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Trade Regulation—Section 5 of FTC Act—Television Advertising.—FTC v. Colgate-Palmolive Co.

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Trade Regulation—Section 5 of FTC Act—Television Advertising.—*FTC v. Colgate-Palmolive Co.*[1]—Colgate-Palmolive Company televised three commercials in which "sandpaper" moistened with Rapid Shave was stroked clean with a safety razor. To compensate for the inadequacies of television transmission, Colgate had substituted for sandpaper, plexiglass with sand applied to it.[2] The Federal Trade Commission ruled that Colgate had engaged in two distinct materially deceptive practices,[3] in violation of Section 5 of the Federal Trade Commission Act.[4] Colgate had represented by implication, first, that little soaking time was needed before sandpaper could be shaved, when in fact 80 minutes was required, and second, that real sandpaper was being used in the advertisement. The Commission issued a cease-and-desist order[5] which in effect directed Colgate to discontinue the use of any undisclosed prop or mock-up in its television advertising.[6]

The First Circuit Court of Appeals agreed with the Commission's finding that Colgate had misrepresented the soaking qualities of its product[7] but, because the court felt the Commission's order as it pertained to future use of simulated props was too broad, it directed the Commission to issue a narrower order.[8]

The new order was also brought to the attention of the court of appeals where it was adjudged to be little more than the original order rephrased.[9] The court directed the Commission to enter an order confined to the facts of the case and to adopt a rule that undisclosed mock-ups shall be prohibited only where used to demonstrate something which in fact cannot be accomplished.[10] From this order the Commission petitioned the Supreme Court for certiorari. HELD: The Commission's order is sustained. Colgate must cease and desist from representing falsely, by the use of a prop or mock-up, that a televised test, experiment, or demonstration provides a viewer with visual proof of a product claim, regardless of whether the claim is itself true.[11]

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which would seemingly open the Massachusetts market to the sale of Coffee-Rich in all marketing situations, including institutional, provided the consumer is made aware that he is confronted with a non-dairy product. His decree forbids enforcement of section 187 against Coffee-Rich "wherever the manufacturer makes a wholesome product and in no way misleads any reasonable person as to its nature." Coffee-Rich, Inc. v. Commissioner of Pub. Health, 209 N.E.2d 389 (Mass. 1965).

1 380 U.S. 374 (1965).

2 The televising of sandpaper distorts its texture to make it appear to be nothing more than colored paper.

3 Colgate-Palmolive Co., 59 F.T.C. 1452, 1476-77 (1961).

4 FTC Act § 5, 38 Stat. 717 (1914), as amended, 15 U.S.C. § 45(a)(1) (1964): Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

5 Colgate-Palmolive Co., supra note 3, at 1477-78.

6 The Supreme Court so interpreted the Commission's order. Supra note 1, at 380.

7 Colgate-Palmolive Co. v. FTC, 310 F.2d 89, 91 (1st Cir. 1962).

8 Id. at 94-95.

9 Colgate-Palmolive Co. v. FTC, 326 F.2d 517, 519 (1st Cir. 1963).

10 Id. at 523.

11 Supra note 1, at 395.

The majority, in reaching its decision on the substantive issues,[12] agreed with the Commission that Colgate had represented: (1) that sandpaper could be shaved by Rapid Shave; (2) that an experiment had been conducted which verified this claim; and (3) that the viewer was actually seeing this demonstration take place for himself.[13] The Court, conceding the truth of the first two representations, proceeded to determine whether the substitution of plexiglass for sandpaper was a materially deceptive practice prohibited by section 5.

The majority agreed with the Commission that the misrepresentation of any fact, so long as it materially induces a purchaser's decision to buy, is a deceptive practice in violation of section 5.[14] Mr. Justice Cardozo, speaking for the Court in *FTC v. Algoma Lumber Co.*,[15] had established this principle. It was held there that a purchaser is free to buy whatever he chooses from the seller, but his choice must not be influenced by the seller's false representations.

The ruling made in *Hutchinson Chem. Corp.*[16] was instrumental in bringing "proof of product claim" within the *Algoma* principle. Hutchinson, the manufacturer of an automobile polish, televised an advertisement showing the polish applied, heated by igniting gasoline, and then cooled with water. They were charged with falsely representing by implication that the commercial proved the polish to be both heat and cold resistant. The examiner ruled that the FTC Act did not empower the Commission to determine whether demonstrations do or do not prove sponsor's claims, and that the Commission could determine only the truth or falsity of the representation made.[17] The Commission reversed and held that this determination did fall within its section 5 powers,[18] and that a commercial which purports to prove something that it does not prove is a materially deceptive act since its purpose is to induce purchase.[19]

The majority fit the instant case into this area of imperfectly proven product claims. They reasoned that Colgate was offering "visual proof" that sandpaper could be shaved: Colgate had not merely asserted that Rapid Shave could shave sandpaper but in effect had asked the skeptical viewer to, "see for yourself, it does shave sandpaper." They reasoned that this "visual proof" of a product claim was designed to induce the consumer to purchase the product and, since it was not valid proof, it was a materially deceptive act.[20]

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[12] A procedural issue was also before the Court pertaining to the timeliness of the petition for certiorari. The issue was resolved in favor of the Commission when it was determined that the time of the filing of the petition was to begin running from the date of the second decision of the court of appeals, rather than from the first decision. Id. at 378-84.

[13] Id. at 386.

[14] Id. at 386-87.

[15] 291 U.S. 67 (1934).

[16] 55 F.T.C. 1942 (1959).

[17] Id. at 1944.

[18] Id. at 1946-47.

[19] Id. at 1947.

[20] Supra note 1, at 388-89.

The majority reached this conclusion by looking at what took place in the studio, rather than at what image was received by the consumer. They felt the case was not concerned with modes of communication, but with a misrepresentation that viewers have objective proof of a seller's product claim over and above the seller's word.[21] They concluded that since Colgate had represented that sandpaper was being used in the studio, the viewer was materially deceived.

Assuming, however, as the Court did, that Rapid Shave can soften sandpaper quickly, there does not seem to be any *material* deceit. As Mr. Justice Harlan pointed out in his dissent in the instant case,[22] in determining what is or is not materially deceptive, the Court's attention should be on what is being viewed by the consumer rather than on what is taking place in the studio. If the consumer receives exactly what was represented, in this case shaving cream that will soak sandpaper, there can be no material deception.

This view finds support in *Carter Prod. Inc. v. FTC*[23] where Rise Shaving Cream was advertised as the wetter lather. A "competing brand" was shown which was quick drying and rough for shaving. This "competing brand" was actually a special formula known to Carter not to be a true representation of the other brands. The court distinguished between mock-ups which are used to compensate for technical deficiencies in television transmission and those mock-ups used to assert qualities which do not exist.[24] It cited with approval[25] the decision of the court of appeals in *Colgate*[26] that, if what the viewer sees on the television screen is a true representation of what he will receive when he buys the product, it is immaterial that props or mock-ups are used to portray this image.[27] The court stated that Carter had engaged in deceptive practices, not because a mock-up was used to compensate for the technical limitations in television to prove a product claim, but because the mock-up distorted the comparison test with an inaccurate representation.[28]

The majority in *Colgate* compared Colgate's commercial to three types of activities which had previously been held to constitute false inducements and therefore deceptive practices violative of section 5: (1) a seller falsely represents his line of business, as where he asserts that he manufactures a product when in fact he buys it from other manufacturers and sells it under his own trade name;[29] (2) a product is sold at a stated reduced price but the reduction is from an inflated price rather than from the fair market price;[30] and (3) a product is represented as having been endorsed by a respected or well-known person or organization, when in truth it never has been so

[21] Id. at 388.
[22] Id. at 396.
[23] 323 F.2d 523 (5th Cir. 1963) (dictum).
[24] Id. at 531-32.
[25] Id. at 530.
[26] Colgate-Palmolive Co. v. FTC, supra note 7.
[27] Carter Prod. Inc. v. FTC, supra note 23, at 528-30.
[28] Id. at 530.
[29] E.g., FTC v. Royal Milling Co., 288 U.S. 212 (1933).
[30] E.g., FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937).

certified.[31] In each of these three examples, the misrepresentation in no way affects the quality of the article sold, but it does act as an inducement to the consumer and consequently constitutes a deceptive practice under section 5.[32]

Mr. Justice Harlan, however, raises an important distinction between these condemned activities and the Rapid Shave advertisement. Still assuming that Rapid Shave can soften sandpaper as quickly as it does the mock-up, there can be no material deception because the consumer receives exactly what he expected.[33] In each of the above forms of deception, the consumer does not receive the article as advertised. In the first case, the seller is not in that particular line of business so the consumer does not receive the added assurance of satisfaction that he expected; in the second, the saving expected never materializes; and in the third, the certification is non-existent so the assurance again is not received. In the instant case, however, the consumer receives what he expected, that is, shaving cream which will soak sandpaper sufficiently for shaving. This should be the determining factor of what is materially deceptive.

The Court's decision does not make the use of all undisclosed mock-ups illegal per se. The majority distinguished between those mock-ups used merely for illustration purposes and those which offer proof of a product claim. Only the latter are declared unlawful.[34] However, these areas of proof and illustration so overlap that a clear separation between them will be impossible in many instances. Thus, advertisers who in good faith use a prop in what they honestly believe to be an illustration may find themselves being brought before the Commission for using a mock-up to prove a product claim. For example, a manufacturer advertising a liquid product may add coloring to illustrate the true color of his product to the viewer. The Commission, however, may hold that the coloring misrepresents the richness of the product and is, consequently, proof of a product claim and a false inducement in violation of section 5.

The decision in the instant case does not consider the situation in which an advertiser takes advantage of television transmission to enhance the appearance of an inferior product. For example, a manufacturer might offer towels which are barely fit for ordinary use, but because of imperfect transmission, color[35] and texture would appear luxurious. The majority in *Colgate* might say that the viewer has been deceived, if at all, only by the inadequacies of television, not by the advertiser, since the Court apparently demands absolute truth only in the studio. If, on the other hand, the Court prohibited transmitting "up" (the use of transmission peculiarities to enhance the product's qualities), television demonstrations would be limited to those products which transmit with perfect fidelity or transmit "down" (televising detracts from their appearance). The television industry would then lose a considerable amount of demonstrative advertising. It is true that

[31] E.g., Niresk Indust., Inc. v. FTC, 278 F.2d 337 (7th Cir. 1960).

[32] Id. at 339; FTC v. Royal Milling Co., supra note 29, at 216-17; FTC v. Standard Educ. Soc'y, supra note 30, at 116-17.

[33] Supra note 1, at 396-97.

[34] Id. at 392-93.

[35] E.g., a light blue article in the studio may appear sparkling white to the viewer.

these advertisers could and probably would shift to other types of television commercials. It is submitted, however, that there is a trend in our complex market economy toward great distances between buyers and sellers. Demonstrative advertising is necessary to compensate for the informational gap which results from this separation. Therefore, the alternatives facing the Court in the towel hypothetical would be to (1) allow transmitting up and the consequent consumer deception, or (2) forbid it, causing the buying public to lose a large segment of desirable demonstrative advertising.

Returning to the decision in the instant case, similar economic ramifications may be seen. The majority, in forbidding the use of mock-ups, has condemned makers of products which transmit down to the dilemma of committing suicide by televising down or abandoning informative television demonstrations.

It appears that the majority has placed on the television industry the burden of improving technologically or losing a considerable segment of demonstration advertising. It would further seem that any adaptation inside the television camera or use of a colored filter over the camera lens to make white transmit as white (or sandpaper transmit as sandpaper) would be a permissible measure to compensate for the difficulties inherent in all light transmission. But, both are manipulations of the truth and in effect are no different than a mock-up. Yet, here the axe would fall, though the result is the same and only the method employed in the studio is different.

In summary, the majority may have lost sight of the objective of section 5, namely, the protection of the consumer. Its decision provides section 5 protection only to the consumer who needs no protection since he has received exactly what he expected, and places unreasonable burdens on television advertisers and the television industry.

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Workmen's Compensation—Full Faith and Credit—Provision for Exclusive Jurisdiction in Administrative Board.—*Crider v. Zurich Ins. Co.*[1]— Petitioner, a resident of Alabama, was injured in that state while in the employ of Lawler Construction, a Georgia corporation. At the time of injury both he and his employer were under the Georgia Workmen's Compensation Act.[2] Petitioner brought suit against Lawler in an Alabama court under the Georgia act and was awarded a default judgment. To enforce this judgment, the petitioner instituted a diversity action against Zurich Insurance, the workmen's compensation carrier for Lawler, in a federal district court in Alabama. Zurich filed a motion to dismiss, contending that since the Georgia act invested primary jurisdiction in the Industrial Accident Board of Georgia,[3] the Alabama court had lacked subject-matter jurisdiction to enter the default

[1] 85 Sup. Ct. 769 (1965).
[2] Ga. Code Ann. § 114 (1956).
[3] Ga. Code Ann. § 54-108 (1960).