in sharp practices.

We invite your help and we wish to help you in eliminating that fringe.

The practical effect of the Commission's activities towards suppressing false advertising is in no sense of the word a restraint on business; it is directed towards freeing business from the evils with which it is beset; our purpose is to eradicate the restraints and the practices of the troublesome minority who are interested in getting something for nothing.

Advertising plays a very important part in our economy. Truthful informative advertising is very valuable in promoting commerce among our citizens. Deceptive advertising is wrongful and distinctly harmful not only to the consuming public, but also to industry itself.

Advertising is valuable to the advertiser only to the extent that it has reader and listener confidence. Members of industry who have never indulged in false and misleading advertising suffer immeasurably because of public confidence being shaken by false advertising disseminated by others.

Have you ever considered how valuable would be advertising if all advertising was truthful and everybody learned that they could rely upon all advertising representations? We earnestly invite the cooperation of you and all other business men towards bringing about as nearly as we can such an ideal situation.

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