University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.

$4.50 PER ANNUM FOREIGN, $5.00 CURRENT COPIES, 75 CENTS

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LEGISLATION

A Revised Federal Trade Commission Act—The Wheeler-Lea Amendment

Upon the signing by the President on March 21, 1938 of the Wheeler-Lea Amendment in the form agreed upon by a conference committee of both Houses of Congress, there occurred the first major change in the Federal Trade Commission Act during the twenty-four years subsequent to its enactment. The purpose of the revision may be briefly stated as the enlargement of the scope of the Commission's jurisdiction, the augmentation of its powers of enforcement and investigation, and the granting of a specific remedy for deceptive use of advertising media in connection with food, drugs, curative devices and cosmetics.

Thus, the effect of the revision is largely to change the purpose of the Commission from the curtailment of monopolistic tendencies, to one charged with the arbitration of disputes between competing businesses, and with the protection of the public from unfair practices. As will be subsequently shown, the provisions enlarging the jurisdiction and improving the administrative procedure of the Commission are primarily designed to counteract the effect of limitations imposed by judicial interpretation of the original act, while the stipulations relating to the dissemination of false advertising are completely new additions to the Act.

A relatively unimportant change included in the amended Act is the inclusion in section 1 of the original act [1] of a provision that upon the expiration of his term, a Commissioner shall continue in office until his successor is appointed.[2] Although nothing in the old Act prohibited a Commissioner from so remaining, a provision that the powers of the Commission should not be impaired by a vacancy indicates that the practice was not contemplated. Normally, the new provision should prove advantageous, especially since it eliminates the necessity of a Commissioner being withdrawn in the midst of an investigation because of the expiration of his term. Since no limit is placed on the time in which a successor shall be appointed, there exists the possibility, though not a probability, that the new provision could be used by the President to continue a Commissioner in office without a definite appointment, and to leave the duration of his term to the pleasure of the chief executive.

Section 2 of the Amendment merely provides new definitions in addition to those already contained in section 4 of the existing Act. In a letter to the Senate Committee, the Federal Trade Commission stated that there was doubt as to whether the trust, or the so-called Massachusetts Trust, was within the meaning of the words "company or association" as used in the original act.[3] These are now expressly included in the definition of the word "corporation". A limitation upon the meaning of corporation as used in the Act has been provided by the exclusion from the definition of associations of those which do not carry on a business for their own profit or for that of their members. The scope of the words "documentary evidence" is clarified by the inclusion within that term of books of account and financial and corporate records. The definition of "Anti-trust Acts" has been enlarged by adding to the Sherman Act,[4] the Clayton Act,[5] and an act regulating combinations in restrain of foreign trade.[6] The inclusion of the Communications Act as an act to regulate commerce will apparently exempt persons within section 3 (h) thereof [7] from the jurisdiction of the Commission under section 5 of the Federal Trade Commission Act.[8]

Jurisdictional Changes

It has been stated that most of the complaints issued by the Commission have been based upon the authority conferred by section 5.[9] In view of this fact, even an otherwise trivial Amendment to this section may become important.

1. 38 STAT. 717 (1914), 15 U. S. C. A. § 41 (1937).

2. Pub. L. No. 447, 75th Cong., 3d Sess. (March 21, 1938).

3. SEN. REP. No. 221, 75th Cong., 1st Sess. (1937) 5. But see Guarantee Veterinary Co. v. Federal Trade Comm., 285 Fed. 853 (1922) in which a trust was held to be subject to the jurisdiction of the Commission.

4. 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-11 (1927).

5. 38 STAT. 730 (1914), 15 U. S. C. A. §§ 12-27 (1927).

6. 28 STAT. 509, §§ 73-77 (1894), as amended 37 STAT. 667 (1913), 15 U. S. C. A. § 8 (1927).

7. 48 STAT. 1064, § 3 (1934), 47 U. S. C. A. § 153 (n) (Supp. 1938).

8. *Supra* note 1, at § 45.

9. Holliday, *The Federal Trade Commission* (1922) 8 A. B. A. J. 293, 296.

It may be contended, however, that the changes made by the new Act will prove to be of more theoretical than of practical import.

The conditions surrounding the passage of the Federal Trade Commission Act clearly indicate that it was evolved primarily for the purpose of providing an administrative agency to regulate commercial tendencies which had not yet attained sufficient stature to fall within the jurisdiction of the anti-trust laws, but which were definitely restrictive of that free competition which then was considered the economic goal of the nation.[10] To this end, section 5 of the Act declared unfair *methods of competition* in commerce to be unlawful, and the courts, in construing this section, have emphasized the fact that before the jurisdiction of the Commission could be invoked, the unfair method must be shown to have a harmful effect upon competition. Thus the Supreme Court in *Federal Trade Comm. v. Raladam Co.*,[11] declared as the three pre-requisites to the exercise of power by the Commission, (1) that the method complained of be unfair, (2) that it be a method of competition in commerce and (3) that a proceeding by the Commission would be in the interest of the public. The word "competition" was held to import the existence of present or potential competitors whose business would be injuriously affected by the method in question. While injury to a competitor was necessary to the jurisdiction of the Commission, the theory was not that the competitor should be protected, but rather that the public interest in free competition should be secured.[12] The Supreme Court has also ruled that injury to the public must be shown in order to bring the case within the public interest requirement, and that a showing that the act complained of resulted in confusion of the public, without injury to them, was insufficient.[13] This curtails a previous decision of the Circuit Court of Appeals for the First Circuit that a specific finding by the Commission that its action in bringing the complaint is in the public interest is unnecessary and that, in the absence of evidence of arbitrary exercise of discretion, the bringing of the complaint is sufficient proof of the public interest involved.[14]

Inasmuch as the Commission's powers have been exercised not so much to prevent monopolistic tendencies in business as to adjudicate private disputes based on abuse of the privilege of free competition, the theory has arisen that its essential function is to protect the consuming public, and that the old section 5 (a), construed by the courts so as to place the emphasis on the competitive element, is inadequate for this purpose. The addition in the new section 5 (a) of the prohibition of "unfair or deceptive acts or practices in commerce" was proposed for the avowed purpose of extending the jurisdiction of the Commission to all acts affecting or deceiving the public, and of eliminating the time and expense involved in proving injury to competitors.[15] While it is not to be expected that many cases will arise under the amended section which could not have been dealt with under the old, the change will have the effect of reconciling the theoretical purpose of the Commission with the results it actually accomplishes, and will simplify the task of bringing many of the complaints within its jurisdiction through the elimination of procedural difficulties. It should also be noticed that the unfair act complained of need no longer be so established as to be within the meaning commonly imputed to the word "method", and may be prohibited before it has progressed to that stage.[16]

10. BLAISDELL, THE FEDERAL TRADE COMMISSION (1932) 5.
11. 283 U. S. 643 (1931).
12. (1938) 1 N. A. M. L. DIG. 84.
13. Federal Trade Commission v. Klesner, 280 U. S. 19 (1929).
14. Moir v. Federal Trade Commission, 12 F. (2d) 22 (C. C. A. 1st, 1926).
15. SEN. REP. No. 221, 75th Cong., 1st Sess. (1937) 3.
16. But see dicta in Philip Carey Mfg. Co. v. Federal Trade Comm., 29 F. (2d) 49, 51 (C. C. A. 6th, 1928) to the effect that a single act could constitute substantial evidence of an unfair method of competition under the old act.

It seems improbable that the extension of the Commission's jurisdiction involved here will raise any serious constitutional questions. Attacks on the original Act on the grounds that it was indefinite, and a delegation of legislative power were not sustained,[17] and it is difficult to find any additional objections in the present revision. While, at first glance, an unfair or deceptive act in commerce may seem to be more difficult of definition than an unfair method of competition, it does not present a more difficult standard to apply in a given factual situation. The principal distinction is that while the word "unfair" in the original phrase definitely related to competition or competitors, it now has no relation to anyone unless it is construed as meaning unfair to the public. Having related it to the public, the unfairness is as capable of determination as it was in relation to competition. The Amendment makes no change with respect to the problem of whether the power of the Commission may constitutionally be applied to acts which, though intrastate in nature, bear some relation to interstate commerce.

Procedural Revision

The remainder of section 5 of the new Act revises the original Act with a view to removing flaws in the procedural machinery of the Commission, and to expediting the performance of its functions. The most important change, in this respect, is the provision for the review of orders of the Commission by the circuit courts of appeal. It often has been reiterated that the Federal Trade Commission exercises administrative and not judicial powers.[18] This has been interpreted to mean that its function is restricted to the finding of facts, which to be effective, must be adopted by the circuit court of appeals,[19] but which, if supported by the evidence, are conclusive on the court.[20] Furthermore, the enforcement of the cease and desist orders of the Commission rested solely with the circuit court, and could be had only upon application by the Commission. Confusion has resulted from conflicting decisions of the courts of the Second and Seventh Circuits as to whether such enforcement could be had, and an order of the circuit court obtained, without showing that the Commission's order had been violated.[21] It is clear that while the finding of facts were conclusive, the order of the Commission was effective only at the pleasure of the party proceeded against until action had been taken by a circuit court. One of the main objectives of the Wheeler-Lea Amendment is to relieve the Commission of the necessity of establishing its order in the court before it becomes effective, unless the validity of the order is attacked by a petition for review filed by the party affected. To this end, section 5 (g) provides that an order to cease and desist shall become final if no petition for review is filed within sixty days of the service of the order;[22] upon the expiration of the time allowed for filing a petition of certiorari if the order has been affirmed by the circuit court of appeals or the petition for review dismissed; upon the denial of a petition for certiorari under the same conditions; or upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court if such Court directs that the order be affirmed or the petition dismissed. Section 5 (l) provides for a civil

17. Sears, Roebuck & Co. v. Federal Trade Comm., 258 Fed. 307 (C. C. A. 7th, 1919).

18. Federal Trade Comm. v. Eastman Kodak Co., 274 U. S. 619 (1927); Chamber of Commerce of Minneapolis v Federal Trade Comm., 280 Fed. 45 (C. C. A. 8th, 1922).

19. Chamber of Commerce of Minneapolis v. Federal Trade Comm., 280 Fed. 45 (C. C. A. 8th, 1922).

20. Federal Trade Comm. v. Algoma Lumber Co., 291 U. S. 67 (1934).

21. Compare Federal Trade Comm. v. Standard Education Society, 14 F. (2d) 947 (C. C. A. 7th, 1926) with Federal Trade Comm. v. Balme, 23 F. (2d) 615 (C. C. A. 2d, 1928).

22. Section 5 (c) sets forth the procedure for obtaining review and establishes the limit of sixty days.

penalty for violation of the order after it has become final and which shall accrue to the United States and be recoverable in a civil action brought by the Federal Government.

From the foregoing discussion it would seem that the effect of the Amendment is to confer an element of judicial power upon the Commission which it had previously lacked. It was said of the old act that since a hearing was granted by the Commission with an ultimate review by the circuit court of appeals, there was no denial of due process of law.[23] Under the amended section, there may be review by the circuit court only if the party against whom the order is issued asks for it within a specified time, and should he fail to ask, thus assuming the expense and burden of initiating the proceeding, he will be subjected to a penalty without such a review.[24] The question may arise as to whether the court hearing the action by the United States to recover the penalty will have jurisdiction to consider the validity of the order, or whether it will be limited to a consideration of whether there has been a violation of the order so as to subject the defendant to the penalty. Apparently, the question has not arisen under the very similar provisions of the Packers and Stockyards Act.[25]

As originally drawn by the Senate, the Amendment contained the old provision relating to applications by the Commission to the circuit court of appeals for enforcement of its order whenever the party against whom the order was issued failed to obey it, but amended it so as to provide that it would be unnecessary for the Commission to first prove violation of the order,[26] thus resolving the aforementioned conflict between the Seventh and Second Circuits in favor of the latter.[27] This entire provision was eliminated by the conference committee of the two Houses, apparently on the theory that it was unnecessary inasmuch as the Commission's order automatically becomes final upon the expiration of the sixty day period. However, it seems that the Commission is now rendered powerless to prevent violation of its order during that time. This is peculiar in view of the fact that upon the filing of the petition for review, the circuit court is given power to enjoin violation *pendente lite* because of the damage which might occur before disposition of the case.

The Wheeler-Lea Amendment further provides in section 5 (b) that the Commission may modify or set aside its order at any time until the expiration of the time allowed for filing the petition for review, or until the filing of the transcript of the record in the proceedings before the Commission in the court following the filing of such petition. After the expiration of the sixty days, the Commission may modify or set aside its order with the consent of the party affected.

Section 5 (c) not only adds the sixty-day limitation to the procedure for obtaining review of the Commission's order, but further amplifies the power of the court by giving it authority to issue such writs as are ancillary to its jurisdiction or, in its judgment, are necessary to prevent injury to the public *pendente lite*. The obvious purpose of this provision is to provide a method of terminating business practices which would injuriously affect the public or competitors if allowed to continue during litigation. Somewhat similar provisions are found in the Packers and Stockyards Act,[28] and the Securities Exchange Act.[29] To the extent that the court affirms the order of the Commission, it issues its own

23. Chamber of Commerce of Minneapolis v. Federal Trade Comm., 280 Fed. 45 (C. C. A. 8th, 1922).

24. A similar provision in the Packers and Stockyards Act has been sustained. Trunz Pork Stores, Inc. v. Wallace, 70 F. (2d) 688 (C. C. A. 2d, 1934).

25. 42 STAT. 159, 163 (1921), 7 U. S. C. A. §§ 194-195 (1927).

26. SEN. BILL No. 1077, 75th Cong., 1st Sess. (1937) 7.

27. *Supra* note 21.

28. 42 STAT. 159, 163 (1921), 7 U. S. C. A. § 194 (1927).

29. 48 STAT. 881, 901 (1934), 15 U. S. C. A. § 78y (b) (Supp. 1938).

order commanding obedience to its terms. Subsection (c) is also intended to clarify the existing provisions by the statement that the findings of the Commission shall be conclusive if supported by "evidence", the term being considered more inclusive than the former requirement of "testimony".[30]

Section 5, subsections (h), (i), (j) and (k) of the Wheeler-Lea Amendment find no counterpart in the original act. Their purpose is to further clarify the time at which an order of the Commission becomes final by making express provisions concerning it in the event that the order is appealed either to a circuit court of appeals or to the Supreme Court. Section 5 (h) therefore stipulates that if the order is modified or set aside by the Supreme Court, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final thirty days after its date unless, in the meantime, either party has instituted proceedings to have the order corrected to conform to the mandate. In that event, the order becomes final when corrected. Similarly, section 5 (i) provides that when the order is modified or set aside by a circuit court of appeals, and either the time allowed for filing a petition for certiorari has expired without the filing of a petition, or certiorari has been denied, or the decision of the circuit court has been affirmed, then the order of the Commission rendered in accordance with the mandate of the circuit court is to become final in the same manner as under subsection (h). Section 5 (j) provides for finality of the order in the event that the Supreme Court or circuit court orders a rehearing, by directing that when opportunity for certiorari has passed or the decision of the circuit court affirmed, the order rendered upon rehearing shall become final in the same manner as though no prior order of the Commission had been rendered. Section 5 (k) merely defines the term "mandate" as the final mandate.

Regulation of Advertising

The Federal Trade Commission Act, and those changes made in it by the Wheeler-Lea Amendment which have already been discussed, have been framed for the purpose of providing a means of regulating trade in general. However, sections 12, 13, 14, 15 and 16, added by the amendment, are aimed at the prevention of a specific abuse in a particular field of trade, namely, the dissemination of false or misleading advertising of food, drugs, devices and cosmetics. The intention of Congress undoubtedly is to supplement the provisions of the Pure Food and Drug Act relating to the misbranding of drugs or articles of food,[31] by taking action against false advertisements in addition to labels, and by utilizing the enforcement procedure of the Federal Trade Commission to provide civil as well as criminal penalties.

To this end, section 12 (a) (1) provides that it shall be unlawful for any person, partnership or corporation to disseminate or cause to be disseminated any false advertisement by the mails or in interstate commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of such articles. The meaning of this provision appears clear; it applies only to advertisements disseminated in interstate commerce and makes the intent to induce the purchase of these products immaterial, although it is difficult to understand for what other reason a product would be advertised. Section 12 (a) (2) is broader, relating as it does, to an advertisement disseminated by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices and cosmetics in interstate commerce. This would appear to be a legislative determination that the purely intrastate act of advertising a product subject to interstate sale is an act so

30. *Supra* note 15, at 8.
31. 34 STAT. 768 (1906), 21 U. S. C. A. §§ 1-15 (1927).

affecting interstate commerce as to subject itself to federal regulation. In addition, section 12 (b) provides that any act made unlawful by section 12 (a) shall be an unfair or deceptive act in commerce under section 5. Thus, while the general question of the applicability of section 5 to intrastate acts affecting interstate commerce remains one for the courts to determine, it is settled by the legislature when the act complained of is the false advertisement of food, drugs, devices or cosmetics. The constitutionality of this provision will probably not present a serious problem. By the National Labor Relations Act, Congress assumed regulatory power over intrastate practices which it declared burdened interstate commerce[32] and this provision recently has been sustained.[33] Furthermore, the court has recognized that intrastate acts which pertain to the introduction of goods into the state from without are interstate in nature and, therefore, not subject to state regulation.[34] It would follow that such acts are subject to federal regulation.

Section 13 (a) provides that when the Commission has reason to believe that any person, partnership or corporation is violating or about to violate section 12, and that the enjoining of the violation pending proceedings by the Commission under section 5 is to the interest of the public, it may sue for an injunction in a United States District Court and upon a proper showing, a temporary injunction shall be granted without bond. Subsection (b), however, provides that when the delivery of a particular issue of a publication would be delayed after the regular time therefor by an injunction restraining the dissemination of a false advertisement contained in the issue, that issue may be excluded from the operation of the injunction. Such exclusion may be had, however, only when the delay would be caused by the customary method of manufacture and distribution of the publication, and not due to an attempt to evade the Act. Objection to section 13 was made by some members of the House committee on the ground that since the advertisement is not subject to the Act unless it is misleading in a material respect, the Commission should not have been given a discretionary power to decide whether or not the suit for an injunction would be to the interest of the public, and that this limitation should be removed making it mandatory upon the Commission to seek the injunction.[35] This objection overlooks the fact that the advertisement may be materially misleading and yet not be of sufficient importance to justify the added burden on the courts of the use of injunctive procedure designed to assist the Commission in cases where speed in acting is essential. Subsection (b) is a recognition by Congress of the fact that the rights of innocent parties should be protected as far as possible without interfering with the proper exercise of the Commission's functions.

While the dissemination of false advertisements of food, drugs, devices and cosmetics is normally subject to civil penalties under section 5, criminal penalties are also provided in section 14 (a) to deal specifically with violations of section 12 (a) which involve commodities whose normal or prescribed use is injurious to health, and also with all intentional violations. Such violations are denominated misdemeanors and are accordingly punished. Regard is again shown for the innocent agents of dissemination by the provision in section 14 (b) exempting publishers, radio broadcast licensees, and agencies or media for advertising, from liability under section 14 (a), unless they refuse, upon request of the Commission, to furnish the Commission with the name and address of the manufacturer, packer, distributor, seller or advertising agency which caused

32. 49 STAT. 449 (1935), 29 U. S. C. A. § 151 (Supp. 1938).
33. Jones & Laughlin Steel Co. v. National Labor Relations Board, 301 U. S. 1. (1937).
34. Rearick v. Pennsylvania, 203 U. S. 507 (1906); Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925).
35. H. R. REP. No. 1613, 75th Cong., 1st Sess. (1937) 26.

them to disseminate the false advertisement. Advertising agencies are in turn exempted unless they refuse to reveal the name and address of the person behind them.

If the teeth of the new provisions are to be found in section 14, it remains for section 15 to supply the heart by defining a false advertisement within the meaning of the act. After broadly stating that a false advertisement is one, other than labeling, which is misleading in a material respect, it then proceeds to define the latter phrase. In determining whether an advertisement is misleading in a material respect, there must be considered not only representations made or suggested by any statement, word, design, device, sound or any combination, but also omissions of facts material to such representations or to consequences which may result from the normal use of the product, or from use under any conditions prescribed by the advertisement. This definitely includes articles which not only have no beneficial effect, but which may have harmful consequences, against which section 14 (a) is directed. The original provision, as introduced in the House of Representatives as an amendment to the Senate bill, contained a provision excluding from the definition the advertisement of articles concerning the effect of which qualified medical opinion differed, provided that the fact of such division of opinion was indicated in the advertisement.[36] The purpose of the provision was to conform with decisions of the Supreme Court to the effect that Congress may not penalize the making of a statement or representation about which qualified opinion differs, although a fraudulent misrepresentation, depending on the existence of a state of mind, can be prohibited.[37] The provision was discarded by the conference committee as unnecessary,[38] but will probably be reinserted by the courts in applying the Act to specific cases. Special provision is made for advertisements circulated only among members of the medical profession, in which case it will not be considered false if it contains no false representation of a material fact and includes a truthful disclosure of the formula. It should be noted that this definition requires that the representation be false, rather than merely misleading, a distinction of little consequence in view of the practical difficulty of misleading a qualified physician who is furnished with the formula.

Subsections (b), (c), (d) and (e) of section 15 are intended to define, as broadly as possible, the terms food, drugs, devices and cosmetics. Most noteworthy is the fact that the terms include not only the articles themselves, but also their components, regardless of the fact that the substance used as a component would not otherwise be within the definition.[39]

Conclusion

It is impossible to predict the effect which the amended Act will have upon the practical administration of the Commission. It has reconciled the theoretical and actual functions of the body, has filled gaps in its jurisdiction, and has strengthened and emphasized its powers to regulate misleading advertising. Furthermore, the Commission has been materially aided in being relieved of the necessity of obtaining court sanction of its orders until appeal is taken by the party affected. On the other hand, some of the changes, while clarifying, do not appear to have been necessary. Were it not for the criminal provisions of sec-

36. *Id.* at 7.

37. Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510 (1916).

38. H. R. REP. No. 1774, 75th Cong., 3d Sess. (1938) 10.

39. The remainder of the Act is concerned with administrative details. Section 16 provides for enforcement of sections 14 (a) and 5 (1) by the Attorney-General. Section 17 contains the separability clause to the effect that the invalidity of one section shall not affect the rest and section 18 provides for its citation as the "Federal Trade Commission Act".