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The FTC's Reliance on Extrinsic Evidence in Cases of Deceptive Advertising: A Proposal for Interpretive Rulemaking. *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993)

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Note*

The FTC's Reliance on Extrinsic Evidence in Cases of Deceptive Advertising: A Proposal for Interpretive Rulemaking. *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993)

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I. INTRODUCTION

The Federal Trade Commission's ("Commission") decision in *In re Kraft, Inc.*[1] shocked many members of the legal community.[2] The decision reasserted the Commission's long dormant authority to disregard relevant extrinsic evidence and rely solely on its own reasoned analysis in determining whether an advertisement implicitly conveys deceptive claims.[3] Viewed by many as an example of the Commission flexing its regulatory muscle,[4] the decision was reminiscent of the expansive discretion asserted during the Commission's pre-Reagan era.[5] On appeal, the Seventh Circuit reluctantly upheld the Commission's decision, solidifying the Commission's broad discretion to determine when commercial speech is deceptive[6] and thereby exclude such speech from full constitutional protection.[7] This Note analyzes the dilemma the Seventh Circuit faced in *Kraft, Inc. v. FTC* as it heard arguments that were compelling as a matter of policy, but weak as a matter of law, and suggests that the Commission should clearly define the parameters of its reliance on extrinsic evidence through administrative rulemaking.

Part II begins by describing the basis of the Commission's authority to regulate advertising and how that authority is implemented, and then provides the factual background and procedural history of *Kraft*. Part III first provides an analysis of the standard for deception implemented by the Commission in advertising cases. Next, it provides an analysis of Kraft's principle arguments regarding extrinsic evidence and why those arguments succeed as a matter of policy but fail as a matter of law. Finally, it suggests that both the development of precedent and the issuance of policy statements have failed to ade-

1. 114 F.T.C. 40 (1991).
2. Felix H. Kent, *The 'Kraft' Case: Symbol of FTC Activity*, 205 N.Y. L.J., June 21, 1991, col. 1 (discussing the controversy within the legal and advertising community resulting from the Commission's decision).
3. *In re* Kraft, Inc., 114 F.T.C. 40 (1991).
4. Kent, *supra* note 2 (stating that *Kraft* should be taken as a message to advertisers that "the cop is back on the beat").
5. *Id. See also* Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?*, 30 AM. BUS. L.J. 1 (1992)(comparing Commission activities prior to the Reagan administration to Commission activities during and immediately following the Reagan administration).
6. Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).
7. *See, e.g., In re* R.M.J., 455 U.S. 191, 200 (1982)(stating that commercial speech that is determined to be "[f]alse, deceptive, or misleading" is "subject to restraint"); Friedman v. Rogers, 440 U.S. 1, 11 n.9 (1979)("When dealing with . . . commercial speech we . . . 'allow[ ] modes of regulation that might be impermissible in the realm of noncommercial expression.'" (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978))); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 & n.24 (1976)("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

quately restrain the Commission's discretion in the area of extrinsic evidence, and that administrative rulemaking would provide a more efficient and effective means of restraining the Commission's discretion. Part IV concludes the note with a suggestion that the Commission initiate a rulemaking proceeding to clarify the area of reliance on extrinsic evidence.

II. BACKGROUND

A. Federal Trade Commission Advertising Authority

The Federal Trade Commission Act ("Act") prohibits the dissemination of false advertisements likely to induce the purchase of food products.[8] The Act defines the dissemination of such advertisements as an "unfair or deceptive act or practice in or affecting commerce,"[9] and empowers the Commission to regulate trade for the purpose of preventing such deceptive acts or practices.[10] The Commission is authorized to enforce the Act against individual companies on a case by case basis[11] or against entire industries through the establishment of industry-wide standards.[12]

The Commission may opt[13] to proceed by prosecuting an individual company when the Commission has reason to believe that company is engaging in a deceptive practice and that regulation of that practice would be in the public interest.[14] In such cases, the Commission serves the company with a complaint and notice of a hearing[15] to be held before an administrative law judge ("ALJ").[16] In advertising cases, the ALJ will determine whether the advertisement in question is false within the meaning of the Act and issue an initial decision.[17] Before an initial decision will be considered a final action subject to judicial review,[18] it must be appealed to the Commission,[19] where it will be reviewed *de novo*.[20] Following the Commission's issuance of a final order, respondents may seek review in the United States Courts

8. 15 U.S.C. § 52 (1988).
9. *Id.*
10. *Id.* § 45.
11. *Id.* § 45(b).
12. *Id.* § 57a(a)(1)(B).
13. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)(stating that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion").
14. 15 U.S.C. § 45(b) (1988).
15. *Id.*; 16 C.F.R. § 4.4(a) (1995).
16. 16 C.F.R. § 3.42(a) (1995).
17. *Id.* § 3.51(a).
18. *Id.* § 3.51(b).
19. Appeals to the Commission are made pursuant to 16 C.F.R. § 3.52 (1995).
20. 16 C.F.R. 3.54(a) (1995).

of Appeal.[21] In reviewing the Commission's findings, courts apply the highly deferential substantial evidence test.[22] Furthermore, courts have traditionally recognized the Commission's expertise in assessing whether particular acts or practices are deceptive.[23] In light of this expertise, and in accordance with the prescribed standard of review, courts give great deference to the Commission's determinations of deception.[24]

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21. 15 U.S.C. § 45(c) (1988).
22. Courts are compelled by statute to apply the substantial evidence test. *See id.* ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."). *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, (1986)("our review is governed by 15 U.S.C. § 45(c)"); Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1384 (7th Cir. 1986)(stating that "the standard of judicial review of the Federal Trade Commission's findings of fact . . . is the familiar substantial-evidence standard"), *cert. denied*, 481 U.S. 1038 (1987); Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1149 (9th Cir. 1984)("In reviewing the Commission's liability determinations, we apply the standard of review set out in 15 U.S.C. § 45(c)"); Kaiser Aluminum & Chem. Corp v. FTC, 652 F.2d 1324, 1329 (7th Cir. 1981)(stating that "the Commission's findings . . . are to be upheld if supported by substantial evidence"); Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979)("we may not substitute our inferences for those drawn by the Commission simply because we might have evaluated the facts differently as an original matter"). The test has been judicially defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).
23. *See, e.g.*, Thompson Medical Co. v. FTC, 791 F.2d 189, 193 (D.C. Cir. 1986)(stating that "[t]he FTC has substantial expertise in . . . assessing whether advertisements are . . . deceptive"); American Home Prod. Corp. v. FTC, 695 F.2d 681, 686 (3d Cir. 1982)(stating that "[t]he Commission's familiarity with the expectations and beliefs of the public, acquired by long experience, is especially crucial"); Litton Indus., Inc. v. FTC, 676 F.2d 364, 369 (9th Cir. 1982)(stating that "[d]etermining whether an advertisement is deceptive draws upon the FTC's familiarity with the public's expectations"); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978)(stating that "the Commission has accumulated extensive experience and is . . . in a better position than the courts to determine when a practice is deceptive"); Fedders Corp. v. FTC, 529 F.2d 1398, 1403 (2d Cir.)(stating that "the Commission's greatest expertise [is] what constitutes deception in advertising"), *cert. denied*, 429 U.S. 818 (1976); Resort Car Rental System, Inc. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975)(stating that the Commission "has the expertise to determine whether advertisements have the capacity to deceive").
24. *See, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965)(stating that "[t]his Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts"); FTC v. Mary Carter Paint Co., 382 U.S. 46, 48 (1965)(stating that "it is not for courts to say whether this violates the Act. 'The Commission is often in a better position than are courts to determine when a practice is deceptive' " (quoting Colgate-Polmolive, 380 U.S. 374, 380 (1965))); Thompson Medical Co. v. FTC, 791 F.2d 189, 197 (D.C. Cir. 1986)(stating that "the Commission's conclusion that acts or practices are likely to deceive is due special deference"); American Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 968 (D.C. Cir. 1985)("we must perform our . . . judicial function . . . while . . . according due deference to the Commission's judgment"); Bristol-Myers Co. v. FTC, 738 F.2d 554, 562 (2d Cir. 1984)(holding that the Commission's findings must be given

Alternately, the Commission may proceed by establishing industry-wide standards with respect to unfair or deceptive acts or practices.[25] Such standards may take several forms, including enforcement policy statements,[26] industry guides,[27] and trade regulation rules.[28] Enforcement policy statements are typically published in the Federal Register and provide information regarding future enforcement strategies and objectives.[29] Enforcement policy statements do not carry the force of law, but do provide guidance to how the substantive law will be interpreted and applied.[30] Industry guides are interpretive rules that set forth particular types of acts or practices which the Commission would likely find deceptive.[31] Like enforcement policy statements, industry guides do not carry the force of law, but provide useful guidance to the law.[32] Trade regulation rules are substantive "rules which define with specificity acts or practices which are unfair or deceptive . . . [and] may include requirements prescribed for the purpose of preventing such acts or practices."[33] Trade regulation rules do carry the full force of law.[34]

"great weight"); Litton Indus., Inc. v. FTC, 676 F.2d 364, 369 (9th Cir. 1982)(stating that "[c]ourts give great weight to the FTC's legal conclusions in deceptive advertising cases"); Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979)(stating that "[t]he Commission has the discretion to interpret the meanings of various communications"); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir.)(stating that "the Commission's judgment is to be given great weight"), *cert. denied*, 414 U.S. 1112 (1973); Libbey-Owens-Ford Glass Co. v. FTC, 352 F.2d 415, 417 (6th Cir. 1965)(stating that "it was within the discretion of the Commission to interpret and determine the meaning of the commercials").

25. 15 U.S.C. § 57a(a)(1) (1988).

26. *Id.* § 57a(a)(1)(A).

27. *Id.*; 16 C.F.R. § 1.5 (1995).

28. 15 U.S.C. 57a(a)(1)(B) (1988); 16 C.F.R. § 1.7 (1995).

29. STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 25.04 (1993)(citing FTC Operating Manual ch 8.5.5).

30. *Id.*

31. 16 C.F.R. §§ 1.5, 1.7 (1995).

32. *Id. See also* FTC v. Mary Carter Paint Co., 382 U.S. 46, 48 (1965)(describing guides as "not fixed rules as such, and . . . designed to inform businessmen of the factors which would guide Commission decision[s]"); Helbros Watch Co. v. FTC, 310 F.2d 868, 869 n.3 (D.C. Cir. 1962)(stating that "[guides] serve to inform the public and the bar of the interpretation which the commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out"), *cert. denied*, 372 U.S. 976 (1963); *In re* Gimbel Bros., Inc., 61 F.T.C. 1051, 1073 (1962)(stating that "[i]nsofar as the Guides Against Deceptive Pricing are concerned . . . they do not constitute law").

33. 15 U.S.C. § 57a(a)(1)(B) (1988); 16 C.F.R. § 1.8 (1995).

34. 16 C.F.R. § 1.8 (1995)("A violation of a rule shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of that [Federal Trade Commission] Act, unless the Commission otherwise expressly provides in its rule.").

B. *Kraft, Inc. v. FTC*

Kraft manufactures and markets Kraft Singles process cheese food slices. In the 1980s, the increasing presence of less expensive imitation slices[35] caused Kraft to lose some of its market share. In response, Kraft developed its multimillion dollar "Five Ounces of Milk" advertising campaign.[36] The campaign was an attempt to inform consumers that Kraft singles are nutritionally superior to imitation slices because they contain milk and other dairy products whereas imitation slices consist primarily of water, vegetable oil, and flavoring.[37] Two of the ad sets in Kraft's campaign are referred to as the "Skimp" ads and the "Class Picture" ads. The Skimp ads emphasized the calcium content of Kraft Singles. Although there were several variations on the Skimp ads, all of the variations contained statements similar to the following: "Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow."[38] The Class Picture ads emphasized the calcium content of Kraft Singles without any express comparisons to imitation slices.[39] Most of the variations on the Class Picture ads contained statements similar to the following: "KRAFT Singles are important. KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth."[40]

Consistent with Kraft's express statements, Kraft Singles are in fact made from five ounces of milk.[41] However, during processing, approximately 30% of the milk's original calcium content is lost.[42] This leaves one slice of Kraft Singles with about 15% of the U.S. recommended daily allowance of calcium per ounce, approximately the same amount as the majority of imitation slices.[43] In 1987, the Commission filed a complaint against Kraft alleging that the 'Five Ounces of Milk' advertising campaign materially misrepresented the calcium content

35. Imitation slices need not conform to the nutritional requirements of pasteurized process cheese food, 21 C.F.R. § 133.173 (1995), and are required to carry the label "imitation." 21 C.F.R. § 101.3(e) (1995).
36. In 1985 and 1986, Kraft spent over $30 million on the 'Five Ounces of Milk' advertising campaign. *In re* Kraft, Inc., 114 F.T.C. 40, 52 (1991).
37. Kraft, Inc. v. FTC, 970 F.2d 311, 315 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993). Pasteurized process cheese food is required by federal regulation to contain at least 51% cheese ingredients after pasteurization and at least one additional dairy ingredient. 21 C.F.R. § 133.173(a) (1995).
38. *In re* Kraft, Inc., 114 F.T.C. 40, 52 (1991).
39. Kraft, Inc. v. FTC, 970 F.2d 311, 315 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).
40. *In re* Kraft, Inc., 114 F.T.C. 40, 127 (1991).
41. Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).
42. *In re* Kraft, Inc., 114 F.T.C. 40, 119 (1991).
43. *Id.* at 120.

of Kraft Singles by implying that one slice of Kraft Singles has a calcium content equivalent to five ounces of milk and that one slice of Kraft Singles contains more calcium than most imitation slices.[44]

In a hearing before an ALJ, the complaint counsel argued that both misrepresentations were apparent on the face of Kraft's advertisements.[45] After voluminous extrinsic evidence was introduced at the hearing,[46] the ALJ decided that such evidence was unnecessary, agreeing with the complaint counsel that both misrepresentations were facially apparent.[47] Consequently, the ALJ required Kraft to cease and desist from its multimillion dollar ad campaign.[48]

Kraft appealed the initial decision to the Commission, arguing that the ALJ should have relied on the available extrinsic evidence in determining whether a deceptive claim was implicitly conveyed.[49] The Commission affirmed the ALJ's decision that both the Skimp and the Class Picture ads could be interpreted on their faces as conveying the milk equivalency claim without resort to extrinsic evidence.[50] The Commission further held that the Skimp ads could be determined on their faces to convey the imitation superiority claim[51] but the Class Picture ads could not,[52] nor was there sufficient extrinsic evidence to support a finding that the Class Picture ads conveyed the superiority claim.[53]

Kraft appealed the Commission's decision to the Seventh Circuit, arguing that the Commission should be required as a matter of law to rely on extrinsic evidence to determine whether an implicit deceptive claim is conveyed.[54] After reviewing the findings of the Commission

44. *Id.* at 47.

45. *Id.* at 55.

46. The extrinsic evidence included copy tests, materiality surveys, and bioavailability research. Many of the surveys were conducted by experts in the advertising field and by leading consumer survey organizations. Additionally, numerous experts testified regarding their interpretations of the copy tests as well as their interpretation of the ads themselves. *Id.* at 67.

47. *Id.* at 126-28. Although the ALJ did not rely on the extrinsic evidence, he stated that the evidence was consistent with his analysis. *Id.*

48. *Id.* at 114-15.

49. *Id.* at 119.

50. *Id.* at 125, 128.

51. *Id.* at 129.

52. *Id.* at 130.

53. *Id.* at 131.

54. Kraft, Inc. v. FTC, 970 F.2d 311, 318 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

under the highly deferential substantial evidence test,[55] the Seventh Circuit affirmed the Commission's decision.[56]

III. ANALYSIS

A. The Standard for Deception

"The Commission will [currently] find an act or practice to be deceptive if there is a representation, omission, or practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment."[57] This standard represents a departure from earlier analyses under which an act or practice would be determined deceptive "if it has a tendency or capacity to mislead a substantial number of consumers in a material way."[58] The adoption of the reasonable consumer standard symbolizes the trend toward increased objectivity begun by the Commissioners appointed under the Reagan administration.[59]

Application of the current deception standard in advertising cases involves a three part analysis beginning with a determination of what claims an advertisement makes.[60] An advertisement will be deemed to convey a particular claim if reasonable consumers would interpret the advertisement to convey that claim.[61] In making this determination, the Commission will often distinguish between express and im-

55. Kraft argued that the Commission's findings should be reviewed *de novo* because Kraft's First Amendment rights were at issue. However, the court found Kraft's argument unconvincing and refused to review the Commission's findings under a standard other than the traditional substantial evidence test. *Id.* at 316-17.

56. *Id.* at 321.

57. *FTC's Policy Statement on Deception sent to Chairmen of Senate Commerce, Science and Transportation Committee and House Energy and Commerce Committee*, 45 Antitrust & Trade Reg. Rep. (BNA) 689, 694 (Oct. 14, 1983)[hereinafter *Statement on Deception*]. The phrase "in a material way" is often substituted for the phrase "to the consumer's detriment" appearing at the end of the current standard. Either phrase is acceptable because according to the *Statement on Deception*, "injury and materiality are different names for the same concept." *Id.* at 694.

58. *Deception Policy Statement Prepared by Commissioners Bailey and Pertschuk and Transmitted on Feb. 29 to the House Energy and Commerce Committee*, 46 Antitrust & Trade Reg. Rep. (BNA) 372, 379 (Feb. 29, 1984)[hereinafter *Bailey and Pertschuk Statement*].

59. The reasonable consumer standard of deception became binding when it was applied in *In re* Cliffdale Associates, Inc., 103 F.T.C. 110 (1984). For a discussion of the increased restraint exhibited by the Commission beginning in the Reagan administration, see Petty, *supra* note 5.

60. *Statement on Deception*, *supra* note 57, at 689-90.

61. *In re* Thompson Medical Co., 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *In re* Cliffdale Assoc., Inc., 103 F.T.C. 110, 164-66 (1984). *See also Statement on Deception*, *supra* note 57, at 690 (distinguishing the approaches to express and implied claims).

plied claims,[62] both of which may be found likely to mislead.[63] An express claim involves a direct representation,[64] whereas an implied claim involves indirect representations created through context and may vary along a continuum from claims that are clearly deceptive to claims that are barely deceptive.[65]

The second step of the Commission's analysis is to determine whether claims are misleading from the perspective of the reasonable consumer.[66] An advertisement is deceptive if any reasonable interpretation of that advertisement is misleading, even though other reasonable interpretations are possible.[67] Whether an interpretation is reasonable will be determined from the perspective of a member of the group at which the advertisement was targeted.[68]

The final step of the Commission's analysis is to determine whether a false or misleading claim is material.[69] Any misrepresentation that is likely to affect consumers' decisions regarding a commercial transaction is material.[70] Express claims are presumed to be material,[71] as are intentional implied claims.[72] Furthermore, claims that involve health or safety are presumed material whether the claim is express or implied, intentional or unintentional.[73]

62. *In re* Thompson Medical Co., 104 F.T.C. 648, 788 (1984)("the Commission has traditionally distinguished between express and implied claims"), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). *See also Statement on Deception*, *supra* note 57, at 690 (distinguishing the approaches to express and implied claims).

63. *See, e.g.*, *In re* Removatron Int'l Corp., 111 F.T.C. 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

64. *In re* Thompson Medical Co., 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

65. *Id.* at 789 ("They range from . . . language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.").

66. *Statement on Deception*, *supra* note 57, at 689-90.

67. *See In re* Sears, Roebuck & Co., 95 F.T.C. 406, 511 (1980)(stating that "[i]t is hornbook law that where an advertisement is subject to two or more possible interpretations, an advertiser will be liable for the truth of each possible meaning"), *aff'd*, 676 F.2d 385, (9th Cir. 1982); *In re* National Comm'n on Egg Nutrition, 88 F.T.C. 89, 185 (1976)("where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation"), *enforced in part by*, 570 F.2d 157 (7th Cir. 1977). *See also Statement on Deception*, *supra* note 57, at 691 ("when a seller's representation conveys more than one meaning . . . the seller is liable for the misleading interpretation").

68. *Statement on Deception*, *supra* note 57, at 691.

69. *Id.* at 693.

70. *Id.* Furthermore, the affected decision need not be the decision to purchase a product and may be merely a decision of "how to act" under certain circumstances. *Id.* at 693 n.45 (citing RESTATEMENT (SECOND) OF TORTS § 538(2)).

71. *Id.* at 694.

72. *Id.*

73. *Id.*

In cases like *Kraft*, involving allegations of implied deceptive claims, the most critical and perhaps the most controversial step in the Commission's tri-partite analysis is the initial determination of what claims are conveyed. The Commission will first attempt to determine what claims are made by examining the net impression created by the advertisement.[74] If, through such an examination, the Commission is unable to determine that an alleged implied claim is made, then the Commission may rely on extrinsic evidence[75] such as consumer surveys, expert testimony, copy tests, and marketing research.[76] Consequently, companies will often amass large amounts of expensive extrinsic evidence in an attempt to convince the Commission that no deceptive claims are implicitly conveyed. Such evidence is usually admissible;[77] however, whether the Commission will rely on the evidence is largely a matter of agency discretion.[78] It was upon the Seventh Circuit's interpretation of the scope of this discretion that

74. *In re* Thompson Medical Co., 104 F.T.C. 648, 790 (1984).

75. *Id.* at 789.

> If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable.

Id. See also In re Bristol-Myers Co., 102 F.T.C. 21, 319 (1983)(stating that "[t]here also may be instances where claims cannot be inferred from a facial examination of the advertisements and resort to extrinsic evidence is necessary"), *aff'd*, 738 F.2d 554 (2d Cir.1984), *cert. denied*, 469 U.S. 1189 (1985); *In re* The Kroger Co., 98 F.T.C. 639, 728 (1981)("In many cases, the Commission has refused to accept particular interpretations . . . because the advertisements themselves did not imply them and no extrinsic evidence had been offered to prove their apprehension by . . . consumers."); *In re* Leonard F. Porter, Inc., 88 F.T.C. 546, 625-26 (1976)(stating that "[w]hile it is certainly within the authority and expertise of the Commission to make . . . a determination [of implied deception], the judgment . . . cannot . . . be made without resort to record evidence respecting the assumptions, attitudes, and behavior of consumers").

76. *Statement on Deception*, *supra* note 57, at 690 n.8.

77. 16 C.F.R. 3.43(b) (1995).

78. *See, e.g.*, Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977)(stating that the Commission's decision was apparently "reached independent[ly] of the supplemental evidence"); Carter Prod., Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963)("[T]he Commission may draw its own inferences from the advertisement and need not depend on testimony or exhibits (aside from the advertisements themselves) introduced into the record."); Niresk Indus., Inc. v. FTC, 278 F.2d 337, 342 (7th Cir. 1960)("We think the Commission could find and conclude, from an inspection of the advertisements alone, that they had a tendency to [deceive]."), *cert. denied*, 364 U.S. 883 (1960); Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944)("The Commission had a right to look at the advertisements in question, . . . and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive . . . ."); *In re* The Kroger Co., 98 F.T.C. 639, 728 (1981)("[T]he Commission has sufficient expertise to determine an advertisement's meanings—express and implied—without necessarily resorting to evidence of consumer perceptions.").

Kraft's multimillion dollar 'Five Ounces of Milk' advertising campaign rested.

B. Reliance on Extrinsic Evidence

On appeal to the Seventh Circuit, Kraft's primary argument was that the Commission erred as a matter of law in failing to rely on extrinsic evidence in determining that the ads contained implied deceptive claims.[79] Kraft argued that without consideration of extrinsic evidence the Commission could have "no objective basis" for a determination that the ads conveyed implicit deceptive claims.[80] Kraft further argued that a cease and desist order based on the Commission's purely subjective determination of implied deception thwarts constitutionally protected non-deceptive commercial speech.[81]

1. Objective Standard

Kraft argued that, in all cases of allegedly implied claims, the Commission should be required to base determinations of deception on extrinsic evidence rather than its own reasoned analysis.[82] Kraft contended that consumer perceptions are influenced by so many external variables that the Commission could not possibly predict what implied messages are conveyed without relying on extrinsic evidence.[83] This claim is supported by a wealth of academic commentary,[84] and

79. Kraft, Inc. v. FTC, 970 F.2d 311, 318 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Commentators have noted the complexity of determining the messages conveyed by advertisements. *See, e.g.*, Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 672-74, 717 (1985)(discussing empirical evidence tending to show the complexity of determining what inferences consumers draw from advertisements); Shari Seidman Diamond, *Using Psychology to Control Law: From Deceptive Advertising to Criminal Sentencing*, 13 LAW & HUM. BEHAV. 239, 241 (1989)("[T]he legal test of deceptive advertising is fundamentally a behavioral test—a psychological test of perception."); Richard W. Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 U. KAN. L. REV. 625, 629-31 (1969)(discussing empirical evidence that consumers interpret advertisements as a function of multiple complex factors). Commentators have also noted the inability of the Commission to deal effectively with this complexity. *See, e.g.*, Paul H. LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1, 28 (1971)(stating that "[t]he invalidity of the presumption of FTC expertise should be sufficient in itself to end judicial reliance upon it"); Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 470 (1964)("[a] review of the cases demonstrates that generally the Commission will find that an advertisement promises what the Commission itself believes it promises"); Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 678 (1977)("[T]here is no

was recognized by the court as having "some force as a matter of policy."[85]

Kraft further argued that support for such a standard is found in an examination of the analogous context of false advertising claims brought under the Lanham Act.[86] Kraft contended that because extrinsic evidence is generally required to establish an implied claim under the Lanham Act,[87] extrinsic evidence should also be required to establish the nearly identical claim under the Federal Trade Commission Act. The Seventh Circuit recognized that had *Kraft* been brought by a competitor under the Lanham Act, extrinsic evidence probably would have been required.[88] However, the court reasoned that such a standard is unnecessary in cases brought under the Federal Trade Commission Act because the Commission holds the expertise necessary to make such decisions without the aid of extrinsic evidence.[89] Yet, in the next breath, the court admitted that "proof of the FTC's inexpertise abounds,"[90] making Kraft's arguments compelling as a matter of policy.[91]

Although Kraft presented strong policy arguments for an objective standard,[92] the arguments ran contrary to a large body of precedent.[93]

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reason to believe that commissioners of the FTC have unusual capacity or experience in coping with questions of meaning."); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 86 (1969)(suggesting that expertise may be lacking because many commissioners do not serve full terms and staff turnover is high); Ivan L. Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. CIN. L. REV. 1243, 1268 (1989)("to operate without extrinsic evidence . . . is to subject oneself to arbitrary conclusions"); Suzanne Bonamici, Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases*, 62 OR. L. REV. 561, 572 (1983)("Deference to the FTC's presumed expertise . . . is frequently and intensely criticized.").

85. Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

86. *Id.* at 319. The Lanham Act provides that any person engaging in deceptive advertising "shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such" advertising. 15 U.S.C. § 1125(a) (1988).

87. *See, e.g.*, Avis Rent A Car System, Inc. v. Hertz Corp., 782 F.2d 381, 386 (2d Cir. 1986)("[W]hen the claim is that a literally true statement has a tendency to mislead, confuse or deceive, evidence must be introduced to show what the person to whom the advertisement was addressed found to be the message."); Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190, 1198 (S.D.N.Y. 1987)("I do not find plaintiff's claim to be facially false. And since defendants offered no evidence that consumers were deceived or confused by this claim in plaintiff's advertising, defendants have failed to carry their burden with respect to this claim.").

88. Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

89. *Id.*

90. *Id. See also supra* note 84.

91. Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

92. *Id.*

Thus, the Seventh Circuit was faced with the dilemma of choosing between good policy on the one hand and well supported law on the other. Compelled by the long line of cases refusing to impose upon the Commission a requirement of reliance on extrinsic evidence,[94] the court ultimately rejected Kraft's arguments for an objective standard.[95] The seminal case in this line of precedent is *Zenith Radio Corp. v. Federal Trade Commission*.[96]

In *Zenith*, the Commission alleged that Zenith Radio Corporation had misrepresented, through advertisements boasting of its radios' capacity to receive foreign broadcasts, the number of tubes its radios contained by referring to certain tuning devices and other electronic devices as tubes.[97] The Commission further alleged that, as a consequence of this misrepresentation, Zenith had implicitly represented that the large number of tubes contained in its radios increased the ability of the radios to receive radio broadcasts when, in fact, some of those devices referred to as tubes were not actually tubes and did not affect radio reception.[98]

The Commission found Zenith's actions to be in violation of the Act and entered a cease and desist order.[99] Zenith appealed the Commission's decision to the Seventh Circuit. The sole issue before the Seventh Circuit was "whether there [was] substantial evidence to support the order."[100] In upholding the Commission's order, the court stated that "[t]he Commission was not required to sample public opinion to determine what the petitioner was representing . . . . The Commission had a right to look at the advertisements . . ., consider the relevant evidence . . ., and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive . . . ."[101]

Further support for the Commission's discretion to "decide for itself,"[102] independent of extrinsic evidence, whether an advertisement

93. *See, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); American Home Prod. Corp. v. FTC, 695 F.2d 681, 687-88 & n.10 (3d Cir. 1982); Resort Car Rental System, Inc. v. FTC, 518 F.2d 962, 964 (9th Cir.), *cert. denied sub nom.* MacKenzie v. United States, 423 U.S. 827 (1975); J.B. Williams Co. v. FTC, 381 F.2d 884, 890 (6th Cir. 1967); Carter Prod., Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); E.F. Drew & Co. v. FTC, 235 F.2d 735, 741 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944).

94. *See* cases cited *supra* note 93.

95. Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

96. 143 F.2d 29 (7th Cir. 1944).

97. *Id.* at 31.

98. *Id.*

99. *Id.* at 30.

100. *Id.*

101. *Id.* at 31.

102. *Id.*

is implicitly deceptive was provided by the Supreme Court in *Federal Trade Commission v. Colgate-Palmolive Co.*[103] In *Colgate-Palmolive*, the Commission filed a complaint against Colgate-Palmolive Co. charging that their Rapid Shave ad set was deceptive.[104] The ad set consisted of three television commercials, each of which claimed that Rapid Shave shaving cream could soften the toughness of sandpaper.[105] The commercials presented what appeared to be a piece of sandpaper being covered with Rapid Shave and the tough surface then immediately being shaved clean. Rapid Shave was in fact capable of softening sandpaper after a substantial soaking; however, to facilitate the filming of the commercial, Colgate-Palmolive used a plexiglass mock-up with the appearance of sandpaper rather than using actual sandpaper.[106]

The Commission determined that the advertisements conveyed three representations: "(1) that sandpaper could be shaved by Rapid Shave; (2) that an experiment had been conducted which verified this claim; and (3) that the viewer was seeing this experiment for himself."[107] The Commission argued that the third claim was clearly not true and, therefore, the advertisement was deceptive within the meaning of the Act.[108] Colgate-Palmolive Co. contended that the record was inadequate to sustain the Commissions's finding.[109] However, the Court held that the record was adequate and that the Commission was not required to "conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead."[110]

There must, of course, be substantial evidence to support Commission conclusions. However, the decisions in *Zenith* and *Colgate-Palmolive* teach us that substantial evidence, even in cases of implied claims, may consist of the advertisement itself. Thus, these early cases have been cited consistently throughout the years as providing the Commission with a license to disregard all types of extrinsic evidence introduced at a hearing and find implicit deception based solely upon its own subjective analysis.[111] However, both *Zenith* and *Colgate-*

103. 380 U.S. 374 (1965).
104. *Id.* at 376.
105. *Id.*
106. *Id.* at 376.
107. *Id.* at 386.
108. *Id.*
109. *Id.* at 391.
110. *Id.* at 391-92. The language "tendency to mislead" was used prior to adoption of the reasonable consumer standard. *Bailey and Pertschuk Statement, supra* note 58, at 379. However, the language is taken to hold nearly the same meaning as the reasonable consumer standard.
111. *See, e.g.*, American Home Prod. Corp. v. FTC, 695 F.2d 681, 687 & n.10 (3d Cir. 1982)("[T]he Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception." (citing

Palmolive were decided prior to the Supreme Court's extension of first amendment protections to commercial speech,[112] leaving the door open for Kraft to challenge the Commission's decision on constitutional grounds.

2. Constitutionally Protected Commercial Speech

Kraft argued that the Commission's "current subjective approach chills some truthful commercial speech."[113] In the course of developing major ad campaigns, companies will often make large expenditures for marketing tests to ensure that the ads do not convey any deceptive claims. This is precisely what Kraft did. However, under the current standard, if such testing shows conclusively that the ads do not convey any deceptive claims, such results are no guarantee that the ads are permissible. No matter how sophisticated the testing process, the Commission has the discretion to discount the scientific evidence and, based on its own opinion, determine that the ad is deceptive on its face.[114] Kraft argued that the uncertainty produced by such a standard will lead companies to avoid making non-deceptive constitutionally protected claims for fear that the Commission may arbitrarily decide that the claim is deceptive.[115]

Again, Kraft's arguments were compelling as a matter of policy, even persuading the court to suggest that "reliance on extrinsic evidence should be the rule rather than the exception."[116] However, like the objective standard argument, Kraft's commercial speech argument was fatally flawed as a matter of law. The court rejected Kraft's first amendment argument, relying primarily upon the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*.[117]

In *Zauderer*, an Ohio attorney ran a set of two newspaper ads for legal services.[118] The Office of Disciplinary Counsel of the Supreme Court of Ohio filed a complaint against Zauderer charging that one of Zauderer's ads was deceptive in that they implicitly conveyed the claim that a client whose case is unsuccessful would not be liable for

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FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965))); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978)(citing FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965)); Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1953)(quoting Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (1944)), *rev'd in part*, 348 U.S. 940 (1955). *See also* cases cited *supra* note 78.

112. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

113. Kraft, Inc. v. FTC, 970 F.2d 311, 320 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

114. *See* cases cited *supra* note 93.

115. Kraft, Inc. v. FTC, 970 F.2d 311, 320 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).

116. *Id.* at 321.

117. 471 U.S. 626 (1985).

118. *Id.* at 629-30.

costs.[119] Before the Supreme Court, Zauderer challenged the State's sanction on First Amendment commercial speech grounds.[120] In upholding the decision against Zauderer, the Court, quoting *Colgate-Palmolive*, stated that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the ad had a tendency to mislead.' "[121]

The Seventh Circuit determined that the ads Kraft disseminated included a possibility of deception as self-evident as in the ad in *Zauderer*.[122] The courts reasoning was based upon the similarities between the ad in *Zauderer* and those disseminated by Kraft. Specifically, the court noted that in both cases "an omitted piece of information . . . led to potential consumer deception, and in both cases the ads were literally true, yet impliedly misleading."[123] The court further bolstered its holding by relying on previous cases that found commercial speech to be "less susceptible to the chilling effect of regulation than other" forms of speech.[124]

3. *Agency Discretion*

Kraft's arguments for a standard requiring the Commission to rely on extrinsic evidence in all cases of implied claims are, in effect, arguments for a restriction of agency discretion. Although the Seventh Circuit felt compelled by precedent to uphold the scope of discretion asserted by the Commission in the Kraft litigation, the court was clearly uncomfortable with the potential ramifications of its approval of such broad agency discretion. In an attempt to temper the effect of its holding, the court emphasized its recognition of the validity of Kraft's arguments as a matter of policy[125] and even went so far as to take the opportunity to give the Commission a piece of advice, stating that "the Commission would be well-advised to adopt a consistent position on consumer survey methodology . . . so that any uncertainty is reduced to an absolute minimum."[126]

Judge Manion, in his concurring opinion, emphasized his discomfort with a standard that grants the Commission discretion to "avoid extrinsic evidence by simply concluding that a deceptive, implied

119. *Id.* at 633. The complaint also alleged that Zauderer's ads had violated several provisions of the *Ohio Disciplinary Rules.*
120. *Id.* at 636.
121. *Id.* at 652-53.
122. Kraft, Inc. v. FTC, 970 F.2d 311, 321 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

claim is facially apparent."[127] Manion noted that such a standard renders companies unable to predict which advertisements may be deemed deceptive and thereby poses a serious threat to constitutionally protected consumer speech.[128] However, Manion agreed that the court's decision was compelled by precedent.[129] Manion reiterated that it would be in the Commission's best interest to heed the advice of the court and restrain its discretion by "develop[ing] a consumer survey methodology that advertisers can use to ascertain whether their ads contain implied, deceptive messages."[130]

C. Restraining Agency Discretion

1. Precedent

Controlling agency discretion is a critical issue throughout administrative law.[131] Agency discretion can be checked and controlled in several ways, including the requirement that administrative agencies establish a system of precedent and explain departures from precedent.[132] The requirement of adherence to precedent works to ensure that agency decisions are reasoned and predictable, thereby restraining the agency's discretion.[133]

However, in the case of the Commission's reliance on extrinsic evidence, precedent has been insufficient to provide any true restraint on discretion. Rather, the precedent has served as a justification for expansive agency discretion,[134] and leaves companies with little gui-

127. *Id.* at 327 (Manion, J., concurring).
128. *Id.* at 327-28 (Manion, J., concurring).
129. *Id.* at 328 (Manion, J., concurring).
130. *Id.* (Manion, J., concurring).
131. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.5 (3d ed. 1994).
132. *See, e.g.*, Atchison T&SFR Co. v. Witchita Bd. of Trade, 412 U.S. 800, 808 (1973)(stating that "departure from prior norms . . . must be clearly set forth so that the reviewing court may understand the basis of the agency's action."); Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977)("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); Oil, Chemical & Atomic Workers Int'l Union v. NLRB, 547 F.2d 598 (D.C. Cir.), *cert. denied*, 429 U.S. 1078 (1976); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)(stating that when an agency "swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute"). *See also* DAVIS & PIERCE, *supra* note 131, at 206 ("The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them.").
133. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)(stating that reasoned decision making, which includes stating clear reasons for varying from precedent, "furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers."). *See also* DAVIS & PIERCE, *supra* note 131, § 11.5 (discussing various mechanisms for controlling agency discretion).
134. *See* cases cited *supra* note 78.

dance as to when the Commission will rely on extrinsic evidence. Judge Manion urged the Commission to remedy the situation itself by creating a standard that would provide companies with ample guidance on the issue of extrinsic evidence.[135] One way that administrative agencies can provide such guidance when their system of precedent either fails or develops too slowly is through the issuance of policy enforcement statements.

2. *The 1994 Enforcement Policy Statement on Food Advertising*

From time to time, the Commission will issue enforcement policy statements in the area of deceptive advertising.[136] In 1994, the Commission issued its Enforcement Policy Statement on Food Advertising.[137] The statement was intended to clarify the Commission's enforcement policy regarding nutrient content and health claims in food advertising in light of the passage of the Nutrition Labeling and Education Act of 1990 and the Food and Drug Administration's 1993 promulgation of implementing regulations.[138]

In describing the legal framework for Commission action, the Enforcement Statement reiterated its policy that the Commission may rely on its own expertise in finding an advertisement deceptive, and need not rely on extrinsic evidence.[139] The Statement cited *Kraft* as supporting authority.[140] In addition, the Statement again suggested that the Commission will rely on extrinsic evidence in some cases.[141] Unfortunately, the Statement did not provide any new information regarding the nature of the circumstances under which the Commission would rely on extrinsic evidence. The Statement, again citing *Kraft* as supporting authority, said that an ad may "implicitly characterize the amount of a nutrient in a product through representations regarding the ingredients with which the product is made."[142] The Statement provides no guidance as to how a company can tell when a statement regarding ingredients will be interpreted by the Commission as being an implicit representation of nutrient content.

In sum, the 1994 Statement provides companies with no new information regarding when the Commission will or will not rely on extrinsic evidence nor does it provide any indication of how to predict when the Commission will find a truthful statement to be implicitly decep-

135. Kraft, Inc. v. FTC, 970 F.2d 311, 327 (7th Cir. 1992)(Manion, J., concurring), *cert. denied*, 113 S. Ct. 1254 (1993).
136. *See, e.g.*, *Statement on Deception*, *supra* note 57.
137. 59 Fed. Reg. 28,388 (1994).
138. *Id.*
139. *Id.* at 28,389.
140. *Id.* at 28,389 n.16.
141. *Id.*
142. *Id.* at 28,392.

tive. Together, the Statement and Commission precedent leave companies groping for a clear rule regarding extrinsic evidence, the type of rule that can be best established through administrative rulemaking.

3. Theoretical Proposal for an Interpretive Rule

Substantive rulemaking is perhaps the most effective method of restraining agency discretion absent Congressional action.[143] Throughout many areas of administrative law, both courts and scholars have provided numerous reasons for the superiority of rulemaking as a method of developing agency law.[144] The advantages of rulemaking are largely a result of the notice and comment procedure required for most substantive rulemaking under the Administrative Procedure Act (APA).[145] The APA's requirement that agencies provide notice of rulemaking proceedings and opportunities for the participation of interested parties in those proceedings[146] often leads to a procedure that is more fair, results in substantively higher quality rules, and is more efficient than adjudication.[147]

However, the Commission's authority to establish substantive rules relating to deceptive acts or practices is restricted to trade regulation rules and nonbinding interpretive rules.[148] Trade regulation rules must "define with specificity acts or practices which are unfair or deceptive."[149] Consequently, a trade regulation rule would not be an appropriate mechanism for establishing a general standard for reliance on extrinsic evidence.

Interpretive rules provide guidance to how the Commission will make decisions in future deception cases.[150] Consequently, an interpretive rule would be a more appropriate mechanism for establishing

143. DAVIS & PIERCE, *supra* note 131.
144. *See, e.g.*, NLRB v. Wynn-Gordon Co., 394 U.S. 759, 777-78, 780-81 (1969)(Douglas, J., dissenting)(Harlan J., dissenting); California v. Lo-Vaca Gathering Co., 379 U.S. 366, 376-77 (1965)(Harlan, J., dissenting); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990); Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U. L. REV. 661 (1991); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (1988); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Russell L. Weaver, Chenery II: *A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161 (1988).
145. 5 U.S.C. § 553 (1988).
146. *Id.* § 553(b).
147. DAVIS & PIERCE, *supra* note 131, § 6.7.
148. 15 U.S.C. § 57a(a)(1) (1988).
149. *Id.* § 57a(a)(1)(B).
150. *See generally* 16 CFR § 1.5 (1995)(commission guides are interpretive rules).

a general standard for reliance on extrinsic evidence. However, interpretive rules are less powerful tools than trade regulation rules because 1) they do not carry the full force of law,[151] and 2) they are exempt from the notice and comment procedure.[152] Yet each of these limitations can be overcome. First, judicial acceptance of and reliance upon an interpretive rule would produce a binding judicial rule equivalent in content to the interpretive rule. Second, although interpretive rules are exempt from the notice and comment procedure, that exemption does not prevent the Commission from holding such hearings and conducting such studies as it deems necessary for establishment of the rule.[153]

To provide advertisers with the type of guidance suggested by the court,[154] the Commission should establish an interpretive rule setting forth, with clarity and particularity, circumstances under which the Commission will rely on extrinsic evidence in cases of implicit deception. Such a rule would involve two components. The first component would be a definition of the point on the deception continuum beyond which extrinsic evidence is necessary to find deception. The second component would be a definition of the characteristics that will determine where a particular advertisement will fall on the deception continuum. Establishment of an interpretive rule with these components would produce many of the same rulemaking advantages typically associated with trade regulation rules—increased fairness, higher substantive quality, and increased efficiency.[155]

a. Fairness

Establishment of an interpretive rule would increase fairness because it would provide clearer advance notice. The most significant flaw in the current precedent based standard is its failure to provide interested parties with adequate notice of what types of claims might be deemed implicitly deceptive without resort to extrinsic evidence. As Judge Manion recognized, this uncertainty has the strong potential to result in a chilling effect on constitutionally protected commercial speech.[156] An interpretive rule clearly establishing the point on the deception continuum beyond which the Commission will rely on extrinsic evidence would serve the function of improving notice, thereby reducing the potential chilling effect on protected speech.

151. *See generally* the non-binding nature of FTC guides, *supra* note 32.
152. Administrative Procedure Act § 4, 5 U.S.C. § 553(d)(2) (1988).
153. *See generally* 16 C.F.R. §§ 1.5, 1.6 (1995).
154. Kraft, Inc. v. FTC, 970 F.2d 311, 320-21 (1992), *cert. denied*, 113 S. Ct. 1254 (1993).
155. DAVIS & PIERCE, *supra* note 131, § 6.7.
156. Kraft, Inc. v. FTC, 970 F.2d 311, 327 (1992)(Manion, J., concurring), *cert. denied*, 113 S. Ct. 1254 (1993).

b. Substance

An interpretive rule would yield a standard of higher substantive quality than the current adjudicative approach because the Commission would not be limited to one set of facts.[157] The Commission's case by case development of its extrinsic evidence standard may work sufficiently well for implied claims that fall on that end of the deception continuum closest to explicit deception. However, the case specific approach begins to break down in cases like *Kraft* where the implied claim falls somewhere on the end of the continuum closer to deception that is barely discernable. In such cases, the Commission lacks a clear point of reference against which it can determine precisely where an advertisement falls on the deception continuum. Absent the limitation of considering a specific case, the Commission could create such a reference point by fashioning an interpretive rule that clearly defines the point on the deception continuum beyond which extrinsic evidence will be necessary. Furthermore, without the restraint of applying the law to a particular set of facts, the Commission could define with particularity the characteristics that determine where a particular advertisement falls on the deception continuum.

c. Efficiency

Establishment of an interpretive rule would be more efficient than the current adjudicative approach to dealing with issues of extrinsic evidence because the rule's guidance would reduce some time-consuming aspects of adjudicatory hearings and eliminate some relitigation of the issue presented in *Kraft*. Consideration of extrinsic evidence is one of the most time-consuming aspects of adjudicatory hearings on implied deception. This aspect would be reduced through establishment of an interpretive rule because respondents, as well as Commission attorneys, would likely introduce extrinsic evidence only in cases where the interpretive rule suggests that the Commission will rely on the extrinsic evidence. Although the potential would still exist for litigation over whether extrinsic evidence meets a threshold level of scientific reliability, such litigation would be largely restricted to cases in which the advertisement in question falls beyond the point on the deception continuum where the Commission states that it will rely on extrinsic evidence.

Furthermore, an interpretive rule would reduce the continued relitigation of the issues presented in *Kraft*. The issue of Commission reliance on extrinsic evidence has arisen in several circuits numerous times in the past.[158] Although the Commission has the discretion to

157. DAVIS & PIERCE, *supra* note 131, § 6.7.

158. *See, e.g.*, United States Retail Credit Ass'n v. FTC, 300 F.2d 212 (4th Cir. 1962); Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S.

determine where on the deception continuum a particular advertisement falls, and consequently whether extrinsic evidence is necessary, there certainly is a point at which a Commission determination that extrinsic evidence is not required would be an abuse of that discretion. Absent improved guidance, the issue is likely to continue to arise in the future. However, establishment of an interpretive rule would eliminate some of this continuing litigation by defining *a priori* the point on the deception continuum beyond which extrinsic evidence will be required and what characteristics will determine where a particular advertisement falls on the deception continuum.

IV. CONCLUSION

The Commission's decision in *Kraft* serves as an example of the Commission pushing its discretion to the outer limits. The Seventh Circuit was clearly uncomfortable upholding such expansive administrative discretion, yet its decision was compelled by precedent. In an attempt to restrain the Commission's discretion and thereby reduce uncertainty, the court advised the Commission to adopt a consistent position on extrinsic evidence. The Commission has thus far failed to heed this advice. The Commission provided no information in its 1994 Enforcement Policy Statement on Food Advertising regarding its reliance on extrinsic evidence beyond the standard articulated in *Kraft*. Furthermore, the Commission has not undertaken a rulemaking proceeding in the area of reliance on extrinsic evidence. However, the issue is one well suited to amelioration through the Commission's authority to establish interpretive rules. Establishment of a consistent standard through an interpretive rule would be in the best interest of the Commission, as well as all interested parties.

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917 (1962); Niresk Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); Carter Products, Inc. v. FTC, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959).