Interstate Dissemination of Advertising: Jurisdiction Which Must Be Earned

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Administrative Law Commons, Antitrust and Trade Regulation Commons, and the Communications Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol38/iss3/6

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Colgate opinion, and improved techniques have eliminated the necessity for many of the dubious visual practices once common. The important point, however, is that the industry recognizes the Colgate opinion as establishing a standard by which it may govern itself in the future. It would thus appear that the Commission was successful, by means of a formal cease and desist proceedings, in providing a meaningful guidepost for the advertising industry in regard to false advertising.

INTERSTATE DISSEMINATION OF ADVERTISING: JURISDICTION WHICH MUST BE EARNED

Section 5(a) (1) of the Federal Trade Commission Act declares unlawful all "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. . . ."1 False advertising is recognized as an unfair method, act or practice within the meaning of section 5(a) (1).2 In addition, section 12 of the Act specifically makes it unlawful to disseminate in commerce any false advertisement designed to induce the purchase of foods, drugs, devices, or cosmetics.3 If a false advertisement relates to other commodities, the FTC has historically exercised jurisdiction under section 5(a) (1) where the sale is in interstate commerce. For forty-six years after the passage of the Act, however, the FTC did not attempt to assert jurisdiction over false advertising for commodities other than those mentioned in section 12 where the dissemination was interstate but the sale was intrastate.

2. Lighthouse Rug Co. v. FTC, 35 F.2d 163, 164 (7th Cir. 1929); Silver Co. v. FTC, 289 F. 958 (6th Cir. 1923); Guarantee Veterinary Co. v. FTC, 285 F. 853, 857 (2d Cir. 1922); Sears, Roebuck & Co. v. FTC, 258 F. 307, 310 (7th Cir. 1919).
   (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
      (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
      (2) By any means, for the purpose of inducing, or which is likely to induce, directly, or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.
   (b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 (section 5(a) (1)) of this title.
In 1960, precedent was broken. A complaint was issued against S. Klein Department Stores for violating section 5(a)(1) by an "interstate dissemination" of false advertising without alleging that the merchandise itself was "in commerce." After lengthy litigation, a cease and desist order was issued by the Hearing Examiner. Then, paradoxically, the Commission, without opinion and with two Commissioners dissenting, dismissed the action.

Since the Commission gave no reasons for the dismissal, it can only be speculated whether the majority felt that there was not an adequate legal basis for jurisdiction or whether the decision was one of policy. Whatever the reason, the enigmatic finish of S. Klein raises serious questions concerning the policy of the FTC in regard to the enforcement of section 5(a)(1) and the practice of false advertising. A more detailed analysis of the S. Klein case may serve to indicate the answers to these questions and the probable future path that the FTC will take.

The Need for Regulation in the Intrastate Retail Area. Truthful advertising has social and economic value because it promotes intelligent choice in a free market. False advertising, on the other hand, is a serious problem of increasing legal significance. Unrealistic list or cost prices, artificial discounts, misrepresentation of origin, brand or content of goods, and other fictitious claims are all practices designed to influence the buyer's decision by a distortion of the truth. Such practices are not only unfair to competitors who engage in truthful advertising, but ultimately result in injury to the buyer who relies on the misleading claims of the advertiser. The problem is magnified by the fact that the average purchaser today is unable to discover the falsehood contained in the advertisement until after the sale. The maxim of "caveat emptor" is increasingly inconsistent with adequate protection to the consumer. Our economy has ceased to be a face-to-face market when the buyer

---

4. 3 Trade Reg. Rep. ¶ 28778 (June 10, 1960).
6. 3 Trade Reg. Rep. ¶ 15752 (Feb. 23, 1962). After the complaint was issued, an interlocutory appeal was taken by the respondent, but denied, with opinion, by the Commission, 3 Trade Reg. Rep. ¶ 29222 (Dec. 8, 1960). S. Klein then petitioned the district court for an injunction to prevent the FTC from asserting jurisdiction; however the cause was dismissed, Civil No. 4177-60, D.D.C., Dec. 28, 1960. Then, after a hearing on the merits, an order to cease and desist was issued by the Hearing Examiner. On appeal, the Commission refused to accept either the finding or the order of the Hearing Examiner, and dismissed the complaint.
8. For a comprehensive list of the practices and methods considered by the FTC to be unfair, see 1959 FTC Ann. Rep. 85-90. See generally, Printers' Ink, June 15, 1962, p. 63. Deceptive pricing representations seem to be a continued object of FTC complaints.
knows the seller and can adequately judge the goods. Rather, it is an impersonal market where production is carried on at a distance and knowledge is concentrated on the seller's side. Caveat emptor and permissible "puffing" are giving way to expanded warranties and public demands for legal enforcement of high standards in advertising.\footnote{9}

Because the common law remedy of damages for fraud is inadequate,\footnote{10} a veritable flood of state and federal statutes now define false advertising and provide criminal and civil sanctions.\footnote{11} However, due to lax or weak enforcement machinery and ambiguous standards, the intended elimination of false and overreaching advertisements has not been achieved. The problem is compounded by the fact that marketing regions are not confined to state boundaries. Rather, because of the ease of travel and the vast numbers of persons who can be reached through the mass media of communication, the effects of particular practices often extend into two or more states. Of the hundred major metropolitan markets in the United States, eighteen are inherently interstate in character because of population in two or more states.\footnote{12} At least thirty-one more of these markets are located within thirty miles of state boundaries so that news media which service them are interstate in character.\footnote{13} Of the remaining fifty-one major markets, only a few are located where there is little possibility of an advertisement placed with media in the market being distributed to a neighboring state.\footnote{14} State agencies as a rule are ill

\footnote{9} Moore, supra note 7.
\footnote{10} See generally, Reynolds, Legal Curbs on Advertising, 50 TRADEMARK REP. 394 (1960); Seavey, Caveat Emptor as of 1960, 38 TEXAS L. REV. 439 (1960). Prevention rather than a cure is needed because the consumer has no common law remedy for his time and trouble where he detects the truth only after investigation or an excursion to the advertiser's premises. After a purchase, the difficulty of proof is a continuing obstacle.
\footnote{11} These statutes have been enacted through the efforts of the aroused public, organized industry groups, better business bureaus and regulatory agencies. See Herman, Fair Trade: Origins, Purposes, and Competitive Effects, 28 GEO. WASH. L. REV. 621 (1959). For comprehensive tables showing the various state statutes, see Note, The Regulation of Advertising!, 56 COLUM. L. REV. 1098 (1956); Printer's Ink, Dec. 4, 1959, pp. 21-22. Generally, violations of these statutes are misdemeanors. The number of reported cases is small and enforcement seems lax, although threats of prosecution are sometimes used to obtain voluntary cessation of improper practices. Ordinarily, the duty of enforcement is detailed to prosecuting agencies which are already overburdened with more pressing problems. Surveys indicate, however, that a greater number of prosecutions occur where a special agency is responsible for gaining compliance.
\footnote{12} Printers' Ink, Oct. 30, 1959, § 1, p. 30.
\footnote{13} Ibid.
\footnote{14} Viewed from population alone, five of the ten largest standard Metropolitan Statistical Areas are entirely interstate in character and have a population of approximately 30 million people. See 1960 Census, Bureau of Census; Printers' Ink, Sept. 1, 1960, pp. 23, 28. According to Printers' Ink, Nov. 25, 1960, pp. 21, 23, the largest complex is the New York-Northeastern New Jersey Standard Consolidated Area with a total of 14,650,818 people, retail sales in excess of $20 billion per year and more than 180,000 retail outlets. The average of one retail outlet per 92 persons in this area is
equipped to deal with instate activity and local jurisdictional limits prevent the enforcement of uniform rules within the actual boundaries of the business world. Clearly, the problem of false advertising is federal in scope.\textsuperscript{15}

The FTC has attempted to cope with the problem where goods \textit{sold} in interstate commerce are falsely advertised, or where the false advertisements in interstate media or the mails relate to fur\textsuperscript{16} or fabric labelling,\textsuperscript{17} food, drugs, devices or cosmetics.\textsuperscript{18} Yet for forty-six years, the FTC asserted no jurisdiction over local retailers despite the interstate dissemination of their advertisements. A local retailer could openly employ a practice which the interstate retailer had been ordered to stop. The result was a double standard where the state or local authorities did not coordinate their efforts with the FTC.\textsuperscript{19} Such a standard was not only inequitable to those retailers subject to FTC jurisdiction, but it also seriously hindered attempts by the Commission to stop deceptive prac-

---

\textsuperscript{15} Because competitive inequities may result when merchandisers of products sold in interstate commerce are made to comply with standards which may be ignored by those who sell only locally, the Commission brought a test case during the year. This charged S. Klein Department Stores, of New York City, with having made false pricing and savings claims for its merchandise in advertising in newspapers and on radio and television. The unusual element of the complaint is that solely because the alleged false claims were given interstate circulation by the print and broadcast media, the Commission asserted jurisdiction in the matter.
tices in a given market area. Such attempts repeatedly met with failure because limiting the advertising practices of two or three firms who clearly came within the jurisdiction of the FTC did not adequately solve the problem. The need for a uniform policy of enforcement was thus apparent.

Before *S. Klein*, it was stated that a more uniform policy of enforcement was dependent upon the FTC undertaking to: (1) aid in the promotion of new state laws, or (2) recommend to Congress that new federal legislation be adopted which would give the FTC clear-cut jurisdiction over local retailers who sell intrastate but advertise in interstate media or the mails, or (3) attempt a test case to determine whether jurisdiction could be exercised under the existing law. Of these three alternatives, the latter seemed to offer the best opportunity for success with a minimum of effort and expense. Evidently, in *S. Klein*, the Commission initially felt that it had a good test case for laying the groundwork, both legal and practical, for a new enforcement program which would enable it to regulate false advertising in the intrastate retail area more effectively.

**Interstate Dissemination of Advertisement and FTC Jurisdiction Under Section 5(a)(1).** In its original complaint, the FTC charged that *S. Klein* “has been and is engaged in disseminating . . . in newspapers of interstate circulation and in radio and television broadcasts of interstate dissemination, advertisements designed and intended to induce sales of its merchandise. . . .” Thus, for the first time, the FTC sought jurisdiction over a party under section 5(a)(1) based solely on the dissemination of advertising in interstate commerce and not on the sale of the advertised product in interstate commerce. The legal basis of such jurisdiction was challenged by respondent *S. Klein*.

The constitutional power to regulate “commerce among the states” has been interpreted as the equivalent of a power to regulate “intercourse for purposes of trade.” It includes the interstate movement of commodities, the interstate transmission of information, and intrastate commerce which affects interstate activity. Practically, the power in its constitutional sense implies a legislative power as broad as the economic needs of the nation. It is clear, therefore, that Congress has the power

---

22. United States v. Darby, 312 U.S. 100 (1941); Southern Ry. Co. v. United States, 222 U.S. 20 (1914). Thus, communications of a commercial nature are subject to regulation by Congress.
23. The constitutional power question has been well litigated. The result is that Congress has broad powers to legislate in “commerce” matters; therefore, the question posed is generally that of the congressional intent.
to regulate interstate advertising with respect to intrastate sales. The only question relates to the scope of commerce which Congress intended to subject to the FTC's jurisdiction under section 5(a)(1) of the FTC Act—all commerce including advertising, or just interstate sales of goods and services and only such advertising as promotes such sales? Did Congress, in other words, consider the advertisement and sale of a product as being separate and distinct unfair practices, or did it consider the advertisement as merely inducing the sale and declare unlawful only the sale in interstate commerce of the falsely advertised product?

The Hearing Examiner in *S. Klein* took the position that the advertising and the sale were separate and distinct practices having no necessary relation to each other. Relying on *Mueller v. United States* and *Shafe v. FTC*, two cases involving the dissemination of false advertising within the meaning of section 12 of the FTC Act, he stated:

[A] showing that the goods advertised by respondent moved in commerce is not an essential element of the offense. The gravamen of the charge is the use of misrepresentation in the

---

24. 262 F.2d 443 (5th Cir. 1958). This case concerned a product for baldness (cosmetic) and the dissemination of advertisements. Dictum from the case was that there is no difference between the fact that the newspaper disseminates the advertisements rather than the individual or firm. In this controversy, the firm did not ship the cosmetics outside of Texas; however, the violation was under § 12(a), not § 5(a)(1) of the FTC Act.

25. 256 F.2d 661, 663 (6th Cir. 1958). This case involved a cease and desist order to prevent the dissemination of false advertisements even though the company was advertising in Michigan papers only and restricted its sales to that state. The product was patent medicine under § 12(a) of the FTC Act. The court stated that "under this section (12(a)) it is not necessary that there be a sale in interstate commerce. It is the dissemination of false advertising that the statute is directed against." *Id.* at 662. *Cf.*, Brewer & Sons v. FTC, 158 F.2d 74 (6th Cir. 1946), compare with *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946). At 664 of *Shafe*, the court was of the opinion that "the false advertising was disseminated in commerce . . . even though a small percentage of the average daily circulation of the newspaper . . . went into states other than Michigan." This statement by the court seems to be dictum only. *Cf.*, Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934); DeGorter v. FTC, 244 F.2d 270 (9th Cir. 1957). The latter case concerned the Fur Products Labeling Act and the court reasoned:

[I]n regulating interstate transactions under the Congressional power to regulate interstate commerce, it is not necessary that a regulation be confined to persons who are also engaged in interstate commerce, since there is no constitutional inhibition against regulating purely local activities if, in the opinion of the Congress, they have a deleterious effect on commerce between the states.

In other words, the power of Congress in the commerce area is both plenary and absolute. In this connection, it should be noted that there have been recent statutes giving the FTC expanded jurisdiction to reach purely intrastate acts; however, such legislation has been limited to particular commodities, e.g., wool—Wool Prods. Labeling Act, 54 Stat. 1128 (1940), 15 U.S.C. § 68 (1958); fur—Fur Prods. Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. § 69 (1958); textiles—Textile Fiber Prods. Identification Act, 72 Stat. 1717 (1958), 15 U.S.C. § 70 (1958).
advertising of the product, not in the actual sale which occurs thereafter. The act, practice or method of competition charged to be unfair or deceptive is the use of false advertising claims in inducing sales, rather than in sales themselves. If the act or practice charged to be unfair occurs in commerce the Act has been violated, without a showing that the act or practice has resulted in a sale in commerce.28

In that section 12 specifically prohibits the dissemination in commerce of any false advertisement relating to food, drugs, devices or cosmetics, reliance by the Hearing Examiner on the *Mueller* and *Shafe* cases in a case not involving these products is at least questionable. Applying the doctrine of "expressio unius est exclusio alterius" to sections 5(a)(1) and 12, it can be argued that the FTC has no jurisdiction over the interstate dissemination of false advertisements relating to products other than food, drugs, devices or cosmetics. Enforcing this maxim of legislative interpretation is the holding of the United States Supreme Court in *Federal Trade Comm'n v. Bunte Bros.*,27 a case analogous to *S. Klein* in which the FTC sought under section 5 to assert jurisdiction over interstate sales on the theory that they were "affecting interstate sales." Stating that "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly,"28 the Court held that a "much clearer manifestation of intention than Congress has furnished" in section 5 would

26. 3 TRADE REG. REP. ¶ 15519 (Oct. 18, 1961). In originally denying an interlocutory appeal by S. Klein, 3 TRADE REG. REP. ¶ 29222 (Dec. 8, 1960), the Commission found interstate disseminations of advertising within the purview of § 5(a)(1). They felt the specified targets of the Act are unfair or deceptive activities in commerce, and that interstate communications for commercial purposes constitute commerce. There have been numerous cases where the FTC has issued orders against the "interstate dissemination of false advertisements"; however, jurisdiction was based upon a sale in commerce. For this reason, such cases are not in point. Yet they do illustrate a recognition of the problem. See Dixie Pecan Growers Exchange, 13 F.T.C. 234 (1930); Raladam Co., 12 F.T.C. 363, 369 (1929); Process Eng'r Co., 7 F.T.C. 287, 295 (1924); Royal Duke Oil Co., 6 F.T.C. 149, 154 (1923); Chemical Fuel Co., 4 F.T.C. 387, 390 (1922); Guarantee Veterinary Co., 4 F.T.C. 149, 153-54 (1921), aff'd 258 F. 853 (2d Cir. 1922); Montgomery Ward & Co., 3 F.T.C. 151, 155 (1920); Sears, Roebuck & Co., 1 F.T.C. 316 (1918), aff'd 258 F. 307, 310 (7th Cir. 1919).

A distinction between "interstate" and "intrastate" disseminations has been recognized by separate prohibitions in a single proscription aimed at both types of violations where jurisdiction was asserted on a sale in commerce. See Dixie Pecan Growers Exchange, supra; Raladam Co., supra; Turner & Porter, 7 F.T.C. 100, 105 (1924); Royal Duke Oil Co., supra; Ruby Levy, 4 F.T.C. 209, 214 (1921); Union Soap, 4 F.T.C. 397 (1921); Waverly Brown, 3 F.T.C. 156 (1920). In a few of the preceding cases, separate proscriptions against both forms of the illegal activity were issued.

27. 312 U.S. 349 (1941).
28. Id. at 351.
be necessary to justify jurisdiction. In light of section 12, *S. Klein* would appear to present a stronger case for the application of this rationale. Finally, the fact that the FTC had not asserted jurisdiction over interstate advertising under section 5(a)(1) for forty-six years would support the argument that the FTC does not in fact have such jurisdiction. As stated by Mr. Justice Frankfurter in *Bunte*:

> Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.

Counterbalancing the above arguments against the position of the Hearing Examiner in *S. Klein* is the legislative history behind section 5(a)(1) and section 12. During the Senate floor debates prior to passage of the Act, Senator Copeland proposed that section 12 be expanded to include false advertising relating not only to foods, drugs, devices, or cosmetics but relating to "any commodity." Comparing section 5(a)(1) with section 12 and in reply to Senator Copeland, Senator Lea said:

> [T]he Federal Trade Commission has always had jurisdiction over false advertising of foods, drugs, devices and cosmetics as well as over all other commodities. The new provisions of this bill dealing with those specific commodities do not confer upon the Commission jurisdiction which it does not now possess but

---

29. FTC v. Bunte Bros., 312 U.S. 349, 356 (1941). But Justice Douglas, in the dissenting opinion, reasoned that unfair competition involves "not only an offender but also a victim. The fact that the acts of the offender are intrastate is immaterial. The purpose of the Act is to protect interstate commerce against specified types of injury." In other words, it was felt that the injury and not the type of conduct was important to the determination. At 357, it was noted that "[History] warns us not to whittle away administrative power by resolving an ambiguity against the existence of that power where the full arsenal of that power is necessary to cope with the evil at hand."

30. Id. at 355, the majority holding that "'unfair methods of competition in [interstate] commerce' should not be read as "'unfair methods of competition in any way affecting interstate commerce.'"

31. There was confusion during the Senate floor debates. See 83 Cong. Rec. 410, 3255, 3291, 3292, 3293 (1938). Whether § 12(a) should have encompassed all commodities was the subject of serious consideration. Senator Copeland said "Every household in America is being imposed upon by the false advertising of a thousand things besides foods, drugs, and cosmetics. So . . . my particular plea is that the language in section 12, subsections (1) and (2), be changed from 'foods, drugs, devices, or cosmetics' to 'any commodity.'" *Id.* at 3291.
are designed to make its control of such advertising more effective.\textsuperscript{32} Although far from conclusive, this exchange indicates that at least some members of the Senate were under the impression that the FTC did have jurisdiction under section 5(a)(1) over the interstate dissemination of false advertisements. Section 12 merely served to emphasize this power with respect to certain products.

Finally, it can be argued in support of the Hearing Examiner's opinion that section 5(a)(1) is remedial in nature and should be liberally construed. If the court should find that jurisdiction over interstate dissemination of advertising where the sale is not in commerce is necessary before the FTC can adequately and effectively carry out a uniform policy of enforcement, then the court should permit the FTC to exercise such power.\textsuperscript{33} If not explicit, the authority to exercise such power is at least implied in section 5(a)(1) and it would not constitute judicial legislation for the court to so construe it.

Based on the above analysis of the legal issues involved in the \textit{S. Klein} case, it would appear that the Commission had a reasonable chance of gaining judicial approval of its asserted right to regulate the interstate dissemination of false advertisements under section 5(a)(1) without the sale of the advertised product itself being in commerce. Certainly, a court which found favor with this view would not find the legal arguments against such jurisdiction insurmountable. The question remains, then, why did the FTC decide to drop the case?

\textbf{The Decision to Dismiss the Charge Against S. Klein—The Need for a Planned Program of Attack.} In view of the reasonable possibility of ultimate success in the courts, it would seem that the FTC did not dismiss the action against S. Klein because of purely legal reasons. Rather, it would appear that the decision was based on policy considerations of an administrative nature. More precisely, it would appear that the FTC realized that it was ill prepared to launch a coordinated attack upon the problem presented by the dissemination in interstate commerce of false advertisements and decided to wait until such time as it was prepared before testing its jurisdiction in the courts.

The FTC is charged with the primary duty of interpreting and applying the public policy reflected in the FTC Act. It attempts to carry

\begin{footnotesize}
\begin{enumerate}
\item Id. at 3255-56.
\item Lichter v. United States, 334 U.S. 742, 778 (1948). \textit{But cf.} Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926) which held "the Federal Trade Commission is no part of the judicial system. . . . It does not exercise judicial powers. It is an administrative body created by statute. It has only such duties and powers as are given it, by expression or fair implication. . . ." \textit{Id.} at 683.
\end{enumerate}
\end{footnotesize}
out this duty through its investigative\textsuperscript{34} and preventive powers.\textsuperscript{35} The former includes a duty to investigate and determine what new acts and practices should be brought within the FTC's jurisdiction.\textsuperscript{36} Initially, with reference to its preventive role, there was some disagreement as to whether the FTC should act primarily as an extension of the courts, or as a great public education and information agency such as visualized by President Wilson.\textsuperscript{37} It was established early, however, that its legislative mandate charged the Commission to "stop those methods of competition which fall within the meaning of the word 'unfair'" in their incipiency.\textsuperscript{38} The Commission was to act, where possible, in a preventive manner before the harm precipitated, rather than in a curative role as a judicial tribunal.

In performing its enforcement function to prevent social harm, the FTC has used two principal means. The first and by far the most often relied upon, is mandatory compliance under section 5(b).\textsuperscript{39} Under this

\begin{itemize}
  \item 34. 15 U.S.C. § 46(a) (1958).
  \item 35. 15 U.S.C. § 45(a)(b) (1958). This is the duty to prevent "persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." Their function has been expressed as "representing the government as parens partiae, . . . to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure . . . quite irrespective of whether the specific practices in question have yet been denounced in common-law cases." Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919). Accord, FTC v. Bunte Bros., 312 U.S. 349 (1941); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
  \item 36. See 1959 FTC ANN. REP. 85-90 for a list of practices and methods considered to be unfair.
  \item 37. As originally envisioned by President Wilson, the agency being created would become:
    \begin{quote}
      [A]n indispensable instrument of information and publicity . . . a clearing house for facts by which both the public mind and the managers of great business undertakings should be guided, and . . . an instrumentality for doing justice where the process of the courts . . . are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.
    \end{quote}
  \item 38. FTC v. Raladam Co., 283 U.S. 643, 647 (1931). A duty to act in a preventative manner has been discussed in several cases. See generally, Hastings Mfg. Co. v. FTC, 153 F.2d 253 (6th Cir.), cert. denied, 328 U.S. 853 (1946); Miller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Keller v. FTC, 132 F.2d 59 (7th Cir. 1942); Koolish v. FTC, 129 F.2d 64 (7th Cir.), cert. denied, 317 U.S. 483, rehearing denied, 317 U.S. 711 (1942).
  \item 39. 15 U.S.C. § 45(b) (1958). The number of orders issued by the FTC has grown steadily each year. In a news release of July 3, 1960, the acting Executive Director of the Commission was quoted as stating that the number of complaints against deceptive practices issued in 1960 was more than three times the average for any year from 1949 to 1958. Further, in "Consumer Self Protection and the Federal Trade Commission," address by Earl W. Kintner, Chairman, Federal Trade Commission, before a Consumer Conference at Geneva College, Beaver Falls, Pennsylvania, April 14, 1961, it was pointed out that "it has been estimated that as early as 1925, orders directed
The cease and desist order is the backbone of the enforcement program. Yet, in recent years it has become apparent that problems which have many facets, such as false advertising, are too large in scope to be dealt with by mandatory compliance alone. As a result, increasing reliance has been placed upon voluntary programs as a means of securing compliance with the FTC Act.

Administered by the Bureau of Industry Guidance, four principal techniques of voluntary compliance are presently being utilized: (1) guidance programs, (2) trade practice conferences, (3) trade regulation against false advertising constituted 70% of the total number of orders issued by the Commission annually. "Numerically, false advertising provides the bulk of the Commission's casework...." 1959 FTC Ann. Rep. 4.

40. For an excellent discussion of this procedure, see Note, The Federal Trade Commission and Reform of the Administrative Process, 62 Colum. L. Rev. 671, 685-96 (1962). See also, 1961 FTC Ann. Rep. 9, 10. In order to bring such an action, three pre-requisites have been found necessary by court interpretation: "(1) that the methods complained of are unfair; (2) that they are methods in competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public." FTC v. Raladam Co., 283 U.S. 643, 646-47 (1931). The Wheeler-Lea Amendment to the FTC Act changed the interpretation given the term "competition" as used in this case. Prior to this amendment, the Commission had no authority to proceed against acts where no substantial harm to competition, present or potential, was shown. This amendment, therefore, shifted the emphasis from an indirect protection of the public through the protection of the competitive system to a direct protection of the public itself from injury even where no injury to a competitor could be shown. See generally, Baker and Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517 (1962). See also, FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); FTC v. Royal Milling Co., 288 U.S. 212, 216 (1933); FTC v. Klesner, 280 U.S. 19, 28 (1929); Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942).

41. It has been offered that guidance, not methods of mandatory compliance, is the fundamental function of the FTC. "Let's Get Rid of Uncertainty," Address by Paul R. Dixon, Chairman, Federal Trade Commission, before American Association of Advertising Agencies, The Greenbrier Hotel, White Sulphur Springs, West Virginia, April 28, 1962. See also, "Some Recent Developments in Antitrust Enforcement," Excerpts from lectures by Professor H. Thomas Austern, New York University School of Law, Antitrust in Action, April 1, 8 and 22, 1960, p. 17.

42. E.g., Guides Against Bait Advertising and Guides Against Deceptive Pricing. These guides take the form of informal, interpretative instructions issued to the staff which are also published. "Where voluntary compliance cannot be obtained, the Guides serve the additional purpose of spotlighting persistent violations which warrant formal action." 1960 FTC Ann. Rep. 81. Guides have been carried to the local level in many instances. Also, meetings have been held to effect citywide compliance with the guides, e.g., FTC News Release, Sept. 11, 1960. As a supplement to the trade practice rules program, the guide program represents "our greatest tool in assisting... self regulation," statement by Earl W. Kintner, Chairman, Federal Trade Commission, before Second Annual Mid-Winter Conference of the Advertising Federation of America, Washington, D. C., Feb. 5, 1960, at p. 37. The guide program is now rather ineffectual because of the lack of a voluntary enforcement program. Recently, the Commission,
lation rules, and (4) advisory opinions. As an adjunct to these programs, the FTC can cooperate with state and local agencies and industry groups. The most important characteristic of the voluntary compliance program is the preparation it can provide for the preventive program in general. "Public education" is an important tool to aid in achievement of objectives sought by the overall program of enforcement. The FTC, through its resources of both knowledge and experience, is in an excellent position to deal with industry groups through guidelines, education and cooperation.

Both the mandatory and the voluntary procedures have their functions in the administration of the Federal Trade Commission Act. On the one hand, the threat of the cease and desist order is sufficient to encourage voluntary compliance by the majority of the members of a given industry. On the other hand, the compliance secured through the voluntary programs permits the FTC with its limited staff to selectively initiate the mandatory proceedings where they will do the most good. Neither, however, is sufficient in itself to effectuate an overall policy of enforcement. Rather, an effective program of total enforcement is dependent upon a balanced plan of attack in which the mandatory ma-

without explanation, transferred the programs to the Trade Practice Conference Division.

43. See "Uncertainties Under our Antimonopoly Laws," Remarks by Everette MacIntyre, Commissioner, Federal Trade Commission, before the Winter Conference of the American Marketing Association, New York, New York, Dec. 27, 1961, at p. 12, to the effect that:

[C]onsiderable discussion has centered on the powers of the Federal Trade Commission to make substantive rules which would cover industry-wide unfair trade practices. In this discussion, Section 6(g) of the Federal Trade Commission Act has been cited . . . . It is reasoned that this provision of the law could be relied upon to aid the Commission in carrying out its responsibilities in prohibiting the unfair methods of competition and unfair and deceptive acts and practices made unlawful by Section 5 of the Federal Trade Commission Act. Trade practice conference procedures for informational statements designated as Trade Practice Rules have been utilized for some time. They are designed to afford guidance and gain voluntary cooperation and compliance. These Trade Practice Rules have, however, been criticized as being too general. See generally, Hill v. FTC, 124 F.2d 104 (5th Cir. 1941); 1960 FTC ANN. REP. 11.

44. "Without self-policing . . . the Commission would be confronted with a really hopeless task," Printers' Ink, Feb. 9, 1962, p. 15. See also, Printers' Ink, May 18, 1962, p. 44 (Legislative recommendations by Association of Better Business Bureaus); Printers' Ink, Jan. 12, 1962, p. 21 (Cleveland Plan involving a combination committee with members from the media, advertising groups and the Better Business Bureau); Advertising Age, Oct. 10, 1960, p. 134 ("hear and tell" meetings).

45. The preventative nature of these methods is particularly important since they allow an attack on an industry-wide basis rather than on a case-by-case approach. The economy of such an enforcement technique, if successful, is apparent.

46. "We think that public knowledge of what we do is one of the most effective ways of discouraging deceit," statement by Earl W. Kintner, Chairman, Federal Trade Commission, Printers' Ink, April 22, 1960, p. 13.
chinery is blended with the voluntary methods of compliance. As stated by Commissioner Elman in his dissenting opinion in *Federal Trade Comm'n v. Gimbel Bros.*, "The job of an agency, unlike a court, is to regulate through administration, a unique process of governmental activity that requires positive, planned and systematic effort to achieve the statutory objectives."

Commissioner Elman was addressing his remarks to what he considered to be the apparently inconsistent and often inconsequential attacks by the FTC on a hit and miss basis with no correlation to the overall program of enforcement. S. Klein would appear to be an example of just such an attack. The procedures, both mandatory and voluntary, were available and were being used in other areas subject to regulation by the FTC. Yet there appeared to be no coordinated plan for the regu-

---

47. It is contended that the answer is a middle ground "where there is a necessary, reasonable amount of restraint of law coupled with a necessary, reasonable amount of self-restraint, self-policing and self-discipline." Statement by Earl W. Kintner, Chairman, Federal Trade Commission, *Advertising Age*, Dec. 28, 1961, p. 8.


49. *Id.* at 20568. Commissioner Elman went on to cite President Wilson's address before both Houses of Congress on Jan. 20, 1914, concerning the proposed function of the FTC "as an instrumentality for doing justice to business where the processes of the court or the natural forces of correction outside the courts are inadequate..." *Ibid.* He further referred to FTC v. Gratz, 253 U.S. 421, 435 (1920), in which it was stated that the FTC was a "new experiment on old lines!" In other words, Elman felt the FTC is not a "passive arbitrator of controversies" like a court which applies specific legal standards. The idea should be to do justice where the processes of the courts are inadequate or impractical. Also, planned affirmative action was the assignment under section 5(b) of the FTC Act, not a hit and miss approach, but rather "selectivity of enforcement." In citing REDFORD, NATIONAL REGULATORY COMMISSIONS: NEED FOR A NEW LOOK, 15 (1959); HENDERSON, THE FEDERAL TRADE COMMISSION, 337 (1924), Elman noted that the Commission has invariably through its history handled too many cases, or quantity instead of quality with the result that the public interest has not always been discernible. In summary, he pointed out that "the Commission is not confined to a choice between 'issue a complaint' or 'file and forget'..." which would allow the ignoring of violations. "The genius of the administrative process is that it affords flexibility of action in dealing with problems." *Id.* at 20572. Further, he noted that formal proceedings often are disproportionate in expense to the benefits obtained, and informal or voluntary compliance procedures, guidance programs, and other state and federal agencies may provide the solution so that the FTC can get on with the purpose of the act. *Ibid.*

50. In charging the Commission with the basic duty of protecting our competitive free enterprise system, its function as a tribunal is probably indispensable; yet, its ability to be conceptually consistent by legal decisions has been challenged because of a lack of conformity with economic realities.

"It is of capital importance that the business men of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety." "Uncertainties Under our Antimonopoly Laws," Remarks by Everette MacIntyre, Commissioner, Federal Trade Commission, before the Winter Conference of the American Marketing Association, New York, New York, Dec. 27, 1961, p. 6. See also, "Let's get Rid of Uncertainty," Address by Paul R. Dixon, Chairman, Federal Trade Commission, before American Association of Advertising Agencies, The Greenbrier Hotel, White Sulphur Springs, West Virginia, April 28, 1962.
lation of the dissemination in interstate commerce of false advertising. There was no voluntary program in effect nor were there any plans for such a program. Practically, it may well be that New York City is much too large a market area to initiate a program of city-wide or industrywide clean up against the type of advertising allegedly used by S. Klein. Whatever the reason, it is clear that without such a voluntary program, the effectiveness of a cease and desist order is greatly limited.

Thus it appears that while from a legal point of view S. Klein was a good test case for the FTC to seek jurisdiction over the interstate dissemination of false advertisements under section 5(a)(1), from an administrative or policy perspective it had serious shortcomings. Whether the FTC was capable of going into the retail market with the full capacity to carry out compliance was questionable. Without such capabilities, the effectiveness of the total program of enforcement would be minimal. The decision to dismiss the case against S. Klein should therefore probably be construed to mean that the majority of Commissioners felt that the overall program of enforcement would not be benefited because of existing inadequacies in the voluntary compliance program.

Conclusion. Jurisdiction over interstate disseminations of advertising continues to be the key to the success of any future plan of enforcement on the retail level. Assertion of such jurisdiction depends, however, upon the development of a planned and co-ordinated program of enforcement by the FTC. The mandatory machinery is necessary not

51. This does not mean that the FTC has not experimented in both city and regional voluntary programs to eliminate specified types of misleading advertising, 1960 FTC ANN. REP. 3. See also, Printers' Ink, Jan. 12, 1962, p. 23 for a brief discussion of the Cleveland Plan which has been adopted in fifty cities. It utilizes a review panel composed of representatives from advertisers, advertising agencies, media, and the Better Business Bureau. The Plan provides a striking illustration of a voluntary compliance program without public fanfare and devoid of hard feelings because of discrimination. Printers' Ink, April 1, 1960, p. 12, mentions Chairman Kintner's endorsement of the Cleveland Plan concept.

52. See Business Week, Aug. 27, 1960, p. 58. The FTC admitted that a victory "would certainly open up a tremendous new field." One member of the staff added, however, that "Lord knows we have enough to do now. Maybe we are biting off more than we can chew."

53. Printers' Ink, Jan. 12, 1962, p. 20, points out the growing pressure in government circles for increased control of advertising. See also, Note, The Regulation of Advertising, 56 COLUM. L. REV. 1077 (1956) which argues that enforcement at the local level, except in the very large cities, cannot be achieved by mere encouragement of local action. Further, the scope of the enforcement problem, even on a state wide basis, seems to demand a state administrative agency similar in concept to the FTC. Such an agency would have the marked advantage of being able to proceed against a person without branding him a criminal such as would be the case where the attorney general or a local prosecutor has the enforcement responsibility. At 1078, it is noted that the potential jurisdictional conflict between such an agency and the FTC should be recognized and the state statutes drafted with this in mind.
only to penalize those who do not comply with the provisions of the FTC Act, but also as a spur to voluntary compliance. Yet, as noted above, without an effective program of voluntary compliance, the mandatory machinery is not sufficient to deal with the problem. *S. Klein* served to focus attention on this fact.

The FTC still has the three alternatives available to it prior to *S. Klein* for gaining jurisdiction over the interstate dissemination of advertising. It can aid in the promotion of new state laws for the regulation of false advertising. This would appear to be the most burdensome alternative and the least likely of immediate success. Secondly, it can press Congress for an unequivocal grant of power to deal with interstate advertising and more funds to cope with the problem. In this regard, it is suggested that acceptance of such a proposal by Congress would be enhanced by a demonstrated ability of the FTC to deal with the problem through voluntary procedures. If its efforts to enforce its jurisdiction are then blocked by unfavorable judicial decisions, Congress would be more likely to pass legislation paving the way for FTC jurisdiction in this area. Finally, the FTC can select another test case, perhaps in a smaller community, and aim for a court fight. Such a decision, however, is dependent upon a shift of opinion among the commissioners who evidently did not think that the time was ripe for such a test in *S. Klein*. Regardless of the path the FTC chooses to take, one thing is clear from the experience of *S. Klein*. If the FTC is to gain jurisdiction over the interstate dissemination of advertising, it must earn its right to such jurisdiction by developing a balanced plan of total enforcement; for only by co-ordinating the mandatory machinery with the voluntary procedures of enforcement can that middle ground “where there is a necessary, reasonable amount of restraint of law coupled with a necessary, reasonable amount of self restraint, self policing and self discipline” be reached.54