

IN THE MATTER OF
FREDERICK CLUTHE TRADING AS CHARLES CLUTHE
& SONS; AND CHARLES CLUTHE & SONS

MODIFIED ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 3512. Modified Order, Jan. 25, 1955

Order reopening proceeding in which findings and order originally issued April 10, 1939, 28 F. T. C. 1390, and modifying Paragraph Four of said Findings and said Cease and Desist Order to permit respondent to advertise that the "Cluthe Truss" could give certain relief from reducible inguinal ruptures.

*Mr. Charles S. Cox and Mr. William M. King for the Commission.
Miller & Chevalier, of Washington, D. C., for respondents.*

ORDER REOPENING PROCEEDING AND GRANTING MOTION FOR MODIFICATION
OF FINDINGS AS TO THE FACTS AND OF ORDER TO CEASE AND DESIST

This matter coming on to be heard upon motion of the Director, Bureau of Litigation, filed August 26, 1954, to reopen the proceeding and to modify the findings as to the facts and order to cease and desist, and upon answer filed by respondents interposing no objection to the granting of such motion; and

The Commission having duly considered the matter and having determined, for the reasons set forth in the accompanying opinion, that the request for modification of Paragraph 4 of the findings as to the facts and for modification of the order to cease and desist should be granted and that the proceeding accordingly should be reopened for that purpose:

It is ordered, That said motion to reopen should be, and it hereby is, granted.

It is further ordered, That Paragraph 4 of the findings as to the facts originally entered herein be modified to read as follows:

"PAR. 4. The representations thus made by the respondents are false and misleading. In truth and in fact, the use of said device (a) will not overcome rupture troubles; (b) will not fit all ruptures, but can be expected to fit most reducible inguinal ruptures; (c) will not cure ruptures; (d) will not provide an effective treatment for ruptures; (e) will not end rupture worries; (f) will not prevent the intestines from passing through all forms of ruptures, but will prevent the intestines from passing through most reducible inguinal ruptures; (g) will not enable a ruptured person to engage safely in severe forms of

exercise or strain; (h) will seal a rupture only in the sense that, while worn, it will prevent the protrusion of the intestines through most reducible inguinal ruptures; (i) will not eliminate the necessity of an operation for rupture, for the reason that ruptured persons face the possibility that their ruptures may become strangulated, in which event, an operation is necessary as a life-saving measure. Elastic and spring trusses can be adapted for use on the human body,"¹

It is further ordered, That the order to cease and desist herein be modified to read as follows:

"*It is ordered*, That the respondent Frederick Cluthe, individually and trading as Charles Cluthe & Sons, or under any other name or names, his representatives, agents and employees, and the respondent Charles Cluthe & Sons, a corporation, its representatives, officers, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a truss now designated as the 'Cluthe Truss,' or any other truss of substantially the same design, style and workmanship, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

"(a) That the use of such truss will prevent the intestines from passing through the rupture, unless such representation be expressly limited to reducible inguinal ruptures;

"(b) That the use of such truss will enable ruptured persons to engage safely in severe forms of exercise or strain;

"(c) That the use of such truss will seal a rupture except in the sense that, while worn, it will prevent the protrusion of the intestines through reducible inguinal ruptures;

"(d) That the use of such truss will end rupture worries."²

It is further ordered, That the respondent Frederick Cluthe, in-

¹ Paragraph Four in the original findings (28 F. T. C. 1397) read: "PAR. 4. The representations thus made by the respondents are false and misleading. In truth and in fact, said product is not a new kind of truss and invention; will not overcome rupture troubles; will not fit and cure the rupture; is not a way of obtaining sure results in the treatment of a rupture; will not end rupture worries; will not make one secure against all likelihood of having his intestines pass through the rupture; will not enable a ruptured person to engage safely in the most severe form of exercise and strain. Elastic or spring trusses can be adapted for use on the human body. Respondents' truss will not seal the rupture opening and will not save or eliminate the necessity of an operation for rupture."

² The specific prohibitions in the order as originally entered against respondent Cluthe, individually, etc., and corporate respondent Charles Cluthe & Sons, etc., required said respondents to cease and desist from representing, etc.:

"(a) By the use of the term 'guaranteed to hold,' or any other term or terms of similar import and meaning, or in any other manner, that the use of such truss will prevent the intestines from passing through the rupture.

"(b) That the use of such truss will enable ruptured persons to engage safely in severe forms of exercise and physical effort.

"(c) That such truss will seal a rupture."

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dividually and trading as Charles Cluthe & Sons, or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a truss now designated as the 'Cluthe Truss,' or any other truss of substantially the same design, style and workmanship, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

"(a) That such truss is a new kind of truss or invention;

"(b) That the use of such truss is an effective treatment for ruptures;

"(c) That elastic or spring trusses are not adaptable for use on the human body;

"(d) That such truss will fit ruptures, unless such representation is expressly limited to reducible inguinal ruptures;

"(e) That the use of such truss will cure a rupture;

"(f) That the necessity for an operation for ruptures will be eliminated by reason of the use of such truss.³

"It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order."

OPINION OF THE COMMISSION

By MASON, Commissioner:

The Federal Trade Commission on April 10, 1939, made its findings as to the facts and conclusion and issued its order to cease and desist herein upon the basis of an amended complaint and answer thereto admitting all material allegations of fact set forth in the amended complaint. Said order became final by operation of law.

This matter is now before the Commission upon motion of the Director, Bureau of Litigation, "TO REOPEN THE ABOVE PROCEEDING AND

³ The specific prohibition in the order as originally entered against respondent Cluthe, individually, etc., required said respondent to cease and desist from representing, etc.:

"(a) That such truss is a new kind of truss or invention.

"(b) That a ruptured person using such truss will be assured of beneficial results by reason of the use thereof.

"(c) That elastic or spring trusses are not adaptable for use on the human body.

"(d) That such truss will fit ruptures.

"(e) By the use of the term 'overcome rupture troubles', or any other term or terms of similar import and meaning, or in any other manner, that the use of such truss will cure a rupture.

"(f) That the necessity for an operation for rupture will be eliminated by reason of the use of such truss."

TO MODIFY THE FINDINGS AS TO THE FACTS AND ORDER TO CEASE AND DESIST" and supporting affidavit.

Said motion recites it to be in the public interest that this proceeding be reopened and the findings as to the facts and the order to cease and desist be modified, as moved in said motion, so as to recite and conform to the actual properties of respondents' said device.

Respondents by their counsel filed an answer to said motion stating they would have no objection to its being granted.

Section 5 (b) of the Federal Trade Commission Act, as amended, provides, among other things, that "after the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require."

The motion under consideration here states that the findings as to the facts are not in accord with the true facts in that they fail to recognize certain values possessed by respondents' device and by reason thereof the order to cease and desist based upon said findings is too restrictive and deprives respondents from claiming values for their device which they should be permitted to claim and which their competitors may rightfully claim for their devices and that it is in the public interest that the findings be modified to state the truth and the order be modified accordingly.

The motion is supported by the affidavit of Frederick B. Brandt, M. D. Affiant states in his affidavit that he is a duly licensed and practicing physician and surgeon in the District of Columbia; that he graduated from the University of Maryland in 1943 and has been engaged in the private practice of surgery from July 1950 and the date of the affidavit; that he has been a Diplomate of the American Board of Surgery since 1951 and a Fellow of the American College of Surgeons since 1952; that he is a member of the active attending surgical staff of Garfield Hospital and is an instructor in anatomy and surgery at the Georgetown School of Medicine, both in the District of Columbia. Undoubtedly, Dr. Brandt is one especially qualified to make the affidavit.

He states that he has examined respondents' truss and sets out various things the truss will and will not accomplish in line with the claims made which were involved in the original proceeding. A comparison of the affidavit with the findings as to the facts clearly points out in

what respects the findings as to the facts are not correct, in the opinion of the affiant.

Section 5 (b), quoted above, contemplates reopening of proceedings, in circumstances similar to those present here, only "after notice and opportunity for hearing." The motion here was served upon respondents without a rule to show cause. However, as previously indicated, respondents subsequently by their counsel filed an answer in which it is stated that they have no objection to the granting of the motion. Any procedural defect in the proceeding that may have existed prior to the filing of this answer may be considered to be cured.

Our approval of the situation here, however, should not be considered as a precedent in future similar proceedings. The Commission expects the procedural requirements of Section 5 (b) of the Federal Trade Commission Act and its directives implementing the same to be strictly observed with due regard to the requirement as to notice and opportunity for hearing.

As indicated, the motion before us is uncontested. The supporting affidavit gives the Commission an adequate factual basis, in the absence of any contest, which it may properly consider as determinative of the factual matters involved. The fact that the original order to cease and desist herein is more restrictive than those in subsequent cases is an uncontroverted fact. Cf. *Dobbs Truss Co., Inc.*, Docket 5808, issued April 3, 1952.¹ It follows that respondents are thus placed at a competitive disadvantage. It is clear, therefore, that there is sufficient public interest to justify the Commission in granting the motion in the manner and form as prayed. We accordingly are granting the motion.

¹ 48 F. T. C. 1090.

Decision

IN THE MATTER OF
UNION CIRCULATION CO., INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 5978. Complaint, Apr. 15, 1952—Decision, Jan. 25, 1955

Order requiring four corporations and a partnership, located in three States, engaged in obtaining magazine subscriptions through door-to-door solicitation pursuant to authority granted them by publishers, doing a combined business of some \$15 million annually and constituting a substantial portion of the industry in the United States, to cease cooperating in a "no-switching" agreement under which they agreed not to employ parties who had previously been actively engaged for themselves or others in soliciting magazine subscriptions, and ceased and limited their efforts to obtain magazine subscriptions for publishers unless the publishers refused or discontinued authority to solicit subscriptions for their magazines to agencies employing sales representatives formerly connected with other subscription agencies.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Lynn C. Paulson and *Mr. T. Harold Scott* for the Commission.

Mr. Benjamin Kirschstein and *Mr. Gilbert H. Weil*, of New York City, for Union Circulation Co., Inc., and along with—

Mr. Mortimer M. Lerner, of New York City, for National Circulation Co., Inc., and Periodical Sales Co., Inc.;

Mr. William N. Kenefick, of Michigan City, Ind., and *Mr. F. Kenneth Dempsey*, of South Bend, Ind., for Publishers Continental Sales Corp.;

Mr. A. Walter Socolow, of New York City, for Leo E. Light and Roy C. Hodge.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges respondents, all of whom are engaged in the door-to-door solicitation of magazine subscriptions, with violation of the Federal Trade Commission Act through the making of agreements that they will not employ as sales representatives persons who during the previous year have been connected in a similar capacity with other subscription agencies. Certain other related practices are also attacked in the complaint. After answers had been filed by respondents, extended hearings were held at which evidence both in support of and in opposition to the charges in the complaint was received, such evidence being duly recorded and filed in the office of the Commission. Upon conclusion of the reception of