

Misleading labeling is an unfair competition act

By Marcelo E. Gallo

- Misleading labeling in the derogated Act 22,802, on Fair Commercial Practices.

Section 5th of Act 22,802¹ prohibited the so-called misleading labeling under the following terms: *“It is prohibited to include in the presentation..., containers, labels and packages, words, phrases, descriptions, trademarks or any other sign that may mislead, deceive or confuse, as regards the nature, origin, quality, purity, mix o quantity of fruits or products, properties, characteristics, uses, commercialization conditions or production techniques.”*

The regulation, as it is clearly reflected in its text, categorized the deception made through the labeling of fruits or products commercialized in the country as a punishable conduct.

The concept was taken from subsection a) of section 12 of the Identification of Goods Act Nº 19,982². This subsection was split by the legislator of 1983; misleading labeling was stipulated in section 5th of Act 22,802, contained in Chapter I (“Identification of goods”) and misleading advertising in section 9th, contained in Chapter III (“Advertising and promotion by means of prizes”).

Section 5th reflected, as regards labeling, the provisions contained in section 10 bis of the Paris Convention for the protection of Industrial Property dated March 20, 1883³, punishing deception when it was made through the labeling of products (under the terms of the regulation: through their presentation, containers, packages or labels), considering it as an unfair competition act.⁴

- Misleading labeling in the Emergency Decree (DNU) 274/2019 (New Fair Commercial Practices Regime).

The new regime on Fair Commercial Practices, enacted by means of Emergency Decree 274/2019 (the “ED”), defines “Unfair Competition” in general in its Title I (“Unfair Competition”), in its section 9th and regulates certain particular events of unfair competition in its section 10th.

¹ Enacted and implemented on May 5, 1983. Derogated by the Emergency Decree 274/2019, dated April 17, 2019.

² The Act that was derogated by its similar Act Nº 22,802.

³ Section 10 bis, subsection 1) of the Paris Convention sets forth that the signatory countries undertake to ensure to its citizens an effective protection against unfair competition in its subsections 2) and 3), providing that every competition act contrary to fair uses regarding industrial and commercial issues (subsection 2) that should be especially prohibited since they are unfair competition acts:

“1st. Every such act creating confusion, by any means whatsoever, with the establishment, products or industrial or commercial activity of a competitor; 2nd. false allegations, while engaged in commerce, tending to discredit the establishment, products or the industrial or commercial activity of a competitor; 3rd. Specifications or allegations, the use of which, while engaged in commerce, mislead the public on the nature, manufacturing process, characteristics, employment eligibility or quantity of goods.” (subsection 3rd).

⁴ See in such sense the work of Jorge Otamendi “La competencia desleal” (Unfair Competition), published in the Magazine “Revista Jurídica de la Universidad de Palermo”, Year 3, Number 2, pages 41/42.

Next, in its section 11, the Emergency Decree forbids the so-called “misleading advertising”, reproducing to such end the regulation contained in section 9th of the derogated Act 22,802, the only difference being that, before the provision, it adds as a title, precisely, “Misleading advertising”.⁵

The regulation of section 11, which punishes misleading advertising – which, as I highlighted in a previous work,⁶ is a typical unfair competition act – is not included in Title I, dealing with “Unfair Competition”, but in Title II, that deals with “Advertising and Promotions”.

Oddly enough, in spite of having included a regulation that typifies misleading advertising as a punishable conduct, the authors of the Emergency Decree did not feel inclined to typify misleading labeling in none of the seventy-seven (77) sections that compose the Emergency Decree, as it did the previous Act 22,802.

In other words, the Emergency Decree does not expressly mention the prohibition to include in the presentation, containers, labels and packages of the goods commercialized in the country, words, phrases, descriptions, trademarks or any other sign that may mislead, deceive or confuse under the terms that were stated in section 5th of Act 22,802.

It is not clear to me why the Emergency Decree treated differently misleading acts carried out through advertising and misleading acts made through labels.

But said different treatment is not an obstacle, in my opinion, to consider that the deception performed through the use of containers, labels or packages of the products is an unfair competition act and as such is typified by certain regulations of the Emergency Decree.

- Misleading labeling is an unfair competition act.

The Emergency Decree comprises unfair competition acts performed in the market with competitive purposes (section 4th).

The Emergency Decree prohibits unfair competition acts, whatever the form adopted is, the means used and the market in which they take place (Emergency Decree, section 8th).

Pursuant to the Emergency Decree every action or omission which, through improper means, proves to be objectively suitable to affect the competitive position of a person or the proper operation of the competitive process, constitutes an unfair competition act (Emergency Decree, section 9th).

⁵ Section 11 of the Emergency Decree 274/2019: *“Misleading advertising. It is forbidden to carry out any kind of presentation, advertising or publicity that through inaccuracies or concealments may mislead, deceive or confuse the characteristics, properties, nature, origin, quality, purity, mix, quantity, use, price, commercialization conditions or production techniques of personal property, real property or services.”*

⁶ The position of the regulation of section 11 of the Emergency Decree, its usefulness that is very questionable and my opinion in the sense that it should be derogated was discussed in a recent article published by me in Abogados.com.ar on July 2, 2019.

Please note that at least six (6) of the thirteen (13) particular events of unfair competition acts typified by section 10 of the Emergency Decree⁷ are such because– or when - they mislead, deceive or confuse.

Finally, please note also that subsection a) of section 10 provides that the following are considered unfair competition acts “a) Misleading acts: Mislead on the existence or nature, manufacturing process or distribution, main characteristics, purity, mix, fitness for use, quality, quantity, price, selling or buying conditions, availability, results that may be expected from their use and, in general, on the attributes, benefits or conditions corresponding to goods and services.”

And subsection b) considers that the following are unfair competition acts “b) Confusing acts: Mislead with respect to the business origin of the activity, establishment, inherent goods or services, in such a way that it is considered that they have an origin other than their corresponding one.”

Similarity – almost identity - of the event contemplated in subsections a) and b) of section 10 of the Emergency Decree and those considered in the regulation of the derogated section 5th of Act 22,802⁸ allows us to conclude, in my opinion, that misleading labeling is now typified, in the first place, by the regulations of subsections a) and b) of the above mentioned section 10 – just like I believe, that misleading advertising is.

Except for deception on the “production techniques”⁹, all the cases considered by the derogated section 5th of Act 22,802 are contemplated also – expressly - by the regulations of subsections a) and b) of section 10 of the Emergency Decree.¹⁰

⁷Those contained in subsections a) Acts of deception, b) Acts of confusion, g) Improper exploitation of another’s good standing, h) Unfair imitation acts, i) Acts of denigration and m) Comparative advertising infringing the provisions set forth in section 15 of the Emergency Decree.

⁸ That – as I mentioned before –prohibited the inclusion in containers, labels and packages, of words, phrases, descriptions, trademarks or any other sign that could mislead, deceive or confuse the nature, origin, quality, purity, mix or quantity of fruits or products, their properties, characteristics, uses, commercialization conditions or production techniques.

⁹ Since failure to mention the “properties” (Which in accordance with the Spanish Royal Academy Dictionary means, in its third meaning: “Attribute” or “essential quality of someone or something”), that was included in section 5th, may be probably replaced by the survival of the mention of the “characteristics” (Spanish Royal Academy Dictionary: 2. adjective. It is said of a quality: That gives the nature or is used to distinguish someone or something of its fellow men. It is used also as a feminine noun).

¹⁰Miguel del Pino and Mario Peruzzotti, in their article “Nuevo Régimen de Lealtad Comercial en Argentina” (New Regime of Fair Commercial Practices in Argentina), published in “La Ley” on May 22, 2019, pages 12 to 15, when discussing subsection a) of section 10 of the Emergency Decree they express: “*The event mentioned in the Emergency Decree aims to restrict the solicitation of customers by means of any type of misleading messages.*” And quoting concepts developed by jurisprudence that interpreted during the 36 years in which the regulations of sections 5th and 9th of the derogated Act 22,802 were in force, continue to state that: “... *the purpose of this precept [they refer to subsection a) of section 10 of the Emergency Decree] is to avoid that consumers, through unclear and misleading indications or inaccuracies, either misleading or deceitful for the acquisition of products, goods or the hiring of services thus protecting, their right to a proper, complete and accurate information in the consumption relationship... Likewise, it is intended to preserve the loyalty of commercial relationships, that comprises the consumers’ and competitors’ rights,*

In addition, in certain cases misleading labeling may fit into the framework of unfair competition acts consisting in (i) the improper exploitation of another party's good standing, leading someone to confuse the inherent goods, services, activities, signs, distinctive signs or establishment with those of another one (Emergency Decree, section 10, subsection g) or (ii) the imitation of appropriate goods and services, to generate confusion with respect to the origin of the goods and services (Emergency Decree, section 10, subsection h).

Notwithstanding the foregoing, the categorization of misleading advertising contained in the Emergency Decree versus the failure by said regulation to typify misleading labeling could lead to interpret that the legislator intended to abolish the possibility that to mislead, deceive or confuse be considered as an unfair competition act when it is carried out through labeling.

But clearly, it is not reasonable to think that a regulation intending to fight unfair competition has chosen to allow such unfair conducts.

I think that failure to include a regulation on misleading labeling in the Emergency Decree similar to the one included in misleading advertising was neither caused by a mistake nor was aimed to prevent to consider misleading, deception or confusion as an unfair competition act when it is carried out through the labeling of products.

I believe, on the other hand, as I have already mentioned in another work,¹¹ the mistake of the legislative technique was to include in the Emergency Decree a specific regulation on misleading advertising, placed – for worse, if possible - outside the title of the Emergency Decree that deals with unfair competition.

Because– as I have already said - the regulations of the sections that make-up Title I of the Emergency Decree are enough to consider that those acts or conducts performed through advertising are unfair, even when advertising is not expressly mentioned at the time of typifying them and, I add now, as they also are to punish misleading labeling –once again - even if the concept “misleading labeling” is not expressly mentioned when typifying same.

I insist, in such sense, in which the inclusion of section 11 in the Emergency Decree, related to misleading advertising is not only useless, but also dangerous, because it may give rise to misconceptions.

Hence, I believe that it would be appropriate to derogate said section 11 and eventually – although in my opinion unnecessary – to make a few comments on the advertising and labeling in some of the regulations of Title I (“Unfair Competition”) of the Emergency Decree.

since they may cause the deviation or potential solicitation of customers through methods contrary to fair commercial practices.”

¹¹ The article published in Abogados.com.ar on July 2, 2019, quoted above.

Buenos Aires, July 2, 2019.