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## Group Fraud: Fault or Duty?

William J. Moore\*

To this warre of every man against every man . . . nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law; where no Law, no Injustice. Force, and Fraud, are in warre, the two Cardinall vertues.

Hobbes, *Leviathan*.<sup>1</sup>

THE VAST INCREASE of corporate and organizational advertising<sup>2</sup> through mass media is posing difficult problems for the law. Numerous articles have been written on the Federal Trade Commission's control of false advertising,<sup>3</sup> but little thought or study has been given to private law remedies in relation to these organizational strategies. The traditional notions of fraud are premised upon a bargaining, individualistic society which stresses the notions of "fault" and "honesty," and not upon a highly institutionalized economy, in which these notions of "fair play" are highly irrelevant to the consumer.

Indeed, the classic formula for fraud and deceit is intended to limit the strategies used by parties in the bargaining process. And the function of the formula is to uphold the reasonable expectations of the "honest" party<sup>4</sup> to the transaction. On the other side of the coin, the common law developed the individualistic notion of fault in the form of "scienter" or "an intention to deceive."<sup>5</sup> This notion of fault is not exclusive with fraud and deceit but runs all through the common law; in criminal law it is called *mens rea* in which a defendant may not be found guilty

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<sup>1</sup> In Cohen and Cohen, *Readings in Jurisprudence and Legal Philosophy* 382 (1951).

<sup>2</sup> The generic term *advertising* can include false representations in T.V., radio, newspapers, direct mail, brochures, catalogs, sales talk, etc. We are not primarily concerned here with labeling devices or corporate trade names.

<sup>3</sup> See particularly the Symposium on Advertised-Product Liability in 8 *Clev-Mar. L. Rev.* (1959). Also, Barnes, *False Advertising*, 23 *Ohio St. L. J.* 597 (1962).

<sup>4</sup> See Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 *U.C.L.A. L. Rev.* 583 (1958). Some of the legal rules developed to determine whether the plaintiff's expectations are reasonable are "reliance," "opinion," and "materiality."

<sup>5</sup> *Ibid.*

unless there is both an intent and the act. These are the necessary ingredients of a crime which is *malum in se*. In a rough sort of a way, the courts in the fraud cases have said they would not protect the purchaser's reasonable economic expectations if the seller's conduct falls below that which they considered fair.

Recently, this legal bastion of "fairness" and "fault" has been assaulted by courts, administrative agencies, and legal scholars. The walls are still standing, but here and there cracks have begun to appear and the words status and duty are no longer obscene in the field of seller's liability for false and misleading representations. A thorough study would require an analysis of all the environmental factors<sup>6</sup> in a group-institutionalized society and also the interests the courts are protecting. This paper will touch on judicial protection of the consumer's interest in physical integrity, and the protection of consumer economic expectations where these interests have been harmed by the false representations.

### I. Concepts and Formulae Should Be Rejected

Probably no area of the law is as conceptually confusing as that of fraud, deceit and misrepresentation. The sub-rules and the sub-sub-rules surrounding the notion of fraud are numerous and conflicting.<sup>7</sup> To further confuse the observer, the writers in the field have advocated various theories of recovery for similar fact patterns.<sup>8</sup> The net result appears to be a legal anarchy not unlike Hobbes' "warre of every man against every man." It is true, of course, that this formula approach is evasive. The formulae of fraud, deceit, etc. are at one end and at the other we have the factual dispute itself. It is also true that the theories, rules, or formulae ask the wrong questions and fail to give a satisfactory answer to what they do ask. This does not mean, however, that we should give up, become discouraged, or say that it is basically a fact question which will be decided by

<sup>6</sup> These environmental factors are used to show, in a general way, the change from a mercantile, trading society to a highly specialized group society. W. H. Whyte, Jr., in his book, *The Organization Man* (1956), calls it the change from the protestant ethic to the social ethic.

<sup>7</sup> Areas of interpretation have included 1) misrepresentation of a fact, 2) knowledge of its falsity, 3) materiality, 4) inducement, reliance, and 5) damage. See Prosser, *Torts*, § 86 at 523 (2d ed. 1955); 1 *Encyc. of Negligence*, §§ 297-306 (1962).

<sup>8</sup> *Infra*, n. 33, 34, and 35.

the jury.<sup>9</sup> The real questions are whether we should eliminate the notion of "fault," and the factors to be considered in determining a seller's liability for deceit in our modern society. I believe that some of the more important factors, even more important than the ambiguous rules of *scienter*, opinion, reliance, and materiality, are the following:

1. *The character and status of the parties to the transaction*

The common law has recognized this factor to a certain degree by placing a higher duty upon the seller where there is a confidential or fiduciary relationship. In this situation the courts have done away with the strict requirements of *scienter* and created a "constructive fraud" doctrine.<sup>10</sup> Similarly the competency or capacity of a party has been used to impose a duty where none would have existed without the disability.<sup>11</sup> But all of these concepts are of a bilateral nature and fail to recognize the true nature of our economy. Of far more significance today is the highly organized nature of the manufacturer-distributor-seller in our economy and the highly unorganized and inarticulate nature of the consumers. The consumer co-operatives are few in number and the consumer magazines and Better Business Bureaus are of doubtful value. Also, Professor Galbraith's theory of countervailing power<sup>12</sup> has never worked with conspicuous success from the consumer's point of view. Its only manifestation has been to create larger federal agencies to control the strategies used by the manufacturer-suppliers.

2. *The degree of "standardization" or "institutionalization" of the property transaction and the type of arena in which the transfer takes place*

It is axiomatic that when an organization is in its beginning stages and before the lines of responsibility and function are drawn, a great amount of wheeling and dealing is permissible.

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<sup>9</sup> Green, Deceit, 16 Va. L. Rev. 749 (1930). Professor Green suggests that "much of the talk of the judges in many of the earlier cases . . . sounds strange. Perhaps much of this language has made judges feel that it was necessary to find ways to leave troublesome cases to juries, so that the jury, unembarrassed by history, might do what the judge would like to see done," at p. 770.

<sup>10</sup> 24 Ohio Jur. 2d 626, Fraud and Deceit, § 9; Sheffer v. Sheffer, 16 Ohio App. 305, 32 O.C.A. 469 (1922).

<sup>11</sup> 24 Ohio Jur. 2d 627, Fraud and Deceit, § 10.

<sup>12</sup> Galbraith, American Capitalism (1952).

As the organization matures and when its true purpose and function have solidified, this freeplay is no longer permitted. People have come to rely upon certain actions and characteristics and the law will not permit any deviation. The same thing is true in the process of trading. Professor Green states that:

The insurance contract and the oil and gas lease are excellent examples of how even important contracts pass through stages of development before they become well formulated. In the transactions of more or less undeveloped patterns the doctrines of "actual fraud" and sometimes of negligence are employed as means of permitting leeway in keeping with the demands of the interests and the habits of the people they serve.<sup>13</sup>

In the thirty-four years since Professor Green's article was written our economy has developed many more standardized situations. The growth of chain stores, supermarkets, bargain-barns, etc. has reduced almost all personal property transactions to the level of take-it-or-leave-it and not of the bargain and "horse" trade nature.

### 3. *The relative base value position of the parties to the transaction*

This includes all the values in our society and particularly those of wealth, power, and knowledge. In a recent article covering the subject of false advertising, the writer stated:

. . . whether we consider the quality of pre-packaged foods, the efficacy of drugs, the composition of textiles, the identity of artfully processed furs, the composition of metal products . . . motors . . . appliances . . . the consumer or buyer is inescapably dependent upon the representations . . . made by the seller. And even in those areas where the consumer is presumably competent to make a judgment . . . the hectic pace of contemporary living seldom permits him to go beyond such comparison shopping as is possible on the basis of the price advertisements appearing in the daily press.<sup>14</sup>

Even here, of course, the enormous disparity between the parties of knowledge prevents any rational selection. The manufacturer has usually covered or wrapped his product in an attractive package and through saturation advertising has attempted to make the purchasers' choice depend upon a brand name or some other

<sup>13</sup> Green, *op. cit. supra* n. 9 at 751.

<sup>14</sup> Barnes, *False Advertising*, 23 *Ohio St. L. J.* 597, 602 (1962).

irrational factor.<sup>15</sup> The inherent qualities of the product are frequently ignored, and the seller-advertising agency has aimed at subconscious, even Freudian, factors. When the product is not packaged, as in the case of automobiles or appliances, the consumer is also at a disadvantage. The complexity of automatic transmissions, refrigeration mechanisms and the like have reduced the average consumer's selection to that of styling comparisons.<sup>16</sup> The impact of these environmental factors eliminates any notion of rational bargaining and therefore, in the proper instances, the legal doctrines of "fault," "reliance," and "privity."

#### *4. The outcome and effects manufacturer-supplier strategies have upon the consumer-public*

On the general level it has been argued that false and misleading advertising is bad for the economy in general. It fosters a decrease in Consumer Confidence and it operates as a sort of Gresham's law. That is, one bad, unethical advertiser by his disreputable representations can force the rest of the industry to make similar claims.<sup>17</sup> On a more specific level, the courts have always focused upon the effect or impact a representation had upon a particular plaintiff.

## **II. Protection of Consumer's Interest in Physical Integrity**

The courts have been more eager to extend the notion of the vendor's duty and obligation to the public in the physical injury cases.<sup>18</sup> Where a consumer has relied upon a manufacturer-supplier representation and this reliance has resulted in physical injury, recent cases have imposed a strict liability, free from any notions of fault, upon the supplier. The initial judicial focus was

<sup>15</sup> Treece, Copying Methods of Product Differentiation, 38 Notre Dame Law. 244, 258 (1963).

<sup>16</sup> Barnes, *op. cit. supra* n. 14 at 603.

<sup>17</sup> State v. Schaengold, 13 Ohio L. Rep. 130, 89 A.L.R. 1005 (1915). The court, in upholding the constitutionality of the Ohio false advertising law, said, "some merchants and manufacturers have wilfully misrepresented their wares, thereby . . . injuring the honest business man who will not resort to dishonest and alluring advertising to obtain trade. And if this practice is not curbed it can readily be seen that the honest business man will be compelled by the competition in his business to do likewise." *Id.* at 132.

<sup>18</sup> James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U. L. Rev. 537 (1952); McNiece and Thornton, Is the Law of Negligence Obsolete? 26 St. John's L. Rev. 255 (1952); James, Some Reflections on the Bases of Strict Liability, 18 La. L. Rev. 293 (1958); Prosser, Strict Liability to the Consumer, 69 Yale L. J. 1099 (1960).

on the effect of the misleading advertisement. Since the effect was the elimination of hair from a girl's head,<sup>19</sup> or dynamite injury,<sup>20</sup> or burns from highly inflammable hula skirt,<sup>21</sup> or auto tire failure<sup>22</sup> resulting in physical injuries, it is not too surprising that the courts have picked out the warranty formula amongst the deceit-negligence-negligent misrepresentation-warranty-estoppel theories of recovery.<sup>23</sup>

These courts have rejected the outmoded, individualistic bargaining ideas of privity and placed responsibility directly upon the originator of the advertisement; thereby taking notice of the true nature of the conflict. Most of these cases have stressed the environmental factors of the property transactions in eliminating the "privity" requirement. In a recent case the plaintiff was injured while working with dynamite produced by DuPont but sold by an intermediate distributor. The court in rejecting the notion of privity said:

We know that a given article may pass through several hands after it leaves the factory and that retailers or middlemen are mere "conduits . . . through which the manufacturer distributes his goods" (citing the Ohio case of *Rogers v. Toni Home Permanent Co.*, 147 NE 2d at 615). Thus, the consumer has come to rely more and more upon the representations and reputation of the manufacturer and less and less upon those of the retailer. This reliance is particularly justified where the articles are either sold in sealed containers or are otherwise of such a nature that no consumer could reasonably rely upon anyone but the manufacturer to detect or prevent latent defects.<sup>24</sup>

This case and others have relied upon all the environmental factors mentioned previously to determine whether the consumers' expectations should be given judicial sanctions. The courts, at one place or another, have mentioned the highly organized nature of marketing in which the retailer is a mere

<sup>19</sup> *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N. E. 2d 612, 75 A. L. R. 2d 103 (1958).

<sup>20</sup> *Arfons v. E. I. DuPont De Nemours & Co.*, 261 F. 2d 434 (2d Cir. 1958).

<sup>21</sup> *Brown v. Chapman*, 304 F. 2d 149, 198 F. Supp. 78 (9th Cir. 1962). This case, however, involved implied warranties and not direct, express representations by the defendant.

<sup>22</sup> *Hansen v. Firestone Tire & Rubber Co.*, 276 F. 2d 254 (6th Cir. 1960).

<sup>23</sup> But in *Rogers v. Toni Home Permanent*, *supra*, n. 19 at 252, 253, Judge Taft in a concurring opinion said the plaintiff's petition raised a good cause of action for negligence, deceit, or innocent misrepresentation.

<sup>24</sup> *Arfons v. E. I. DuPont et al.*, *supra*, n. 20 at 436.

"conduit," the standardization of consumer purchases, and the wide gap in knowledge about the product.<sup>25</sup> The same line of rationale has been applied in other fact situations and is not logically or realistically limited to inherently dangerous products such as dynamite. Nor is it logically limited to food, drug, and cosmetic cases.

Judge Kaufman in the *Du Pont* case said, "We do not read the *Rogers* case as merely another step along a well traveled road. That decision blazed a new trail . . . We cannot at this point say that the *Rogers* case is limited to its particular facts. . . ." <sup>26</sup>

The trend in the cases involving a false representation and physical injuries has been away from any individualistic notion of fault and scienter. The courts have emphasized the social-environmental forces in our economy, and the effect the representations have had upon the consumer; not the subjectivities of the manufacturer-supplier.

### III. Protection of Consumer Economic Expectations

Moving away from the physical injury problem, we come to the more typical "fraud" cases which the courts have characterized as protection of property interests. The private action of fraud has usually been employed to protect the stability of sales and credit transactions and the expectations of the parties. The problems with the use of fraud and deceit in this area have been:

#### 1. *The difficulty of establishing the private remedy because of the scienter requirement*

Where the intentional tort theory is used most courts say an essential element is our old friend "fault," "scienter," "dishonesty," or "intent to deceive."<sup>27</sup> A few cases, where the effect of the misrepresentation is one of injury to "property" rights, have used the warranty doctrine and eliminated fault,<sup>28</sup> but

<sup>25</sup> In another warranty case involving the liability of food manufacturers the court said: "it is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption." *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 612, 164 S. W. 2d 828, 829 (1942).

<sup>26</sup> *Arfons v. E. I. DuPont et al.*, *supra*, n. 20 at 436.

<sup>27</sup> 24 Ohio Jur. 2d 703, *Fraud and Deceit*, §109.

<sup>28</sup> Prosser, *supra*, n. 18 at 1143, suggests there are at least four cases protecting "property." The list is small because the products involved so far have been "intended for bodily use."



even then the parol evidence rule would eliminate recovery for oral misrepresentations in most instances. Furthermore, it is around this conception of fault that the courts have become engulfed in a semantic shell game. One writer has listed five possible states of mind that a seller could have in the transfer of property.<sup>29</sup> But for every state of mind there is probably a rule which could be discovered by a decision-maker to justify any result. Ohio, for instance, has purported to follow the strict notions of *scienter* established in *Derry v. Peek*,<sup>30</sup> but recently the Supreme Court, in a real estate transfer case,<sup>31</sup> created what amounts to a *scienter* substitute. It is probably true, as suggested by Professor Green in 1930, that the formula (e) adopted by any given jurisdiction is essentially immaterial.<sup>32</sup> And that the discovery by the court or jury of a dishonest intent is essentially a "gut reaction" process whereby the decision-maker reaches an ultimate result and then pushes the correct legal button.

Other solutions to the problem have been somewhat more conceptualistic. There have been suggestions to broaden the negligence<sup>33</sup> or warranty<sup>34</sup> theories. Also, there have been suggestions that a higher duty be placed upon sellers by analogy to the strict responsibility for innocent misrepresentation in other remedies.<sup>35</sup> Since the remedies of legal and equitable rescission

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<sup>29</sup> Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 U.C.L.A. L. Rev. 583, 589 (1958).

<sup>30</sup> 14 App. Cas. 337, 374 (1889). The court held that for an action of deceit to lie there must be proof "that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

<sup>31</sup> *Pumphrey v. Quillan*, 165 Ohio St. 343, 135 N. E. 2d 328 (1956). "A case may be made against one . . . (2) who misstates his own state of mind in regard thereto, as by saying that he knows its existence when he is conscious that he merely believes it to exist, or has no belief one way or the other of its truth or falsity; (3) who asserts a fact as of his own knowledge, or so positively as to imply that he has knowledge, when he knows that he has not sufficient information to testify it." See 24 Ohio Jur. 2d 708, *Fraud and Deceit*, § 115.

<sup>32</sup> Green, *op. cit. supra*, n. 9 at 757. "Each formula is elastic enough to allow the broadest range, both in the exercise of the court's own judgment and in permitting the employment of a jury. Can it be that the choice of formula is relatively immaterial?"

<sup>33</sup> Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733 (1929); Bohlen, *Should Negligent Misrepresentations be Treated as Negligence or Fraud*, 18 Va. L. Rev. 703 (1932).

<sup>34</sup> Williston, *Liability for Honest Misrepresentation*, 24 Harv. L. Rev. 415 (1911).

<sup>35</sup> See Prosser, *Torts*, § 88 at 549 (2d ed. 1955).

and restitution are aimed at the prevention of unjust enrichment, the courts have allowed relief regardless of the seller's honesty.<sup>36</sup>

It is interesting to note that while the courts have been willing to discuss the social factors governing the imposition of liability in the warranty cases, they have been unwilling to do so in the deceit cases. As noted earlier,<sup>37</sup> a few principles have developed placing a higher duty on the seller in the confidential-fiduciary cases. Similarly the institutionalization of the market is given brief recognition in some of the pure business transactions of credit, negotiable instruments, accounting procedures and so forth.<sup>38</sup> Apparently in these "business deal" cases, the courts have felt that the value of certainty outweighs the need for finding any subjective intent or fault. As yet, however, most courts have not eliminated the necessity of scienter in the common, run-of-the-mill consumer transactions and they have refused to take judicial notice of any of the social factors governing their decisions.

This refusal to accept innocent misrepresentation as a ground for recovering damages is foolish.<sup>39</sup> In many other areas of the law, when the courts and administrative bodies have dealt

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<sup>36</sup> *Parmlee, Admr. v. Adolph*, 28 Ohio St. 10 (1875); *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283 (1877).

See also *Mulvey v. King*, 39 Ohio St. 491, 494 where the court said, "It may be considered as well settled in this state . . . that an action for damages caused by misrepresentation can not ordinarily be maintained, without proof of actual fraud, or such gross negligence as amounts to fraud. When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, however honestly made, the same principles cannot be applied. It is then only necessary to prove that the representation was material . . . , that it was false, that the other party had a right to rely upon it, and that he was induced by it to make the contract in order to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it."

For another retention of the benefit case see *Gaisser v. Hansen*, 25 Ohio C. C. (n. s.) 262, 37 Ohio C. C. 430 (1915).

<sup>37</sup> 24 Ohio Jur. 2d, *supra*, n. 10.

<sup>38</sup> *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275 (1922); *Seneca Wire & Mfg. Co. v. Leach & Co.*, 247 N. Y. 1, 159 N. E. 700 (1928); *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931); *Rouse, Legal Liability of the Public Accountant*, 23 Ky. L. J. 1 (1934).

<sup>39</sup> Prosser states that only thirteen jurisdictions have flatly rejected the rule of *Derry v. Peck*, *supra*, n. 30, and all its variations and grant a cause of action for innocent misrepresentation. Prosser, *supra*, n. 7 at 547. Professor Keeton, however, states that in most of these cases the misrepresentor was a party to the transaction and therefore the recovery is similar to rescission and restitution to prevent unjust enrichment. Keeton, *Fraud*, 5 U.C.L.A. L. Rev. 583, 600 (1958).

with group ideological and economic strategies, they have been forced to do away with any hope of finding a single, subjective intent. The courts placed stress upon the impact or effect of the organizational activity and not the subjective intent. For instance, in 1945, Judge L. Hand raised a "hornets' nest" of controversy by his interpretation of Section 2 of the Sherman Act in *United States v. Aluminum Co. of America*.<sup>39a</sup> The Judge rejected the necessity of finding a sole intent and said:

To read the passage as demanding any "specific intent" makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here "Alcoa" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" the market, however innocently it otherwise proceeded.<sup>40</sup>

Also, in the price fixing, employer boycott, market division cases, the courts abandoned the motive test and adopted the impact-effect test.<sup>41</sup> In labor law, the early courts placed themselves in trouble by attempting to find an "illegal objective" in certain types of union strategies such as picketing and black-listing.<sup>42</sup> Now, however, where the union strategies are other than picketing, Congress has eliminated motive as a method of judicial and administrative control.<sup>43</sup> Therefore, unless the effect of the publicity is to stop deliveries or interfere with employees, it is permissible.

The Federal Trade Commission has attempted to give to the consumer a public remedy and to protect him from misrepresentations and false advertising.<sup>44</sup> Of particular interest here, in the private remedy of deceit, is that the Commission has rejected the common law notions of *scienter*<sup>45</sup> and truth.<sup>46</sup> In determining whether a particular representation is unfair the Commission looks for noticeable emphasis of effects upon the con-

<sup>39a</sup> 148 F. 2d 416, 153 F. Supp. 132 (2d Cir. 1945).

<sup>40</sup> *Id.* at 432.

<sup>41</sup> Burns, *A Study of the Antitrust Laws* (1958) at 39.

<sup>42</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911); Frankfurter and Greene, *The Labor Injunction* (1930).

<sup>43</sup> Labor-Management Relations Act (1947) § 8(b) (4) (i) & (ii) amended by Labor-Management Reporting & Disclosure Act (1959), Public Law 86-257, Title VII, § 704(a), 73 Stat. 542, 29 U. S. C. 158.

<sup>44</sup> See *supra*, n. 3.

<sup>45</sup> *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578 (2d Cir. 1941).

<sup>46</sup> *Bockenstette v. Federal Trade Commission*, 134 F. 2d 369 (10th Cir. 1943).

sumer public. The bellwether case of *Charles of the Ritz*<sup>47</sup> prohibited the manufacturer from using the word "rejuvenescence" in its advertising of face cream, and Judge Clark answered the manufacturer's defense of "no deception" with a frank awareness of the consumers' interests:

The important criterion is the net impression which the advertisement is likely to make upon the general populace. . . . And, while the wise and the worldly may well realize the falsity of any representations that the present product can roll back the years, there remains "that vast multitude" of others who, like Ponce de Leon, still seek a perpetual fountain of youth. As the Commission's expert further testified, the average woman, conditioned by talk in magazines and over the radio of "vitamins, hormones, and God knows what," might take "rejuvenescence" to mean that this "is one of the modern miracles" and is "something which would actually cause her youth to be restored." It is for this reason that the Commission may "insist upon the most literal truthfulness" in advertisements . . . and should have the discretion, undisturbed by the courts, to insist if it chooses upon a form of advertising clear enough so that, in the words of the prophet Isaiah, wayfaring men, though fools, shall not err therein."<sup>48</sup>

It would seem appropriate for common law courts to discard this antiquated intent element and approach the deceit problem in a modern, enlightened manner.

2. *The highly organized nature of the manufacturer-distributor-seller and the highly unorganized nature of the consumer-purchaser permits the seller to benefit by the "accumulation" rule*

This rule states that mass production, mass advertisement, and mass marketing of relatively inexpensive, non-durable, consumer goods permit a slight amount of misrepresentation per item. These false representations are made because (a) the consumer is probably not misled and (b) even if he is, the damages are small and he therefore has no remedy.<sup>49</sup> This accumulation of "fraud" over a period of time can amount to a sizeable sum of money. Thus fraud, if it is spread over a wide base, can

<sup>47</sup> 143 F. 2d 676 (1944).

<sup>48</sup> *Id.*, at 679-680.

<sup>49</sup> *Alden v. Wright*, 47 Minn. 225, 49 N. W. 767 (1891); *Bailey v. Oatis*, 85 Kan. 339, 116 P. 830 (1911); 24 Ohio Jur., 739, *Fraud and Deceit*, § 150.

become a very profitable enterprise. Along with the accumulation rule is the 'small differentiation' principle. This principle states that the smaller the differentiation between products, or the more similar they are in looks and function, the more blatant or false the advertising will become. A brief view of the gasoline, hair oil, shaving cream, toothpaste and soap advertisements will aggravate the observer with a depressing perspective.

In this latter field of small, inexpensive, consumer items, the public remedy via the Federal Trade Commission is the most effective.<sup>50</sup> The private remedy of fraud and deceit would be too sporadic. And even without the halter of *scienter*, the common law doctrines of proof of damages<sup>51</sup> and the limitations upon the bringing of class actions<sup>52</sup> would effectively stifle any consumer revolt. But this does not mean the action of fraud, without *scienter*, is without merit for the more expensive consumer purchases.

### Conclusion

Professor Handler, in 1929,<sup>53</sup> suggested that people expect too much from the law, and that changes will only come about in false advertising when the producer-advertiser becomes more socially conscious. Professor Handler said, "a new business psychology must be bred" and "a regard for truth and an aversion for falsity must be inculcated."<sup>54</sup> While these general conclusions may be correct, I would not agree that the private remedy for fraud is entirely useless for controlling overzealous advertisers. If some of the dated concepts, such as *scienter*, are removed or brought up to date, deceit is a very useful complement to the other actions of negligence, warranty, and rescission and restitution. Furthermore, it seems wrong to leave the individual consumer completely at the mercy of the federal and state agencies or the self-imposed restraint of the private producer-distributor.

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<sup>50</sup> See *supra*, n. 3. Also see Handler, False and Misleading Advertising, 39 Yale L. J. 22 (1929).

<sup>51</sup> See *supra*, n. 49. And see, Oleck, Cases on Damages, c. 25 (1962).

<sup>52</sup> Garfein v. Stiglitz, 260 Ky. 430, 86 S. W. 2d 155 (1935).

<sup>53</sup> Handler, *op. cit. supra*, n. 50.

<sup>54</sup> *Id.* at 52.