

# FALSE ADVERTISING IN GEORGIA—PRIMA FACIE VIOLATIONS—PROPOSED STATUTES

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On March 28, 1961 the General Assembly approved a law<sup>1</sup> for the prevention of untrue and fraudulent advertising, amending a prior statute<sup>2</sup> approved March 25, 1958 which covered only that phase of false advertising known as bait advertising. By its terms the new statute encompasses the entire area of false advertising exclusive of bait advertising which is already covered by the prior statute. The practical application of these two statutes in their present form is questionable. Two proposed false advertising statutes are presented here for the consideration of the General Assembly. The proposed statutes basically differ from those now the law in the approach taken to criminal enforcement.

## HISTORY

Prior to the passage of these two recent statutes practically the only remedy<sup>3</sup> the citizen of Georgia had against false advertising was the ancient action of deceit which was exceedingly clumsy<sup>4</sup> in practical operation. The scarcity of cases reported under this form of action is indicative of its ineffectiveness.

Present day methods of mass consumer sales and the constant bombardment of advertising matter has brought with it a great need<sup>5</sup> for consumer protection. The point has been reached where even the honest advertiser needs protection from his more unscrupulous brother.

The history of state legislation in this field began early in the 20th century. The clumsiness of the action for deceit culminated in the

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1. Ga. Laws 1961, p. 197.

2. Ga. Laws 1958, p. 411, GA. CODE ANN. §106-501 (1960 Supp.).

3. Possible remedies are: Rescission, but this requires mutual assent. GA. CODE §20-906; Breach of warranty but the burden of proof is upon the purchaser. GA. CODE §96-301 (1933). See generally, Comment, *False Advertising in Georgia*, 12 MERCER L. REV. 260 (1960).

4. The necessary proof includes (1) seller's knowledge that the statement is false and (2) buyer's reliance on the veracity of the statement. PROSSER, TORTS (2nd Ed.) p. 522. No false advertising cases under an action for deceit have been brought in Georgia to date.

5. For an exhaustive list of articles see Comment, *False Advertising in Georgia*, 12 MERCER L. REV. 260 at fn 7. (1960).

drawing up of a model statute in 1911. The Printers Ink Model Statute was rapidly adopted in many states, but it was opposed and defeated in Georgia by the publishers of country newspapers who derived a large portion of their revenue from patent medicine advertisements. General activity in the false advertising field in Georgia was not resumed until 1958, when the bait advertising statute was enacted.

### JURISDICTION

The states have ample jurisdiction<sup>6</sup> in which to act. The Federal Government takes an active part in combating fraudulent advertising but they have not preempted the field. They actually need help. The states, with proper statutes and enforcement are in an excellent position to give this help. The Printers Ink Model Statute<sup>7</sup> excluded all oral statements from its operation and did not require damage as an element of the action. The only intent required was the intent to sell, *no knowledge* of the advertisement's fraudulent character needed to be proved. This statute is today the main weapon in the arsenals of other states in their fight against false advertising.

### THE NEW STATUTE—A COMPARISON WITH THE OLD

The new Georgia statute is designed to cover *any* disposition of property or performance of services brought to the public's attention within the state. There being no requirement of consumer reliance or special damages the act is satisfied by any type of untrue or fraudulent advertising, whether or not an immediate sale is contemplated. Georgia's prior statute covered only those situations in which the seller has the intent not to sell at the price advertised or on the terms advertised or not to sell at all. The prior statute is aimed at protecting against the practice of offering high quality goods as "bait" to attract a customer and then selling him something else of lesser quality or higher price once an audience with the consumer is obtained and a buying mood established. The goods advertised are mere bait to attract the customer, thus, the name bait<sup>8</sup> advertising. The new Georgia

6. See Comment, *False Advertising in Georgia*, 12 MERCER L. REV. 260 (1960) for a detailed analysis of the jurisdiction of the states in false advertising cases. See also Comment, *State Control of Bait Advertising*, 69 YALE L. J. 830 (1960).
7. Comment, *The Regulation of Advertising*, 56 Colum. L. Rev. 1019 (1956). The Printers Ink Model Statute was drawn up by Mr. Harry Nims at the request of Printers Ink, a magazine published for advertisers. Comment, *False Advertising in Georgia*, 12 MERCER L. REV. 260 (1960).
8. Comment, *False Advertising in Georgia* 12 MERCER L. REV. 260 (1960); Comment, *The Regulation of Advertising*, 56 Colum. L. Rev. 1019 (1956) and Comment, *State Control of Bait Advertising*, 69 YALE L. J. 830, 837 (1960).

statute is designed to prohibit *all* varieties of false advertising and this is where it differs from the prior statute.

The prior statute was designed to handle situations such as that which arose in *People v. Glubo*,<sup>9</sup> where an advertisement was disseminated over a radio station, "For a close out price of just \$29.95 our top quality brand new 1954 model round bobbin sewing machine with an exclusive magic stitcher which darns, mends, embroiders, monograms, which sews over pins and needles and which sews forward and reverse all without additional attachments". In response to each inquiry for the sewing machines a lead man would approach the customer and take his order by accepting a deposit for as little down as 25¢ on the \$29.95 machine. A few days later another man would visit the customer ostensibly to demonstrate and deliver the machine. During the demonstration the machine would prove inoperative and the salesman would then attempt to step up the customer to a more expensive machine by pointing out the inferiority of the \$29.95 machine and other tactics. If he failed he would then leave with the \$29.95 machine and a few days later the deposit would be mailed back to the customer.

The new statute is designed to prevent situations such as advertising "Firestone Convoy Tubes 50% off regular first line price" when Convoy tubes were in reality third line tubes<sup>10</sup> and selling tout sheets at a race track after first notifying the printer of the first four winners of the day and having him put these on a sheet already made up to show the tout's best guess as to the winners of the last four races and delivering 3000 of these to the track for sale to late afternoon customers.<sup>11</sup>

Georgia's newest statute against false advertising reads:

No person, firm, corporation or association or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services professional or otherwise, or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto shall make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication or advertising device or by public outcry or proclamation or any other manner or means whatever, any statement concerning such real or personal property or services, professional or otherwise, or concerning any circum-

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9. Comment, *State Control of Bait Advertising*, 69 YALE L. J. 830, 837 (1960) 5 N.Y. 2d 461, 158 N.E. 2d 699 (1959).

10. *People v. Wohl*, 39 Calif. App2d 771, 100 P2d 550 (1940).

11. *People v. Kelly*, 122 NYS 2d 248 (1953).

stances or matter of fact connected with the proposed performance or disposition thereof, which is untrue or fraudulent and which is *known* to be untrue or fraudulent or with reasonable care should be known to be untrue or fraudulent.

Nothing in this section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising, who broadcasts, telecasts, publishes or prints such advertisement in good faith without knowledge of its false or fraudulent character.<sup>12</sup> (emphasis supplied.)

The statute is clear and concise but will be ineffective because of the difficulty encountered in establishing the requisite knowledge.

An intent to dispose of property or to perform services or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto is the first requisite of the statute. The last mentioned intent "to do anything of any nature whatsoever . . ." obviously means anything relating to the disposition of property or performance of services. This being so, a situation illustrated by an early Ohio case is not covered. In that case, under a statute making it unlawful to advertise with the advertising being untrue, deceptive or misleading, a defendant advertised for salesman at \$25 per week plus commission and plaintiff, in answer to the advertisement worked nine days, being paid only \$11 for his services. Here the defendant advertised *to buy* the services of the plaintiff. This situation exists today in newspaper advertising in Georgia where promises of fantastic rewards for salesman are made, but which materialize in only a very few cases. This practice is not prohibited under the present Georgia statutes since in the recent general statute the requisite intents must, by the wording of the statute, flow from the *disposition of property or the rendering of services and not from the purchase of services or property*. The practice does not come under the more narrow bait advertising statute either, since there is no intent "not to sell"; only an intent to purchase.

The advertisement placed before the public within the state must be untrue or fraudulent and it must be *known* to be so or with the exercise of reasonable care should have been known to be so. This requirement emasculates the statute.

This requirement appearing at the end of the statute, must be read with the subject of the sentence, the intent to dispose of property or to render service. Reading them together it is seen that the intent nec-

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12. Ga. Laws 1961, p. 197. This statute is almost the same as the California statute, CALIF. BUS. & CODE ANN. §17,500. No reported cases appear under this statute.

essary for conviction is either an intent to dispose of property or to render service. Reading them together it is seen that the intent necessary for conviction is either an intent to dispose of property or render service plus a specific *mens rea* (knowledge) or an intent to dispose of property or render service plus proof of negligence.

The requiring proof of a specific *mens rea* or its substitute, negligence, in practical effect nullifies the effectiveness of the statute. Solicitors throughout the state will attest to the difficulty of proving intent of any sort, and in a criminal case proving a specific criminal intent is even more difficult. Proof of negligence, which in most cases will have to be imputed to the defendant, also presents a heavy burden for the state. Where will the line be drawn between legitimate "puffing" of wares and negligent advertising?

Most solicitors carry a heavy load of work. The rewards, in the usual case, of a prosecution under this statute in proportion to the amount of work required is prohibitive of effective enforcement. In the scale of serious crimes false advertising must be placed far below the too-frequent murders and rapes. Since a criminal penalty is imposed under both false advertising statutes the burden of proof required is "beyond a reasonable doubt". More prosecutions would be attempted if the burden were lightened to require only a preponderance of the evidence.

On the problem of practical enforcement several alternatives might be considered. Juries are usually reluctant to brand a man a criminal solely for false advertising. Perhaps there should be civil action for treble damages or minimum damages? But treble damages are not very practical since special damage would first have to be shown as an added element of proof before they could be trebled, and even treble damages might be too insignificant in amount to warrant prosecuting a private action of this sort. Further, competitors might sue on the ground of unfair competition, but the small businesses would probably hesitate to start what could be protracted litigation where damages are hard to prove. Injunction is too mild a remedy and substantial profits could be made before the injunction issued.<sup>13</sup>

The following two statutes are submitted to the General Assembly for their consideration. The author has freely dipped into the statutes of Georgia and of other states for provisions considered appropriate, however, the two statutes proposed are new to all jurisdictions, and

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13. See generally Comment, *State Control of Bait Advertising*, 69 YALE L. J. 830 (1960), Comment, *The Regulation of Advertising*, 56 COLUM. L. REV. 1019 (1956), Comment, *False Advertising in Georgia*, 12 MERCER L. REV. 260 (1960).

should be read with this thought in mind: it is not the educated or the intelligent or the wary who need protection from unscrupulous advertisers but rather the gullible, the inexperienced, and the timorous. Statutes in this area should be drafted with that in mind.

#### THE PROPOSED GENERAL STATUTE

1. The following definitions shall apply to this act.
  - a. The term PERSON shall mean any individual, firm, corporation, partnership, or association or any employee or agent<sup>14</sup> thereof.
  - b. The term ADVERTISEMENT shall be considered to include an offer for sale made before the public as part of its definition.
  - c. The term FALSE ADVERTISEMENT shall mean an advertisement which contains any insertion, representation, or statement of fact which is untrue, deceptive, or misleading.<sup>15</sup> In determining whether any advertisement is untrue, deceptive, or misleading there shall be considered, among other things, not only representations contained in the advertisement made or suggested by any word, design, device, sound, or combination thereof, but also there shall be considered the extent to which the advertisement fails to reveal material facts in the light of such representations.<sup>16</sup>
2. Nothing in this act shall be construed to apply to face to face representations.<sup>17</sup>
3. Any solicitor in any circuit within the state upon his own information or upon complaint may prosecute any person violating this act.
4. No person duly licensed<sup>18</sup> to do business within the state by the state or any political sub-division thereof shall make or disseminate or cause to be made or disseminated in any newspaper or other advertising device or publication or by public outcry or proclamation or by any

14. The Printers Ink Model Statute did not add the requirement "employee or agent thereof" until 1945. The original statute was drawn in 1911.

15. The same as Printers Ink Statute.

16. IND. STAT. ANN. 10-2124 (1960 Supp.). This definition came originally from Massachusetts.

17. *Vis-a-vis* transactions were deleted as dangerous—could easily lead to perjury on the part of the dissatisfied purchaser.

18. The proposed statute does away with the element of *scienter* or negligence on the part of the seller. Forfeiture is provided as a penalty. The requirement of licensing will avoid too harsh an application of the statute on amateur sellers. Anyone dealing from the want-ads in a newspaper expects to assume some risk. People dealing with professional sellers or advertisers expect protection from the state.

other manner or means whatever any false advertisement concerning the disposition of real or personal property or concerning the rendering of services, professional or otherwise or concerning any circumstances or matter of fact connected with the disposition<sup>19</sup> of such real or personal property or concerning any circumstances or matter of fact connected with the rendering of such services professional or otherwise; with the intent, directly or indirectly to dispose of or obtain<sup>20</sup> real or personal property or to perform or have performed<sup>21</sup> services professional or otherwise or to induce the public to enter into any obligation relating thereto.<sup>22</sup>

5. Special Damages need not be alleged or proven.<sup>23</sup>
6. To sustain a conviction under this act a preponderance of the evidence shall be required.<sup>24</sup>
7. The penalty for violating this Act shall be a forfeiture within the discretion of the court but in no case shall it exceed one hundred dollars for each violation thereof. Each day of publication shall constitute a separate violation. There shall also be in the discretion of the court a public printing of the violation in a newspaper of general circulation in the county where the violation occurred or in a newspaper of general circulation in the county of the residence or principal place of business of the offender. Such public printing may be in both newspapers at the discretion of the court. The public printing shall be one insertion each week for a consecutive four week period and shall include the name of the offender and the name of the individual most responsible for the violation and the nature of the offense. The name of the

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19. The requirement of "intent to purchase" and "or the hire of professional services" for conviction under the Printers Ink Statute was added in 1945. Because of the infinite variety of advertising techniques the author submits this as a method of defining the boundaries of the intent without making it necessary to specify instances; thus making the statute more inclusive without losing a standard for the guidance of the court. The phrase "proposed disposition" and the phrase "the rendering of" includes both the selling and buying by the advertiser as well as leasing, mortgaging, or any other method of transferring a property interest or for the rendering of services, professional or otherwise.

20. *Ibid.*

21. *Ibid.*

22. The requirement "before the public within the state" was deleted since the methods of dissemination assure it will be before the public, *e.g.* an "advertising." The requirement that it be within the state simply complicates matters since this Act applies to everyone subject to the jurisdiction of the courts of Georgia whether the ad is disseminated outside the state or not.

23. Add solely for clarification.

24. This greatly increases the effectiveness of the statute. It actually is doubtful whether any really effective false advertising statute can be drawn with "beyond a reasonable doubt" as the burden of proof. The crime just is not that serious in most cases.

victim, if there be one, shall not be included. The costs to be borne by the offender.<sup>25</sup>

8. Nothing in this Act shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, a magazine, or other form of advertising who broadcasts, telecasts, publishes or prints such advertisement in good faith without knowledge of its untrue, deceptive, or misleading character.<sup>26</sup>
9. Ga. Laws 1961, p. 197 is hereby repealed.

#### THE PROPOSED BAIT ADVERTISING STATUTE

1. The following definitions shall apply to this Act.
  - a. The term PERSON shall include any individual, firm, corporation, partnership, or association or any employee or agent thereof.
  - b. The term ADVERTISE shall be considered to include an offer for sale made before the public as part of its definition.
2. Any solicitor in any circuit within the state may upon his own information or upon complaint may prosecute any person violating this Act.
3. No person shall advertise by making or disseminating or causing to be made or disseminated in any newspaper or other advertising device or publication or by any other manner or means whatever any assertion, representation, or statement of fact concerning the disposition of real or personal property or concerning the rendering of services, professional or otherwise, or concerning any circumstances or matter of fact connected with the proposed disposition of such real or personal property or concerning any circumstances or matter of fact connected with the rendering of such services, professional or otherwise, with the intent not to dispose of, obtain, perform, or have

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25. This is a unique feature of the Act. It will be noticed the trial judge is given discretion in both determining the amount of the forfeiture and the degree of notoriety to be given to the offense. The only absolute restrictions are (1) that the name of the victim must not be published. This encourages people to press their rights, and (2) a minimum forfeiture of \$100.

The forfeiture provision can be sustained by the legislature as analogous to the action of *qui tam*. This is an action given by statute to allow an informer to obtain a percentage of the penalty imposed by the state for the commission or omission of an act. BLACK'S LAW DICTIONARY 1414 (4th ed.) (1957). See also State ex rel. Rodes v. Warner, 197 Mo. 650, 663, 91 S.W. 962, 965 (1906).

Tourists smuggling goods into the country and evasion of taxes are two affirmative acts covered by this type of action. See Comment, *State Control of Bait Advertising*, 69 YALE L. J. 839, 840, note 54.

26. This is a general provision designed to protect the printer or publisher acting in good faith. Otherwise the burden of ascertaining compliance with the statute would be thrust upon them.

performed at the price advertised or upon the terms advertised or not to dispose of, obtain, perform, or have performed at all.<sup>27</sup>

4. The following shall<sup>28</sup> be a prima facie violation of the Act.
  - a. The refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer.
  - b. The substantial disparagement by acts or words of the advertised product of the disparagement of the guarantee, credit terms, availability of service, repairs or parts or in any other respect in connection with it.
  - c. The failure without just cause to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the merchandise is available only at certain designated outlets.
  - d. The refusal to take orders for the advertised product to be delivered within a reasonable period of time.
  - e. The showing or demonstration of a product which is defective, unuseable or impractical for the purpose represented or implied in the advertisement.
  - f. Use of a sales plan or method of compensation for salesmen, designed to prevent or discourage them from selling the advertised product.
  - g. Switch after sale. After the sale to attempt to "unsell" with the intent to sell other merchandise in its stead.
  - h. Accepting a deposit of the advertised product, then switching the purchaser to a higher priced product.
  - i. Failure to make delivery of the advertised product within a reasonable time or to make a refund.
  - j. The delivery of the advertised product which is defective, unuseable or impractical for the purpose represented or implied in the advertisement, and failing to deliver a product as advertised within a reasonable time after notice of the defective product is given.

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27. This is similar to the general statute so the operative provisions may be interpreted together. This could have been added at the end of the other statute but it was kept separate for the sake of clarity.

28. These are lifted verbatim from the *FTC Guides to Bait Advertising*, 24 FED. REG. 9755 (1959) with slight modifications to make the Acts sufficiently incriminating to establish a prima facie case thus to prevent an inadvertent or unskillful seller from being wrongly punished.

These are the most common types of violations. Since bait advertising covers only a narrow range of advertising fraud it lends itself more readily to specificity than does a general statute designed to cover all advertising.

5. The sale of the advertised product shall not preclude a violation of this statute but shall be taken into account with all other evidence.
6. Special damages need not be alleged or proved.<sup>29</sup>
7. To sustain a conviction under this Act a preponderance<sup>30</sup> of the evidence shall be required.
8. The penalty for violating this Act shall be a forfeiture within the discretion of the court but in no case shall it exceed one hundred dollars for each violation thereof. Each day of publication shall constitute a separate violation. There shall also be a public printing at the discretion of the court of the violation in a newspaper of general circulation in the county where the violation occurred or in a newspaper of general circulation in the county of the residence or principal place of business of the offender. Such public printing may be in both newspapers at the discretion of the court. The public printing shall be one insertion each week for a consecutive four week period and shall include the name of the offender and the name of the individual most responsible for the violation and the nature of the offense. The name of the victim, if there be one, shall not be included. The costs to be borne by the offender.<sup>31</sup>
9. Nothing in this Act shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of advertising, who broadcasts, telecasts, publishes or prints such advertisement in good faith without knowledge or its untrue, deceptive, or misleading character.<sup>32</sup>
10. Ga. Laws 1958, p. 411 is hereby repealed.

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29. See note 21, *supra*.

30. See note 22, *supra*.

31. See note 23, *supra*.

32. See note 24 *supra*.