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Advertising--False Impression Held Actionable (People v. Minjac Corp., 4 N.Y.2d 320 (1958))

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seem to be harmed by a six-year statute of limitations in determining municipal liability.

ADVERTISING—FALSE IMPRESSION HELD ACTIONABLE.—Defendant corporation had advertised toys for sale at large discounts. Nevertheless it sold two games at a "discounted" price greater than the standard retail rate established in the community. In affirming a conviction for deceptive advertising,[1] the Court of Appeals *held* that though the defendant might set its list prices and discounts freely, it might not create the false impression that it was underselling its competitors. *People v. Minjac Corp.*, 4 N.Y.2d 320, 151 N.E.2d 180, 175 N.Y.S.2d 16 (1958).

At common law the merchant's practice of making exalted claims for his wares was not actionable if the parties dealt at arm's length.[2] But when the expansion of business gave rise to mass advertising, exaggeration to the point of falsehood became so common that some regulation was badly needed. The only existing remedy made successful prosecution all but impossible because it entailed proving all three requirements of a deceit action, *i.e.*, intentional falsification, reliance, and resulting harm.[3] In 1911 the trade magazine *Printer's Ink* proposed a Model Statute [4] designed to curb advertising abuses. This statute did not require knowledge of falsity, intent to deceive, or damage to a purchaser, but rather imposed absolute liability on anyone guilty of the prohibited act.[5] At present only five states have not adopted this Model Statute in a general way; [6] eleven have added the requirement of knowledge of falsity.[7]

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for filing a petition in an article 78 proceeding in certiorari or mandamus), *with* N.Y. CIV. PRAC. ACT § 48(1) (which allows a six-year period for the commencement of a contract action).

[1] "Any . . . corporation . . . [which], with [the] intent to sell or in any wise dispose of merchandise, . . . directly or indirectly, to the public . . . , makes, publishes, . . . or places before the public . . . in the form of a . . . poster, bill, sign, placard, card . . . an advertisement [which] . . . contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor." N.Y. PEN. LAW § 421 (Supp. 1958).

[2] See, *e.g.*, Burwash v. Ballou, 230 Ill. 34, 82 N.E. 355 (1907).

[3] See RESTATEMENT, TORTS § 525, at 59 (1938).

[4] See Comment, 36 YALE L.J. 1155, 1156 n.6 (1927).

[5] *Id.* at 1157.

[6] Arkansas, Delaware, Georgia, Mississippi, and New Mexico. See Note, 56 COLUM. L. REV. 1018, 1058 (1956).

[7] CAL. BUS. & PROF. CODE ANN. § 17500 (West 1956); FLA. STAT. ANN. § 817.06 (1941); MD. ANN. CODE art. 27, § 195 (1957); MASS. ANN. LAWS c. 266, § 91 (1956); N.H. REV. STAT. ANN. 580:9 (1955); PA. STAT. ANN.

Though New York has had some form of deceptive-advertising statute on its books since 1904,[8] the law was of little effect because for conviction it required proof that the advertiser had been aware of the falsity of his statements.[9] When New York adopted the Model Statute in its complete form in 1921 [10] (retained substantially unchanged as section 421 of the Penal Law), it took its first step in the direction of effective advertising control. But since section 421 is a penal statute, it was questioned whether the section should be interpreted strictly in favor of the defendant [11] even though such an interpretation would greatly hamper its regulatory power. This query has been answered in the negative both by the courts [12] and by the provisions of the Penal Law itself.[13] In *People v. Glubo* [14] the court, while affirming a conviction for misleading radio commercials under section 421, said:

> It should be noted . . . that the rule of strict construction is not applicable here. The Legislature has expressly abrogated that rule with respect to all the provisions of the Penal Law.[15]

That section 421 has *not* been construed strictly in favor of the defendant has been made clear by convictions under it in the absence of intention to deceive,[16] knowledge of falsity,[17] or actual deception of a purchaser.[18]

In the past, the New York courts were reluctant to convict solely on the ground of false *impression* when the words of the advertisement did not actually constitute a false *statement.* In *People v. Le Winter's Radio Stores, Inc.,*[19] conviction was refused though a storekeeper had placed a sign on a refrigerator quoting an incorrectly

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tit. 18, § 4857 (1945); S.D. CODE § 13.1831 (Supp. 1952); TENN. CODE ANN. § 39-1910 (Supp. 1958); TEX. PEN. CODE ANN. art. 1554 (1953); UTAH CODE ANN. § 76-4-1 (1953); VT. STAT. § 8324 (1947).

[8] Laws of N.Y. 1904, c. 423.

[9] "Any . . . corporation . . . [which] *knowingly* makes or disseminates any statement or assertion of fact . . . which is untrue or calculated to mislead, shall be guilty of a misdemeanor." *Ibid.* (Emphasis added.)

[10] Laws of N.Y. 1921, c. 520.

[11] That this attitude persists, see People v. Minjac Corp., 4 N.Y.2d 320, 324, 151 N.E.2d 180, 183, 175 N.Y.S.2d 16, 20 (1958) (dissenting opinion).

[12] *Accord,* People v. Reilly, 255 App. Div. 109, 6 N.Y.S.2d 161 (4th Dep't 1938), *aff'd mem.,* 280 N.Y. 509, 19 N.E.2d 919 (1939). See People v. Glubo, 5 A.D.2d 527, 540, 174 N.Y.S.2d 159, 170 (2d Dep't 1958) (dictum).

[13] "The rule that a penal statute is to be strictly construed does not apply to this chapter or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law." N.Y. PEN. LAW § 21.

[14] 5 A.D.2d 527, 174 N.Y.S.2d 159 (2d Dep't 1958).

[15] *Id.* at 540, 174 N.Y.S.2d at 170.

[16] People v. Garten, 235 App. Div. 641, 255 N.Y. Supp. 823 (2d Dep't 1932) (mem. opinion).

[17] People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690 (1943).

[18] People v. Kelly, 204 Misc. 145, 122 N.Y.S.2d 248 (Magis. Ct. 1953).

[19] 256 App. Div. 1098, 11 N.Y.S.2d 689 (2d Dep't 1939) (mem. opinion).

low price, because in small print the word "from" preceded the amount, indicating that the sign did not necessarily refer to that particular appliance.[20] However, in the principal case, conviction was allowed for false impression alone when the defendant placed this sign in its window:

Westchester First
Toy Discount
Super Market
20% to 40% Off

Although the sign did not claim that every item in the store was included in the discount,[21] and the games purchased by the complainant might have been distinguished from the toys mentioned in the advertisement as being sold at a discount, the majority held that a generally false impression had been created.

With this approach, New York is following the lead of the federal courts. In *FTC v. National Health Aids, Inc.*,[22] the court stated that the test of the falsity of an advertisement is the net impression likely to be made on the general public.[23] The decision in the *Minjac* case also ties in with the policy shown toward the related problem of "bait" advertising. This is the practice of offering a discount on a brand-name product solely as a lure without intending to sell the lead item. In doubt as to whether section 421 could be stretched to cover such situations, the legislature has this year passed an amendment to the General Business Law [24] empowering the Attorney General to obtain injunctive relief against violators. The injunction can issue without proof that anyone has in fact been misled.[25]

It is suggested that the New York trend in advertising regulation is indicative of a strong approach to the problem. Without the likelihood of successful conviction, few regulatory agencies or indi-

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[20] See Trial Record, People v. Le Winter's Radio Stores, Inc. (Ct. Spec. Sess.), as quoted in People v. Glubo, 5 A.D.2d 527, 539, 174 N.Y.S.2d 159, 169-70 (2d Dep't 1958). *But see* People v. Kelly, *supra* note 18. A racing-form publisher had printed winners on his tip-sheet after the races had been run and then left the selections around the track at the end of the day as an inducement to purchase the form in the future. He was convicted of false advertising under § 421 even though he had not made a false statement, apparently on the strength of the deliberate fraud involved.

[21] People v. Minjac Corp., 4 N.Y.2d 320, 325, 151 N.E.2d 180, 183, 175 N.Y.S.2d 16, 20 (1958) (dissenting opinion).

[22] 108 F. Supp. 340 (D. Md. 1952).

[23] The federal statute reads: "It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing . . . directly or indirectly the purchase of food, drugs, devices, or cosmetics. . . ." 52 STAT. 114 (1938), 15 U.S.C. § 52 (1952).

[24] N.Y. GEN. BUS. LAW § 396 (Supp. 1958).

[25] *Ibid.* See 140 N.Y.L.J. No. 55, p. 1, col. 5, 6 (Sept. 17, 1958).

vidual citizens would instigate prosecution. However, it should also be noted that the false-impression doctrine is broad enough to include a very large percentage of current discount-offering ads. Since widespread prosecution seems impractical, the force of the doctrine will probably be applied in a few isolated cases as a deterrent to other violators.

CONFLICT OF LAWS—LEX LOCI DELICTI HELD APPLICABLE AS TO AVAILABILITY OF DEFENSE OF CHARITABLE IMMUNITY, REGARDLESS OF LAW OF PLACE WHERE CHARITY ORGANIZED.—Plaintiff brought this action for the wrongful death of his fifteen-year-old daughter. Decedent fell to her death while on a tour in Oregon conducted by defendant, a charitable organization incorporated under the laws of New York. One of the affirmative defenses [1] pleaded by defendant was that of charitable immunity from tort liability, under the decisional law of Oregon. The lower court granted a motion to strike the defense.[2] The Appellate Division modified [3] the ruling by upholding the validity of this defense, *holding* that the *lex loci delicti* controls as to the availability of the defense of charitable immunity and not the law of the state where the charity was organized. *Kaufman v. American Youth Hostels, Inc.*, 6 A.D.2d 223, 177 N.Y.S.2d 587, *motion for leave to appeal granted*, 6 A.D.2d 1016, 178 N.Y.S.2d 623 (2d Dep't 1958).

In general, the law of the place where a tort was committed is controlling,[4] not only as to whether a cause of action arose *ab initio*,[5] but also as to the availability of defenses,[6] *e.g.*, charitable immunity. There is, however, an exception to this rule. Where a strong public policy of the place of the forum is in direct conflict with the law of the place of commission of the tort, that public policy must prevail.[7]

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[1] Another defense, involving a covenant not to sue, was set up in the answer, but is not treated here.

[2] Kaufman v. American Youth Hostels, Inc., 174 N.Y.S.2d 580 (Sup. Ct. 1957).

[3] The ruling of the Supreme Court as to the defense of charitable immunity was reversed; as to the covenant not to sue, affirmed.

[4] *Accord*, Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244, 248, 194 N.E. 692, 694 (1935). See RESTATEMENT, CONFLICT OF LAWS § 166, comment *b*, § 377 (1934); GOODRICH, CONFLICT OF LAWS § 95, at 267 (3d ed. 1949).

[5] See Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 226, 186 N.E. 679, 682 (1933).

[6] STUMBERG, CONFLICT OF LAWS 188-89 (2d ed. 1951). *Cf.* Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112 (1929).

[7] Jewtraw v. Hartford Acc. & Indem. Co., 280 App. Div. 150, 153, 112 N.Y.S.2d 727, 731 (1952); Allison v. Mennonite Publications Bd., 123 F. Supp.