

July 13, 1977

MEMORANDUM

Re: FTC Litigation Involving National  
Commission on Egg Nutrition

The National Commission on Egg Nutrition ("NCEN") was a not-for-profit corporation formed by various associations of egg producers in response to the controversy involving the relationship between the cholesterol content of eggs and the incidence of heart disease. NCEN ran a series of print and broadcast advertisements to the effect that (1) there is no scientific evidence that egg consumption increases the risk of heart attacks or heart disease and (2) there is evidence that eating eggs does not increase this risk.

The FTC issued a complaint charging that these statements were false and violated Sections 5 and 12 of the Federal Trade Commission Act. It also sought an injunction, under Section 13(a) of the Act, against the continuation of the NCEN advertising pending resolution of the administrative proceeding.

I.

The District Court denied the FTC's request for an injunction, but the Court of Appeals reversed and directed the entry of an injunction. FTC v. National Commission on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), cert. denied,

426 U.S. 919 (1976). The injunction entered by the Court of Appeals precluded representations by NCEN that there was no scientific evidence that egg consumption increases the risk of heart disease. It also precluded any representations as to NCEN's theory that dietary cholesterol intake was not harmful unless NCEN also stated that there is substantial contrary evidence.

In the course of its opinion, the Court of Appeals ruled on three issues that are directly relevant to questions that would be presented by any Tobacco Institute advertisements.

(1) The Court rejected an argument made by NCEN that the FTC lacked jurisdiction over it because NCEN was a not-for-profit corporation. The Court ruled that the FTC had jurisdiction over the NCEN because, under Section 4 of the Act, it was "organized to carry on business for [the profit] . . . of its members." In essence, the Court's holding was that the FTC has jurisdiction over trade associations which are formed and operated for the benefit of their members. This conclusion appears to be sound, and the Institute could not argue to the contrary.

(2) The Court also determined that the NCEN's messages constituted advertisements within the meaning of the Act:

"The clear purpose of the statements in issue in this case is to encourage the consumption of eggs by allaying fears the

public may have about their high cholesterol content . . . [G]iven the nature of the pronouncements in question, the District Court could properly conclude that they were advertisements, . . . because they were representations concerning the qualities of a product and promoting its purchase and use." 517 F.2d at 488.

To the extent any Tobacco Institute messages can be similarly construed, either explicitly or by implication, the same conclusion would follow as to its proposed advertisements.

(3) Finally, the Court of Appeals rejected the contention that the First Amendment prohibited the issuance of any injunction regarding NCEN's advertisements. The Court acknowledged that the First Amendment is not "wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy." *Id.* at 489. On the other hand,

"NCEN has done more than espouse one side of a genuine controversy, however. It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false or misleading . . . The First Amendment problem . . . is therefore not before us." *Ibid.*

The Court of Appeals' opinion was issued before the Supreme Court decided Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), which established unequivocally that commercial advertising is not wholly without First Amendment protection. But it is unlikely that the Court of Appeals would have resolved the First Amendment issue

any differently had the Virginia Pharmacy opinion been available to it. For one thing, the Court of Appeals assumed that the First Amendment was not wholly irrelevant, a proposition confirmed by Virginia Pharmacy. Second, in Virginia Pharmacy, the Supreme Court expressly noted that the First Amendment is not an obstacle to the regulation of false, or even deceptive or misleading, advertising. 425 U.S. at 748 & n.24.

The Court of Appeals' opinion is, therefore, authority to the effect that the First Amendment would not protect misleading or deceptive, and possibly "unfair," Tobacco Institute advertising.

## II.

Following an administrative hearing, the FTC issued a cease-and-desist order containing essentially the same provisions as the injunction pendente lite issued by the Court of Appeals. Like the Court of Appeals' injunction, the FTC's order imposed an affirmative disclosure requirement -- that NCEN disclose "that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease" -- if NCEN made any representation regarding any relationship between dietary cholesterol or eggs and heart disease. An appeal has been taken by NCEN from the FTC's order

to the Court of Appeals for the Seventh Circuit, and the matter was argued in mid-June.

The Virginia Pharmacy case had been decided when the FTC issued its opinion, and that case is discussed extensively by the FTC. The FTC's opinion is, therefore, a good indication of how it is likely to evaluate the First Amendment problem in connection with Tobacco Institute advertisements.

NCEN's argument before the FTC was that the controversial nature of the cholesterol controversy and its status as a matter of public debate precluded FTC regulation of NCEN's pronouncements on this issue. The FTC decided, however, that NCEN's advertisements constituted "commercial speech" subject to regulation under Section 5, and were not comments on political or social issues, which would be fully protected by the First Amendment. The FTC's rationale was that:

"There are significant differences, we believe, between scientific health claims made about a product by a commercial organization and commentary on genuine political or social issues, differences which warrant their well-recognized disparity in legal treatment. Arguments directed to social and political issues, whether made by individuals or corporations, are likely to be recognized by the public as expressions of opinion, by their very nature subject to controversy and substantial reputable disagreement. Even interspersed 'factual' statements are likely to be viewed with the skepticism reserved for an advocate's expression of a disputed point of view. We do not think that consumers, or at least a substantial segment of consumers, necessarily reserve the same skepticism in viewing what purport to be largely or entirely

factual scientific recitations of the health and nutritive virtues of a food product by a party presumptively in possession of all information relevant thereto. . . ."

The FTC seems to be saying here that NCEN's advertisements were more than mere statements of opinion; they were factual representations. The implication is that if the advertisements made clear that they were only expressions of opinion as to a controversial health issue, they would enjoy full First Amendment protection.

On the other hand, at a later point in the opinion, the FTC asserts, without explanation, the power to impose restrictions even on advertisements which plainly constitute only expressions of opinion. The FTC states:

"[T]he order will not prevent respondents from presenting to consumers their point of view regarding the safety of eggs, provided they make it clear that their assertions are subject to substantial disagreement." (Emphasis added.)

The FTC viewed this conditional permission to express a point of view on a controversial health issue as accommodating the First Amendment interests articulated by the Court in Virginia Pharmacy.<sup>\*/</sup>

In short, the FTC is likely to conclude that any advertisement that has the tendency or capacity to induce the purchase of a product -- whether or not brand names are used in

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<sup>\*/</sup> This proposition is plainly a debatable one, but the FTC is likely to adhere to it unless and until it is subjected to close judicial scrutiny.

the ad -- is not ousted from FTC jurisdiction by the First Amendment. It is also likely to conclude -- as it did in the NCEN case -- that ads conveying the impression that particular products may not be harmful are likely to induce purchase of those products. Accordingly, the FTC is unlikely to be deterred by First Amendment considerations from challenging any Tobacco Institute advertisements which the FTC concludes are false or deceptive.

These conclusions confirm our continued advice that as an absolute requirement any Tobacco Institute advertisements should carry the statutory warning and some form of First Amendment statement. The latter may be expanded to indicate that there is controversy.

H.T.A.  
H.D.