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False Advertising--Failure to Reveal Material Facts

G. Vernon Owen Jr.

But even the liberal federal rules require that he be given notice by the pleadings.[46]

As the situation now stands in Ohio the plaintiff in a negligence action must inform the defendant of the very acts upon which his case relies, and yet the plaintiff has no right to be informed generally by the pleadings that the defendant is going to assert the defense of contributory negligence.

One certain way to rectify the situation is for the legislature to require the courts to restrict consideration by the jury of the evidence of the plaintiff's negligence under a denial to the issue of the plaintiff's sole negligence.

M. KENNETH THORNTON
RICHARD C. OGLINE

Recent Decisions

FALSE ADVERTISING — FAILURE TO REVEAL MATERIAL FACTS

Can the Federal Trade Commission order an advertiser to inform the public that more often than not his product is worthless? In effect, that was the novel question with which the United States Court of Appeals for the District of Columbia was confronted in a recent case.[1] An advertiser was charged with having represented that "Oxorin Tablets" would have a beneficial therapeutic effect upon the reader if he were "tired," "weary," or "run down." The Commission found that the pills had no such beneficial effect unless the conditions described were due to simple iron deficiency anemia, and that more often than not such conditions were the result of causes other than simple iron deficiency anemia. The Commission ordered the advertiser to cease and desist from representing that "Oxorin Tablets" would have any beneficial effects upon the conditions of lassitude described unless such conditions were caused by simple iron deficiency anemia, and unless he revealed that more often than not these conditions were the result of causes other than simple iron deficiency anemia.[2] The Court of Appeals held that a failure to reveal that the conditions of lassitude described were less frequently the result of simple iron deficiency anemia than of other causes was not a "false advertisement" as defined by Section 15a of the Federal Trade Commission Act. The order was modified by striking the portion requiring that revelation, and affirmed

[46] FED. R. CIV. P. 8(c).

[1] Alberty v. FTC, 182 F.2d 36 (D.C. Cir.), *cert. denied*, 71 Sup. Ct. 49 (1950).

[2] FTC v. Alberty, 44 F. T. C. 475,517 (1948). Similar orders were issued by the Commission in FTC v. Market Drug Co., 44 F. T. C. 721 (1948) (order 1a); FTC v. Sunway Vitamin Co., 44 F. T. C. 708 (1948) (order 1a); FTC v. American Dietads, 44 F. T. C. 667 (1948) (order 1b).

as modified.[3] One judge dissented, contending that the order should have been affirmed *in toto.*

In 1938 Congress amended the Federal Trade Commission Act by enacting the Wheeler-Lea Act.[4] The dissemination of false and misleading advertising of food, drugs and cosmetics was declared to be unlawful.[5] The Federal Trade Commission was empowered to prevent such advertising as being an "unfair and deceptive act and practice in commerce."[6] The statute also provided a definition of false advertising.[7]

This definition was intended to be very broad.[8] The common law elements of *scienter* and reliance were not included as necessary elements of the statutory offense,[9] for the purpose of the act was not the punishment of

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[3]The court also found that a failure to reveal that the advertiser's product was recognized as having value only by the homeopathic school of medicine was not a "false advertisement." It is doubtful that the Commission's order required this revelation. See FTC v. Alberty, 44 FTC 475, 519 (1948) (order lk)

[4]38 STAT. 717 (1914), 15 U.S.C. Sec. 41 (1934), as amended, 52 STAT. 111 (1938), 15 U.S.C. Sec. 41 (1946) Hereinafter referred to as the Federal Trade Commission Act. For an analysis of the Wheeler-Lea Act see Note, 86 UNIV. OF PA. L. REV. 757 (1938) For a discussion of the decision in FTC v. Raladam, 283 U.S. 643, 51 Sup. Ct. 587 (1931), which was at least partly responsible for the need of the Amendment, see Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising,* 31 COL. L. REV. 527 (1931). See also Kelley and Cassedy, *The Federal Trade Commission Act as Amended by the Wheeler-Lea Act,* 2 FOOD DRUG COSMETIC L.Q. 315 (1947)

[5]Federal Trade Commission Act § 12a. The demand for this legislation came not only from the public, but from honest manufacturers and advertisers as well. H.R. REP. No. 1613, 75th Cong., 1st. Sess. 23 (1937). For a history of the Commission's attempts to regulate the advertising of food, drugs and cosmetics, see Cassedy, *False Advertisement of Food, Drugs, and Cosmetics,* 4 FOOD DRUG COSMETIC L. Q. 353 (1949)

[6]Federal Trade Commission Act Sec. 12b.

[7]*Id.* § 15a. "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) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates. "

[8]"The definition is broad enough to cover every form of advertisement deception over which it would be humanly practicable to exercise governmental control. It covers every case of imposition on a purchaser for which there could be a practical remedy. It reaches every case from that of inadvertent or uninformed advertising to that of the most subtle as well as the most vicious types of advertisement." H.R. REP., *supra* note 5, at 5.

[9]*Ibid.* "To the duped customer, the state of mind of the advertiser at the time the misrepresentation was made is of no consequence. It is not the advertiser's subjective intent or knowledge but the fact that his wares are not as represented that causes harm." Handler, *The Control of False Advertising Under the Wheeler-Lea Act,* 6 LAW & CONTEMP. PROB. 91 (1939). Mr. Handler's fear that the phrase 'misleading in a material respect' might be interpreted by the courts as a require-

a wrongdoer or the protection of the individual, but the protection of the public generally.[10] Thus, it need not be shown that the consumer has actually been deceived by the representation, but only that it has the capacity or tendency to deceive or mislead.[11] Nor need the representation be actually false, for technically correct grammatical construction will not save a representation from being misleading if the public would be likely to misunderstand it.[12]

In deciding whether a representation is misleading in a material respect, the criterion is not whether it would be misleading to an expert, or a reasonable man, but whether it would mislead a substantial part of the consuming public.[13]

Section 15a of the Federal Trade Commission Act declares that in determining whether a representation is misleading the Commission may consider " the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity "[14] Since it can be determined with some degree of accuracy whether harmful consequences may result from the use of a commodity, there is little difficulty in applying the latter part of this test. Thus, false advertising may be constituted by a failure to reveal that excessive exposure to an ultra-violet lamp may be dangerous to certain skin diseases,[15] that a preparation for delayed menstruation may cause serious gastro-intestinal disturbances,[16] or that an obesity cure may result in serious and irreparable injury to the health of the user.[17]

What constitutes a failure "to reveal facts material in the light of such representations" is not so clear. Most of the controversy in this area has centered around the question of whether it is misleading not to reveal that a preparation will afford only temporary relief to a certain condition.[18]

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ment of reliance, have not been realized. For a discussion of the remedies against false and misleading advertising at common law, see Handler, *False and Misleading Advertising*, 39 YALE L. J. 22 (1929).

[10] Belmont Laboratories, Inc. v. FTC, 103 F.2d 538 (3rd Cir. 1939).

[11] Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676 (2nd Cir. 1944).

[12] D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942). "The statutory ban applies to that which is suggested as well as that which is asserted." Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROB. 91 at 102 (1939).

[13] "Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal." Aronberg v. FTC, 132 F.2d 165,167 (7th Cir. 1942).

[14] See note 7 *supra.*

[15] Ultra-Violet Products, Inc. v. FTC, 143 F.2d 814 (9th Cir. 1944).

[16] Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942)

[17] American Medicinal Products v. FTC, 136 F.2d 426 (9th Cir. 1943).

[18] It has been held by implication that a failure to reveal that a preparation would afford only temporary relief for the symptom of itching was not misleading. D.D.D.

It would be impossible to deduce any general rule from the few decisions pertaining to "temporary relief."

The decision in the *Alberty* case has limited that which constitutes a failure "to reveal facts material in the light of such representation." The decision, however, seems to be based more on an inability to grasp the facts involved rather than on any notions as to the extent of the law or reasons of public policy.[19] The court's confusion is adequately illustrated by the statement that " the Commission goes far across the line when it attempts to require an advertiser of a drug admittedly beneficial in one ailment to state affirmatively that there are other ailments not reached by the drug."[20] This statement, if made in relation to a set of facts such as those implied, would undoubtedly be valid, but the fact is that the Commission made no such attempt. The Commission merely found that an advertisement that described the conditions of lassitude accompanying simple iron deficiency anemia but failed to reveal that the same conditions were caused by other ailments which the "Oxorin Tablets" would not benefit, would be misleading to the consuming public.[21] The Commission's order left the advertiser free to state that his preparation would remedy simple iron deficiency anemia, but if he chose to describe the conditions accompanying that ailment, he was required to make further revelations.

Although the court was undoubtedly influenced by the affirmative aspect of the order, the decision in the *Alberty* case cannot be construed to prohibit affirmative orders where the facts not revealed are material because of the representations made. The power to make affirmative orders as to the consequences of a preparation has repeatedly been upheld.[22] The defi-

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Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942). An opposite result was reached where the court found that the advertiser had impliedly represented that his preparation would give permanent relief to dandruff. Sebrone v. FTC, 135 F.2d 676 (7th Cir. 1943) In another case the court went so far as to sanction a finding by the Commission that a failure to reveal that the advertiser's hair preparation would not color hair to which it was not applied (that is which had not yet grown out) was misleading. Gelb v. FTC, 144 F.2d 580 (2nd Cir. 1944)

[19] In FTC v. American Dietads Co., 44 F. T. C. 667 at 707 (1948), Commissioner Mason objected to such an order as is here under discussion on grounds of policy.

[20] Alberty v. FTC, 182 F.2d 36, 39-40 (D.C. Cir.), *cert. denied,* 71 Sup. Ct. 49 (1950)

[21] "It decided that the Commission goes too far when its order 'requires that the advertiser tell the public that his product is more frequently valueless than it is valuable.' I do not find that a startling requirement when its function is to rebut a false or misleading inference that the product is more frequently valuable than it is valueless." Bazelon, J., dissenting in Alberty v. FTC, 182 F.2d 36,45 (D.C. Cir.), *cert. denied.* 71 Sup. Ct. 49 (1950)

[22] "The order does not require petitioners to reveal anything. It requires them to cease and desist from disseminating false advertisements, particularly those described in the order, but does not require them to advertise at all. If petitioners do not