

Allies In A Common Cause
By Thomas B. Leary*

Thank you very much; it is a great pleasure to be here. I was told that I can talk about anything I like, but I assume you probably want to know what we are doing and why we are doing it. This morning I thought I would let my colleague Michelle Rusk go into detail about what we are doing and I will try to tell you why I think we are doing it. I will also give you my personal views on some other things that may be of interest.

The big news for you is that the Federal Trade Commission has embarked on a major program that deals with health issues generally and diet supplement issues specifically. As you know, the Food and Drug Administration announced a new policy in this area last December, which dovetails very closely with what we are doing. They can speak for themselves. I would like to tackle the topic from a slightly different perspective – starting with a five-minute history of the last forty years of advertising regulation.

Some History

* Commissioner, Federal Trade Commission. This paper is based on the transcript of informal remarks delivered on January 16, 2003, at a Conference on Dietary Supplements of the Food and Drug Law Institute. As always, the opinions expressed are individual and not necessarily shared by any other Commissioner.

First, views on advertising at this government agency have evolved dramatically in the last forty years. Some of you may remember a book called *The Affluent Society*, published by John Galbraith in 1958. It was a widely-read work of pop sociology, masquerading as economics, which I suspect was required reading for a lot of you when you were in college. One of the basic themes of that book, and subsequent polemics by the same author, was that advertising is evil because it stimulates consumers to want all kinds of things that are bad for them and bad for society. That particularly naive view of advertising informed the FTC well into the 1970s. You may remember the statements that Mike Pertschuk made when he chaired the FTC in the late 1970s, claiming that it was appropriate for the FTC to address even truthful advertising that stimulated consumer demands for things that were undesirable.¹

For a whole variety of reasons, that particular view of advertising changed dramatically. I think it is fair to say there is a uniform consensus in the Commission today that, overall, advertising is pro-consumer. This is not a partisan issue. I will quote a statement that former Chairman Bob Pitofsky made in an antitrust opinion that is pertinent here. “We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominately to foster and sustain competition, facilitating consumers’ efforts to identify the

¹ E.g.; Michael Pertschuk, Remarks before the Annual Meeting of the Section on Antitrust and Economic Regulation, Association of American Law Schools, Atlanta, GA (Dec. 27, 1977).

product or provider of their choice and lowering entry barriers for new competitors.’² That was Bob Pitofsky on advertising and I think it is fair to say the current Chairman, Tim Muris, would echo those sentiments, and then some.

The reason that we are so concerned with deception and, in some cases, unfairness in advertising is precisely because we think advertising is generally useful and pro-consumer I will get into that in a little more detail later, but you should understand that it makes sense for people who believe advertising is important to prosecute vigorously when the advertising is false, deceptive, or unfair.

A second noteworthy development is the evolution of opinion in the Supreme Court on so-called commercial speech. Those of you who follow First Amendment law in this area know the Supreme Court is gradually extending greater protection to commercial speech.³ I understand that the Court is going to hear an interesting case involving advertising by Nike in California, which was a mixture of commercial speech and political speech.⁴ The issues are not precisely similar to

² In re California Dental Association, 121 F.T.C. 284, 296 (1996); aff’d 128 F.3d 720 (9th Cir. 1997); aff’d in part, rev’d in part, 526 U.S. 756 (1999); vacated, 221 F.3d 942 (9th Cir. 2000).

³ E.g.; 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)

⁴ Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002), cert. granted, (U.S. Jan.10, 2003)(No. 02-575).

what we are talking about here, but the Court may – at least, in passing – provide additional views on the importance of commercial speech.

A final development of critical importance was the passage of the Dietary Supplement and Health Education Act of 1994,⁵ which made it much easier to promote diet supplement products. You can now advertise certain qualities of those products without prior FDA approval. As you all know, there has been a steady growth in sales of diet supplement products since that time. The last numbers I saw showed sales of \$17.7 billion in 2001.

How do we view these issues today in the Federal Trade Commission? What are some of the factors we need to take into consideration in setting our priorities? The first thing we have to recognize is that the FTC can not cover the waterfront. It is a relatively a small agency. There are about a thousand people working at the FTC, roughly divided between our competition mission and consumer protection mission, which includes advertising. I think there are approximately 550 people on the consumer protection side. Advertising of health products and diet supplement products is a major priority, but it is still involves only a small number of the 550 people. Our prosecutions are necessarily exemplary. We have to bring some high profile cases and publicize them widely, in the hope that they will deter people who are tempted to behave in the same way and educate consumers about the most common scams. We also have to rely a great deal on the efforts of the private sector. That is why I think it is so important to talk to people

⁵ 21 U.S.C. Section 321 et seq. (1994)

like you and to enlist your help. It is wonderful if you feel public-spirited or patriotic about all this, but what I want to do this morning is also appeal to your naked self-interest.

An Appeal to Self Interest

Those of you who have studied economics know that there is a phenomenon called an “externality.” The term refers to consequences of a transaction that have an impact on people who are outside of the transaction. The consequences can be positive or negative.

Let me give an example. I used to work in the automobile industry and there are positive and negative externalities associated with motor transportation. The most noticeable negative externalities are environmental damage and accidents. The most noticeable positive externalities are lower costs throughout the economy because motor transportation makes it so much cheaper to distribute goods and for people to search out and buy them.

There are externalities associated with deceptive advertising that you may not have considered. The harmful effect on competitors who are disadvantaged is obvious, but there is also an adverse impact on everybody who sells products to consumers. The reason is that deceptive advertising contributes to a pervasive atmosphere of cynicism. We all have a certain wariness when we consider product offerings because we have been disappointed so many times in the past. The cynicism fostered by misleading advertising imposes costs on every business in the United States, and indirectly imposes costs on every consumer in the United States. That is

why the battle against false advertising is important not only for us in government but also important for all of you who represent companies that want to advertise honestly. It is not just our fight, it is your fight too. We are appealing to industry members to take a hard look at this, and see what there is that we can do together to deal with this problem, which imposes a tax on the economy as a whole.

Recently we made a particular appeal to the media. A number of you here probably have media clients. You know that responsible media read their ads; they already screen them to catch appeals that are patently offensive, obscene, or abusive. We are asking them to engage in a voluntary effort to screen out the most obviously false health and weight loss claims before they are published.

The emphasis here is on the term “obviously false.” As Tim Muris explained with reference to weight loss claims: “We are not asking media outlets to review clinical studies or other substantiation for weight loss ads . . . This is not rocket science.”⁶ At the FTC we know that every media outlet cannot support the detailed screening of ads that the major networks undertake; we are talking about the worst examples. There are cases involving claims that you can lose weight by wearing earrings! Or, shoe insoles! Pills that tell consumers they can eat whatever they want and still lose weight! We have had cases involving supplements that

⁶ Timothy J. Muris, “Do the Right Thing” (Apologies to Spike Lee), Address to the Cable Television Advertising Bureau, February 11, 2003, <<http://www.ftc.gov/speeches/muris/030211rightthing.htm>>

supposedly gobble up fat in your body when you are asleep because the fat is “defenseless” – complete with images of little pacmen eating up little fat cells! We are asking the responsible media to consider whether they can do something about this nonsense on a voluntary basis.

Essentially, we are trying to appeal to the self-interest of the media, just as we appeal to the self-interest of advertisers, because the credibility of the media is also at stake. It is astonishing that these ridiculous claims are carried in reputable media outlets that seek credibility for the news stories they publish. We are not talking about publications sold in supermarket checkout counters now; we are talking about mainstream media. These ads not only affect the overall impact of the editorial content, but also directly diminish the economic value of the legitimate advertising that is carried. What we are trying to do is persuade the media that your space or air time is more valuable if you are a little bit more selective about the ads you will accept.

We recognize the media has a special status; we respect the values embodied in the First Amendment. We do not want to encourage censorship of advertising purely for economic reasons any more than we would encourage censorship of the news for economic reasons. We do not claim to have all the answers. What we are doing is opening a dialogue. We do not claim that this is easy, but we think it is important.

Anticipating Objections

There may be objections. I can anticipate some questions that people may ask. Some may say: “Why the big fuss? Overall dietary supplement sales of some \$17 billion account for roughly two tenths of one percent of the gross national product.” Well, we recognize that the dishonestly-sold segment of this sector represents a modest slice of the American economy. These may not be the most significant frauds perpetrated in terms of dollar volume. On the other hand, the advertising is particularly visible right now. The alarming increase in the number of people who are overweight or obese, for example, is a problem that is hotly publicized and hotly discussed at the moment.

If fraudulent claims are made about dietary supplements in this environment, it creates credibility problems for everyone, including the Federal Trade Commission. I am not primarily worried about appropriations for the FTC, but I am concerned about the integrity of our mission. A blizzard of false claims in an area that is a focal point of public concern undercuts the credibility of our ongoing efforts to promote honest advertising generally. We do focus on high visibility areas for that reason. If lawn care became a big public issue five years from now, we might take a very close look at advertising for weed-whackers. There would be nothing wrong with that because public perception of honesty in advertising depends in some measure on a perception that we are active.

Others may object that there is some tension, if not outright conflict, between our statements to the media that some of these claims are so patently ridiculous they should not be running them, and the fact that the FTC does not exist to protect the most naive and the most credulous people in society. We try to protect the so-called “reasonable consumer.” The apparent tension is not real because there is also embedded in our jurisprudence the concept that advertisers take their consumers as they seek them and find them. If advertising is specifically directed at a vulnerable group – perhaps a group that is unusually credulous or desperate – and if advertising is specifically crafted to address the mind-set of that group, then it is no defense for these advertisers to say that their own advertising is too ridiculous to be believed by reasonable people. These advertisers have anticipated the doubts or vulnerabilities of their target audience and have specifically tried to address them. They may claim that their products are a “miracle” breakthrough or that “we know everything you tried has failed, but this is different.” When people make claims like that, I do not think it is unreasonable for us to take them at their word.

Conclusion

I want to leave with you with one final thought. It has to do with politics and your self interest. Today we are living in a fairly deregulatory environment. In fact, notwithstanding some notable exceptions, we essentially have been living in that environment since the latter stages of the Carter Administration. I personally believe this environment is essential for prosperity in this country and around the world. But, political fashions can change very rapidly, and support for deregulation can change overnight if there are prominent scandals. Consider, for example, the

kind of regulation that is being considered today for the securities business or the accounting profession. People are talking about initiatives that would have been unthinkable five years ago, and that is because of some highly publicized scandals and the perceived failings of a relatively relaxed regulatory environment. If your clients have a stake in the partial deregulation of food supplements that was put in place in 1994, you also have a very high stake in what we are doing. A sense of political reality is an enormously important thing for any company that faces the threat of government regulations, and that is just about every company in the United States. You have to pay attention to these things because political facts are market facts. Political threats are like market threats because they can have an enormous impact on your economic well being.

I repeat what I said up front that, to a large extent, we in the Commission cannot address this issue alone. There is a blizzard of this stuff, and we are never going to stop it altogether. But, we need to do the best we can and be perceived as doing the best we can – and so do you. One reason I am so pleased to talk to an audience like this one is that I look upon you as allies in a common cause.