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Fair Packaging, Fair Labeling and the Federal Trade Commission: An Exercise in Consumer Protection

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FAIR PACKAGING, FAIR LABELING AND THE FEDERAL TRADE COMMISSION: AN EXERCISE IN CONSUMER PROTECTION

For many years the manufacturer who misrepresents the quality or nature of his products to the public has been the subject of harsh criticism. Although the authors of more recent writings[1] are less graphic in their analyses of the problem than were their forebearers,[2] they still reflect a great concern and, in some cases a great anger with the manufacturers. Recently, there has been increased activity in law reviews and other legal periodicals with regard to protecting the consumer from these unscrupulous manufacturing concerns.[3] The most recent development in consumer protection is the Fair Packaging and Labeling Act[4] which became effective on July 1, 1967.[5]

In light of the Congressional concern for consumer protection shown by the passage of the Fair Packaging and Labeling Act and the public interest which will be aroused by its enactment, this Note shall trace generally the development of consumer protection from deceptive practices with emphasis upon deceptive packaging and labeling. The first two sections of the Note, which deal with consumer protection under the common law and under the Federal Trade Commission Act, are intended to provide a background for the final section, a discussion of the provisions of the Packaging and Labeling Act.

The Federal Trade Commission has been chosen as the vehicle for the development of consumer protection for two reasons. First, the increased jurisdiction granted the FTC during its history provides the basis for a more informative and interesting discussion. Second, it is felt that the weakest area of the new act—the limitation on products covered—is one which directly affects the FTC.

I. Common Law Remedies

Prior to the enactment of the Federal Trade Commission Act of 1914 the remedies available to a victim of a deceptive advertising practice were

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1 *E.g.*, Packard, The Waste Makers (1960); Packard, The Hidden Persuaders (1957); Seldin, The Golden Fleece (1963); Smith, The Health Hucksters (1960).

2 *E.g.*, Adams, The Great American Fraud (1907); Kallet & Schlink, 100,000,000 Guinea Pigs (1932); Lamb, American Chamber of Horrors (1934).

3 See, *e.g.*, Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L.J. 484 (1967); Developments in the Law, *Deceptive Advertising*, 80 Harv. L. Rev. 1005 (1967); Legislation and Administration, *The Consumer in the Marketplace—A Survey of the Law of Informed Buying*, 38 Notre Dame Law. 555 (1963).

4 80 Stat. 1296-1302 (1966); 15 U.S.C.A. §§ 1451-61 (Supp. Feb. 1967).

5 Fair Packaging and Labeling Act § 13, 80 Stat. 1302 (1966); 15 U.S.C.A. § 1461 (Supp. Feb. 1967). The Act further provides that the agencies concerned with its enforcement may postpone the effective date as to those provisions which affect them. *Ibid.*

clearly inadequate. The number of elements required to establish a cause of action and the difficulty in proving many of these elements made pursuit of a common law remedy almost futile. Generally, there were two such remedies: the purchaser could bring an action in either deceit or breach of warranty.[6] A short discussion of these early remedies will show their respective weaknesses.

Deceit

Although a writ of deceit existed as early as 1201, it came to be regarded as inseparable from an undefined contractual relationship between the buyer and seller and was not recognized as purely a tort action until 1789.[7] The case making this distinction was *Pasley v. Freeman*[8]—now termed "the parent of the modern law of deceit"[9]—and after this decision an action in deceit was clearly disassociated from an action for breach of warranty.

In order to establish a cause of action in deceit, a purchaser-plaintiff had to allege and prove five elements: (1) a false misrepresentation of fact made by the defendant, (2) the defendant's knowledge or belief that the representation was false (scienter), (3) defendant's intention to induce the plaintiff to act or refrain from acting in reliance upon the misrepresentation, (4) justifiable reliance on the misrepresentation by the plaintiff, and (5) damage to the plaintiff resulting from the reliance.[10] The first two elements have probably posed the most serious obstacles for plaintiffs in deceit cases.

With regard to the requirement that the misrepresentation must be one of fact, vendors have escaped liability despite statements that their products were "unreservedly . . . the best . . . on the American market today."[11] or "absolutely perfect."[12] This result was reached because the courts have reasoned that if the misrepresentations were found to be an opinion,[13] a

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6 Comment, 5 B.C. IND. & COM. L. REV. 704, 706 (1964).

7 PROSSER, TORTS § 100, at 699 (3d ed. 1964).

8 3 Term Rep. 51, 100 Eng. Rep. 450 (1789).

9 PROSSER, *op. cit. supra* note 7.

10 1 HARPER & JAMES, TORTS § 7.1, at 528 (1956); PROSSER, *op. cit. supra* note 7, at 700; 3 RESTATEMENT, TORTS § 525 (1938).

11 Prime v. Brackett, Shaw & Lint Co., 125 Me. 31, 130 Atl. 509 (1925).

12 Vulcan Metals Co. v. Simmons Mfg. Co., 248 Fed. 853 (2d Cir.), *cert. denied*, 247 U.S. 507 (1918). Compare Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625, 626 (1922), in which the court held that a statement on the wrapper of a loaf of bread representing the bread to be "100 per cent pure . . . a healthful and nutritious food" applied only to the absence of any deleterious or unwholesome ingredients and did not expose the maker to liability because of a nail found in the loaf. The court also mentioned that the plaintiff had not proved scienter, for there was no evidence presented that the defendant knew the nail to be in the bread.

13 *E.g.*, Finch v. McKee, 18 Cal. App. 2d 90, 62 P.2d 1380 (1936); see Harper & McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 1004 (1938).

statement of law,[14] a prediction[15] or a statement of value,[16] the plaintiff had failed to prove an essential element of his cause of action.

The earlier cases required the plaintiff to show a conscious misrepresentation in order to satisfy the element of scienter,[17] making an honest belief in the truth of a representation a complete defense. There has been great confusion in the American courts as to exactly what mental state constitutes scienter,[18] and it is difficult to determine what definition will be applied by many courts. It can be said, however, that the standard has been relaxed since the earliest decision.[19] Nevertheless, the plaintiff undertook a formidable burden when he attempted to show the requisite mental state of the defendant. For example, in an early New Hampshire case,[20] the defendant, a Christian Scientist healer-preacher, assured the plaintiff that he was fully capable of curing her appendicitis. His treatment consisted of telling the plaintiff to take no medicine, directing her to read a manual entitled "Science and Health," continuing her regular diet of solids, and crouching before the plaintiff in an attitude of prayer while reading to her extracts from the manual. In short time the plaintiff's condition became serious and the necessary surgery was performed by a physician. Subsequently, the plaintiff brought suit on several grounds, one of them being deceit. In discussing the plaintiff's failure to show scienter the court applied a purely subjective standard in determining the requisite mental state. Conceding that every member of a jury might believe the claims made by the defendant to be absurd and in fact untrue, this was not sufficient to infer that the defendant did not believe he could call upon God to heal any disease through prayer. Thus, regardless of the absurdity, inanity or factual untruth of any claim made by the defendant, an action in deceit would fail if the defendant himself believed his claims to be valid.

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14 *E.g.*, Gormely v. Gymnastic Ass'n, 55 Wis. 350, 13 N.W. 242 (1882); see Champion v. Woods, 79 Cal. 17, 21 Pac. 534 (1889). In *Champion* the court indicated that the plaintiff should have known that no one could be expected to "know the law" and that the defendant could offer only an opinion.

15 *E.g.*, Sawyer v. Prickett, 44 U.S. (19 Wall.) 146 (1875); Cash Register Co. v. Townsend, 137 N.C. 652, 50 S.E. 306 (1905).

16 *E.g.*, Byers v. Federal Land Co., 3 F.2d 9 (8th Cir. 1924).

17 *E.g.*, Kountze v. Kennedy, 147 N.Y. 124, 41 N.E. 414 (1895); Lamberton v. Dunham, 165 Pa. 129, 30 Atl. 716 (1895).

18 Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733, 737 (1929); see 1 HARPER & JAMES, *op. cit. supra* note 10, at 536; PROSSER, *op. cit. supra* note 7, § 102, at 715-19.

19 *Compare* Peek v. Derry, 14 App. Cas. 337 (1889), *with* Anderson v. Tway, 143 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 861 (1945).

20 Spead v. Tomlinson, 73 N.H. 46, 59 Atl. 376 (1904). Although this case dealt with a sale of services rather than goods, it is illustrative of the difficulties involved in proving scienter.

Breach of Warranty

The difficulties in an action against a seller for breach of warranty made this remedy as inadequate as an action in deceit. The representations that gave rise to an express warranty had to be representations of fact; statements of description,[21] opinion,[22] or quality[23] would not give rise to a warranty. Under the Uniform Sales Act,[24] "no affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." If the contract of sale was in writing the parol evidence rule generally prevented proof of an oral warranty.[25] Moreover, the necessity of showing privity was a further limitation upon this remedy. Not atypical was the following statement by an Arkansas court: "[A] warranty upon the sale of personal property does not run with the property. There is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales. Each vendee can resort . . . only to his immediate vendor."[26] Thus, the purchaser could not rely upon any warranties made by the manufacturer to the dealer.[27] Also, he had to show his reliance upon the statements constituting the warranty[28] which alone involved serious problems of proof.

In addition to the weaknesses of these two actions[29] there were two further serious deterrents faced by the pre-1914 plaintiff. First, the costs of

21 *E.g.*, Shambaugh v. Current, 111 Iowa 121, 82 N.W. 497 (1900) (cattle represented to be "thoroughbred"); Ryan v. Ulmer, 105 Pa. 332, 56 Am. Rep. 210 (1885) (contract to deliver "five car loads fully cured sweet Pickled shoulders" contained no warranty as to quality).

22 *E.g.*, Saverman & Ball v. Simmons, 74 Ark. 563, 86 S.W. 429 (1905); Ragsdale v. Shipp, 108 Ga. 817, 34 S.E. 167 (1899) (seller represented that animal would soon recover from disease).

23 *E.g.*, Bullard v. Brewer, 118 Ga. 918, 45 S.E. 711 (1903).

24 UNIFORM SALES ACT § 12 (1906).

25 Note, *The Parol Evidence Rule and Breach of Warranty Resulting from Misstatements in Advertising*, 21 COLUM. L. REV. 805, 806 (1929).

26 Nelson v. Armour Packing Co., 76 Ark. 352, 90 S.W. 288, 299 (1905).

27 Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 26 (1922). It has been noted that in national advertising the manufacturer normally addresses his appeal to the public, not the dealers, encouraging the consumer to purchase his goods at a retail outlet. Thus in some situations it may be that the retailer is authorized to make a collateral agreement between the purchaser and the manufacturer in the terms of the advertisement which prompted the purchase. *Id.* at 26-27. This theory would be applicable in circumstances similar to that in the classic case of Carill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256, wherein the advertisement stated that the manufacturer would pay a reward to any person contracting influenza after having used the smoke ball.

28 *E.g.*, Crocker Wheeler Elec. Co. v. Johns-Pratt Co., 29 App. Div. 300, 51 N.Y. Supp. 793 (1898), *aff'd per curiam*, 164 N.Y. 593, 58 N.E. 1086 (1900).

29 Although actions in deceit and breach of warranty were the most feasible remedies for a deceived purchaser, they were not the only actions which might have been taken against a seller. However, the other remedies were even less effective. See Handler, *supra* note 27, at 27-42.

litigation were disproportionately high when compared with the measure of damages recoverable by a successful plaintiff. For example, in a deceit action, a number of courts held that the correct measure of damages was the actual loss sustained as a result of the fraud, which, in the case of purchase of goods, would be the difference between the price paid by the plaintiff and the true value of the goods.[30] Most decisions, however, allowed the plaintiff's recovery to be measured "by the difference between what the value would have been if the facts had been true as represented by the defendant and the actual value thereof."[31] If a buyer had been misled into making a purchase because of deceptive packaging of the product, either of these tests would have produced a measure of damages that would be negligible compared with the expense of litigating the alleged breach of warranty. The second deterrent was general attitude of American courts that the purchaser was able to take care of himself. This *caveat emptor* approach has been said to have reached its triumph in the American decisions.[32] The extent to which the doctrine prevailed in the state courts was recognized by the Supreme Court when it stated, "[O]f such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception . . . , sanction it."[33]

Thus the ancient doctrine of *caveat emptor*, the rigid requirements of proving such elements as scienter and a misrepresentation of fact, and the stringent doctrine of privity of contract, combined with high litigation costs to prevent the common law from keeping abreast of the realities of the market and gave a deceived purchaser little chance of redress. Into this jurisprudential vacuum stepped the Federal Trade Commission.

II. The Federal Trade Commission Act

When the Federal Trade Commission was first envisioned by Congress, the regulation of unfair competition was not contemplated as one of the functions of the Commission.[34] Section 5 of the original Federal Trade Commission Act[35] was added as a substitute for the first four sections of the Clayton Bill which dealt with specific methods of unfair competition.[36] Section 5 of the 1914 Act provided:

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30 *E.g.*, Duffy v. McKenna, 82 N.J.L. 62, 81 Atl. 1101 (1912).

31 1 Harper & James, *op. cit. supra* note 10, § 7.15, at 592. See, *e.g.*, Boddy v. Henry, 113 Iowa 462, 85 N.W. 771 (1901); Nysewander v. Lowman, 124 Ind. 584, 24 N.E. 355 (1890); Moase v. Hutchins, 102 Mass. 439 (1869).

32 Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1113, 1178 (1931).

33 Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388-89 (1870).

34 Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Acad. Pol. Sci. Proc. 666 (1926).

35 38 Stat. 719 (1914).

36 Rublee, *supra* note 34.

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce.[37]

The term "unfair competition" was thought to have a recognized meaning in the language of the antitrust law since the Supreme Court in the *Standard Oil* case[38] had described certain monopolistic practices of the defendants as "unfair methods of competition."[39] This phrase was intentionally used in Section 5 of the Federal Trade Commission Act.[40]

At first the commissioners of the FTC differed among themselves as to whether the phrase "unfair methods of competition" extended to false and deceptive advertising,[41] but they resolved this issue affirmatively and the Commission issued its first complaints against fraudulent advertising.[42] The early court decisions indicated that the FTC was not empowered to protect the consumer as such, and any consumer protection came as an indirect result of the Commission's activities in protecting competition. The first comprehensive judicial review of the Federal Trade Commission Act was made by the Seventh Circuit Court in *Sears, Roebuck & Co. v. FTC*,[43] a case that clearly presented the effects of misleading advertising upon competition. However, the Seventh Circuit did not rest its affirmation of the Commission's order on the direct adverse effects which the advertising had upon Sears' competitors alone, but indicated that the Commission had the authority to deal with deceptive practices regardless of their direct effect on competition:[44]

> The commissioners . . . are to . . . stop all those trade practices that have a capacity or tendency to injure competitors directly or *through deception of purchasers*, quite irrespective of whether the specific practices in question have been denounced in common-law cases.[45]

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37 38 Stat. 719 (1914).

38 Standard Oil Co. v. United States, 221 U.S. 1 (1911).

39 *Id.* at 43.

40 See Rublee, *supra* note 34, at 668. For an extensive treatment of the legislative history leading to the phrase "unfair methods of competition," see Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 520-42 (1962).

41 Rublee, *supra* note 34, at 671.

42 FTC Dkts. 1, 2 and 3, 3 TRADE REG. REP. ¶ 25021, charged that cotton goods and cotton thread were being sold as "silk" or "cilk." Goldin Bros., 1 F.T.C. 538 (1916); A. Theo. Abbot & Co., 1 F.T.C. 16 (1916); Circle Cilk Co., 1 F.T.C. 13 (1916).

43 258 Fed. 307 (7th Cir. 1919).

44 Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 452 (1964).

45 Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 311 (7th Cir. 1919). (Emphasis added.)

However, shortly after *Sears, Roebuck*, the Supreme Court in *FTC v. Gratz* indicated that it considered the term "unfair methods of competition" to include only those activities considered illegal at common law.[46] Since the common law status of false advertising was unclear,[47] serious doubts arose as to the Commission's authority over deceptive advertising practices.

Fortunately, the doubts raised by *Gratz* were eliminated by the Supreme Court's 1922 decision in *FTC v. Winsted Hosiery*.[48] Although the *Gratz* decision was not mentioned by the Court in *Winsted*, an FTC cease and desist order against false advertising activity was expressly upheld. The Court reasoned that the false advertising in question was an unfair method of competition because trade was diverted from those producers who did not employ deceptive advertising practices.[49] The Supreme Court in a later case[50] stated that in *Winsted* "an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against."[51] Thus after the *Winsted* decision, the jurisdiction of the FTC over false advertising was indisputable;[52] and, just as importantly, it was clearly recognized that false advertising was a method of unfair competition within section 5 of the Federal Trade Commission Act.

In 1931 the authority of the FTC to prevent false advertising as an unfair method of competition was severely, although temporarily, limited by the Supreme Court's decision in *FTC v. Raladam Co.*[53] The Commission, having found that Raladam marketed an "obesity cure" which was falsely advertised to be safe, dependable and without danger of harmful results, ordered the company to cease its false advertising and to refrain from advertising the product as a cure for obesity without an accompanying statement that it could be safely taken only under medical direction and supervision. The Supreme Court affirmed the Circuit Court's reversal of the FTC order and held that the Commission lacked jurisdiction unless it could show that

46 See FTC v. Gratz, 253 U.S. 421 (1920). The Court defined the words "unfair methods of competition" as being "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.* at 427.

47 Millstein, *supra* note 44, at 452.

48 FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

49 The Court summarily rejected the defense that the other producers could protect their trade by resorting to the same type of deceptive advertising techniques as did Winsted. *Id.* at 493.

50 FTC v. Klesner, 280 U.S. 19 (1929).

51 *Id.* at 28.

52 Millstein, *supra* note 44, at 452.

53 283 U.S. 643 (1931). For a vivid description of the factual situation leading to the Commission's action against Raladam, see LAMB, AMERICAN CHAMBER OF HORRORS 5-9 (1936).

competition was or could be adversely affected by the false advertising practices.

Thus after *Raladam* any benefits inurring to the consumer from FTC action were completely indirect in nature, *i.e.*, they were merely incidental to the businessman's protection from unfair methods of competition. Unless there were competitors who had suffered or could potentially suffer from the false advertising practices, the Commission was unable to prevent advertising misrepresentation even though it was clearly deceptive to the consumer.

The effect of *Raladam* was not, however, as serious as first thought.[54] The practical result of the case was that the Commission had to prove harm to competitors before the false advertising could be struck down. In most cases it was able to prove this harm.[55] Furthermore, the decision was a "blessing in disguise"[56] for it provided the main stimulus for the Wheeler-Lea amendments[57] to the Federal Trade Commission Act, which amendments legislatively overruled the *Raladam* decision and substantially broadened the Commission's jurisdiction.

The Wheeler-Lea amendments extended the FTC's jurisdiction to include "unfair or deceptive acts or practices"[58] in addition to its existing jurisdiction over unfair methods of competition. This phrase, conferring broader jurisdiction upon the FTC, makes no mention of competition, thus the procedural requirements of *Raladam* are avoided.[59] The legislative removal of the requirement of showing competition and injury thereto allowed the Commission to center its attention on "the direct *protection of the consumer* where formerly it could protect him only indirectly through protection of the competitor."[60] Thus, with the passage of the Wheeler-Lea amendments to the Federal Trade Commission Act the doctrine of *caveat emptor* ceased to be the commercial and economic policy of the United States.[61]

The Wheeler-Lea amendments adopted elements significantly different from those required to show a cause of action at common law.[62] Neither

54 For an example of the first impressions of the *Raladam* opinion, see Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising*, 31 COLUM. L. REV. 527 (1931).

55 After the *Raladam* decision in 1931 the FTC began a second proceeding against the Raladam Co. In this action the Commission showed the existence of injury to competitors, and the cease and desist order was upheld by the Supreme Court. FTC v. Raladam Co., 316 U.S. 149 (1942).

56 Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548, 550 (1964).

57 52 Stat. 111 (1938).

58 15 U.S.C. § 45(a)(1) (1964).

59 H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937).

60 Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941).

61 MacIntyre, *Fair Advertising Landmarks*, 18 FOOD DRUG COSM. L.J. 115, 117 (1963).

62 See generally Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROB. 91, 96-103 (1939).

scienter nor reliance is a necessary element of the statutory offence, and the requirement that the representation be one of fact is not as rigid as the common law test. Furthermore, under the amended Federal Trade Commission Act, the relevant inquiry is whether the consumer is deceived and not whether the seller intended to deceive.[63]

Packaging and Labeling

The Federal Trade Commission and the Food and Drug Administration, the agencies concerned with packaging and labeling under the Fair Packaging and Labeling Act, have long had express authority to regulate the packaging and labeling of certain foods, drugs and cosmetics.[64] However,

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[63] Focusing the inquiry upon the deception of the consumer necessarily requires that a test be formulated relating to the consumer's capacity for deception. Even before the Wheeler-Lea Act, the Supreme Court stated that § 5 was "made to protect the trusting as well as the suspicious." FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937). Perhaps the lowest standard applied by the Commission was in Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944), wherein the court indicated that an advertisement was deceptive if anyone of any intelligence level could find and believe a misleading connotation. The usual standard is reflected in the language of Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944): the Act is to protect "the public—that vast multitude which includes the ignorant, the unthinking and the credulous." It is generally accepted that neither actual deception nor an intent to deceive is required—it is sufficient that the advertisement have a capacity or tendency to deceive. See Kalwajtys v. FTC, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); Brockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943); Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941).

For a general discussion of the standards of credulity applied by the Commission, see Millstein, *supra* note 44, at 457-65; Weston, *supra* note 56, at 555-56.

[64] The basis for the FTC regulation is found in § 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act, 15 U.S.C. § 45(a)(1) (1964), giving the Commission jurisdiction over "deceptive acts or practices." This section is supplemented by § 4 of the Wheeler-Lea Act, 52 Stat. 114 (1938), 15 U.S.C. § 52 (1964), which provides that a false advertisement of a food, drug or cosmetic is "an unfair or deceptive act or practice in commerce within the meaning of [§ 5] . . . ." Although a false label is not included in the definition of a false advertisement, see 15 U.S.C. § 55(a)(1) (1964), and is therefore not a deceptive act or practice described in 15 U.S.C. § 52 (1964), the FTC still may act against a false labeling situation if it constitutes an unfair method of competition. Fresh Grown Preserve Corp. v. FTC, 125 F.2d 917 (2d Cir. 1942). The activity of the FTC in the food, drug and cosmetic field is discussed in Brennan, *Affirmative Disclosure in Advertising and Control of Package Design Under the Federal Trade Commission Act*, 20 BUS. LAW. 133, 142-44 (1964); Forte, *The Food and Drug Administration, The Federal Trade Commission and the Deceptive Packaging of Foods*, 40 N.Y.U.L. REV. 860, 879-901 (1965); Vernon, *Labyrinthine Ways: The Handling of Food, Drug, Device and Cosmetic Cases by the Federal Trade Commission Since 1938*, 8 FOOD DRUG COSM. L. J. 367 (1953); Legislation and Administration, *The Consumer in the Marketplace—A Survey of the Law of Informed Buying*, 38 NOTRE DAME LAW. 555, 560-64, 568-70 (1963).

The FTC has also been given jurisdiction over advertising and labeling in specified industries. See Wood Products Labeling Act of 1939, 54 Stat. 1128 (1939), 15 U.S.C. §§ 68-68j (1964); Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1964);

the Fair Packaging and Labeling Act provides for regulation of "any consumer commodity,"[65] and the jurisdiction of the FTC extends to, and is limited to, those consumer commodities which are other than foods, drugs, or cosmetics.[66] In discussing packaging and labeling under the Federal Trade Commission Act, however, both food, drug and cosmetic and non-food, -drug and -cosmetic cases will be included. This is warranted because FTC jurisdiction over foods, drugs and cosmetics under the Wheeler-Lea amendments to the Federal Trade Commission Act and over other consumer commodities under the Fair Packaging and Labeling Act is obtained in the same manner, that is, by stating that a violation of the statutory provisions is an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act.[67]

The packaging cases decided by the FTC usually deal with "slack-filling" —best explained in the Commission's decision in *Papercraft Corp.*,[68] involving a respondent who manufactured gift-wrapping paper. The rolls of gift-

Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (1964); Textile Fiber Products Identification Act, 72 Stat. 1717 (1958), 15 U.S.C. §§ 70-70k (1964).

The basis for FDA regulation is found in the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040, as amended, 21 U.S.C. §§ 301-92 (1964). The legislative history of the act shows that the FDA was not intended to have authority over advertising. See Nelson, *Control of Advertising by Section 502(f)(1)*, 7 FOOD DRUG COSM. L.J. 579, 582 (1952). The FDA does, however, have the authority to affect those provisions of the Act dealing with the "misbranding" of any food, drug or cosmetic which is prohibited by § 301 of the act. 21 U.S.C. § 331(b) (1964). A food is deemed misbranded 'if its labeling is false or misleading in any particular," 21 U.S.C. § 343(a) (1964), or "if its container is so made, formed or filled as to be misleading." 21 U.S.C. § 343(d) (1964). The same language is present in the provisions applying to drugs, 21 U.S.C. §§ 352(a), (i) (1964), and cosmetics, 21 U.S.C. §§ 362(a), (d) (1964).

For discussions relating to the FDA authority in this area, see Forte, *supra* at 863-79; Developments in the Law, *The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 649-57 (1954); Legislation and Administration, *The Consumer in the Marketplace—A Survey of the Law of Informed Buying*, *supra* at 564-68, 570-72.

[65] Truth in Packaging Act, § 3(a), 80 Stat. 1296 (1966); 15 U.S.C.A. § 1452(a) (Supp. Feb. 1967); see notes 99-101 *infra* and accompanying text.

[66] Truth in Packaging Act, § 7(b), 80 Stat. 1300 (1966); 15 U.S.C.A. § 1456(b) (Supp. Feb. 1967); see notes 102-04 *infra* and accompanying text.

[67] *Compare* Wheeler-Lea Act § 4, 15 U.S.C. § 52 (1964), *with* Truth in Packaging Act § 7(b), 80 Stat. 1300 (1966); 15 U.S.C.A. 1456(b) (Supp. Feb. 1967).

[68] TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16721 (FTC 1964). For additional discussion of the slack-filled package, see Depau, *The Slack-Filled Package Law*, 1 FOOD DRUG COSM. L.J. 86 (1946); Larrick, *Some Comments on Packaging*, 17 FOOD DRUG COSM. L.J. 442 (1962); Martin, *Section 403(d)—Containers So Made, Formed or Filled as to Be Misleading*, 8 FOOD DRUG COSM. L.J. 663 (1953). Although these articles concern the Food, Drug and Cosmetic Law, the discussions of slack-filling are fully applicable.

One of the most significant and informative cases in this area is United States v. 174 Cases of Delson Thin Mints, 180 F. Supp. 863 (D.N.J. 1960), *vacated*, 287 F.2d 246 (3d Cir. 1961), *on remand*, 195 F. Supp. 326 (D.N.J. 1961), *aff'd per curiam*, 302 F.2d 724 (3d Cir. 1962).

wrapping paper were packaged in boxes 24 inches long and each contained a transparent "window" 19 inches long through which the paper could be viewed. Thus to a person inspecting a box it would appear that the rolls of paper were as long as the box because the ends of the rolls could not be seen through the transparent window. In fact, however, the rolls of paper were each 20 inches long, and the box contained 2 inches of empty space at either end. The Commission stated that this type of packaging—"slack-filling"—was deceptive and unlawful:

> "Slack-filling"—broadly, any use of oversized containers to create a false and misleading impression of the quantities contained in them—is an unlawful trade practice. For a seller to package goods in containers which—unknown to the consumer—are appreciably oversized, or in containers so shaped as to create the optical illusion of being larger than conventionally shaped containers of equal or greater capacity, is as much a deceptive practice, and an unfair method of competition, as if the seller were to make an explicit false statement of the quantity or dimensions of his goods. While the Commission is not concerned with requiring standardized or uniform packaging as such, it is concerned with all forms and methods of deceptive packaging of goods in commerce, no less than with false and misleading advertising or labeling of such goods.[69]

The Commission stated that the deception was not cured by stating the actual width of the rolls on the box. Furthermore, a person misled by such a deceptive packaging practice is not one of the " 'foolish or feeble-minded' who are not entitled to the Commission's protection."[70] Also rejected was respondent's contention that the empty spaces at either end of the package were "cushion ends" necessary to enable the full width of the rolls to be displayed to the potential customer.[71]

Other packaging practices found by the Commission to constitute "slack-filling" have been the filling of standard gallon paint cans with less than one

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69 TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16721, at 21652 (FTC 1964). (Footnote omitted.)

70 Id. at 21653.

71 This argument is often made by respondents in slack-filling cases. The problem is not one which yields to hasty analysis for there are instances in which slack-filling is beneficial to the consumer. For example, some cushioning may be needed to protect a good from breaking or being otherwise damaged in shipment and handling, or a product may be wrapped in separate containers, as are some foods, to preserve freshness. Note, *Federal Regulation of Deceptive Packaging: The Relevance of Technological Justifications*, 72 YALE L.J. 788, 794 (1963). The producer usually contends that slack-filling is necessary in order for him to compete with the other packages on the shelf or that the slack-filled package results from machine packaging and the economies of this process (and the resulting savings to the consumer) outweigh any losses due to the slack-filled package. See *id.* at 793-94. See generally *id.* at 790-802.

gallon of paint,[72] filling standard sized butter containers with substantially less than the standard amount of butter,[73] and packaging a womens' face powder in a cardboard box approximately twice as large as the quantity of powder it contained.[74]

A recent case indicates that the FTC will employ the same approach as used in slack-fill deceptions to deceptive practices in which the nature of the product precludes it from being slack-filled. The respondent in *Superior Insulating Tape Co.*[75] sold tape rolled onto a cardboard spool, a part of which was of the same color as the tape rolled around it. The rest of the spool, that part nearest the center or core, was of a contrasting color. Thus a portion of the roll, when viewed by the purchaser, appeared to be tape when it was in fact a part of the cardboard spool, colored in such a way that it looked like the tape. The Commission found that this practice constituted an unfair and deceptive

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72 Baltimore Paint and Color Works, Inc., 9 F.T.C. 242 (1925), *aff'd*, 41 F.2d 474 (4th Cir. 1930); *cf.* Export Petroleum Co., 17 F.T.C. 119 (1932).

In light of *Papercraft*, the form of the cease and desist order issued against the respondent in *Baltimore Paint* should be noted. In *Baltimore Paint* the Commission ordered the respondent to cease and desist from selling paint in standard sized cans if these cans contained less than the standard amount of paint, "unless the said cans or containers are clearly marked or labeled to denote the quantity less than one gallon or one-half gallon of paint contained therein." 9 F.T.C. at 248. In *Papercraft* this result was expressly avoided. See text preceding note 70, *supra*. The Commission stated that the deception was *not* cured by an accurate statement on the package of the actual quantity (*i.e.*, the width of the rolls of wrapping paper) of its contents.

73 Mountain Grove Creamery, Ice and Elec. Co., 6 FTC 426 (1923); Witchita Creamery Co., 6 F.T.C. 435 (1923); Meriden Creamery Co., 6 F.T.C. 444 (1923). The action against Witchita Creamery was taken soon after the members of the trade had joined in what was known as the "Trade Practice Submittal—Butter Manufacturers." This agreement condemned the type of practice followed by the Witchita Creamery and petitioned the FTC to take action against those butter makers who participated in such activities. Witchita Creamery Co., *supra*, at 439.

74 United Drug Co., 35 F.T.C. 643 (1942). Cf. Harry Greenberg, 39 F.T.C. 188 (1944); Marlborough Labs., Inc., 32 F.T.C. 1014 (1941); Trade Labs., Inc., 25 F.T.C. 937 (1937). In *Trade Labs., Inc., supra*, the Commission noted:

> When the purchasing public makes a purchase of a product of the type manufactured and packaged by the respondent [shaving cream] (not being able to see the inside of the carton or container or able to examine it before purchase), it expects and usually does receive a tube or an amount of the product commensurate with the size of the pasteboard carton or container in which the product is packed for sale.

Id. at 944.

A slight variation from these cases, resulting in a more obvious § 5 violation, is found in U.S. Packaging Corp., 53 F.T.C. 1174 (1957). There the respondent manufactured artificial snow in cans larger than those of its competitors. In its ads and counter displays, respondent represented that because its cans were larger, a greater quantity of snow could be produced from each can. The representation was found to be false, and respondent was ordered to cease and desist from representing that the size of its container determined the quantity of snow contained therein.

75 61 F.T.C. 416 (1962).

act or practice and an unfair method of competition, and the respondent was ordered to cease and desist from representing its tape to be of a greater length than it actually was.

A case embodying deceptive packaging and deceptive labelling is *Burry Buscuit Corp.*[76] There the respondent packaged crackers in cardboard boxes larger than that size reasonably required to package the quantity of crackers actually placed in the box, thus, each box contained "substantially less" than its capacity. Furthermore, each box had written upon it "Average 90 Crackers" when in fact the number of crackers in each box was substantially less than 90. The respondent was ordered to discontinue both of these deceptive practices. The FTC has also ruled labels to be deceptive when they represent cloth lengths before shrinkage rather than the actual length after processing,[77] when they state that the number of crayons in a box is less than the number actually contained therein,[78] and when they represent the average number of oranges in a crate to be more than the number actually packaged in each crate.[79]

In each of the cases above the packaging and labeling deceptions have been treated as violations of section 5 of the Federal Trade Commission Act—the misrepresentations being found to be deceptive acts or practices in commerce and/or unfair methods of competition. But although the FTC has had the authority to issue cease and desist orders against deceptive packaging and labeling practices, there are certain limitations on the effectiveness of the Commission's actions. Before the Commission can act to stop the continuance of any practice related to the packaging or labeling of consumer commodities under the Federal Trade Commission Act, it must find, based upon reliable, probative and substantive evidence, that the practice is likely to deceive the purchasing public.[80] This requirement applies to situations where the deceptive practice is a result of an omission of information on a package as well as cases of affirmative misrepresentations.[81] Furthermore, the nature of the statutory scheme necessitated that the Commission approach packaging and labeling violations through laborious case-by-case prosecution.[82] These requirements resulted in a significant time lag between the date a deceptive practice was initiated and the date of

76 33 F.T.C. 89 (1941).

77 Lasher's Silk Mfg. Co., 34 F.T.C. 1478 (1942).

78 Adolph Wein, 27 F.T.C. 1470 (1938).

79 J. C. Hickson & Co., 26 F.T.C. 23 (1937).

80 *Hearings on Packaging and Labeling Practices Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. 274 (1963) (statement by Paul Rand Dixon, Chairman, Federal Trade Commission). See generally, Millstein, *supra* note 44, at 478-83; Weston, *supra* note 56, at 563-64.

81 *Ibid.*

82 S. REP. NO. 1186, 89th Cong., 2d Sess. (1966), in 3 1966 U.S. CODE CONG. & ADMINISTRATIVE NEWS 4069, 4071-72.

final cessation of the practice.[83] For example, if a producer used a "cents-off" label to increase the quantity of his sales, and the FTC moved against the producer for violation of section 5 by employing a deceptive act or practice in commerce, it is most likely that all benefits from the labeling practice would be reaped before a final cease and desist order could be issued.[84]

In part because of these limitations,[85] and to insure that labeling and packaging practices adequately informed consumers of package contents and to give consumers a basis for value comparisons,[86] Congress passed the Fair Packaging and Labeling Act.

III. The Fair Packaging and Labeling Act

The Fair Packaging and Labeling Act,[87] popularly referred to as the "Truth-in-Packaging" Act, was born on June 28, 1961, as Senator Phillip Hart intoned, "Today we are beginning hearings on packaging and labeling practices of food and household products as they affect consumers."[88] It was more than five years later, on November 3, 1966, that President Lyndon Johnson signed the present act into law.

During its evolution the proposed law received much criticism.[89] It was argued that existing laws were adequate,[90] that ultimately the American

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83 The most ludicrous example of the delay that might be secured by a respondent is found in the "Carter's Little Liver Pill" litigation. Carter Products, Inc. v. F.T.C., 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959). The time between the issuance of the FTC complaint and denial of certiorari by the Supreme Court was sixteen years.

For general discussions of the problem of delay in the FTC, see Weston, *supra* note 56, at 561-63; Note, 62 Colum. L. Rev. 671 (1962).

84 See also the criticism in Printer's Ink, Dec. 18, 1959, at 21, quoted in Weston, *supra* note 56, at 548-49 n.4, that a practice may have achieved its results before the FTC begins to take action.

85 See S. Rep. No. 1186, *supra* note 82, at 4071-72.

86 *Id.* at 4069.

87 80 Stat. 1296-1302 (1966), 15 U.S.C.A. §§ 1451-61 (Supp. Feb. 1967).

88 *Hearings on Packaging and Labeling Practices Before the Subcommittee on Anti-Trust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., pt. 1 at 1 (1961).

89 See generally Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 Mich. L. Rev. 1255 (1966).

90 *E.g., Hearings on Packaging and Labeling Practices Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 1 at 259 (1963) (statement by the general counsel for the Grocery Manufacturers' Association): "Both the Federal Trade Commission and the Food and Drug Administration now possess plenary power to prohibit all deceptive and misleading practices in connection with packaging and labeling." *Contra, Hearings on Fair Packaging and Labeling Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 24 (1965) (Statement by Commissioner of FDA that that agency had "lost every contested action involving deceptive packaging of food").

Somewhat analogous to this argument is the one that the shopper needs no protection. A statement of this argument is found in an excerpt from an ad by the Scott Paper Co.,

system of competition would be greatly injured,[91] and intimated that the entire proposal smacked of communism.[92] Perhaps the harshest criticism came from a representative of the National Association of Manufacturers who testified during the Senate hearings on the proposed legislation that

> [t]he jobs of designers, artists, engineers, molders of glass and plastic, steel and tin plate workers, and employees in paper mills, printing plants, advertising agencies, and many others will be regulated or jeopardized by this bill.
>
> In one way or another you may expect a disruption of these enterprizes, their employees, their suppliers, their investors, and the smaller services which surround them.[93]

The most entertaining and probably the most original criticism appeared in an article published in *Printer's Ink*,[94] an advertising trade journal. The article was a fictional account of the thoughts and events of one Stanley Jurasik, who, on the fateful day of January 17, 1973, receives word that the well-established soap manufacturer for whom he has worked most of his life is about to close its doors. Stanley had received an early call from his boss asking him to attend a mid-morning meeting with the top management of the company. At that meeting the president tells his faithful employees,

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reprinted in *Hearings on Packaging and Labeling Practices Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 1 at 457 (1963):

> . . . [A] strange change comes over a woman in a store. The soft glow in the eye is replaced by a steely financial glint; the graceful walk becomes a panther's stride among the bargains.
>
> A woman in a store is a mechanism, a prowling computer. Mentally she is a memory bank, calculating the variables, thousands of little lights flicking over the great question in her life—last week that package was 43 cents, now it's only 39; and right beside it is this new brand—slightly larger for 41 cents.
>
> This is why she pinches and prods and shakes things, listens to cans and boxes. She is mentally x-raying the interior of the package. The American housewife is her own final bureau of standards.

Compare this view with that of Marya Mannes, testifying in 1961: "[A]s a housewife I buy what is sold to me. It is packaged. I buy it on faith. That is why, these days, the word 'consumer' is sometimes spelled 's-u-c-k-e-r.'" *Hearings, supra* note 88, at 24.

91 *Eg., Hearings on Packaging and Labeling Practices Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 1 at 428, pt. 2 at 553 (1963).

92 *Hearings, supra* note 91, pt. 2 at 564:

> You cannot control the label without controlling the package.
>
> You cannot control the package without controlling the quantity.
>
> You cannot control the quantity without controlling the composition of the contents.
>
> You cannot control the contents without controlling the allocation of the resources of our society . . . .

93 *Id.* at 554.

94 Ford, *The Day the Brands Died*, Printer's Ink, Jan. 22, 1965, p. 11.

"[Y]esterday the Supreme Court said the FTC does indeed have the power to tell us how much we can advertise and, the FTC says we can't advertise any more than our smallest competitor does."[95] Stanley realizes that this information is being given to other workers about the country as the FTC arbitrarily flexes its regulatory muscles in the wake of the Supreme Court's decision. Stanley, thinking back over the history of federal regulation of advertising, sees the blackest day as the day that the "Truth-in-Packaging" Act became law.

But, despite its opposition, the Fair Packaging and Labeling Act was finally given an affirmative vote by Congress and signed by the President. The remainder of this Note will discuss the principal portions of that act, with emphasis upon the increased powers given the FTC.

The purpose of the regulatory scheme is to enable consumers to obtain accurate information as to quantity of container contents and to aid consumer value comparisons.[96] Thus, while the act does regulate packaging and labeling practices which have the capacity to or do deceive the consumer, it also regulates those practices which, although not deceptive, have a tendency to impair the consumer's ability to make the most financially advantageous purchase.[97] In addition, contrary to the regulatory scheme under the Federal Trade Commission Act, the Fair Packaging and Labeling Act envisions industry—wide regulation as opposed to a case-by-case regulation.[98]

The act subjects to regulation "any person engaged in the packaging or labeling of any consumer commodity."[99] Section 10(a) of the act defines a consumer commodity as any food, drug, device or cosmetic as defined in the Federal Food, Drug and Cosmetic Act,[100] and "any other article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care in the performance of services ordinarily rendered within the household and *which usually is consumed or expanded in the course of such consumption or use.*"[101] The foods, drugs and cosmetics, which are regulated by the Food and Drug Administration,[102] are generally well defined by the Federal Food,

95 *Id.* at 14.

96 S. REP. No. 1186, *supra* note 82, at 4069; see Fair Packaging and Labeling Act, 80 Stat, 1296 (1966), 15 U.S.C.A. § 1451 (Supp. Feb. 1967).

97 Compare text accompanying note 82 *supra.*

98 Compare text accompanying note 80 *supra.*

99 Fair Packaging and Labeling Act § 3(a), 80 Stat. 1296 (1966), 15 U.S.C.A. § 1452(a) (Supp. Feb. 1967).

100 Federal Food, Drug and Cosmetic Act §§ 201(f)-(i), 21 U.S.C. §§ 321(f)-(i) (1964).

101 Fair Packaging and Labeling Act § 10(a), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(a) (Supp. Feb. 1967). (Emphasis added.)

102 See Fair Packaging and Labeling Act § 7(a), 80 Stat. 1300 (1966), 15 U.S.C.A. § 1456(a) (Supp. Feb. 1967).

Drug and Cosmetic Act.[103] However, the other consumer commodities, to be regulated by the FTC,[104] are not defined by the act. The Senate Report gives no indication of what commodities are included within the consumer commodities classification other than a reference to goods bought "at the supermarket."[105] Congressional debate, however, shows an intent to *exclude* certain items from this group of commodities:

> The bill is generally concerned with those items customarily found in the supermarket . . . .
>
> The bill is not intended to cover durable articles or commodities; textiles or items of apparel; any household appliance, equipment or furnishings, . . . bottled gas for heating or cooking purposes; paints and kindred products; flowers, . . . garden and lawn supplies; pet care supplies; stationery and writing supplies, gift wraps, fountain pens, mechanical pencils, and kindred products.[106]

During debate an attempt to expand the coverage of the act to include all products normally purchased by the consumer was resisted.[107]

Those products impliedly excluded from coverage because of the act's definition of consumer commodity are products which otherwise may have been regulated by the Federal Trade Commission. Additionally, the act expressly excludes from its coverage certain specified goods. These include meats, poultry, tobacco and any meat, poultry or tobacco product,[108] certain poisons (fungicides, insecticides, rodenticides) and biological animal products,[109] drugs dispensed by prescription or containing insulin,[110]

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103 21 U.S.C. § 321 (1964).

104 See Fair Packaging and Labeling Act § 7(b), 80 Stat. 1300 (1966), 15 U.S.C.A. § 1456(b) (Supp. Feb. 1967). Any imported consumer commodities subject to regulation under the Act shall be regulated by the Secretary of the Treasury. Fair Packaging and Labeling Act § 7(c), 80 Stat. 1300 (1966), 15 U.S.C.A. § 1456(c) (Supp. Feb. 1967).

105 S. REP. No. 1186, *supra* note 82, at 4070, 4071.

106 111 CONG. REC. 11504 (daily ed. June 2, 1966) (Remarks of Senator Magnuson).

Although these commodities are excluded from the provisions of the Fair Packaging and Labeling Act, the FTC should be able to regulate them to the extent that the packaging or labeling of the products constitutes a violation of § 5 of the Federal Trade Commission Act. Compare Senator Magnuson's comments regarding the exclusion of gift wraps from the Fair Packaging and Labeling Act in the text to this note with the FTC's decision in *Papercraft Corp.*, TRADE REG. REP. (Transfer Binder, 1963-65) ¶ 16721 (FTC 1964).

107 See 111 CONG. REC. 12165-66 (daily ed. June 9, 1966). The initial resistance came from none other than Senator Hart, the sponsor and most enthusiastic supporter of the act. See *ibid.*

108 Fair Packaging and Labeling Act § 10(a)(1), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(a)(1) (Supp. Feb. 1967).

109 Fair Packaging and Labeling Act § 10(a)(2), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(a)(2) (Supp. Feb. 1967).

110 Fair Packaging and Labeling Act § 10(a)(3), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(a)(3) (Supp. Feb. 1967).

alcoholic beverages (distilled spirits, wines and malt beverages),[111] and seeds.[112] In addition, the agencies authorized to administer the act may promulgate regulations exempting certain commodities from the labeling requirements of section 4 of the act[113] if it can be shown that the nature, form or quantity of that commodity is such that full compliance with the labeling requirements is impractical or unnecessary for adequate consumer protection.[114]

Those businesses generally covered by the act either engaged in the packaging or labeling of goods for distribution in commerce or engage in the distribution in commerce of packaged or labeled goods.[115] Wholesale or retail distributors of consumer commodities are covered only to the extent they "are engaged in the packaging or labeling of such commodities or prescribe or specify by any means the manner in which such commodities are packaged and labeled."[116] Thus the act does not apply to retailers and wholesalers as such nor does it apply to the "supermarket" products after they have been placed for retail sale. This provision is consistent with the scope of the act because most goods have been packaged and labeled long before they are placed on display. The section does apply, however, to those businesses which retail goods which they have packaged or labeled. For example, several national chain food stores, such as A & P, retail goods they have manufactured and in some instances packaged under their brand name. These concerns would be subject to the act's provisions. Thus, any vertically integrated corporation which sells consumer commodities at one level and either packages or labels them at another level would be subject to the act.

Expressly excluded from the act's coverage are exporters,[117] and common carriers, contract carriers and freight forwarders for hire, except to the extent they are engaged in packaging or labeling of any consumer commodity for distribution in commerce.[118]

111 Fair Packaging and Labeling Act § 10(a)(4), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(a)(4) (Supp. Feb. 1967).

112 Fair Packaging and Labeling Act § 10(a)(5), 80 Stat. 1301 (1966); 15 U.S.C.A. § 1459(a)(5) (Supp. Feb. 1967).

113 See notes 123-27 *infra* and accompanying text.

114 Fair Packaging and Labeling Act § 5(b), 80 Stat. 1298 (1966), 15 U.S.C.A. § 1454(b) (Supp. Feb. 1967).

115 Fair Packaging and Labeling Act § 3(a), 80 Stat. 1296 (1966), 15 U.S.C.A. § 1452(a) (Supp. Feb. 1967).

116 Fair Packaging and Labeling Act § 3(b), 80 Stat. 1296 (1966), 15 U.S.C.A. § 1452(b) (Supp. Feb. 1967).

117 The act applies to goods packaged or labeled for distribution "in commerce," 80 Stat. 1296 (1966); U.S.C.A. § 1452(a) (Supp. Feb. 1967), and exports to foreign countries are not included within the meaning of "commerce." 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(e) (Supp. Feb. 1967).

118 See Fair Packaging and Labeling Act § 3(a), 80 Stat. 1296 (1966), 15 U.S.C.A. § 1452(a) (Supp. Feb. 1967).

Packages covered by the act are defined as "any container or wrapping in which any consumer commodity is enclosed for use in the delivery or display of that consumer commodity to retail purchasers."[119] Thus, the packages covered are those which ultimately appear on the retailer's shelf and are seen by the consumer. Expressly excluded are shipping containers used solely for transportation of a commodity in bulk or bearing no printed matter pertaining to any particular commodity.[120] The term "label" is defined as "any written, printed, or graphic matter affixed to any consumer commodity or affixed to or appearing upon a package containing any consumer commodity."[121]

The manufacturers and distributors of consumer products covered by the act[122] are subject to two modes of regulation—mandatory controls directly imposed by the act and discretionary controls which may be imposed by regulations promulgated by the FTC or the FDA. The mandatory controls apply to all consumer commodities but relate only to labeling regulation. Generally, section 4[123] *requires* that all consumer commodities bear a label specifying the identity of the product; the name and place of business of the manufacturer, packer or distributor; the net quantity of contents in terms of weight, measure or numerical count depending upon the type of product concerned;[124] and the net quantity per serving if the number of servings is represented on the package label.[125] The last provision of section 4 prohibits the qualification of the separate net quantity statement by any modifying words or phrases. Supplemental statements of the net quantity of contents set apart from the separate net quantity statement re-

119 Fair Packaging and Labeling Act § 10(b), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1459(b) (Supp. Feb. 1967).

120 Fair Packaging and Labeling Act §§ 10(b)(1), (2), 80 Stat. 1301 (1966), 15 U.S.C.A. §§ 1458(b)(1), (2) (Supp. Feb. 1967). Also excluded are containers for certain fruits and vegetables which are regulated by other federal laws. See 80 Stat. 1301 (1966), 15 U.S.C.A. § 1458(b)(3) (Supp. Feb. 1967).

121 Fair Packaging and Labeling Act § 10(c), 80 Stat. 1301 (1966), 15 U.S.C.A. § 1458(c) (Supp. Feb. 1967).

122 See notes 100-21 *supra* and accompanying text.

123 Fair Packaging and Labeling Act § 10, 80 Stat. 1297 (1966), 15 U.S.C.A. § 1453 (Supp. Feb. 1967).

124 Exceptions are made for commodities having a weight less than four pounds or a measure less than one gallon. These products must state their weight or measure in ounces *and* pounds and fractions of a pound, or ounces *and* units and fractions of the largest whole unit, whether pints, quarts or gallons. Exceptions are also made for random packages (a package which is one of a lot, shipment or delivery of packages of the same consumer commodity with varying weight—packages with no fixed weight pattern), which may be expressed in pounds and decimal fractions of a pound carried out to no more than two decimal places. See Fair Packaging and Labeling Act §§ 4(a)(3)(A)(i), (ii), 80 Stat. 1297 (1966), 15 U.S.C.A. §§ 1453(3)(A)(i), (ii) (Supp. Feb. 1967).

125 See Fair Packaging and Labeling Act § 4, 80 Stat. 1297 (1966), 15 U.S.C.A. § 1453 (Supp. Feb. 1967).

quired by the Act may be modified by non-descriptive words so long as the words do not tend to exaggerate the amount of the commodity contained in the package.[126] For example, if a package has a separate net quantity statement as required by the Act, such as "10 oz. net weight," the package could also contain a supplemental statement to the effect that the package contains "10 oz. of fast acting detergent." However, the package could not carry a statement that it contains "10 *jumbo* oz. of fast acting detergent."[127]

In addition to the controls imposed by the act, the FTC and FDA are given the authority to promulgate additional regulations affecting other aspects of packaging and labeling of consumer commodities if they deem additional regulations necessary to prevent consumer deception or to facilitate value comparisons between consumer commodities.[128] These regulations are to be promulgated on a product-by-product basis rather than on an industry-wide basis.[129]

The scope of the discretionary regulatory controls encompass four aspects of packaging and labeling.[130] (1) The agencies may establish and define standards for characterization or description of package sizes. The use of "jumbo" or "giant" sized packages may be found to be so confusing that the consumer is unable to make an accurate value comparison—a "jumbo" box of Brand A may be larger or smaller than a "jumbo" box of Brand B. If value comparisons are hindered by this use of package size descriptions, the agencies may promulgate regulations requiring that with respect to the product concerned, a "jumbo" sized container must be of a standardized size.[131] (2) The agencies have the authority to promulgate regulations affect-

126 Fair Packaging and Labeling Act § 4(b), 80 Stat. 1298 (1966), 15 U.S.C.A. § 1453(6) (Supp. Feb. 1967).

127 S. REP. NO. 1186, *supra* note 82, at 4074.

128 Fair Packaging and Labeling Act § 5(c), 80 Stat. 1298 (1966), 15 U.S.C.A. § 1454(c) (Supp. Feb. 1967).

It is interesting to note that the Senate report accompanying the bill which ultimately became the Fair Packaging and Labeling Act discussed at § 5(g), which would have required the FTC and FDA to consider the probable adverse effects of any discretionary regulations before promulgating such regulations. Factors to be considered included the cost of packaging the products affected, the availability of any product in a reasonable range of package sizes to accommodate consumer convenience, the weights and measures customarily used in the packaging of the affected products, and competition between containers made of different types of packaging material. This section was eliminated completely from the act as finally approved. *Compare* S. REP. No. 1186, *supra* note 82, at 4076, with Fair Packaging and Labeling Act § 5, 80 Stat. 1298 (1966), 15 U.S.C.A. § 1454 (Supp. Feb. 1967).

129 See Fair Packaging and Labeling Act § 5(c), 80 Stat. 1298 (1966), 15 U.S.C.A. § 1454(c) (Supp. Feb. 1967).

130 Fair Packaging and Labeling Act § 5(c), 80 Stat. 1298 (1966), 15 U.S.C.A. § 1454(c) (Supp. Feb. 1967).

131 One author has inquired whether the FTC and FDA will be as generous in this regulation requirement as the Department of Agriculture which has passed a regulation

ing use of the "cents off" or "economy size" claims on packages or labels. Specifically, the regulations may apply to the practice of representing the retail price of a commodity to be lower than the ordinary retail price or that a price advantage is gained because of the size of a package. It should be reiterated that the discretionary controls are not to be adopted unless necessary to prevent deception or to facilitate value comparisons; occasional price reductions for legitimate promotional purposes would not be affected. (3) Regulations may be promulgated regarding that the commodity package disclose the usual or common name of the commodity and, if the commodity contains more than one ingredient, the usual or common name of each ingredient. These regulations cannot apply to foods and may not require that any trade secret be disclosed. (4) The agencies may promulgate regulations to prevent the nonfunctional slack-fill of packages. A package is deemed to be nonfunctionally slack-filled if reasons other than protection of the contents or requirements of the packaging machinery keep the package from being substantially filled to capacity.

This final area of discretionary regulation appears to prevent the greatest problems for the regulatory agencies.[132] The allowance for slack-filling to protect the package contents should allow "cushion ends" in packages to prevent breakage of fragile commodities and permit individual unit wrappings of package contents for the preservation of freshness. Moreover, the inherent limitations of packaging machine technology will result in some permissive slack-filling. But if two manufacturers of a like product package goods by different processes, it is possible that the "requirements" of the machinery may be variant to the extent that one manufacturer's products are packaged with little or no slack-fill, while the products of the other manufacturer are packaged in slack-filled containers. Although the act indicates that the requirements of the machinery of each manufacturer will be the determining criterion, the act is subject to an interpretation that the "requirements" of the machinery of the manufacturer turning out slack-filled packages exceed permissive limits and are not "requirements" at all.

clarifying green olive sizes as Subpetite, Midget, Small, Medium, Large, Extra Large, Mammoth, Giant, Jumbo, Colossal and Super Colossal. 31 Fed. Reg. 14250 (1966); Kennedy, *Now that the Fair Packaging and Labeling Act is Law*, 21 FOOD DRUG COSM. L.J. 632, 642 (1966).

Somewhat in answer to this query is Fair Packaging and Labeling Act §§ 5(d) and (e), 80 Stat. 1299 (1966), 15 U.S.C.A. §§ 1454(d), (e) (Supp. Feb. 1967). These subsections direct that the Secretary of Commerce request manufacturers, packers or distributors of a consumer commodity to develop voluntary package size standards if he finds an "undue proliferation" of the weights, measures or quantities in which a commodity is sold at retail, and this "undue proliferation" impairs the ability of the consumer to make value comparison. One year after this request, if he determines that a voluntary standard will not be issued or that an issued standard has not been observed, the Secretary can recommend to Congress that regulations requiring standardized package sizes be enacted.

132 See Kennedy, *supra* note 131, at 642-43.

Surely the regulations could not be avoided by industry-wide use of machinery which necessarily produces slack-filled packages. Could it then be avoided by a manufacturer who uses a type of packaging machinery which turns out slack-filled containers when the rest of the industry employs a different type of machinery resulting in no slack-fill? Another question is whether the statutory definition of slack-fill covers settling, moisture absorption and hand packaging requirements.[133] The answer is probably in the negative. For example, slack-filled containers caused by settling are usually found in such foods as cereals or crackers. To package these products to prevent settling would probably result in crushing the product. Thus this type of slack-fill is outside the scope of the statute.

The enforcement provision of the Fair Packaging and Labeling Act is contained in section 7[134] and provides that any violation of the act's provisions or any regulation passed pursuant to the act is a violation of the Federal Food, Drug and Cosmetic Act[135] if the product is a food, durg or cosmetic, and a violation of section 5 of the Federal Trade Commission Act[136] if the good is any other consumer commodity.

The discretionary regulatory scheme and enforcement provisions of the Fair Packaging and Labeling Act come closer to eliminating the barrier between effective consumer protection from deceptive packaging and labeling practices and the activities of the Federal Trade Commission than any prior statute or court decision. As mentioned above[137] one of the greatest hindrances to the effectiveness of the Commission's protection of the consumer has been the requirement that the Commission prove that the packaging or labeling practice concerned is deceptive under section 5 of the Federal Trade Commission Act. The present act empowers the Commission to promulgate regulations designed to *prevent* deception and facilitate consumer value comparisons of products, the violation of such regulations being deemed a violation of section 5. This approach has two advantages over the prior arrangement. First, the regulations are not only limited to preventing deception, but may also apply to those practices which hinder the consumer's value comparisons. Second, it would seem that the approach of the act is tantamount to a shift in what has been termed the burden of producing evidence.[138] If the regulations promulgated by the FTC are sufficiently detailed, a manufacturer who violated the regulations would

133 *Id.* at 643.

134 Fair Packaging and Labeling Act § 7, 80 Stat. 1300 (1966), 15 U.S.C.A. § 1456 (Supp. Feb. 1967).

135 Federal Food, Drug and Cosmetic Act §§ 301-02, 304-07, as amended, 21 U.S.C. §§ 331-32, 334-37 (1964). See the general discussion of these provisions, note 64 *supra.*

136 Federal Trade Commission Act § 5, as amended, 15 U.S.C. § 45 (1964). See discussion at notes 34-86 *supra* and accompanying text.

137 Text accompanying notes 80-82 *supra.*

138 JAMES, CIVIL PROCEDURE § 7.7 (1965).

have the burden of showing that his activities are outside the scope and application of the relevant regulations. The Commission should be able to show with relative ease the violation of one of its regulations; upon the manufacturer will fall the duty of showing that his activities do not violate the regulation or that the regulation is not applicable to him.

On its face the Fair Packaging and Labeling Act suggests two weak areas in its attempt to prevent deception of consumers through the activities of the Federal Trade Commission. First, the Commission's authority is exercised through discretionary regulations rather than by mandatory controls set forth in the act itself. Second, a great range of consumer products which would otherwise be subject to FTC regulations are exempted from the act's coverage.

The first seemingly weak area does not upon close examination appear to be weak at all, but rather a strong area of the act. The fact that mandatory controls are present in the act reflects a determination by Congress that the activities controlled have a tendency to deceive the consumer or hinder his making value comparisons between like products. The FTC is given authority by the act to promulgate regulations affecting certain practices if it can make the same determination. In reality the Commission is better able to make this determination than is the Congress. Its experience in consumer deception through packaging and labeling practices should enable it to better determine which practices are likely to deceive and what type of regulation would be most effective in eliminating such practices.

It is the second area, that of exempt products, which is truly weak in that it prevents the FTC from effectively protecting the consumer from deceptive packaging and labeling practices and aiding him in making value comparisons. Deception by packaging and labeling is not necessarily limited to the supermarket, yet it is to "supermarket" products that the act is directed and limited. By the act the consumer is protected and aided in the grocery store, but not necessarily in the hardware, appliance or department store. Only when the products covered by the Fair Packaging and Labeling Act are increased far beyond the present definition of "consumer commodity" can the consumer be certain that the product he buys is substantially the same as the product described or represented to him.

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