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Advertisements Falsely Alleging "Permanent Hair Removal" Violated the Federal Trade Commission Act

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brush and wheel clutches simultaneously engaged, preventing any backward thrust. Austin's expert witness testified that a poorly designed interlock mechanism caused the machine's sudden backward motion. The court concluded that the interlock mechanism could reasonably be construed as a defect under the strict liability definition. The court further found that the machine's bucking motion could reasonably be construed to have caused Austin's injury. Thus, the court found that Austin had presented to the trial court a prima facie case sufficient to justify the jury's verdict.

Assumption of Risk. Garlock contended that the assumption of risk defense barred any liability and, therefore, required a judgment in its favor as a matter of law. This contention, if accepted, would relieve Garlock of liability. To establish an assumption of risk defense, Garlock had to prove that Austin was aware of the specific risk that the machine might knock him backwards, appreciated the magnitude of the risk, and voluntarily exposed himself to the danger. The appellate court noted that Austin was an experienced roofer who appreciated the inherent danger of working on rooftops. He frequently had worked with the sweeper and knew it exerted "some backward pressure" each time he started it. However, Austin testified that he did not realize the sweeper could jump back in the way it had on this occasion, and that he had neither read the warning label nor received any instructions on operating safety. On the strength of Austin's testimony, the appellate court found that the trial court properly denied the motion for directed verdict based on assumption of risk.

"Carelessness" Not the Same as "Misuse." Next, Garlock contended that Austin had misused the machine. A product is not considered defective if the consumer's misuse caused the injury. According to Garlock, by using the sweeper within two to five feet of the roof's edge, despite the displayed warning label proscribing operating the machine within ten feet of a roof's edge, Austin had

misused the product. The appellate court found that Austin had not misused the sweeper. Misuse is using the product for a purpose not intended or foreseen by the manufacturer. The purpose of the sweeper was to sweep gravel, the exact task for which Austin employed it. The court stated that "careless" use of a product for its intended purpose is not the same as misuse.

Garlock also argued that Austin's use of the sweeper in a manner contrary to the warning was tantamount to misuse. The court held that a warning negates strict liability only if following the warning would have abated the danger. In this case, although Austin's use of the sweeper near the roof's edge compounded the danger, Garlock was still strictly liable because the sweeper was dangerous even if the warning had been heeded. The court stated, "[i]f a product is unsafe regardless of whether the user has followed the manufacturer's warning, the user's careless failure to do so is simply contributory negligence." Accordingly, the appellate court agreed with the trial court's denial of Garlock's motion for directed verdict based on a misuse theory.

Manufacturer Waived Objection to Inconsistent Verdict. Garlock lastly contended that the jury verdicts against it, as manufacturer, but for Lincoln, as seller, were inconsistent and required a new trial. The court agreed that, absent special circumstances not present in this case, if the manufacturer of a product is found strictly liable, the seller also is liable. The court declined to consider the issue, however, because Garlock had not raised the objection in a timely fashion. According to the court, a party waives an inconsistent verdict objection if the objection is not raised before the jury is dismissed. Garlock failed to raise the objection until nine days after the trial. Thus, the court considered the objection waived.

Mark A. Myhra

ADVERTISEMENTS FALSELY ALLEGING "PERMANENT HAIR REMOVAL" VIOLATED THE FEDERAL TRADE COMMISSION ACT

In *Removatron International Corporation v. Federal Trade Commission*, 884 F.2d 1489 (1st Cir. 1989), the United States Court of Appeals for the First Circuit held that deceptively advertising a hair removal machine violated section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Additionally, the court granted the government's motion to prohibit continued advertising in order to prevent future economic harm to potential purchasers of the machine.

Factual Background

Removatron International Corporation ("Removatron") and Frederick E. Goodman marketed a hair removal machine, or epilator, which used tweezers combined with a burst of radio frequency energy ("RFE") to destroy hair follicles, thereby removing unwanted body hair. The Federal Communications Commission ("FCC") approved Removatron's machine to emit RFE at a particular frequency. Removatron advertised that the machine permanently removed hair. Removatron's advertisements asserted that the epilator was "clinically tested," that the machine (rather than its RFE) was approved by the FCC, and that the RFE completely destroyed hair follicles by heating the surrounding tissue.

Removatron advertised its machine mainly in beauty industry trade magazines. Salons usually purchased the machine for \$4,000.00, and charged individual customers \$35.00 per one hour treatment. Removatron instructed the purchaser that several treatments were required in order to obtain permanent hair removal and that such treatments might not work for everyone. Machine owners and operators in turn communicated the same information in

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Epilator Advertisements Violate FTC Act (continued from page 81)

written or oral form to their customers.

The Administrative Law Judge's Decision

The Federal Trade Commission (hereinafter referred to as "the government" in its capacity as a party in this action and as "the Commission" in its capacity as adjudicator) filed a complaint against Removatron, claiming that the company's advertisements violated section 5 of the FTC Act because the company did not have a reasonable basis for its claims. Section 5 of the FTC Act stated that "[u]nfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45 (1988).

The Administrative Law Judge ("ALJ") found that Removatron's permanent hair removal claims were ambiguous and that its disclaimers were ineffective. Furthermore, the ALJ concluded that Removatron's permanency claims were establishment claims. Establishment claims are statements, purportedly supported by scientific evidence, that a product works. In contrast, non-establishment claims are simply statements that a product works. Additionally, the ALJ found that Removatron's ads impliedly claimed that the FCC approved the entire machine, not just the RFE.

The ALJ also held that, to have a reasonable basis for claims that assert scientific substantiation, Removatron must possess two well-controlled scientific studies in support of those claims. Because it lacked such support, Removatron's advertising violated the FTC Act. Furthermore, the ALJ found that Removatron's advertisements caused significant emotional and financial injury to consumers.

Based on these determinations, the ALJ entered an order which required that Removatron (1) cease advertising that its machine permanently removed hair, until the company obtained two scientific studies to support those claims; (2) include in its hair re-

moval advertisements a disclaimer that only temporary removal is possible; (3) provide a copy of the ALJ's order to previous purchasers; and (4) give future purchasers a copy of the order. After the ALJ entered this order, Removatron appealed the decision to the Commission.

Removatron's Appeal to the Federal Trade Commission

The Commission also found that Removatron made establishment claims, which the Commission held must be supported by well-controlled scientific tests. The Commission defined a well-controlled scientific test as one in which a skilled person, who has expertise in the field, conducts tests using generally accepted procedures and evaluates the results in a disinterested manner. However, unlike the ALJ, the Commission held that one well-controlled test would be sufficient to substantiate the establishment claims. Because Removatron did not possess any such tests, the Commission agreed with the ALJ that Removatron violated the FTC Act. Although the Commission's findings were generally consistent with the ALJ's, the Commission held that Removatron's customers suffered no emotional injury.

As a result of the Commissioner's findings, the Commission modified the ALJ's order by requiring Removatron to discontinue claims of permanent hair removal until it obtained one well-controlled scientific study that provided support for the permanency claims. The Commission eliminated the requirement that Removatron provide future purchasers with a copy of the order. The remainder of the ALJ's order was affirmed. Thereafter, Removatron petitioned for review in the United States Court of Appeals for the First Circuit.

The First Circuit Court of Appeals

Removatron challenged the Commission's requirements that it support the establishment claims with a well-controlled scientific

study, and that it include a disclaimer in future advertising. The company argued that by requiring a scientific study prior to making permanency statements, the Commission precluded Removatron from making even a non-establishment claim that the product worked. Further, Removatron argued that such a requirement was beyond the scope of the Commission's authority to issue orders.

Broad Discretion to Rule on Unfair Practices. The court explained that the Commission had broad discretion to issue orders dealing with unfair practices. Moreover, Congress had placed primary responsibility in the Commission for developing such orders. Therefore, the courts would not interfere with those orders unless there was no reasonable relation between the remedy and the unlawful practice, or the order's prohibition was not sufficiently clear or precise. Removatron only challenged the reasonable relationship between the terms of the Commission's order and Removatron's unlawful acts.

In reviewing the scope of the Commission's order, the court considered various factors. The court relied on five factors to justify the broad remedy that the Commission ordered: (1) Removatron's deliberate violation of the FTC Act; (2) the substantial potential for economic harm; (3) Removatron's past and continued use of the deceptive advertisements; (4) the average consumer's difficulty in evaluating these claims through personal experience; and (5) the pervasive government regulation of this device, which is likely to lead a consumer to believe that the questionable claim has a basis in fact. The only factor weighing against a broad remedy was that Removatron had not previously violated the FTC Act. The court's analysis of these factors verified that the Commission's order, directing Removatron to obtain scientific substantiation before making permanency claims, was neither unreasonable nor an abuse of discretion.

Disclaimers of Permanent Hair Removal. In addition to the Commission's order requiring scientific support of permanency claims, the court also reviewed the Commission's requirement that Removatron include a disclaimer whenever its advertisements claimed that its machines removed hair, and send a copy of the order to prior purchasers. Removatron contended that this requirement was "corrective" — an advertising requirement that commanded disclosure regardless of the future advertisement's content. The court explained that directing Removatron to send a copy of the order to all past purchasers was not a corrective advertisement requirement; rather, this requirement would guarantee full compliance with the Commission's order. Moreover, requiring the disclaimer in future advertisements was not corrective but was an affirmative advertising requirement that demanded disclosure only when certain claims were made. The order was not corrective because the Commission only required Removatron to include the disclaimer when the company claimed that its machine removed hair.

Sufficient Evidence. Removatron also challenged whether sufficient evidence supported the Commission's findings. Removatron first attacked the finding that it had deceived the public by conveying the message that scientific tests supported its permanency claims. The company attempted to defend its advertisements by advancing several arguments. Removatron contended that the company never claimed that its machine was 100% effective in permanently removing hair for all people all the time. The court found it irrelevant that Removatron did not explicitly make this claim. The overwhelming message of the advertisement that the machine would remove hair permanently for most people most of the time was sufficient to support the Commission's findings.

Additionally, Removatron contended that the company qualified its advertisements by stating that the machine would not work on everyone and that one could only attain permanent hair remov-

al after several treatments. Again, the court disagreed with Removatron and held that these qualifications were inadequate and ineffective because they failed to dispel the message of the permanency claim. Furthermore, Removatron argued that the only relevant audience was the beauty industry. The court found that the relevant audience, in addition to the beauty industry, included potential purchasers and customers of purchasers. Purchasers and customers were the relevant audience because Removatron's sales personnel gave brochures and other information to the purchasers, who passed the information on to potential clients. Therefore, Removatron's advertisements reached an audience outside of the beauty industry.

Removatron also argued that "clinically tested" did not mean "supported by rigorous scientific tests." The company claimed that a lay person could determine that "clinically tested" simply meant that the product had been successful in a clinical setting, not that well-controlled scientific tests had been performed. The court rejected this argument and held that Removatron failed to offer any proof that the lay person would be able to make this distinction.

At the same time that Removatron petitioned for review of the Commission's order, the government sought an injunction *pendente lite*. An injunction *pendente lite* forbids an act and takes effect during the actual progress of a suit. The government sought this injunction because Removatron continued to make its deceptive claims during the course of the lawsuit. Since the Commission's order would not otherwise be binding on Removatron if Removatron appealed the case to the United States Supreme Court, the court granted the injunction. The court concluded that the injunction was necessary to prevent future economic harm to potential purchasers who would be exposed to the deceptive advertisements.

Cathleen R. Martwick

NEW YORK LEMON LAW'S MINIMUM NEW VEHICLE WARRANTY PROTECTION DOES NOT VIOLATE THE COMMERCE CLAUSE

New York's "Lemon Law", N.Y. Gen. Bus. Law § 198-a, provided a minimum warranty of two years or 18,000 miles for each new car purchased and registered in the State of New York. An organization representing the domestic and foreign car industry challenged the statute, charging that it impermissibly interfered with interstate commerce. In *Motor Vehicle Manufacturing Association of United States v. Abrams*, 720 F. Supp. 284 (S.D.N.Y. 1989), the United States District Court for the Southern District of New York held that section 198-a(b) of the Lemon Law did not per se violate the commerce clause, U.S. Const. art. 1, § 8, cl. 3, by regulating manufacturers, agents and dealers who did business outside of New York. However, the court struck down the portion of the statute requiring out-of-state dealers and agents to send written notice of owner complaints to the manufacturers. The court upheld the remainder of the statute because its benefits clearly exceeded the burdens it imposed on interstate commerce.

Background

The Motor Vehicle Manufacturing Association of the United States ("the Association") included trade associations that represented the interests of domestic and foreign car manufacturers, importers, and distributors. The Association claimed that section 198-a(b), which in effect established a minimum level of new vehicle warranty protection, violated the commerce clause of the United States Constitution. According to the Association, section 198-a(b) was per se invalid under the commerce clause because it regulated interstate commerce, it "opened the door" to inconsistent state regulation of an area requiring uniformity, and it impermissi-

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