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FEDERAL TRADE COMMISSION

Address

on

THE ADMINISTRATION OF THE FEDERAL LAWS RELATING
TO FALSE AND MISLEADING ADVERTISING
BY THE FEDERAL TRADE COMMISSION

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By

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The Federal Trade Commission was created by an Act of Congress approved on September 26, 1914, and was organized and became operative the following March.

So, it has just had its twenty-fifth anniversary, and in celebration the March issue of the George Washington University Law Review was entirely devoted to the history, the purposes and the accomplishments of the Commission, and contains many interesting and instructive articles by leading lawyers, educators and economists. If you have not done so, permit me to suggest that you secure a copy from the library and read it, for it will give you more complete information about the Commission than it is possible for me to attempt at this time.

The original Federal Trade Commission Act, in Section 5, declared unlawful, and empowered and directed the Commission to prevent, unfair methods of competition in commerce. The Act did not define the term "unfair methods of competition" but left its meaning and interpretation to the courts on review of the Commission's orders.

During the twenty-five years of its existence hundreds of the Commission's orders have been reviewed by the United States Circuit Courts of Appeal and many by the Supreme Court of the United States. Many more have become effective because they have been accepted without appeal. The result is that now almost every conceivable competitive practice has been defined and legal determination made as to whether it amounts to an unfair method of competition within the meaning of the statute. Among such unfair trade practices are included the following: false and misleading advertising; misbranding, mislabeling and misrepresenting products as to composition, origin, quality or source; passing off one's goods as those of another; disparagement of competitors' business or merchandise; causing breach of contract between competitors and their customers or employees; sale of products by means of lottery devices; unfair use of patent rights; combination or conspiracy to maintain or control prices; combination or conspiracy between competitors to hamper or obstruct the business of rivals; combination or conspiracy to refuse to sell or refuse to buy where the effect is to suppress competition; combination or conspiracy to obstruct the source of supply of a competitor; commercial bribery; threats of litigation not in good faith; full line forcing; and white-listing, black-listing, and other forms of concerted boycott.

In 1919 the Commission's order against Sears, Roebuck & Company was sustained, preventing the use of certain false claims in promoting sales of its merchandise. This was the first Commission case decided by a Circuit Court of Appeals, and since that time a large part of our work has been devoted to false and misleading advertising.

The schemes employed by those who would deceive the purchasing public as to the merits of their goods are limited only by the ingenuity of unscrupulous men. To advertise and sell, for instance, muskrat skin as seal skin for women's coats, birch furniture for mahogany, split-leather for top grain leather, mercerized cotton or rayon for silk, are mentioning only a few grains of sand along the seashore. In the instances cited, the purchaser thinks he is buying a certain article, but actually receives and pays for a different and often an inferior product. While in some cases it has been shown that the substitute product, or misrepresented product, was actually superior in quality, the courts have held that the relative superiority of the merchandise misrepresented over that of competitive merchandise is not material on the theory that the purchaser has a right to receive the product which he intended to buy. The courts have also held that an action will lie against a corporation that by any artifice deceives the public into believing that its goods are those of another.

In the Raladam case under our original Act, the Supreme Court of the United States held in 1931 that it was necessary to prove substantial competition. The effect of this decision was that an order of the Commission based on misrepresentation and deception of the public alone was invalid. The Commission was thus greatly handicapped, particularly in cases involving false advertising and misrepresentation.

We were confronted with serious problems, such as the appearance on the market of a new nostrum or device, the manufacturer advertising that it would "cure" almost all the ills of the human race. As an instance, I want you to note the advertising claims which, prior to the Commission's cease and desist order, were used by a concern known as the Gravitonic Life Ray Corporation. This company was claiming that its device -

"Is a cure or remedy for sinus trouble and infections, sleeping sickness, tuberculosis, stomach and gall bladder troubles, diseases of the kidneys, arthritis, gland disorders, diabetes, tumor, prostate trouble, colds, dizziness, anemia, cancer, chronic indigestion, acute appendicitis, colitis, dyspepsia, nervousness, spinal trouble, high blood pressure, tonsillitis, catarrh, mastoid and ear trouble."

In such cases the Commission, of course, had great difficulty in proving the existence of actual competition. However, in 1938

Congress passed the Wheeler-Lea Act which amended our original Act declaring unlawful, not only unfair methods of competition, but also "unfair and deceptive acts and practices" in commerce.

The amended Act, which was approved on March 21, 1938, is designed specifically to protect the public by making unlawful the dissemination of false advertisements of food, drugs, devices and cosmetics:

When such dissemination is by the United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, the purchase of such commodities;

Also, when such dissemination is by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of those commodities.

By virtue of this amendment, the necessity of establishing an unfair method of competition and showing injury to competition was dispensed with, and the dissemination or the causing of the dissemination of the false advertising has become an "unfair or deceptive act or practice", and as such is unlawful.

The amended Act has armed the Commission with four forms of corrective procedure against offenders. These are as follows:

- (1) Order to cease and desist;
- (2) Civil penalties of not more than \$5,000 for each violation of a cease and desist order after it has become final;
- (3) Enjoining the dissemination of any false advertisement of a food, drug, device, or cosmetic where the Commission has reason to believe that it would be in the interest of the public to enjoin such dissemination, pending the issuance and until final disposition is made of its complaint under Section 5;
- (4) Criminal penalties or fines as high as \$10,000 or imprisonment up to one year, or both, (a) when the false or misleading advertisement is with reference to a food, drug, device or cosmetic which may be injurious to health when used under the conditions prescribed in such advertisement, or under customary and usual conditions; or (b) when the advertisement is disseminated with the intent to defraud or mislead, regardless of whether the product is or is not injurious to health.

Another important amendment to the original Act was the limitation of the time for appeal from an order to cease and desist. In the original Act there was no limitation, but the Wheeler-Lea Act provides that our orders shall become final, unless an appeal is taken within sixty days.

Under the original Act there was no penalty for failure to comply with an order of the Commission. If the Commission discovered that its order to cease and desist was being violated, a petition for enforcement was filed in the Circuit Court of Appeals within the circuit in which the respondent was domiciled, or in the Circuit Court of Appeals within any circuit where the violation occurred. If the Court held that the Commission's order should be affirmed, and so ordered, and the respondent continued the unlawful practices, such respondent could be fined or imprisoned for failure to obey - not the order of the Commission, but the order of the Court.

Since approval of the Wheeler-Lea Amendment, we have been able to detect a very marked improvement in advertising. Unscrupulous vendors who formerly had the temerity to resist the Commission's orders are now faced with the possible assessment of civil penalties up to \$5,000 for each violation.

Of great concern to the consuming public is the promotion of drug products through the use of false claims as to their therapeutic value, and particularly those preparations which may be injurious to the health of users when taken under the conditions prescribed in the advertisements, or under such conditions as are customary or usual.

It was because of these fraudulent practices that the Congress included in the Wheeler-Lea Act a provision which affords greater and more speedy protection to consumers of the commodities named. Section 13 of the amended Act empowers and directs the Commission to bring suit for injunction in the United States District Courts whenever it has reason to believe (1) that any person, partnership or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any false advertisement of food, drugs, devices or cosmetics, and (2) where the Commission has reason to believe that the enjoining, pending issuance and until final disposition is made of the Commission's complaint, would be in the public interest. This new provision already has served as a formidable weapon in the Commission's efforts to stamp out the promotion of drug products, particularly dangerous ones, by fraudulent means. Upon application of the Commission, the United States District Courts have in numerous instances during the past two years enjoined vendors from the further promotion of dangerous drug products without setting forth fully in all advertising matter the injurious effects which may result from use of the preparations under the conditions prescribed. These commodities have included abortifacients and emmenagogues, "cures" for dypsomania,

aphrodisiacs, weight-reducing preparations, etc. Others have been restrained by injunction from conducting contest schemes which required the participants to purchase cosmetic preparations, and which were resulting in the expenditure by the contestants of excessive and unreasonable sums of money.

The Commission's jurisdiction over false and misleading advertising is not confined to those advertisements published in newspapers, magazines and other periodicals, and advertisements disseminated by the United States mail and by other means in the form of circulars, booklets, broadsides and the like, but extends also to advertising disseminated by means of radio broadcasts.

It would consume the time of an army of employees to detect all false advertisements which appear in our newspapers, magazines, and in radio "commercials." There are more than 21,000 newspapers and periodicals published in this country, and 777 radio stations licensed by the Federal Communications Commission and going at full blast. However, the Commission maintains a large staff of reviewers who constantly are checking current periodicals and radio broadcast "commercials" for the detection of false and fraudulent claims. While many of our cases arise from this source, the majority of our proceedings are initiated upon the complaints of consumers and competitors.

The Commission has been fortunate in having splendid cooperation by both the publishers and the operators of radio stations. For many years they have made an earnest endeavor to eliminate false advertising from their journals and commercial broadcasts. Nevertheless, such advertising creeps in for the very obvious reason that the publisher or station cannot always judge and determine the merits of the advertiser's product, and arbitrary action might result in injustice.

Since my message to you is devoted primarily to false advertising, I should like to mention briefly one additional function of the Commission which has for many years proven very effective in our efforts to eliminate this evil.

From time to time, Trade Practice conferences are held under the auspices of the Commission for the purpose of cooperatively considering the types of practices which may be regarded as unfair in a particular industry, and to establish reasonable rules for their elimination. This proceeding is entirely voluntary and is for the use of those industries which choose to avail themselves of it as a means of promoting sound business. Where all or a substantial group of the members of an industry indicate that a trade practice conference proceeding is feasible, the Commission will authorize the holding of such conference, and notices are dispatched to all members of the industry inviting them to attend and take part in the deliberations.

Up to the present time, the Commission has held approximately 200 such conferences, representing as many industries - from canners of sardines to manufacturers of automobile tires - and from sellers of Baby Chicks to producers of Radio Receiving Sets. In all cases where rules have been agreed upon by members of an industry and approved by the Commission, there has resulted the elimination from that particular industry of practices which may have been violative of the Federal Trade Commission Act, and practices which, while not violative of the Act, were regarded as unethical, or otherwise detrimental to competitors and, of course, directly or indirectly affecting consumers.

Let me give you a practical example of how effective and efficient the trade practice conference rules may be, both from the standpoint of the members of the industry and of the Commission. Say an industry is composed of sixty manufacturers or distributors, thirty of whom are engaged in falsely advertising their merchandise. To correct this unfair practice, the Commission normally would be required to send its investigators to thirty different concerns and assemble information and factual data with which to sustain thirty separate complaints, followed by regular routine proceedings, including the taking of testimony, arguments, issuance and enforcement of cease and desist orders, etc. By meeting with all, or a major portion of the members of this industry, the thirty violators may join with the thirty non-violators in agreeing to discontinue voluntarily the unfair practice, as well as other unethical and unfair and deceptive acts and practices, thus effecting (1) a more efficient operation of the respective businesses and more cordial and friendly relations, and (2) a great saving to the Commission in time and money.

The Commission recognizes that truthful advertising is legitimate and is a necessary function of good business. A merchant, except in a very restricted sense, cannot wait for a purchaser to come to his door, and has a perfect right to attract trade by truthful advertising -- even to the extent of "puffing" his wares. Whether this is done in a limited area or by national advertising in magazines having wide circulation or by means of radio broadcasts, is no concern of the Commission.

It is our purpose to see that the buyer gets his money's worth, and to protect, as best we may, the consuming public from the ravages of false representation.