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TRADE RESTRAINTS - FEDERAL TRADE COMMISSION - FALSE REPRESENTATION AS UNFAIR METHOD OF COMPETITION

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TRADE RESTRAINTS — FEDERAL TRADE COMMISSION — FALSE REPRESENTATION AS UNFAIR METHOD OF COMPETITION — An order to cease and desist, directed against the defendant publisher and others, forbade the following trade practices: representing that its encyclopedias were given away and that only the “extension service” was sold; representing the work as given away to selected persons among whom the prospective buyer was one; representing the work as new; selling the same under two names; representing its usual price as higher than that at which it was offered; representing any person as a contributor who was not a contributor; representing any person as giving a

testimonial who had not done so; publishing garbled testimonials; and representing a certain course of instruction as an "Introductory Enrollment" at a special reduced price. Upon a petition for an enforcement order, the findings and order of the Federal Trade Commission were reviewed. *Held*, that the cease and desist order be reversed so far as it forbade (1) representing that the work was given away and only the extension service was sold; (2) the use of fictitious testimonials; and (3) the representing of a course of instruction as a special enrollment course, except as to representations regarding reduced price; but that the order be otherwise substantially affirmed. *Federal Trade Commission v. Standard Education Society*, (C. C. A. 2d, 1936) 86 F. (2d) 692.

Under the Federal Trade Commission Act unfair methods of competition in commerce are declared unlawful.¹ The commission has the power to issue an order to cease and desist where it appears (1) that the methods complained of are unfair, (2) that they are methods of competition in interstate commerce, and (3) that public interest is involved.² But the act is not restricted in its operation to those methods of competition which are forbidden at common law.³ Competition may be held to be unfair although it does not amount to a legal fraud,⁴ it being sufficient that deception will be the natural and

¹ Judicial Code, 38 Stat. L. 717 (1914), as amended, 15 U. S. C., §§ 41-51; see especially 15 U. S. C., § 45. Note that the Federal Trade Commission Act uses the term "unfair methods of competition," rather than "unfair competition" with its limited common-law meaning. Cf. H. Rep. 1142, 63d Cong., 2d sess. (1914). See Montague, "Unfair Methods of Competition," 25 YALE L. J. 20 (1915). The object of the Federal Trade Commission Act was to stop in their incipency those methods of competition which fall within the meaning of the word "unfair." *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 51 S. Ct. 587 (1931).

² 15 U. S. C., § 45; *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 51 S. Ct. 587, 79 A. L. R. 1191 at 1200 (1931); *Federal Trade Commission v. Civil Service Training Bureau*, (C. C. A. 6th, 1935) 79 F. (2d) 113, holding further that the commission is not deprived of jurisdiction if the unfair methods of competition do not result in practical monopoly; *Flynn & Emerich Co. v. Federal Trade Commission*, (C. C. A. 4th, 1931) 52 F. (2d) 836; *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 53 S. Ct. 335 (1933).

³ *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423 (1934). It is sufficient that the trade practice have a tendency or capacity to injure competitors directly or through deception of purchasers. *Sears, Roebuck & Co. v. Federal Trade Commission*, (C. C. A. 7th, 1919) 258 F. 307.

While, before the act, jurisdiction of the courts over unfair competition depended upon the invasion of a property right of the claimant, the Federal Trade Commission has power, on a showing of public interest and other requisites, to issue an order to cease and desist from unlawful practices. *Royal Baking Powder Co. v. Federal Trade Commission*, (C. C. A. 2d, 1922) 281 F. 744; *Federal Trade Commission v. Mennen Co.*, (C. C. A. 2d, 1923) 288 F. 774, cert. den. 262 U. S. 759, 43 S. Ct. 705 (1923); *Federal Trade Commission v. American Tobacco Co.*, (C. C. A. 2d, 1925) 9 F. (2d) 570, affd. 274 U. S. 543, 47 S. Ct. 663 (1927); *United States v. A. L. A. Schechter Poultry Corp.*, 295 U. S. 623, 55 S. Ct. 651 (1935). Cf. 31 MICH. L. REV. 804 (1933).

⁴ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 54 S. Ct. 315 (1934).

probable result of the defendant's acts.⁵ However, the ultimate determination as to what constitute unfair methods of competition is for the court and not for the Federal Trade Commission,⁶ although the mere discontinuance of the unfair practice will not be a bar to a cease and desist order.⁷ While the doctrine of false representation as unfair competition once was limited to cases of "passing off,"⁸ under the Federal Trade Commission Act it is sufficient to justify a cease and desist order that the false and misleading representations have a tendency to injure competitors and involve the requisite public interest.⁹ The circuit court of appeals reversed the cease and desist order as to certain false representations, viz., that the books were free and the extension service alone was to be paid for, on the ground that they were unlikely to be believed and would not be accepted literally.¹⁰ But the court anomalously affirmed the order forbidding false representations that the work was given to selected persons, among whom the prospective buyer was one, on the ground that such false inducements give the unscrupulous seller a competitive advantage.¹¹ Since both representations are false and since even the "selected person" appears to be a prospective purchaser of the extension service, the distinction seems to rest in the flattery (that one is a selected person in the community) which

⁵ See 63 C. J. 396 (1933) and cases there cited.

⁶ Federal Trade Commission v. Gratz, 253 U. S. 421, 40 S. Ct. 572 (1920); Federal Trade Commission v. American Tobacco Co., (C. C. A. 2d, 1925) 9 F. (2d) 570, affd. 274 U. S. 543, 47 S. Ct. 663 (1927); Sears, Roebuck & Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 F. 307; Federal Trade Commission v. Balme, (C. C. A. 2d, 1928) 23 F. (2d) 615, cert. den. 277 U. S. 598, 48 S. Ct. 560 (1928); Federal Trade Commission v. Raladam Co., 283 U. S. 643, 51 S. Ct. 587 (1931); James S. Kirk Co. v. Federal Trade Commission, (C. C. A. 7th, 1932) 59 F. (2d) 179, cert. den. 287 U. S. 663, 53 S. Ct. 220 (1932); see also HARLAN and McCANDLESS, FEDERAL TRADE COMMISSION 31 (1916).

⁷ Sears, Roebuck & Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 F. 307; Fox Film Corp. v. Federal Trade Commission, (C. C. A. 2d, 1924) 296 F. 353; Fairyfoot Products Co. v. Federal Trade Commission, (C. C. A. 7th, 1935) 80 F. (2d) 684.

⁸ Cf. 26 COL. L. REV. 199 (1926).

⁹ Federal Trade Commission v. Gratz, 253 U. S. 421, 40 S. Ct. 572 (1920), holds that the methods must affect the public generally, for the act does not apply to unfair methods between individuals; Armand Co. v. Federal Trade Commission, (C. C. A. 2d, 1935) 78 F. (2d) 707, cert. den. 296 U. S. 650, 56 S. Ct. 309 (1935), holds that the existence of public interest is not precluded by the fact that the unfair competitive practice violates no private right; E. Griffiths Hughes, Inc. v. Federal Trade Commission, (C. C. A. 2d, 1935) 77 F. (2d) 886, cert. den. 296 U. S. 617, 56 S. Ct. 137 (1935); Consolidated Book Publishers, Inc. v. Federal Trade Commission, (C. C. A. 7th, 1931) 53 F. (2d) 942.

But cf. Federal Trade Commission v. Royal Milling Co., 288 U. S. 212, 53 S. Ct. 335 (1933), which requires a substantial public interest, mere representations and deception of purchaser being insufficient.

¹⁰ Federal Trade Commission v. Standard Education Society, (C. C. A. 2d, 1936) 86 F. (2d) 692, 695-6.

¹¹ Ibid.

can hardly be said to be a "substantial evil."¹² However, the court could have distinguished the similar false representations on the ground that the purchaser is more likely to be induced and influenced by the latter practice, making it a matter of degree, although both practices should be condemned. It is clear that selling a product under two names and representing that it is sold "at less than the usual price" are methods of unfair competition that may be restrained by a cease and desist order.¹³ It appears that the court could have affirmed the order in toto, except as to minor details, where the practices or false representations have a tendency to be deceptive, misleading purchasers and injuring competitors. Even methods that are not inherently wrongful but are opposed to good morals because they are characterized by deception and bad faith should be subjected to the control of the Federal Trade Commission.¹⁴

¹² In accord with the principal case: *John C. Winston Co. v. Federal Trade Commission*, (C. C. A. 3d, 1925) 3 F. (2d) 961, cert. den. 269 U. S. 555, 46 S. Ct. 19 (1925); *Consolidated Book Publishers, Inc. v. Federal Trade Commission*, (C. C. A. 7th, 1931) 53 F. (2d) 942, appears to hold to the contrary as to the representation of gift. Since the latter case is the more recent, it may be read as showing the trend toward an insistence upon application of higher ethical standards to business. Cf. 46 HARV. L. REV. 1171 (1933); 40 YALE L. J. 617 (1931).

¹³ *Consolidated Book Publishers, Inc. v. Federal Trade Commission*, (C. C. A. 7th, 1931) 53 F. (2d) 942; *Fox Film Corp. v. Federal Trade Commission*, (C. C. A. 2d, 1924) 296 F. 353; but *Chicago Portrait Co. v. Federal Trade Commission*, (C. C. A. 7th, 1925) 4 F. (2d) 759, cert. den. 269 U. S. 556, 46 S. Ct. 19 (1925), may be contra, as it held that selling methods therein, including representations of a special price, were not unfair; see also, HENDERSON, FEDERAL TRADE COMMISSION 196 (1924).

¹⁴ *Consolidated Book Publishers, Inc. v. Federal Trade Commission*, (C. C. A. 7th, 1931) 53 F. (2d) 942; DUNN, THE FEDERAL ANTI-TRUST LAW (1930).

The proposed amendment to the Federal Trade Commission Act, section 5 (15 U. S. C., § 45) reads as follows, with new matter italicized: "Unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are declared unlawful." Federal Trade Commission Final Report on Chain Store Investigation, S. Doc. 4 (at p. 97), 74th Cong., 1st sess. (1934).