

PRIVILEGED

July 19, 1977

MEMORANDUM TO THE COMMITTEE OF COUNSEL

We have been asked as counsel for The Tobacco Institute, Inc., to consider the legal risks that may be encountered in the dissemination of five proposed advertisements received by us on July 19, 1977. This memorandum summarizes our suggestions and conclusions. We have not been asked to evaluate the impact, if any, of these advertisements when published upon the present or potential product liability litigation. Nor have we been asked to evaluate the public relations value of the proposed advertising, whether it is responsive to the present Federal or State legislative or regulatory problems of the cigarette industry, or any affirmative or negative impact that advertising may have politically in either of those areas.

Controlling Legal Principles

(1) A decade ago Commissioner Elman, in an opinion commenting upon the so-called Tiderock episode, advanced the FTC principle that any direct or indirect public communications by the cigarette industry, which had the effect of "negativizing" the required statutory warning on the package, would violate Section 5 as false, deceptive, or cardinally "unfair."

(2) That principle was part of the background for the FTC complaints in 1971, which culminated in the Consent Orders of 1972, on the theory that the absence of the warning in cigarette advertising was "unfair." It also underlay in part the earlier proposed FTC Trade Regulation Rule for disclosure of "tar" and nicotine in all cigarette advertising, that in turn led to the current voluntary agreement on those disclosures.

(3) Since then the FTC concepts have been sharpened and crystallized in the injunctive litigation in the proceedings against the National Commission on Egg Nutrition. (That litigation was summarized in our memorandum of July 13, 1977.)

(4) Utilization of a First Amendment defense, within recent Supreme Court cases extending the protection of that Amendment to commercial advertising, was delineated in the Court of Appeals opinion in the Egg proceeding. At the very least that proceeding makes it clear that an advertisement by a trade association is covered by Section 5 where its purpose is to encourage the consumption of a product.

(5) The current position of the FTC, in the subsequent administrative FTC action in the Egg proceeding, is that a

distinction must be drawn between "scientific health claims made about a product by a commercial organization and commentary on genuine political or social issues" (July 13, 1977, Memorandum, page 5).

Conclusions

We are of the opinion that the proposed advertisements definitely require certain textual modifications to avoid successful FTC challenge that explicitly or by implication some of the factual statements are inaccurate. (These are detailed in the attached Appendix.) Additionally, we are of the opinion that both to meet the Egg precedent and to afford a minimum sustainable basis for First Amendment protection, every advertisement must include:

(1) In required size, the statutory warning statement because it would be difficult for the FTC to argue that these advertisements "negative" the warning when it is set forth (and there is an issue whether these advertisements are required by the Consent Orders to include the warning). We further recommend that the warning be preceded by a sentence reading:

"Some of the cigarette manufacturers are required by a Federal Trade Commission Order to include the following warning statement in all advertisements:"

The Tobacco Institute was not a respondent and did not agree to the Consent Orders. That technical distinction should be preserved against the day when other advertisements or pamphlets by the Institute may be determined not to warrant the warning statement, e.g., those on "courtesy" or directed to the freedom of choice issue.

(2) Either in the text or preferably in a readily readable area of the advertisement, the following statement:

*X Institute
"kickstart"?*

"The Tobacco Institute recognizes that there are genuine differences of opinion concerning smoking and health. This advertisement is presented by The Tobacco Institute in the belief that full, free, and informed discussion of the smoking and health controversy is in the public interest and in the conviction that the controversy must be resolved by scientific research."

Even if there is eliminated from each of these advertisements the specific statements discussed in the Appendix, and each advertisement contains the foregoing two qualifying

statements, we are of the opinion that there is a very substantial likelihood that the present Federal Trade Commissioners and the Commission staff will seek further regulatory action based on the dissemination of these advertisements.

That risk involves both the tobacco industry and its constituent companies. The form which FTC action may take cannot be definitively determined at this time. Conceivably, the FTC might institute a complaint predicated on the theories of its Egg case. It might seek in addition to the outstanding Consent Orders even though this would be a more complicated effort. In the light of Public Law 93-153, Nov. 16, 1973, authorizing injunctions against violative advertising of any product, the FTC might seek an injunction. The Commission might endeavor to formulate a Trade Regulation Rule covering advertisements which it finds, directly or indirectly, have the effect of "negativizing" the required statutory warning or the terms of the Consent Orders. Lastly, the FTC might attempt to utilize advertisements which it urges have that effect as a further point in the pending penalty actions, both on liability and mitigation, on the theory that the Consent Orders by implication precluded any negation of the required warning. As part of its challenge, the FTC might add as an item of urged relief that there be "corrective advertising."

On the other hand, we believe that a responsible defense could be presented in any judicial challenge of those FTC efforts. That defense would rest upon the First Amendment. In other areas, such as the FDA banning of Red No. 2 and proposed banning of saccharin, there have been massive advertisements challenging the regulatory positions. We know of no FTC challenge of those advertisements. Similarly, with respect to proposed energy programs and in ecological areas and proposals, public challenge by a company or an industry association of the factual bases is commonplace. The present FTC position differentiating between statements of fact and permissible comments on political or social issues may not be sustainable by the Commission in court, even in the face of the counterargument that the First Amendment does not protect an effort to "negative" a requirement of an FTC order. What is essential is that any advertisement make it clear that there is substantial controversy.

These suggested risks are inescapably imponderable. We believe they exist with respect to the tobacco industry. We further believe that they exist for each of the companies and warrant evaluation.

H.T.A.

Attachment
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APPENDIX

Advertisement No. 1

The crucial problem with Advertisement No. 1 is the reprinting of the 1954 advertisement. Because it flatly stated "there is no proof that cigarette smoking is one of the causes," that earlier ad could not safely be disseminated today. The question is whether that earlier ad is disclaimed by the third sentence. We think not. If the earlier advertisement is included, there would have to be added to the second sentence, ". . . and everything that has developed and been argued by anti-cigarette critics . . . and the statements of the Surgeon General required by Government on cigarette packages and in advertising."

Preferably and legally far safer would be to eliminate the earlier advertisement, and introduce Advertisement No. 1 with the statement "Twenty-three years ago the cigarette industry pledged aid and assistance . . ."

At the bottom of page 1 the reference to the American Medical Association project may evoke challenge, not of the fact of the money having been spent but as to what the research was and the final conclusions of the AIA group.

Page 2, in the fifth paragraph, the adjective "further" should be inserted in the phrase "they . . . see little of value in further research . . ."

Page 2, in the final paragraph, the phrase should be "many of these committed antismoking groups . . ." Not all of the industry critics are involved.

On page 3, we think the second sentence is sufficiently ambiguous to evoke challenge. We would propose that the middle phrase read, "having heard similar proposed repressive measures . . ."

Inasmuch as this and other advertisements incorporate by reference the pamphlet on "The Cigarette Controversy," another review and updating of that pamphlet would be desirable. It does contain on the inside cover the qualifier suggesting First Amendment protection.

Advertisement No. 2

The accuracy of the titles has been questioned and these require precise checking.

In the fifth full paragraph on page 1, the phrase "which still strike both smoker and nonsmoker" is susceptible to the specific challenge that it negatives the warning and suggests that cigarette smoking is wholly unrelated to any disease. This phrase might be replaced with the words "the current controversy."

In the final paragraph on page 1, the term "further" should precede "research." It can be argued that the HSA studies are not opposed to further research.

On page 2, the paragraph with the Mark Twain quotation is extremely difficult because it inferentially if not explicitly negatives the warning. In this ad and in the later ones, this quotation is believed to be highly dangerous.

Advertisement No. 3

In Advertisement No. 3, we have no comment on the use of the titles.

On page 1, first full paragraph, second sentence, we believe that it implies that most if not all of the research is carried on jointly by the Government and the industry. This is a question of fact. It might be well to have the phrase read, "funded largely by the tobacco industry and also by the U.S. government."

In the third paragraph on page 2, for above stated reasons, the phrase "the current controversy" should be substituted.

Advertisement No. 4

In this advertisement we have some difficulty in understanding the meaning of what scientists know "for sure." The factual statements warrant careful checking.

On page 2, first paragraph, the substitution similarly of the phrase "the current controversy" is needed in lieu of the phrase "still strike both smoker and nonsmoker."

Advertisement No. 5

In Advertisement No. 5, for the reasons stated, we think the Mark Twain quotation is dangerous and contributes considerable risk.

We feel that the second paragraph on "smokers' lungs" warrants careful checking against the Congressional testimony. The second sentence might be qualified, "It ain't always so -- according to specific and responsible expert testimony . . ."

In the following paragraph, relating to the dog studies, the adjective "many" should be put ahead of "scientists."

On page 2, the Mark Twain reference ought to be eliminated.

In the next paragraph, we suggest deleting the phrase, "relying on public acceptance of what they 'know ain't so.'"

In the fifth paragraph on page 2, we doubt that it is factually correct that in the campaigns of repression "They will be endangering the health of all of us."

At the bottom of the page the substitution of the phrase "the current controversy" is indicated.

In the paragraph on page 3, we think the adjective "better," inserted before "answers," would render these advertisements more defensible under the First Amendment.