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STATEMENT

ON

FAIR ADVERTISING LANDMARKS

BY

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AT A MEETING OF

FOOD, DRUG AND COSMETIC LAW SECTION

NEW YORK STATE BAR ASSOCIATION

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Introduction

It is fitting that your meeting today celebrates the Twenty-fifth Anniversary of the enactment of the Food, Drug and Cosmetic Act and in that connection commemorates the Silver Anniversary of the Wheeler-Lea Amendment to the Federal Trade Commission Act. Indeed, it is a pleasure to participate with you here today in the celebration of the Silver Anniversary of the Wheeler-Lea Act, the Act of March 21, 1938, which so greatly strengthened the authority of the Federal Trade Commission to protect businessmen and the public from false advertising and other deceptive and unfair acts and practices. Everyone recognizes the Wheeler-Lea Act as one of the great landmarks for fair advertising.

Fair Advertising Landmarks

Perhaps the greatest fair advertising landmark of all is the Federal Trade Commission Act as it was originally approved in 1914 and interpreted in some of the early cases, such as Winsted[1/] and Algoma.[2/] Only

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1/ Federal Trade Commission v. Winsted Hosiery Co., Sup. Ct. (1922), 258 U.S. 483.

2/ FTC v. Algoma Lumber Co., et al., Sup. Ct. (1934), 291 U.S. 67.

when some of the guideposts of that basic statute became obscured by the events of time, as by the decision in the first Raladam Case,[3] did it become necessary to spell out, in the Wheeler-Lea Act, what was probably intended by the Congress in the first instance, namely, that consumers as well as businessmen are entitled to be protected from unfair and deceptive advertising and other unfair acts and practices.

Prior to the Wheeler-Lea Act, the Commission's capacity to protect consumers from deceptive practices was only an incident to the businessman's protection against unfair methods of competition. Unless there were competitors and they had suffered actual or potential injury, the Commission could not prohibit a misrepresentation even though it was clearly deceptive to the public.[4]

This does not mean that the Commission was unaware of the consumer or his problem before 1938. The first two cease and desist orders ever entered by the Commission prohibited misrepresentations with regard to composition of sewing

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3/ FTC v. Raladam Co., Sup. Ct. (1931), 283 U.S. 643.

4/ FTC v. Raladam Co., Supra.

thread and textile fabrics for home use. The first cease-and-desist order to be reviewed by the courts involved misrepresentation of food products, sugar, coffee and tea, by one of the nation's largest retailers. The broad responsibility of the Commission to protect the public was described by the court of review in that case as follows:

> "The commissioners, representing the Government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. . . ."

The court added that the advertiser's ethical standards were at least as high as those generally prevailing in the commercial world at that time, and that the Commission's order was to be taken more as a general illustration of the better methods to be required in the future rather than a criticism for past conduct.5/

As early as 1929, it had become apparent to the Commission that misrepresentation embodied in false and misleading advertising was of such volume as to require

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5/ Sears, Roebuck & Co. v. FTC, CA-7 (1919), 258 Fed. 307.

the giving of special attention to the problem. In that year the Commission established a "special board of investigation" to conduct a continuing survey of newspaper and magazine advertising for the purpose of detecting any claims appearing to be questionable. In 1934 the survey was extended to radio advertising and in 1948 to television when it became a significant advertising medium. The Commission has continued that survey or monitoring of advertising up to the present day as an important part of its activity to prevent false and deceptive advertising.

It thus became established in the very beginning of the Commission's history that positive misrepresentations would be prohibited, if they tended to deceive consumers and if there were competitors likely to lose business as a result of the misrepresentations.

With the enactment of the Wheeler-Lea Amendments to the Federal Trade Commission Act in 1938, consumer protection gained new stature. He was given protection in his own right, not dependent on whether the deceptive practice also had an effect of injuring competitors.

The Wheeler-Lea Amendments to Section 5 gave the Commission jurisdiction to prevent "unfair or deceptive acts or practices in commerce," in addition to the "unfair methods of competition in commerce" which previously were unlawful. Thus this change established another great landmark for fair advertising. It put the consumer on a par with the businessman from the standpoint of entitlement to protection from deceptive practices. At that point, caveat emptor or purchaser beware ceased to be the economic and commercial policy of the United States. From then on, consumers and businessmen could deal with each other on a basis of equality, in the knowledge that use of deceptive practice was against public policy. No longer need the consumer suspect that the businessman was likely, or any more likely than anyone else, to engage in deception. By the same token, the businessman was elevated to a new plane of public responsibility and respect. The new law proclaimed to the world an assurance that the American businessman, like every other American, is assumed to act in a manner which will be

honest, nondeceptive, and in the best long-run interests not only of himself but his fellow man.

An equally important contribution of the Wheeler-Lea Amendments to the Commission's arsenal was the provision that cease-and-desist orders entered under the Federal Trade Commission Act would become final sixty days after their issuance, whereupon civil penalties of up to $5,000 for each violation could be collected in suit brought on behalf of the United States. Prior to that, the repeat offender was allowed three bites at the apple before he could be penalized for his wrongdoing. His initial violation would lead to issuance of a cease-and-desist order by the Commission. His next violation would result in a decree from a court of appeals that he comply with the Commission's order. His third violation might result in his being held in contempt of the court's decree.

Under the new procedure, he would be subject to penalties for the first violation of the order. Teeth had been put in the Commission's orders. No longer would they be treated merely as a code of ethics or an illustration of better methods required for the future. They were now a command of the Government, to be respected upon first issuance.

Civil penalties were collected under that section during fiscal year 1962 in the record amount of $100,400.

Probably the most important consumer protection feature of the Wheeler-Lea Amendments was the addition to the Federal Trade Commission Act of new sections, numbered from 12 through 16, giving the Commission special authority to prevent false advertising of food, drugs, therapeutic devices and cosmetics. Not only could such advertising be attacked through a conventional cease and desist proceeding, but pending the outcome of such proceeding, issuance of injunction by a U. S. District Court could be sought, to stop use of the challenged advertisement until the cease and desist proceeding had been brought to conclusion. Additionally, if the advertisement was published with fraudulent intent or if the advertised commodity would be dangerous to health, then upon certification of the facts to the Attorney General a criminal action could be brought to impose punishment by fine up to $5,000 or imprisonment up to six months, or both. The jurisdiction of the Commission over advertising of food, drugs, therapeutic devices and cosmetics was broadened so it would not depend upon sales of a falsely advertised product in commerce, but would extend also

to the dissemination of false advertising by United States mails, or in commerce by any means, or by any means likely to induce a sale in commerce.

An interesting development under the Wheeler-Lea Amendments has been the evolution of affirmative disclosure requirements in the advertising or labeling of products.

In one of the first and most definitive of those cases, the Commission's order as affirmed by a court of appeals in 1942 required affirmative labeling of true composition on food serving trays which were made of paper that had been treated to simulate the appearance of wood. The court observed that:

> "The process used ... to simulate woods does great credit to the ingenuity of ...(the manufacturer), and is so skillfully carried out that the physical exhibits shown us in court were distinguishable from the real wooden trays only after the most careful scrutiny. The trays themselves were the best evidence of the possibility of confusion. Without some warning, the trays of themselves are almost certain to deceive the buying public . . . ." 6/

The complaint as issued by the Commission in that case was couched in the language of the Wheeler-Lea Amendment to Section 5 of the Federal Trade Commission Act, charging use of "unfair and deceptive acts and practices in commerce" with no mention being made of "unfair methods of competition in commerce."

6/ Haskelite Manufacturing Corporation v. FTC, CA-7 (1942), 127 F. 2d 765.

Another landmark complaint issued under Section 5 charged that because of consumer preference for domestic products, failure to disclose the foreign origin of imitation pearls constituted "unfair and deceptive acts and practices in commerce", and the order required that such products not be offered for sale or sold without clearly disclosing the foreign country of origin. In affirming the order, the reviewing court stated:

> "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 merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice violative of section 5 of the Federal Trade Commission Act, . . ." 7/

In another leading case, the court of review emphasized that requiring labels to contain affirmative disclosures is intended to protect the ultimate consumer and not merely the middlemen. The product involved in that instance was rayon dresses which simulated the appearance of silk. The court said that the likelihood of consumers' buying the dresses in the belief they were silk justified the Commission in requiring the manufacturer to label them as rayon, "thus preventing distributors from exercising a deception

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7/ L. Heller & Son, Inc., et al. v. FTC, CA-7 (1951), 191 F. 2d 954.

of which the petitioners themselves were not guilty..."8/ That case, decided in 1952, was of particular significance because it put the force of court decision behind trade practice rules which the Commission had issued in 1937 requiring affirmative disclosure of true composition respecting rayon goods. It also was a significant factor leading to enactment of the Textile Fiber Products Identification Act of 1958.

Other Commission orders requiring affirmative disclosures have been upheld in regard to abridgment of books, reprinting of books or stories under a new title, 9/ and the sale of previously used products. 10/

The Supreme Court recently denied certiorari respecting a Commission order requiring that aluminum watch cases which had been treated to simulate the appearance of gold, be marked to disclose that they were not precious metal. 11/ This was another case of consequence, as it enforced trade practice rules adopted by the Commission in 1948 requiring affirmative disclosure respecting composition of watch cases deceptive in appearance.

By an action similar in principle the Commission modified an order so as to require that a debt collector

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8/ Mary Muffet, Inc., et al. v. FTC, CA-2 (1952), 194 F. 2d 504.

9/ Hillman Periodicals, Inc. v. FTC, CA-2 (1949), 174 F. 2d 122; Bantam Books, Inc. v. FTC, CA-2 (1960), 275 F. 2d 680, cert. den. 364 U.S. 819.

10/ Royal Oil Corp. et al. v. FTC, CA-4 (1959), 262 F. 2d 741.

11/ Theodore Kagen Corp. et al. v. FTC, CA-DC (1960), 283 F. 2d 371, cert. den. 365 U.S. 843.

not only cease misrepresenting the nature of his business, but also cease distributing written materials which did not disclose the nature of his business.

The order as thus modified was affirmed on court review, the main basis being that failure of the written materials to contain the disclosure required by the order would "cause recipients to take action they would not otherwise have taken". 12/

I think it can be said, then, that the Wheeler-Lea Amendment to Section 5, by declaring deceptive acts and practices in commerce to be unlawful, extended the protection of consumers from the area of simple misrepresentation to the area of deception practiced through omission or non-disclosure. When the omission or nondisclosure involves a fact material to the consumer's decision of whether or not to engage in commercial dealings, the Commission may act to protect him. In so doing, the Commission has no desire to dictate what goods or services the consumer shall or shall not purchase. Rather, the purpose is to aid him by making sure that he gets what he thinks he is getting.

The disclosures required in the advertising of food, drugs, therapeutic devices and cosmetics under Sections 12 through 15 of the Act have had a similar evolution.

12/ Mohr et al. v. FTC, CA-9 (1959), 272 F. 2d 401, cert. den. 362 U.S. 920.

Section 15, as you know, defines a false advertisement as including one which fails to reveal facts material in the light of representations made in the advertisement or in the light of possible consequences from use of the advertised product. This provision did not fare well on its first court test, in 1950. The Commission had ordered a respondent, Alberty, to cease advertising a mineral preparation as having a beneficial effect upon the blood, except in cases of simple iron-deficiency anemia. The order further required that the product not be offered for tiredness unless limited to tiredness due to simple iron-deficiency anemia, and unless affirmative disclosure be made that tiredness is caused less frequently by simple iron-deficiency anemia than by other causes for which this product would not be an effective treatment or relief. The respondent refused to disclose in advertising of the product for tiredness that the product would usually not be beneficial, and the courts upheld that contention. It seemed abhorrent to the court that the Commission might have power to require an advertiser to disclose, when a fact, that in most cases his product would be useless. The court felt that the Commission had gone too far toward requiring advertisements to be "informative" and had gone beyond its function of "preventing falsity" 13/

13/ Alberty et al. v. FTC, CA-DC (1950), 182 F. 2d 36, cert. den. October 9, 1950.

Consumer protection activities of the Commission gained significant support from court affirmance of the order in the Koch case of 1953. Disclosures were not involved, but the flagrancy of claims showed a compelling need for action to protect the public. In that case, the Commission's order not only proscribed references to the advertised products' being efficacious in the treatment of cancer, coronary thrombosis, diabetes, meningitis, infantile paralysis, pneumonia, undulant fever, malaria, gonorrhea, and syphilis, but also prohibited claims that the products would be of any benefit in the treatment of any disease of the human body or in animals. 14/

The Alberty decision was specifically overcome in the Wybrant and other hair grower cases, where the courts of appeal beginning in 1959 upheld Commission orders requiring that products not be advertised as efficacious in growing hair or preventing baldness unless it be revealed that the products are of no value in most cases of baldness or excessive hair fall. The courts were furnished with more adequate records in support of the orders against the hair

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14/ Koch et al. v. FTC, CA-6 (1953), 206 F. 2d 311.

growers because, unlike the Alberty case, the Commission in each of the hair grower cases included a specific finding that failure to make the affirmative disclosure required by the order was in itself deceptive. The orders were affirmed by opinions in which the courts declare that the Commission's authority to require affirmative disclosures were necessary to prevent deception is clearly established. 15/

The requirement that affirmative disclosures be made when a product advertised for a designated disease or condition is of limited effectiveness has been extended to vitamin and vitamin-mineral preparations. Consent orders have been accepted requiring advertisements offering such products for tiredness and nervousness to disclose that in the great majority of persons these symptoms would be due to conditions other than vitamin or mineral deficiency, and that in such cases the product would be of no benefit. 16/

15/ Wybrant System Products Corp. et al. v. FTC, CA-2 (1959), 266 F. 2d 571, cert. den. 361 U.S. 883; Erickson Hair and Scalp Specialists v. FTC, CA-7 (1959), 272 F. 2d 318, cert. den. 362 U.S. 940; and Ward Laboratories, Inc., et al. v. FTC, CA-2 (1960), 276 F. 2d 952, cert. den. 364 U.S. 827.

16/ Docket 8151 (7/18/61), Docket 8397 (9/25/61), Docket 8398 (9/22/61), and Docket C-123 (4/19/62).

The Commission issued a similar order in a litigated case involving such a product designated "Rybutol," noting that medical testimony showed the great majority of persons experiencing tiredness and loss of happiness would have these symptoms as a result of a disease or condition other than vitamin deficiency, and that possibly serious consequences might result from continued self-treatment of such diseases and conditions. 17/

In two pending cases the question has been raised of whether advertising of vitamin-mineral preparations for iron deficiency anemia is deceptive if it fails to disclose that in women beyond the child-bearing age and in men of all ages, iron deficiency anemia is almost invariably due to bleeding from some serious disease or disorder and in the absence of adequate treatment of the underlying cause of the bleeding the use of the preparation may mask the signs and symptoms and thereby permit the progression of such disease or disorder. 18/ As these cases are in process of being adjudicated by the Commission,

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17/ Docket 8150, Lanolin Plus, Inc., o.c.d. 9/12/62.

18/ Docket 8523, Hadacol, Inc., et al.; and Docket 8547, The J. B. Williams Company, Inc., et al.

with no conclusion as to final disposition having yet been reached, I will not comment further about them.

I believe the greatest development of the law in deceptive practices before the Commission in the immediate future will entail questions of affirmative disclosure. I think you will see more and more of our cases involving the question of what omissions in advertising and labeling are material enough and deceptive enough to require an affirmative disclosure of facts. Full implementation of this authority of the Commission to prevent deception by requiring affirmative disclosures may obviate the need for a multiplicity of labeling or packaging laws or laws seeking to provide further protection to the public in the sale of particular commodities. The argument might be made that if the practice is deceptive, let the Commission correct it under present law. If no deception is involved, then it may be the practice is not of sufficient importance from the public interest standpoint to warrant its being given further attention.

The jurisdiction conferred upon the Commission by the Wheeler-Lea Amendments to prevent false advertising of food, drugs, therapeutic devices and cosmetics, regardless of whether there were sales in interstate commerce, was confirmed by court decisions in 1958. In the first case, a product designated O-Jib-Wa Bitters was advertised extensively in thirty-five or forty newspapers throughout the State of Michigan as a curative treatment for arthritis, rheumatism, neuritis, sciatica, and various other ailments. The advertiser was careful not to fill any order from persons located outside Michigan. The Michigan newspapers in which he advertised did have some interstate circulation, and were circulated via the U. S. mails. The court held that jurisdiction of the Commission to prohibit use of the advertising was warranted not only on the basis of interstate circulation of the advertisements, but also their circulation via the U. S. mails.[19/] In the second case, Sidney J. Mueller, advertiser of products offered to grow hair, had been operating in several states but, after order to cease and desist was issued, confined his operations within one state. However, he continued to advertise in newspapers which had some interstate circulation and were distributed via

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19/ Shafe v. F.T.C., C.A. 6 (1958), 256 F.2d 661.

the U. S. mails. The court found that the order had been violated because the advertisements had been sent via the U. S. mails and across state lines.[20] He was fined $8,000 for violating the order.[21]

The Commission's jurisdiction to prevent false advertising or other deceptive practices under the Wheeler-Lea Amendments is still limited by the proviso in the original act that proceedings will not be undertaken except when in the public interest. The courts have interpreted that as meaning substantial public interest,[22] which permits the Commission to avoid becoming involved in matters that are essentially private controversies not affecting substantial numbers of the public. The Commission is sometimes criticized for concerning itself with trivial matters, especially in the exercise of its deceptive practices jurisdiction. But I believe you will find if you examine the cases that each of them is important

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20/ Sidney J. Mueller v. U.S., C.A. 5 (1958), 262 F. 2d 443.

21/ U. S. v. Sidney J. Mueller, U.S. District Court, Southern District, Texas, Houston Division, April 10, 1958.

22/ F.T.C. v. Klesner (Shade Shop case), Sup. Ct. (1929), 280 U.S. 19.

either because of flagrancy of practice or numbers of the public affected. I suppose no one would argue that we should ignore the advertising of a mineral preparation offered as a treatment for arthritis and blindness,[23/] even though sales volume may not have been very large. At the other end of the scale, we sometimes have a case in which the claims are not very deceptive, but the volume of advertising and sale of the product is so extensive that even a slight misrepresentation will have a tremendous effect upon the public and upon competition. The top 100 largest advertisers in the United States have been listed.[24/] Orders prohibiting use of misrepresentation or deceptive practice have been issued by the Commission against 38, or more than one-third of those 100 companies. A total of 53 such orders have been issued, as eleven of the companies have had two or more orders issued against them. Forty-seven of those orders have been issued since the date of the Wheeler-Lea Act, including ten which were issued during the past two years. Eight of the companies are now

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23/ Consent order accepted 10/31/61, Docket C-11.

24/ See Advertising Age, August 27, 1962, p. 42.

charged with deceptive practices in nine proceedings pending before the Commission, one company being the subject of two pending actions. Thus the Commission has not overlooked the more important advertisers; neither has it overlooked the smaller advertiser when he was in effect stealing substantial amounts of money from the public.

Under the present organizational setup of the Commission, as adopted July 1, 1961, the investigation and litigation of initial violations occurring under the Wheeler-Lea Amendments, especially those involving food, drugs, therapeutic devices and cosmetics, is vested in the Division of Food and Drug Advertising, Bureau of Deceptive Practices. This Division also monitors radio, television and printed advertising to watch for claims which may be false and misleading. Medical and scientific advice and assistance in such cases is provided by the Division of Scientific Opinions, in the same Bureau. Any field investigation needed is performed by the Bureau of Field Operations. Maintaining and

enforcing compliance with cease and desist orders entered in false advertising and other deceptive practice cases, is a function of the Division of Compliance in the Bureau of Deceptive Practices. Court work arising from the deceptive practice and other Commission cases is performed by the Division of Appeals, Office of General Counsel. The Bureau of Industry Guidance endeavors to prevent deceptive and other unlawful practices on an industry-wide basis, in the field of food and drug advertising as well as other areas.

We at the Commission are grateful for the efforts at self-regulation which have been instituted by business groups, as the prevention of false advertising and other deceptive practice will always, in large measure, be dependent upon such activity.

We are also appreciative of opportunities made available by the bar associations to disseminate widely the views of administrators of the laws through meetings like this, as a possible aid to the better implementation of those laws.

Let me say again that it has been a pleasure to meet with you, and I thank you for your attention.

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