

It appearing to the Commission, for the reasons stated in the accompanying opinion, that the hearing examiner's order appealed from has not been shown to be erroneous in any particular; therefore:

It is ordered, That respondent's interlocutory appeal be, and it hereby is, denied.

Commissioner Elman concurring in the result, and Commissioner Jones not participating.

IN THE MATTER OF
RODALE PRESS, INC., ET AL.

Docket 8619. Order and Opinion, Dec. 3, 1964

Order denying respondents request to dismiss complaint on grounds the book objected to is no longer in general circulation.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY
APPEAL

The complaint in this matter charges respondents with having made false statements and representations in advertising pertaining to a book and various pamphlets concerning diet, disease, and the health of mankind. On November 9, 1964, respondents filed with the hearing examiner a motion to dismiss the complaint or, in the alternative, to certify to the Commission the questions therein presented. After considering complaint counsel's reply to said motion, the examiner, by order dated November 19, 1964, denied the motion. On November 25, 1964, respondents filed with each Commissioner a letter, which will be treated as a request for permission to file an interlocutory appeal from the ruling of a hearing examiner, under Section 3.20 of the Commission's Rules of Practice, in which they reiterate two of the issues raised in the motion. On November 30, 1964, respondents filed a memorandum in support of the above-mentioned letter. It is their position that the two issues mentioned will become moot after the trial of the case and they thus request that the Commission consider and rule upon such issues at this time.

Respondents first contend that any order issued in this case will serve no useful purpose and thus will be a waste of the Commission's time and finances, because the book named in the complaint is no longer in general circulation and is no longer being advertised, and

because the pamphlets specifically named in the complaint are out of date and out of print. In its deliberations prior to issuance of the complaint, the Commission was aware of the alleged discontinuance of the challenged advertising. At that time, it was the Commission's belief that respondents' present advertising probably suffered from the same basic deceptive themes as did the earlier advertising. As a result, the allegations of the complaint were not limited to deception emanating from advertising of the particular publications named, but included deception arising out of advertising of other pamphlets and books published and distributed by respondents. The request for permission to file an interlocutory appeal does not clearly allege that the type of advertising which is the subject of the complaint is no longer being used, but instead alleges only that the particular examples of their advertising set forth in the complaint have been discontinued. Since the allegations of deception in the complaint encompass more than the examples of advertising therein set forth, respondents have not shown a probability that public interest in this proceeding no longer exists, and, as a result, have not shown circumstances requiring the Commission to reconsider the issuance of its complaint.

Respondents next allege that their medical experts who will testify at the hearing will endorse both the book named in the complaint and the advertising of the book, and that such proposed testimony renders trial of this issue unnecessary. However, even assuming that respondents' medical witnesses would testify that the ideas contained in the book are sound from a medical standpoint, such testimony would not compel dismissal of the charge that the advertising of the book is deceptive. It should be emphasized that the complaint does not allege that the ideas and suggestions set forth in the book are false or of no medical value. Instead, the complaint alleges that the advertising creates the impression that the book contains ideas and suggestions which, if followed systematically, will, *inter alia*, add years to the readers' lives, effectively prevent many diseases, and effectuate savings on medical and dental expenses, when in fact these ends will not be accomplished by a faithful adherence to the suggestions set forth in the book. Thus, the endorsement by medical experts of the statements and ideas contained in the book is not dispositive of the issue. Moreover, the ultimate conclusion on whether or not respondents' advertising of the book is deceptive, the question put in issue by the complaint, is one for the Commission to decide after a full hearing and is not one which may be delegated to experts called by either side. As a result, a hearing on the questions raised by the complaint is mandatory.

For the aforementioned reasons, it is the conclusion of the Commission that respondents have not demonstrated the extraordinary circumstances required under our Rules of Practice for permission to file an

interlocutory appeal from the examiner's denial of their motion to dismiss. Accordingly,

It is ordered, That the request to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner Jones concurs in the result.

DISSENTING OPINION

By ELMAN, *Commissioner*:

The complaint in this matter alleges that a book published by the Rodale Press, entitled *The Health Finder*, contains erroneous and dangerous ideas about health, and that in repeating these ideas in its advertising for the book Rodale is engaged in false and deceptive advertising in violation of the Federal Trade Commission Act.

If a seller of a patent medicine misrepresents its effectiveness in treating a disease, he violates the law. Nothing of that sort is involved here. Respondents do not sell any product claimed to have therapeutic properties; all they sell is a book containing ideas about health. The complaint does not charge that their advertisements misrepresent the contents of the book; they simply tell, and tell truthfully, what the book is about. Thus, what is challenged here, essentially, is the book and the ideas in it.¹ These ideas may be silly or senseless; but Rodale has a constitutional right to disseminate them. The Commission is saying, in substance, that Rodale may have a constitutional right to publish *The Health Finder*, but it has no right to advertise the book,

¹ Paragraph Seven of the complaint alleges:

"PARAGRAPH SEVEN: In truth and in fact:

1. The ideas and suggestions contained in 'The Health Finder' will not assure readers:
 - (a) An increased life span.
 - (b) More energy.
 - (c) Savings on medical and dental expenditures.
 - (d) That they will feel better than ever before.
 - (e) That they will gain and maintain health.
2. 'The Health Finder' does not contain the answer to all health problems and will not enable the reader to:
 - (a) Free himself of common colds.
 - (b) Prevent or cure all types of constipation.
 - (c) Prevent ulcers.
 - (d) Prevent fatigue.
 - (e) Prevent goiter.
 - (f) Prevent high blood pressure.
3. The ideas and suggestions contained in 'The Health Finder' are not effective in the prevention, relief or treatment of cancer, tuberculosis, infantile paralysis, heart disease, arthritis, or mental illness. Moreover, reliance on the advertising statements and representations resulting in purchase of the aforesaid book and the attendant delay in receiving adequate treatment promptly, may result in relentless progression of these serious diseases, irreparable injury to health, crippling, and loss of life.

Therefore, the statements and representations [in respondents' advertising] as set forth and referred to in Paragraphs Five and Six were and are false, misleading and deceptive."

even truthfully, because "the ideas and suggestions" contained in the book are not "effective."²

Suppose someone were to write a book advancing the theory that the 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.

I would dismiss the complaint as an unwarranted intrusion by this Commission into an area from which it is excluded by the Constitution and the statute.