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WARNER-LAMBERT COMPANY, Petitioner, v. FEDERAL TRADE COMMISSION, Respondent

No. 76-1138

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

183 U.S. App. D.C. 230; **562 F.2d 749**;

1977 U.S. App. LEXIS 11599; 1977-2 Trade Cas. (CCH) P61,646; 46 A.L.R. Fed. 873; 2 Media L. Rep. 2303

September 14, 1977, Filed

SUBSEQUENT HISTORY: [**1]

562 F.2d 749 at 768.

PRIOR HISTORY:

Original Opinion of August 2, 1977, Reported at: 562 F.2d 749

JUDGES:

Bazelon, Chief Judge, and Wright and Robb, Circuit Judges. Opinion for the court filed by Circuit Judge Wright. Dissenting opinion filed by Circuit Judge Robb.

OPINION BY: WRIGHT

OPINION: [*768] Supplemental Opinion on Petition for Rehearing

WRIGHT, Circuit Judge:

In its petition for rehearing petitioner has urged this court to reconsider its earlier decision affirming, with some modifications, the order of the Federal Trade Commission requiring Warner-Lambert Company to cease and desist from deceptively advertising its product Listerine as a cure for colds or sore throat and affirmatively to correct in its future advertisements the impression created by its prior deceptive advertising. The primary argument raised in the petition for rehearing is that the Commission is barred by the First Amendment from imposing a corrective advertising order in this case. Having considered this claim carefully, it is our conclusion that it must be rejected. Because of the importance of the issues raised, however, we think it desirable [**2] to set forth in some detail our reasons for so concluding.

I

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976), the Supreme Court rejected prior precedents holding that commercial speech is "wholly outside the protection of the First Amendment." *Id.*

at 761. In reaching this conclusion the Court emphasized the interest of consumers in the free flow of truthful information necessary for formulation of intelligent opinions and proper resource allocation. *Id.* at 764-765. Consistent with this concern, [*769] the Court was careful to distinguish truthful commercial speech from that which is false, misleading, or deceptive: "Untruthful speech, commercial or otherwise, has never been protected for its own sake. * * * Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." *Id.* at 771 (citations and footnote omitted). Furthermore, the Court went on to suggest that, because of the "commonsense differences" [**3] between

commercial speech and other varieties, even commercial speech subject to First Amendment protections may nonetheless enjoy a "different degree of protection" than that normally accorded under the First Amendment. *Id.* at 771-772 n.24.

Applying these principles to the case at bar, there can be no question of the legitimacy of the FTC's role in regulating and preventing false and deceptive advertising. In this case it has been found that Warner-Lambert has, over a long period of time, worked a substantial deception upon the public; it has advertised Listerine as a cure for colds, and consumers have purchased its product with that in mind. That the Commission has authority to prohibit Warner-Lambert from continuing to make such false and deceptive claims in its advertisements is not disputed, for it is only truthful claims which are protected under the First Amendment. n1 Here, however, the FTC has determined on substantial evidence that the deception of the public occasioned by Warner-Lambert's past advertisements will not be halted by merely requiring Warner-Lambert to cease making such claims in the future. To be sure, current and future advertising of Listerine, [**4] when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed -- and purchased -- as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly. n2 It will induce people to continue to buy Listerine thinking it will cure colds. Thus the Commission found on substantial evidence that the corrective order was necessary to "dissipate the effects of respondent's deceptive representations." FTC op. at 41, JA 907.

----- Footnotes -----

n1 Cease and desist orders aimed at false or deceptive speech may, in theory, have a chilling effect on truthful speech, and be subject to First Amendment scrutiny on that account. In practice, however, this should rarely if ever be necessary. *See slip op.* at pp. 4-5 *infra*.

n2 In this connection it is worth noting that Warner-Lambert currently advertises Listerine's ability to kill germs that cause bad breath. While we have no reason to doubt the truth of this claim, the emphasis on Listerine's germ-killing ability does seem to tie in closely with prior false advertising as to its capacity to alleviate health problems. *See* FTC op. at 38 n.28, JA 904.

----- End Footnotes----- [**5]

Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of a continuing deception of the public. As the Supreme Court recognized in *Virginia State Board*, in some cases it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." 425 U.S. at 772 n.24. We must conclude -- as did the Commission -- that this is such a case.

II

Admittedly, corrective advertising orders such as that imposed here may give [**770] rise to concern as to their chilling effect on protected truthful speech. The potential advertiser must consider not only the possibility that he will be forced, at some future date, to abandon his advertising campaign, but also that he may be required to include specific disclaimers in future advertisements. But this danger seems more theoretical than real. As the Supreme [**6] Court pointed out in *Virginia State Board*, not only is the truth of commercial speech "more easily verifiable by its disseminator" than other forms of speech, but "since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." 425 U.S.

at 771-772 n.24.

Moreover, whatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced. *See* panel majority op. slip op. at 22-23 n.60; Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*,

90 Harv. L. Rev. 661, 692-693 & nn.129-130 (1976) (emphasizing the relatively small number [**7] of complaints issued by the FTC each year and the lengthy time period between complaints and orders); Note, "*Corrective Advertising*" *Orders of the Federal Trade Commission*, 85 Harv. L. Rev. 477, 482-483 (1973).

III

A more serious First Amendment problem which may be raised by corrective advertising orders involves the burden thereby imposed upon the constitutional right recognized in *Virginia State Board* to advertise truthfully: the party subject to a corrective advertising order may be precluded from exercising his right to advertise unless he also includes specified statements undermining his prior deceptive claims. On the facts of this case, no burden is imposed upon truthful, protected advertising since, as the Commission makes clear, Listerine's current advertising, if not accompanied by a corrective message, would itself continue to mislead the public. Even if, in the circumstances of this case, the current and future advertising of Listerine is considered constitutionally protected speech, however, we think the corrective advertising order in this case remains appropriate.

The Supreme Court, in invalidating the state ban on advertising of prescription [**8] drug prices in *Virginia State Board*,

considered the scope of the restriction on First Amendment rights, the governmental purposes and public interests affected by the ban, and the availability of alternative means to accomplish the legitimate governmental objectives. *See* 425 U.S. at 764-770. *See also* *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810, 45 U.S.L.W. 4895, 4899-4903 (1977). As we have indicated, it is not at all clear, even after *Virginia State Board*, that commercial speech protected by the First Amendment is, apart from "commonsense differences," entitled to the same degree of protection as other forms. n3 Indeed, the opposite conclusion seems the more appropriate one. n4 But in any event, it does seem clear that the corrective advertising order in this case is the least restrictive means of achieving a [**71] substantial and important governmental objective and that, on balance, it must be upheld. n5 *Cf. Buckley v. Valeo*, 424 U.S. 1, 25-29, 65-68, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976); [**9] *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The governmental interest here, of course, is in protecting citizens against deception -- with its attendant waste and misallocation by consumers to the benefit of the wrongdoers -- by ensuring that advertising conveys truthful information to the public. As we noted earlier, it is this very interest which was invoked by the *Virginia State Board* Court as support for its conclusion that commercial speech is protected by the First Amendment. *See* 425 U.S. at 764-765. *See also* *Bates v. State Bar of Arizona*, *supra*, U.S. at , 45 U.S. L. Week at 4899.

----- Footnotes -----

n3 *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779-781, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) (Stewart, J., concurring); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69 n.32, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. Chi. L. Rev. 205, 225 n.121 (1976). [**10]

n4 *Cf. Banzhaf v. FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1101-1103 (D.C. Cir. 1968), *cert. denied, sub nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 842, 24 L. Ed. 2d 93, 90 S. Ct. 50 (1969).

n5 We do not here consider whether the Commission, under principles of administrative exhaustion, should be required initially to decide this constitutional issue in light of the decision in *Virginia State Board*. The extent to which administrative exhaustion of constitutional claims is required presents difficult and unsettled questions of law, and since this point has been neither raised nor briefed by petitioner, we decline to address it in this decision. See *Mathews v. Eldridge*, 424 U.S. 319, 327-330, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764-767, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 20.00 to 20.00-3 (1977 Supp.); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 Harv. L. Rev. 1682 (1977).

----- End Footnotes----- [**11]

And the facts of this case make it eminently clear that this interest will not be substantially served by the less restrictive remedy -- a cease and desist order. Whatever one may conclude as to the effect of Warner-Lambert's long history of deception on the protected status of its current advertising, we see no basis -- and none has been offered -- for questioning the Commission's conclusion that, absent a corrective remedy, consumers will continue to purchase Listerine as a cure for colds. See FTC op. at 38, JA 904. Indeed, at least one advocate of corrective advertising has urged that such orders not be confined to obvious cases such as *Warner-Lambert* where the proof presented to the Commission of the success of a deceptive campaign is so striking. Noting the long history of a deceptive claim uniquely asserted for Listerine, the absence of consumer confusion as to which mouthwash was effective against colds, and the persuasive evidence that this claim was believed by consumers after the false advertising had ceased, Professor Pitofsky has argued that "comparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases. * * [**12] * * If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*." See Pitofsky, *supra*, 90 Harv. L. Rev. at 698.

Finally, the corrective advertising order in this case, by tying the quantity of correction required to the investment in deception, is tailored to serve the legitimate governmental interest in correcting public misimpressions as to the value of Listerine -- and no more. n6 Taking all these factors into account, we think it beyond doubt that the FTC order is a valid one.

----- Footnotes -----

n6 As the Commission itself noted, it may well be impossible to "determine in advance with computer-like precision the minimum amount of corrective advertising which will dispel the otherwise continuing beliefs at issue." FTC op. at 39, JA 905. Even so, considering the 50 years of deceptive Listerine advertising, continuing inflation with attendant increased advertising costs leaves no doubt that the Commission is requiring a significantly smaller quantity of corrective advertising than prior deceptive advertising. As a result, any imprecision in the order's scope would seem likely to inure to Warner-Lambert's benefit.

----- End Footnotes----- [**13]

Petition for rehearing denied.

DISSENT BY: ROBB

DISSENT: ROBB, Circuit Judge, dissenting:

I adhere to the view expressed in my dissent that the corrective advertising order imposed on Warner-Lambert goes beyond the statutory authority of the Federal Trade Commission. Accordingly, so far as that order is concerned I find it unnecessary to reach the constitutional question discussed [**772] by the majority. I would set aside the corrective

advertising portion of the Commission's order.