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**FTC May Determine Whether Advertisements
Containing Therapeutic Claims in Promotion
of Health Books Are Deceptive—
*Rodale Press, Inc.****

Rodale Press advertised that the ideas and suggestions in its publication, *The Health Finder*, would increase life span, prevent various diseases, and permit savings on medical and dental expenses. The Federal Trade Commission challenged the advertising claims, which were substantially restatements of claims made in the book, on the ground that adherence to the book's suggestions would not effect the promised results. The hearing examiner denied Rodale's motion to dismiss the complaint. On request for permission to file an interlocutory appeal from the dismissal, *held*, request denied, one commissioner dissenting.¹ The Commission may challenge the collateral claims in the advertising of a health book as false and deceptive.²

* TRADE REG. REP. (Transfer Binder 1963-65) ¶ 16864 (FTC 1964) (complaint) & *id.*, ¶ 17149 (FTC 1964) (order denying request for permission to file an interlocutory appeal) (pending).

1. Commissioner Elman dissented. See notes 10, 21 *infra*. While the principal attack is on *The Health Finder*, the Commission has also challenged the advertising of two pamphlets, *How To Eat for a Healthy Heart* and *This Pace Is Not Killing Us*, published and distributed by Rodale Press. See TRADE REG. REP. (Transfer Binder 1963-65) ¶ 16864 (FTC 1964) (complaint). *The Health Finder* is no longer in general circulation and the two pamphlets are out of print. Advertisements for all three publications have been long discontinued. There may be some question, therefore, whether the requisite "public interest" still exists. However, the Commission has wide latitude in determining the "public interest." *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954). Moreover, discontinuance of allegedly unfair trade practices does not necessarily make the proceeding moot, because the practices might revive. See *FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938) (*per curiam*).

2. See Address by Charles A. Sweeney, Chief of the Division of Food and Drug Advertising of the FTC, *National Congress on Medical Quackery*, 5 TRADE REG. REP. ¶ 50207 (1963):

"[T]he Commission's interest in advertising for medical books is continuing. It should be made clear in these cases the Constitutional guarantees of free speech and free press preclude the Commission from censoring the content of a book. The Commission does, however, assert jurisdiction over advertising for the book. Thus, if an author expounds his theories for the treatment and cure of arthritis, the Commission does not attempt to stop the sale of the book or the expressions of opinion contained therein. But the collateral claims, in advertising,

Although the Federal Trade Commission has campaigned mainly against deceptive advertising of drugs and related human consumption commodities in the therapeutic field,³ it has instituted several proceedings against health book publishers in recent years.⁴ The Commission's authority to proscribe misrepresentations of the author's or seller's qualifications is well established.⁵ It is also clear that the Commission can prohibit misrepresentations of a book's actual content.⁶ But the Commission's power to enjoin the advertising of the merits of a health book has not been clearly defined. In *Witkower Press, Inc.*,⁷ under facts similar to *Rodale Press*, the Commission issued an order forbidding advertisements which represented that the book offered an effective or reliable cure for arthritis, even though the advertisements asserting the claims were taken almost verbatim from passages in the book. Although the Commission's authority was there questioned,⁸ the final order was never appealed. Legislative history of the Federal Trade Commission Act⁹ indicates that Congress meant to reach every form of advertising deception.¹⁰ Nevertheless, it has been argued by some that Congress did not intend the act to impede the dissemination of *ideas*, whatever their validity,¹¹ and that advertisements repeating the ideas in books are not within the purview of the statute.¹²

that the information and instructions contained in the book will enable a reader to cure his arthritis are subject to challenge and, if false, violate the Federal Trade Commission Act."

3. See address by Charles A. Sweeney, *supra* note 2. The consumer, particularly the infirm consumer, is especially vulnerable to advertisements of therapeutic claims because he cannot evaluate medical representations. Deceptive medicinal advertisements are a matter of utmost public concern. See Barnes, *False Advertising*, 23 OHIO ST. L.J. 597, 633-35 (1962).

4. *E.g.*, *Witkower Press, Inc.*, 57 F.T.C. 145 (1960); *Farrar, Straus & Cudahy, Inc.*, TRADE REG. REP. (Transfer Binder 1963-65) ¶ 16518 (FTC 1963) (complaint), *id.*, ¶ 16866 (FTC 1964) (order to cease and desist); *Simon & Schuster, Inc.*, TRADE REG. REP. (Transfer Binder 1963-65) ¶ 16559 (FTC 1963) (complaint); *Rodale Press, Inc.*, TRADE REG. REP. (Transfer Binder 1963-65) ¶ 16864 (FTC 1964) (complaint) & *id.* ¶ 17149 (FTC 1964) (order denying request for permission to file an interlocutory appeal) (pending).

5. See *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 118 (1937). In *Witkower Press, Inc.*, *supra* note 4, the Commission enjoined the use of "Ph.D." after the author's name when the degree was shown to be phony.

6. See *Bantam Books, Inc. v. FTC*, 275 F.2d 680 (2d Cir. 1960) (fact of abridgement must be clearly set forth); *Standard Distributions, Inc. v. FTC*, 211 F.2d 7 (2d Cir. 1954) (false representation that encyclopedia was a new edition). Similarly, the advertisement cannot misrepresent the material covered in a book. *Cf.* Trade Practice Conference Rules, 16 C.F.R. §§ 150.00-.22 (1960) (pertaining to the subscription and mail order publishing industry).

7. 57 F.T.C. 145 (1960).

8. *Id.* at 218-19.

9. 52 Stat. 111 (1938), 15 U.S.C. §§ 41-77 (1958).

10. See H.R. REP. NO. 1613, 75th Cong., 1st Sess. 5 (1937).

11. In dissent, Commissioner Elman expressed the view that the complaint was beyond the Commission's statutory authorization. TRADE REG. REP. (Transfer Binder 1963-65) ¶ 17149, at 22232-33 (FTC 1964).

12. See *Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 644 (3d Cir. 1941). Of course,

The main problem in construing the Federal Trade Commission Act to cover the *Rodale Press* situation is that such an interpretation may bring the statute into conflict with the first amendment.¹³ In order to prove its allegations that advertising for the *Health Finder* is deceptive,¹⁴ the Commission must establish that the medical advice in the book does not produce the results claimed in the advertising. Since the advertising claims are substantially the same as those made in the book, the Commission must examine the validity of the theories expounded by the author, that is, the medical value of the book's ideas.¹⁵ In defense, Rodale Press must support the book's ideas. On every occasion when the Commission has attempted to ban the ultimate distribution of books with no proved medical value it has been reversed by the courts on the alternative grounds that it exceeded its statutory authority or that it abridged the freedom of the press.¹⁶ Consequently, it now seems clear that the Commission cannot impede a book's publication;¹⁷ and the indispensability of advertising to effective distribution has been judicially recognized.¹⁸ Since a publisher has a first amendment right to launch a book into the marketplace of ideas, it would seem to follow that he has a right to promote its circulation by advertising the ideas expressed in the book.

Protecting the right to advertise the book's ideas presents a problem, however, that is not encountered in protecting the book itself from censorship. When taken from the context of the book and placed into advertisements, the ideas may assume the character of

if the publication itself is in reality a deceptive advertisement for another commodity, its dissemination can be enjoined. See *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953); *Perma-Maid Co. v. FTC*, 121 F.2d 282 (6th Cir. 1941).

13. A first amendment objection was raised but held to be without merit by the Commission in *Witkower Press, Inc.*, 57 F.T.C. 145, 218-19 (1960). It is generally acknowledged that a manufacturer of products for consumption has no constitutional right to disseminate false and misleading advertisements concerning them. *Regina Corp. v. FTC*, 322 F.2d 765, 770 (3d Cir. 1963); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *E. F. Drew & Co. v. FTC*, 235 F.2d 735, 739-40 (2d Cir. 1956); *United States v. Nutrition Serv., Inc.*, 227 F.Supp. 375 (W.D. Pa. 1964). In *E. F. Drew & Co.*, *supra*, the court declined the Commission's invitation to state categorically that no advertisement was protected by the first amendment.

14. In *Rodale Press*, paragraph seven of the complaint states "In truth and in fact: 1. The ideas and suggestions contained in 'The Health Finder' will not assure readers: (a) An increased life span. . . ." TRADE REG. REP. (Transfer Binder 1963-65) ¶ 17149, at 22232 n.1 (FTC 1964).

15. *Cf. Koch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953).

16. *Ibid.*; *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941).

17. The Supreme Court has emphasized that liberty of circulating is as fundamental as liberty of publishing. See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). In *Smith v. California*, 361 U.S. 147, 150 (1959), the Court stated: "And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications [of liberty of the press and of speech]. It is of course no matter that the dissemination takes place under commercial auspices."

18. See *Ford Motor Co. v. FTC*, 120 F.2d 175, 183 (6th Cir. 1941).

accepted medical truths. Apparently, the Commission's view is that such advertisements may be deceptive and are thus subject to challenge,¹⁹ even though the book itself is opinion and protected by the first amendment. Presumably no deception occurs if the advertisement shows the claims to be the author's theories and opinions. However, the Commission has never defined a standard for distinguishing between nondeceptive and deceptive advertising of an author's ideas.²⁰ Indeed, such a distinction, if not spurious, would at least be quite difficult to maintain.²¹ For example, suppose an advertisement reads: "This book will effectively reduce your weight from six to fifteen pounds monthly. No calorie counting, no exercises, just happy eating." Even had these words also appeared in the book's foreword, they may in fact be deceptive because in the context of the advertisement, the word "effectively" tends to elevate the author's opinion to the plane of proved scientific fact. But if it is recited only in the book, it is clearly not subject to challenge. If the statement in the advertisement were clearly and prominently identified as a quotation from the book, it would presumably be considered nondeceptive in the Commission's view and, in any event, should be protected by the first amendment.²² A more difficult case would be presented, however, if the advertisement presented above concluded: "Read the author's ideas and suggestions in this book." Arguably, the advertisement is not deceptive, because it suggests

19. See address by Sweeney, *supra* note 2. In the motion to dismiss, counsel for Rodale Press stated: "[The Commission's] counsel appear to take the position that the medical opinions expressed in the book are matters of opinion and not within the jurisdiction of the Commission to challenge. But the same opinions used in advertising the book cease to become opinions; they suddenly become statements of fact which counsel may be ordered to desist from making." Respondents' Motions To Dismiss the Complaint or in the Alternative To Certify the Questions Presented to the Federal Trade Commission, p. 16, Rodale Press, Inc., F.T.C. Doc. No. 8619 (pending).

20. If the publisher overstates what even the author purports to say, the Commission need not examine the validity of the ideas expressed in the book. See note 6 *supra*, and accompanying text. The Commission then simply compares the advertisement with the contents of the book to determine whether a material variance exists.

21. Commissioner Elman in dissent constructed this hypothetical case: "Suppose someone were to write a book advancing the theory that ills of our body politic would be cured if only the United States Senate were abolished. Could this Commission enjoin advertising for the book by finding that abolishing the Senate is not an 'effective' cure for such ills? Surely not. Congress did not create this Commission to act as a censor of unorthodox ideas and theories in books, whether they deal with politics or health. We should not forget that, in both fields, today's heresy may become tomorrow's dogma." Rodale Press, Inc., F.T.C. Dkt. 8619, TRADE REG. REP. (Transfer Binder 1963-65) ¶ 17149, at 22233 (FTC 1964) (order denying request for permission to file an interlocutory appeal) (pending). In Respondents' Motions To Dismiss the Complaint or in the Alternative To Certify the Questions Presented to the Federal Trade Commission, p. 18, counsel for Rodale Press questioned "whether 'Science and Health with a Key to the Scriptures' by Mary Baker Eddy could be advertised by Christian Scientists as having therapeutic value. Is it the duty of the Commission to examine medical experts and after establishing that the therapeutic value of Christian Science is in conflict with the universal expert opinion of doctors, to prevent the advertising of Mary Baker Eddy's book?"

22. See notes 16-18 *supra* and accompanying text.

to the prospective buyer that the value of the book lies in the ideas expressed by its author. On the other hand, the word "effectively" may still create an impression of proved fact in the mind of the reader of the advertisement, even though it is only the author who believes that his ideas are "effective."

How much clarity the FTC will demand in requiring book advertisements to show that only the author's opinion is involved is uncertain. It seems doubtful that any consistent standard that could serve as a guide to publishers or their advertisers could be developed, except for the extreme cases. The confusion in attempting to formulate a standard is further underscored if the author or publisher incorporates in the book's title a claim which the Commission considers deceptive. In *Rodale Press*, counsel for the Commission conceded that if *The Health Finder* were entitled *How To Live Longer and Feel Better*, which is a phrase taken substantially from the book, the Commission could not enjoin the use of the title.²³ Yet the title serves an advertising function, and it is not unrealistic to assume that an author or a publisher will frequently select a title with that in mind.²⁴

Until a standard capable of consistent legal application is developed, therefore, it seems that first amendment protection should extend to all book advertising repeating substantially ideas expressed in a book.²⁵ Even if a standard evolves, the serious question remains whether the Commission was intended to proceed under the Federal Trade Commission Act against book promotional advertising which merely repeats the ideas expressed by an author. Unlike a manufacturer of products for physical consumption, a publisher is attempting to sell ideas and opinions. In order to market a book successfully, its publisher needs to be able to bring before the public statements made by the author, including the author's conclusions about the value of his ideas. Unless the publisher misrepresents the book's purpose, scope, or actual content,²⁶ it is difficult to justify any FTC restriction on his advertising pronouncement that raises such significant constitutional questions.

23. See Respondents' Motions To Dismiss the Complaint or in the Alternative To Certify the Questions Presented to the Federal Trade Commission, p. 17, *Rodale Press, Inc.*, F.T.C. Doc. No. 8619 (pending).

24. *Calories Don't Count* represents such a use of a book's title. This book is involved in litigation currently pending before the Commission. *Simon & Schuster, Inc.*, TRADE REG. REP. (Transfer Binder 1963-65) ¶ 16559 (FTC 1963) (pending).

25. Should the courts find that the publisher's advertising representations are protected by the first amendment in cases like *Rodale Press*, they will likely reject a construction of the Federal Trade Commission Act which gives it an unconstitutional application, and they hold instead that the Commission does not have authority to proceed under the act itself. *Cf. Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 644 (3d Cir. 1941).

26. See notes 5, 6, & 20 *supra*. For example, if an author falsely states in his preface that his book is "medically endorsed" and this phrase appears in the advertisement, it can be enjoined because it is not a representation of the ideas of the author.