THE J. B. WILLIAMS COMPANY, INC., ET AL.

Docket 8547. Order and Opinion, Nov. 23, 1965

Order denying respondents' request for reconsideration of an order of Sept. 28, 1965, for the purpose of deleting certain paragraphs which require affirmative disclosure in the advertising of Geritol.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Respondents have filed a petition for reconsideration of the Commission's decision and order which issued in this matter on September 28, 1965 [68 F.T.C. 481]. Specifically, respondents request that five paragraphs of the order be deleted and that one paragraph be amended. In the alternative, respondents request that they be granted an additional period of forty-five days to file supplemental briefs and that they be permitted to present oral argument in support of their request.

Procedurally, respondents base their request on § 3.25 of the Commission's Rules of Practice which provides that after completion of service of a Commission decision, a party may file a petition for reconsideration, setting forth the relief desired and the grounds in support thereof. The rule further provides that "Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Respondents concede that the first three paragraphs of the order to which they object, paragraphs numbered 1(a), 1(b) and 1(c), relate to the same alleged misrepresentations covered in paragraph numbered 1(d). They do not dispute that the practice covered by paragraph numbered 1(d) was properly before the Commission and was fully tried and argued. Rather, it is their contention that these first three paragraphs either add nothing or are inconsistent and are therefore unnecessary. This argument goes solely to the Commission's discretion in formulating a proper remedy to eliminate a practice which it has found to be unlawful. It is well settled that the framing of an appropriate order is entirely a matter for the Commission's determination upon the facts of record. As stated by the Supreme Court in the *Ruberoid* case, "Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices."[1] A respondent may, of course, present argument as to the terms of an order to be entered in any matter

[1] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

pending with the Commission for final decision. However, once the Commission has considered these arguments in the light of the facts of record, its judgment as to the proper remedy may not serve as grounds for reconsideration of the order under § 3.25.

Since we have before us respondents' argument as to the first three paragraphs, we have given consideration thereto and we conclude that the grounds they have advanced in support of their request for deletion are without substance. As we have stated, respondents recognize that these three paragraphs relate to the same unlawful practice leading to paragraph numbered 1(d) of the order which requires an affirmative disclosure in Geritol advertising. However, they contend that because of inconsistency and ambiguity, they cannot determine the meaning of these three paragraphs, measure them against the record, or determine their legal propriety. Respondents negate their own argument by their reference to page 547 and footnote 9 of the Commission's opinion. Therein, the Commission's purpose in including the three paragraphs in question, and the meaning to be accorded them, are fully set forth. While respondents urge that this purpose could be accomplished by amendment of paragraph 1(d), this is not grounds for setting aside the paragraphs to which they object.

Respondents advance three arguments in support of their request that two other paragraphs of the order, paragraphs numbered 1(e) and 1(f), be deleted. In substance, these paragraphs prohibit respondents from representing: 1(e) that the tiredness symptoms are generally reliable indications of iron deficiency anemia, and 1(f) that the presence of iron deficiency anemia can be self diagnosed or can generally be determined without a medical test conducted by a physician.

Respondents first contend that these paragraphs "stray far beyond the issues actually tried." However, this ignores the fact that one of the principal issues in this case is the interpretation to be accorded to respondents' advertising. This issue was fully litigated and was the subject of proposed findings submitted to the hearing examiner by both parties. That the case was tried on an interpretation which found the representations prohibited by paragraphs numbered 1(e) and 1(f) to be implicit in respondents' advertising is reflected in finding numbered 20 in the initial decision wherein the examiner stated:

20. We believe that the consumer upon hearing, viewing, or reading respondents' advertisements may reasonably be expected to conclude that his tiredness and run-down feeling will respond to the taking of Geritol, and that he may reasonably conclude that his symptoms are the result of iron deficiency or vitamin deficiency, or both. He may further reasonably be expected to conclude that the heeding of the suggestion "check with your doctor" is unnecessary

because there is a clear implication in the advertisement that the symptoms enumerated may well be those of iron deficiency. * * *

Respondents' argument that the two paragraphs deal with issues that were not tried is rejected.

Respondents next contend that paragraphs numbered 1(e) and 1(f) must be deleted for failure of proof. Obviously, respondents rest this argument upon a conclusion that their first contention is valid. However, having established that the issues dealt with in the two paragraphs were fully tried, the adequacy of the proof in support of these issues is not a question which respondents did not have an opportunity to argue, as required by § 3.25 of the Rules. Moreover, we note that both parties proposed findings to the hearing examiner on the evidence in the record relating to both of these issues.[2]

With reference to respondents' second argument, it appears that they have misconstrued the provisions of paragraph numbered 1(e). To avoid any misunderstanding we wish to make it clear that the prohibition against representations that tiredness symptoms are generally reliable indications of iron deficiency anemia is based on our finding that these symptoms are common to many more prevalent conditions than iron deficiency and therefore cannot be relied upon to indicate that condition.

Respondents' third argument is that paragraphs numbered 1(e) and 1(f) are ambiguous in that terms have been introduced which have not been defined. In substance, respondents would have us set aside these two paragraphs on the grounds that terms such as "self diagnosed" and "generally reliable indications" are too complex. We do not believe that these terms require specific definition, particularly when considered against the background of the highly technical terms used in the trial of this case. As the Supreme Court has stated: "We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices."[3]

In addition to requesting deletion of five paragraphs of the order, respondents also request that paragraph numbered 1(d) be modified. There can be no question that respondents were granted every opportunity to, and did, argue the terms of this paragraph. In fact, they specifically objected to that language in the hearing examiner's order which, as a result of its deletion by the Commission, leads to their present request. They were well aware of the extent of the order should the objectionable language be deleted. The fact that

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[2] For example, pages 42-52 of respondents' proposed findings and page 23 of complaint counsel's proposed reply findings relate to paragraph numbered 1(f) of the order and pages 61-63 of respondents' proposed findings and page 31 of complaint counsel's proposed findings relate to paragraph numbered 1(e).

[3] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

they did not avail themselves of the opportunity to advance their present argument on appeal from the initial decision is not grounds for reconsideration. Moreover, the modification proposed by respondents is designed to permit certain claims for Geritol without the affirmative disclosure requirements of paragraph numbered 1(d) when the advertising is directed to certain subgroups of the general population. However, the evidence discloses that respondents have never directed their advertising exclusively to these subgroups nor have they demonstrated that it is practical, or their intention, to do so. If in the future, respondents desire to confine their advertisements within the bounds of their present request, they have recourse to the Commission under its established Rules of Practice for appropriate modification of the order.[4]

As an alternative to their request for deletion and modification of the order, respondents request an additional period of forty-five days to file a supplemental brief, and ask leave to present oral argument. Specifically, respondents state that they desire the additional time in order to file a detailed brief summarizing the record on the specific points they have raised. The Commission has fully considered this request and is of the opinion that it is sufficiently informed as to the grounds relied upon by respondents so that further analysis of the record and oral argument on the request would serve no useful purpose.

For the reasons stated, the Commission concludes that respondents' petition must be denied. An appropriate order will be entered.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondents, by petition filed October 21, 1965, having requested the Commission to reconsider its decision and order issued herein on September 28, 1965 [68 F.T.C. 481], and delete or modify certain paragraphs thereof or, in the alternative, grant leave for the filing of supplementary briefs and oral argument, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission having considered said petition and, for the reasons stated in the accompanying opinion, having determined that respondents' requests should be denied:

It is ordered, That respondents' petitions for reconsideration and their alternative request for leave to file supplementary briefs and for oral argument be, and they hereby are, denied.

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[4] *Giant Food* v. *Federal Trade Commission*, 322 F. 2d 977 (D.C. Cir. 1963); *Vanity Fair Paper Mills* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

THE ELMO COMPANY, INC.

Docket 5959. Order, Dec. 1, 1965

Order vacating show cause order and referring case to hearing examiner for receiving evidence on question of whether there is sufficient change of law or fact to require setting aside of original order.

ORDER VACATING ORDER TO SHOW CAUSE AND REOPENING PROCEEDING TO DETERMINE WHETHER A CHANGE OF LAW OR FACT OR THE PUBLIC INTEREST REQUIRES SETTING ASIDE CONSENT SETTLEMENT IN WHOLE OR IN PART

The Commission on June 10, 1952 [48 F.T.C. 1379], having issued an order to cease and desist in accordance with a consent agreement executed by respondent and counsel in support of the complaint; and

It appearing that said order requires respondent, in connection with the offering for sale, sale, or distribution of various drugs and devices, known collectively as "Elmo's Home Treatment" to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparations and device, which advertisement represents, directly or through inference:

(a) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect upon deafness not caused by a catarrhal condition of the nose, ear or air passages.

(b) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect in the treatment of deafness, impaired hearing, or head or ear noises caused by discharging catarrh, in excess of affording temporary relief therefrom.

(c) That the effects of its preparations in the treatment of deafness or impaired hearing or head or ear noises due to dry catarrh is in excess of softening of the dry exudates, or that any benefit can be expected by reason of this action of respondent's preparations in the treatment of conditions caused by dry catarrh of the ear canal unless the softened exudates are removed by other means.

(d) That said preparations and device constitute a method of treatment based upon the findings of accepted medical authorities.

(e) That catarrh is the most common cause of deafness.

(f) That Elmo Ear Oil No. 1 or Elmo No. 8 Ear-Vibrator are harmless or may be used without ill effects.

2. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of respondent's aforesaid Elmo Ear Oil No. 1, which advertisement fails to reveal that the cotton on which the product is used should not be pushed into the