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William D. Fearnow

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*Encyclopaedia Britannica, Inc. v. FTC**

I. Introduction

Deceptive sales practices are unlawful under section 5 of the Federal Trade Commission Act.[1] Parties found guilty of deceptive practices are subject to restraining and remedial orders issued by the Federal Trade Commission (FTC). The FTC found Encyclopaedia Britannica, Inc. guilty of deceptive sales practices and issued restraining and remedial orders requiring that specific disclosures be made by salesmen attempting to obtain admission into customers' homes. The order further required that specific disclosures be placed upon all lead-getting material. Although it did not contest the finding of guilt, Britannica appealed to the United States Court of Appeals for the Seventh Circuit for a review of the remedial order.[2] In *Encyclopaedia Britannica, Inc. v. FTC*[3] the Seventh Circuit allowed the remedial order to stand. In so doing the court (1) undermined the requirement that the FTC select the least restrictive remedy, (2) infringed upon Britannica's constitutionally protected speech, and (3) dispensed with the requirement that the FTC adequately articulate its reasons for a chosen remedy.

II. Statement of the Facts

On December 11, 1972, the Federal Trade Commission issued a complaint against Encyclopaedia Britannica, Inc. and its subsidiary, Britannica Home Library Services, Inc.,[4] charging numerous deceptive practices[5] in violation of section 5 of the FTCA.[6] On December 16, 1974, after trial hearings, the administrative law judge entered extensive findings, conclusions and

* 605 F.2d 964 (7th Cir. 1979).

1 15 U.S.C. § 45(a)(1976).

2 15 U.S.C. § 45(c)(1976) provides, in pertinent part, that: "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari."

3 605 F.2d 964 (7th Cir. 1979).

4 Encyclopaedia Britannica, Inc. is a New York corporation with its principal place of business in Chicago. As is widely known, Britannica publishes, sells, and distributes encyclopedias, textbooks, general reference works, and other educational and literary products throughout the world. The primary sales method is direct selling at the homes of customers. *Id.* at 966.

5 "[The complaint] charged deceptive practices in recruitment of sales representatives, in sales presentations to members of the public, in obtaining leads to persons who will allow Britannica sales representatives into their homes, in seeking subscriptions to book promotions, and in collection procedures." *Id.*

6 15 U.S.C. § 45(a)(1). At the time this proceeding was instituted, 15 U.S.C. § 45(a)(1) provided, in pertinent part, that: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." As noted by the *Britannica* court, this section, since the institution of the proceedings against Britannica, has been amended in ways not relevant to Britannica's appeal. 605 F.2d at 966 n.1. In 1975, 15 U.S.C. § 45(a)(1) was amended by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, which substituted "in or affecting commerce" for "in commerce" wherever appearing therein.

a remedial order. The administrative law judge found that Britannica's salesmen had utilized numerous devices to disguise the purpose of their initial contact with consumers. These deceptive devices were approved by Britannica's management and salesmen were trained by Britannica to use such devices effectively.[7]

The remedial order required Britannica salesmen, upon initial contact with the consumer, to present a card to the consumer indicating the salesman's purpose. The order dictated the precise size of the card, the size of the type and the exact words to be used.[8]

The administrative law judge also found Britannica's lead-getting activities deceptive. Magazine, direct-mail advertisements and contest entry cards used solely to obtain names of prospects for salesman contact inadequately disclosed the fact that respondents would be contacted by Britannica's salesmen. The administrative law judge found that such advertisements affirmatively misled the public into thinking all materials and information would come by mail while the sole purpose of the activities was to obtain leads to prospects.[9]

The order required the reply card to disclose clearly and conspicuously that anyone replying might be contacted by a salesman. Like the order requiring a card to be presented upon initial contact, the order requiring warnings on lead-getting material dictated specifics regarding the warning's placement in the advertisement as well as the exact wording and size of the print to be used.[10]

On March 9, 1976, the FTC issued an order affirming the administrative law judge's findings. Britannica petitioned the Seventh Circuit for a review of the order.[11] Britannica did not challenge the sufficiency of the evidence to support the findings of violation, nor did it challenge the propriety of the remedial order. Rather, Britannica focused its attack on those provisions of the order requiring very specific disclosures on initial contact with prospective customers and specific disclosures on lead-getting material. Britannica argued that (1) the disclosures ordered were not the least restrictive means of curing the deception, (2) the order constituted an infringement upon Britannica's constitutionally protected speech, and (3) the FTC failed to articulate adequate reasons for its

7 605 F.2d at 967. "One ploy used to gain entrance into prospects' homes [was] the Advertising Research Analysis questionnaire. This form questionnaire [was] designed to enable the salesman to disguise his role as a salesman and appear as a surveyor engaged in advertising research. [Britannica] fortifie[d] the deception created by the questionnaire with a form letter from its Director of Advertising—for use with those prospects who may question the survey role. These questionnaires [were] thrown away by salesmen without being analyzed for any purpose whatsoever." *Id.*

8 Britannica must not attempt door-to-door sales unless a card 3 inches by 5 inches in dimension, with all words in 10-point boldface type, with the following information, and none other, in the indicated order is presented to such person: "(1) the name of the corporation; (2) the name of the salesperson; (3) the term 'Encyclopedia Sales Representative' [or other applicable product]; (4) the terminology: 'The purpose of this representative's call is to solicit the sale of encyclopedias' [or other applicable product]. . . ." *Id.*

9 *Id.* at 968.

10 The order provided that all solicitation materials must "clearly and conspicuously disclose the following statement in 10-point boldface type: NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product]." The order likewise required that all return cards must contain the same warning "in immediate proximity to the space provided for signature." *Id.* at 969.

11 15 U.S.C. § 45(c) (1976) provides, in pertinent part, that: "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States. . . ."

chosen remedy.[12] After considering and rejecting each of Britannica's arguments, the court voted two to one, Judge Wood dissenting, to affirm the FTC's order.

III. Judicial Review of Remedial Orders

A. *The Legislative and Judicial Background*

The FTC has been given wide latitude in policing unfair and deceptive trade practices.[13] This is largely because of the nature and intent of the Federal Trade Commission Act.[14] The legislative history of the FTCA indicates that Congress intended the statute's definition of "unfair" and later "deceptive"[15] trade practices to be vague. "The term 'unfair' was used deliberately because of its vagueness."[16] The courts have recognized the generality of the FTCA[17] and have granted the FTC wide latitude in enforcing the statute.

The courts, however, have not given the FTC unrestricted discretion. Courts require the FTC to use the least restrictive alternative in formulating remedial orders. In *FTC v. Beneficial Finance Corp.*[18] the FTC ordered the defendant to refrain from using a heavily promoted and patented name for one of its loan campaigns. Advertisements had been made publicizing an "Instant Income Tax Refund" loan. The loan was in fact no different in its qualification requirements or interest rates than Beneficial's other consumer loans. The Third Circuit refused to enforce the order, asserting that careful contextual wording could clarify any possible misconception created by the copyrighted phrase. The court concluded that by failing to consider rewording of the advertisements and ordering total excision, the FTC had abused its "remedial discretion" by failing to use the least restrictive remedy available.[19] The decision was based on the requirement that the least restrictive remedy be used,[20] as well as the court's reluctance to regulate constitutionally protected speech.[21]

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12 605 F.2d at 970. Britannica also argued that the Commission abused its discretion in its method of enforcement and that Britannica did not have an opportunity to rebut information it believed the Commission considered in setting the remedy. The last two issues are not treated in this comment. The court discussed Britannica's fourth allegation in a manner that added little to their general discussion of the FTC's discretion. The fifth issue was tangential to the central holding and thus outside the scope of this comment.

13 Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946).

14 *See* Moog Indus., Inc., v. FTC, 355 U.S. 411 (1958) where the Supreme Court, taking into account what it saw as "the scope of administrative discretion that Congress has given the Federal Trade Commission," concluded that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress." *Id.* at 413.

15 As originally enacted, § 5 of the Federal Trade Commission Act (FTCA) of 1914, ch. 311, § 5, 38 Stat. 719, proscribed only "unfair" trade practices. The Wheeler-Lea Amendment to the FTCA, of 1938, ch. 49, § 3, 52 Stat. 111, provided for the inclusion of the term "deceptive" trade practices.

16 Note, *Recent Positions of the Federal Trade Commission,* 5 LOY. CHI. L.J. 537, 538 (1974).

17 *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965), where the Supreme Court reviewed the history of the FTCA and stated that "It is important to note the generality of these standards of illegality; the proscriptions of § 5 are flexible. . . ." *Id.* at 384-85.

18 542 F.2d 611, 619-20 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

19 *Id.* at 620.

20 *See* Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) and FTC v. Royal Milling Co., 288 U.S. 212 (1933) for development of the basic principle that remedial orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and the public.

21 *See* note 33 *infra.*

B. *The Seventh Circuit's Treatment of FTC Discretion in Remedial Orders*

The Seventh Circuit began by reasserting the principle that the FTC is an "expert body" deserving "wide latitude for judgement."[22] The court also admitted that FTC orders may be altered if they bear no reasonable relation to the unlawful practices in question, and that less restrictive remedies may be substituted by courts when such remedies would further the same interests as the ones proffered by the Commission.[23] Nevertheless, the court concluded that the requirements of the order were "reasonably related to the deceptive practices found."[24] The court went on to state that they did not "think Britannica seriously contends that required disclosure in some form is an improper remedy, and the choice the Commission made as to form and content of the disclosure could not be deemed an abuse of discretion."[25]

While it is true that Britannica did not contend that any form of remedy was improper,[26] it is equally true that Britannica did contend that the "form and content of the disclosures" constituted an abuse of the Commission's discretion. The court failed to comment, however, upon the form and content of the disclosures. Rather, the court simply concluded that the remedy chosen was "well within the range," citing no authority or otherwise defining "the range."[27] By refusing to consider expressly the truly unique facet of the order, particularly the requirement that salesmen present customers with oversize cards warning consumers that the salesman is about to attempt to sell encyclopaedias, the court has granted the FTC unwarranted discretion.

IV. Britannica's First Amendment Rights

A. *The Commercial Speech Doctrine*[28]

Commercial speech is "speech that does no more than propose a commercial transaction."[29] Originally the characterization of an expression as commercial speech deprived that expression of any first amendment protection. In more recent cases, however, first amendment protection has been extended to some, but not all commercial speech.[30] The Third Circuit has concluded that the remedy for a deceptive practice violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective.[31]

Constitutional protection of commercial speech is not, however, without limits. There is no constitutional right to promulgate and distribute false or

22 605 F.2d at 970.
23 *Id.*
24 *Id.* at 971.
25 *Id.*
26 *Id.* at 969.
27 *Id.*
28 *See generally* Note, *The Commercial Speech Doctrine and the First Amendment,* 12 TULSA L. J. 699-730 (1977).
29 National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 162 (7th Cir. 1977).
30 *See* note 33 *infra.*
31 542 F.2d at 619.

misleading advertisements.[32] Thus, regulation of false or misleading speech is permissible.[33]

The Supreme Court has recently taked a narrow view of commercial speech as a protected form when violations of the Sherman Antitrust Act[34] are involved. In *National Society of Professional Engineers v. United States,*[35] for example, the Supreme Court held that a professional society could be enjoined from expressing the opinion that job bidding was unethical. The Court noted that although the order might curtail the exercise of liberties that the defendant might otherwise enjoy, such restriction is the necessary and unavoidable consequence of the Sherman Act violation.[36] The Court concluded that in fashioning a remedy, the district court could, of course, consider the fact that its injunction would impinge upon rights that would otherwise be constitutionally protected, but those protections would not prevent it from remedying the antitrust violations.[37]

Commercial speech is to be restricted only to the extent necessary to protect the governmental interest.[38] The Seventh Circuit, however, has recently given the consumer's interest in obtaining truthful information a high priority. In *National Commission on Egg Nutrition v. FTC,*[39] in which the Seventh Circuit modified orders requiring positive disclosure to remedy misleading advertising, the court concluded that the consumer's interest in obtaining accurate information is served by insuring that the information is not false or deceptive and, in fact, coincides with the public interest served by regulation. "The scale," the court asserted "is tipped in favor of regulation."[40] Thus, there is some indication that the Seventh Circuit seems willing to resolve doubts as to the constitutionality of an attempt to regulate commercial speech in favor of the consumer's need for truthful information.

B. *The* Britannica *Court's Response*

The Seventh Circuit distinguished *Britannica* from three other cases involving conflicts between FTC orders and first amendment protection of commercial speech. The court distinguished *National Commission on Egg Nutrition*[41] by saying that the FTC's order to Britannica, unlike the one made to the National Commission on Egg Nutrition, did not require Britannica to argue the other side of an issue. *National Society of Professional Engineers*[42] was similarly dispensed

32 *See* Regina Corp. v. FTC, 322 F.2d 765, 770 (3d Cir. 1963).
33 *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).
34 15 U.S.C. §§ 1-7 (1976).
35 435 U.S. 679 (1978).
36 *Id.* at 697.
37 *Id.* at 697-98.
38 542 F.2d at 619-20.
39 *See* note 29 *supra.* The court found an order overbroad in that it went beyond requiring a party to correct misleading statements made about cholesterol and its relation to egg consumption. In effect, the order required the party to argue the other side of the debatable cholesterol issue.
40 570 F.2d at 162.
41 *See* note 29 *supra.*
42 *See* text accompanying note 35 *supra.*

with. Finally, *Beneficial*[43] was distinguished because the FTC's order to Britannica did not require Britannica to delete a copyrighted phrase.[44]

According to the *Britannica* court, the FTC order merely directed truthful disclosure of Britannica's purposes. Significantly, the court failed to address the truly unique fact of the Britannica case, *i.e.,* requiring a salesman to present a larger than business card sized warning card to a prospective customer. The court simply refused to pass on the constitutionality of virtually placing words in a salesman's mouth. The court then reasserted its belief that such an order was "the least restrictive alternative which [would] adequately further the legitimate governmental interest of the prevention of deception."[45] The court's failure to address the true nature of Britannica's objections to the order is additional evidence that the balance between commercial speech and regulation of sales practices has tipped toward regulation.[46]

V. The FTC's Duty to Articulate Reasons for Its Choice of Remedial Orders

A. *The Rationale*

The requirement that the FTC articulate its reasons for its chosen remedy is a consequence of the FTC's status as an expert body. In *Gilbertville Trucking,*[47] a case involving complex antitrust remedies, the Supreme Court refused to pass on the appropriateness of the FTC's order since the FTC had not made sufficiently specific findings.[48] The Court made clear that prerequisite to such review is evidence that the FTC did in fact exercise their expert judgement and that the proper standards were applied.[49] To the Court, the importance of such findings was based on more than an academic concern for procedural regularity. Citing the Administrative Procedure Act,[50] the Court concluded that only when the FTC had exercised its judgement and issued its considered opinion was the propriety of its remedy ripe for review.[51]

B. *The Seventh Circuit's Response*

In *Britannica,* the Seventh Circuit found that the FTC had adequately articulated its reasons for choosing the particular form of disclosure. In so doing,

43 *See* text accompanying note 31 *supra.*
44 605 F.2d at 973.
45 *Id.*
46 570 F.2d at 162.
47 Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962).
48 In *Gilbertville,* the FTC had declared informal *de facto* management of two common carriers in a common interest a violation of § 5. The FTC ordered the violation terminated and ordered one appellant to divest himself of his stock in one of the two common carriers. This divestiture order was overturned by the Supreme Court.
49 371 U.S. at 130. *See also* FTC v. Ruberoid Co., 343 U.S. 470, 480-94 (1952) (Jackson, J., dissenting) (for an extended discussion of the FTCA). Justice Jackson argues for "guiding yardsticks" to be developed by the FTC to render complete what he views as unfinished law. *Id.* at 482-85. According to Justice Jackson, if the FTC fails to perform its essentially legislative function by articulating reasons for its holdings, the litigation involved in reviewing FTC orders will do nothing more than "promulgate an inaccurate partial paraphrase of [the FTCA's] indeterminate generalities." *Id.* at 492.
50 *See* note 53 *infra.*
51 371 U.S. at 131.

the court took a fairly liberal view of the requirements of the Administrative Procedure Act[52] and distinguished a case holding that reasons for particular remedial provisions must be articulated.

1. The Administrative Procedure Act

The Administrative Procedure Act requires that all FTC decisions include a statement of findings and conclusions, and the reasons or basis therefore, on all material issues of discretion presented on the record.[53] The court, having "set out or summarized" the "findings, conclusions and comments" of the administrative law judge and the FTC[54] concerning the deceptive practices, found that the record evidenced sufficiently articulated reasons for the remedial orders. Significantly, the court admitted that the administrative law judge and the FTC had made no express comparison between Britannica's suggested less restrictive forms of disclosure and the form adopted.[55] Nevertheless, the court concluded that there was the "clearest implication" from the remarks in the record that the alternatives had been considered and had been found ineffective.[56] The court concluded that the Administrative Procedure Act did not require the court to set aside the order because the FTC "did not expressly make the comparison."[57] Clearly, such a conclusion falls far short of the stringent requirements placed upon the FTC in *Gilbertville Trucking*.[58] By allowing the Commission to articulate its reasons by "implication," however strong, the court seemed to have made impossible a valid judicial determination that the FTC did in fact exercise its expert judgement.[59]

2. The *Burlington* Case

The Court cited *Burlington Truck Lines v. United States*[60] as a case faulting the Interstate Commerce Commission for failing to justify its choice between two different but adequate remedies.[61] First, the court distinguished *Burlington* from *Britannica* by asserting that in *Burlington* there were two equally adequate remedies while in *Britannica* the FTC had "clear, though not expressly

52 *See* note 58 *infra*.

53 Administrative Procedure Act, Pub. Law No. 404, § 8(b), 60 Stat. 237 (1946) (current version at 5 U.S.C. § 557(c) (1976) which provides, in pertinent part, that:

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

54 605 F.2d at 971.

55 *See* cases cited at note 20 *supra* for a discussion of the requirement that the FTC choose the least restrictive remedy.

56 605 F.2d at 971.

57 *Id.* at 972.

58 371 U.S. 115 (1962).

59 371 U.S. at 130.

60 371 U.S. 156 (1962). The case involved judicial review of an Interstate Commerce Commission order that short-haul common carriers be granted operating authority over routes ordinarily serviced by labor-stricken long-haul carriers. The Court reversed the order since there were no findings that other less restrictive remedies would not suffice.

61 605 F.2d at 971.

stated''[62] reasons to adopt one remedy over the other. Second, the court distinguished *Burlington* by asserting that the choice was between two ''quite different'' remedies, although in *Britannica* the ''matters at issue [were] only the form of disclosure to be required.''[63] That both of these distinctions address only tangentially the principal holding of *Burlington* (that a Commission must make particular findings before a court may review an order) underscores the *Britannica* court's intention to require the FTC to do no more than imply that a less restrictive remedial alternative was in fact considered and found insufficient.

VI. Judge Wood's Dissent

In his dissent[64] Judge Wood disagreed with the majority's notion that the remedy was ''well within the range.''[65] To Judge Wood the issue was whether Britannica's suggestion that a business card and a warning of their own choice, rather than the FTC's requirements of a particular card and a particular warning constituted adequate disclosure of Britannica's sales purpose. In Judge Wood's words, ''Britannica [had] suggested acceptable alternative measures which the company viewed as not offending legal and constitutional standards.''[66]

Although the majority refused even to state clearly Britannica's position on review,[67] the dissent dealt specifically with the effect the order would have on Britannica's door-to-door sales:

> It seems to me that to require a salesperson to use the warning card will suggest to many prospects that the sales representative and his company are afflicted with some strange market place malady. Even prospects who are predisposed to acquire for themselves and families the wealth of information found in an encyclopaedia may be expected to turn to some competitor who does not exhibit such abnormal and strange commercial behavior.[68]

Judge Wood then reiterated the principle that there must be specific support for any finding of a need for an exceptional remedy.[69] Finally, the dissent concluded with Judge Wood's stating he would deny enforcement of the FTC's order and demand a more appropriate remedy to be supported by rational analysis.

Thus, the difference between the majority and the dissent was that the majority believed that because the remedy was not unique, it warranted neither close review by the court nor specific justification by the FTC. The dissent, however, considered the remedies to be virtually unheard of in door-to-door sales, unwarranted by the record and enforceable only upon explicit find-

62 *Id.* at 972.
63 *Id.*
64 *Id.* at 977-78.
65 *Id.* at 971.
66 *Id.* at 977.
67 *See* text accompanying note 25 *supra.*
68 605 F.2d at 977.
69 *Id.* at 977-78.

ings that a less restrictive remedy would not suffice. Ultimately, the split of opinion is explainable only upon principles of policy: the majority favoring strict regulation and aggressive consumer protection, the minority trusting of business's will to mend its occasionally errant ways.

VII. Conclusion

Because the Seventh Circuit's holding in *Britannica* gives the FTC a relatively free hand in regulating sales practices, the decision raises serious questions regarding the continued viability of the restrictions placed upon the FTC's exercise of its remedial discretion. Although *Britannica* may be indicative of a growing trend toward more determined FTC control of sales practices,[70] it is more likely an instance of overaggressive regulation in which the FTC has exceeded its powers.[71] In either case, the decision warrants review by the United States Supreme Court to clarify the present status of the FTC's power to regulate sales practices. The Court would be justified in reversing the Seventh Circuit's approval of the FTC's remedial orders in *Britannica* on the grounds that the remedial orders (1) are not the least restrictive alternative, (2) are not constitutionally permissible, or (3) are not adequately justified by specific findings.

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70 *See* Note, *Reducing Consumer Ignorance,* 20 ANTITRUST BULL. 309 (1975) for a discussion of the need for the development of a systematic FTC approach to deceptive practices. *See also* UNIFORM CONSUMER SALES PRACTICES ACT §§ 1-19 (adopted in Kansas, Ohio, and Utah); UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 1-9 (1966 Act) (adopted in Colorado, Georgia, Hawaii, Minnesota, Nebraska, New Mexico, Ohio, and Oregon); UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 1-9 (1964 Act) (adopted in Delaware, Illinois, Maine, and Oklahoma).

71 *See* The Administrative Practice and Regulatory Control Act of 1979, S. 1291, 96th Cong., 1st Sess. (1979), and the Regulation Reform Act of 1979, S. 755, H.R. 3263, 96th Cong., 1st Sess. (1979), two regulatory reform bills in Congress which would require agencies to use the least restrictive alternative in rule making. *See also* TIME, Dec. 3, 1979, at 84, for an article on "a congressional revolt" to control the FTC's "regulation run amuck."