Catholic University Law Review

Volume 27
Issue 4 *Summer 1978*

Article 8

1978

Trade Regulation

Stephen M. Silvestri

CASENOTE

TRADE REGULATION: The Federal Trade Commission has the authority to order corrective advertising to dispel the effects of past deception. *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

In 1914, Congress passed the Federal Trade Commission (FTC) Act,[1] which greatly expanded governmental control over interstate trade by providing for the prosecution of both unfair methods of competition and unfair or deceptive acts.[2] The regulatory powers given the Commission under the Act reach false and deceptive[3] advertising, and enable the FTC to order the cessation of illegal advertising practices.[4] Although technically

1. 15 U.S.C. § 41 (1976).

2. The FTC usually proceeds on a case by case basis in determining what is "deception." Feil v. FTC, 285 F.2d 879, 897 (9th Cir. 1960) (the standard is the reasonable person test, which assumes that many who might be misled are unsophisticated and unwary). *See also* Ford Motor Co. v. FTC, 120 F.2d 175 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941) (average individual is not likely to analyze complicated deferred credit plans carefully); Benrus Watch Co., 64 F.T.C. 1018 (1964) (violation if 14% of the audience is misled). *But see In re* Kirchner, 63 F.T.C. 1282, 1290 (1963) (advertiser may not be charged with every conceivable misconception when the ads may reach the foolish or feeble-minded).

Because the original Act proscribed only practices which injured competition, corporations could deceive consumers with impunity. In 1938, Congress amended the Federal Trade Commission Act to allow the Commission to protect consumers. Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938). In 1975, the FTC jurisdiction was expanded even further to correct consumer abuses. Magnuson-Moss Warranty: the Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 (1976) (FTC jurisdiction expanded to include those persons or entities affecting commerce as well as those in commerce).

3. *See* 15 U.S.C. § 45(a)(6) (1976) "The Commission is empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive practices in commerce." *See* Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976) (FTC has authority to prohibit conduct that, although legally proper, is unfair to the public); *see also* FTC v. Sperry-Hutchinson Co., 405 U.S. 233, 239 (1972) (FTC may define and proscribe an unfair competitive practice even though the practice does not infringe the letter or the spirit of the antitrust laws).

4. 15 U.S.C. § 45(b) (1976) provides:

> If . . . the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act] . . . , it shall make a report in writing in which it shall state its findings as to the facts and shall issue . . . an order requiring . . . [that] person, partnership or corporation to cease and desist from using such unfair method of competition or such act or practice.

limited by statute to issuing cease and desist orders, the FTC has wide discretion in fashioning remedies that comport with the statutory mandate.[5] Accordingly, in certain cases the Commission has ordered affirmative disclosure,[6] forcing an advertiser to qualify a claim held to be deceptive.[7] Recently, in *Warner-Lambert Co. v. Federal Trade Commission*,[8] the United States Court of Appeals for the District of Columbia Circuit increased the arsenal of agency remedies when it concluded that the FTC could compel corrective advertising[9] to dispel the effect of past illegal practices, even when future advertisements did not neccessarily

---

Subsequent to the cease and desist order, continued false advertising of the same type regarding the same category of products results in penalties of $10,000 per day per violation. 15 U.S.C. § 45(m)(1) (Supp. IV 1974) *as amended*, 15 U.S.C. § 2301 (1976).

5. Generally, the courts will not interfere with an FTC order unless the remedy does not rationally relate to the violation. *See* FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946); William H. Rorer, Inc. v. FTC, 374 F.2d 622, 627 (2d Cir. 1967); Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 789 (D.C. Cir. 1965). *But see* REPORT OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, H.R. REP. NO. 533, 63d Cong., 2d Sess. 7-8 (1914) (FTC has no power to regulate production).

6. Before affirmative disclosure may be ordered, the FTC must find that the failure to make an affirmative statement is misleading because of the claims made in the advertisement, or because of the consequences from the use of the product. Alberty v. FTC, 182 F.2d 36, 39 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950). *Accord*, Feil v. FTC, 285 F.2d 879, 899 (9th Cir. 1960); Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 955 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 23 (5th Cir. 1960).

7. *See, e.g.*, Royal Baking Powder Co. v. FTC, 281 F. 744 (2d Cir. 1922) (order to affirmatively disclose that baking powder was now made from phosphate, since consumers may have bought the product because it once was produced from cream of tartar).

8. 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

9. Gerald J. Thain, former Assistant Director for National Advertising of the FTC Bureau of Consumer Protection, has described corrective advertising as an order which

> corrects misimpressions caused by past advertising, even if current advertising for the product is completely truthful. Corrective advertising is thus designed to deprive false advertisers of the fruits of their . . . past deception. While such attempts to restore competitive conditions to the *status quo ante* may seem novel as applied to false advertising matters, the same principle is the basis for the remedy of divestiture, which the Commission has used for several years to fashion relief in antitrust cases involving mergers and monopolies.

Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349, 353 (1973). For a discussion and explanation of the remedy of corrective advertising see ROTHSCHILD AND CARROLL, CONSUMER PROTECTION REPORTING SERVICE, § 3.16 (1973); Anderson & Winer, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEX. L. REV. 312 (1972); Lemke, *Souped-Up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 U. MICH. J. LEGIS. REF. 180 (1971); Note, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972); Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496 (1972); Note, *Corrective Advertising and the FTC: No Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971).

mislead the consumer.[10]

The FTC issued a complaint against the Warner-Lambert Corporation in 1972[11] charging that the company's advertisements for its mouthwash, Listerine,[12] were false and deceptive in violation of section 5(a)(1) of the Federal Trade Commission Act.[13] After concluding that the representations made were false,[14] the FTC ordered Warner-Lambert to include in its future Listerine advertising a statement that the product would not help prevent colds or sore throats or even lessen their severity.[15] Claiming the authority to order the relief necessary to protect the public from the effects

10. 562 F.2d at 760-61. The Commission has also imposed a number of corrective advertising orders with the consent of the violator. *See, e.g., In re* Sugar Information, Inc., 81 F.T.C. 711 (1972); *In re* Medi-Hair Int'l., 80 F.T.C. 627 (1972); *In re* Ocean Spray Cranberries, Inc., 80 F.T.C. 975 (1972); *In re* Rickles, 79 F.T.C. 513 (1971).

The FTC has developed two types of corrective orders. Most require the advertiser to explain or repudiate schemes that have been held to be deceptive. *See* ITT Continental Baking Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,681 (1971) (order requiring producer of Profile Bread to apportion 25% of future advertising funds to informing the public that the product is ineffective for weight reduction). The Commission has also ordered violators to inform or confess to the public that the FTC has found its advertising to be deceptive or unfair in violation of the Act. *See* Coca-Cola Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,351 (1970) (proposed order requiring the advertiser to state that the Commission has alleged false advertising; case dismissed for failure to prove deception).

11. In 1940, the FTC issued the same complaint but dismissed the action without prejudice. Commissioner March found insufficient evidence to conclude that Warner-Lambert's tests which demonstrated Listerine to be an effective cold fighter, were incorrect. *See* Lambert Pharmaceutical Co., 38 F.T.C. 726, 749 (1944).

12. The complaint alleged that Warner-Lambert had misrepresented that Listerine would cure, prevent, or alleviate sore throats and the common cold. *In re* Warner-Lambert Co., 86 F.T.C. 1398, 1486-87 (1975). For text of the advertisements, *see id.* at 1403-04.

13. 15 U.S.C. § 45(a)(1) (1976).

14. The FTC based its conclusion on six separate findings: First, the ingredients were not present in sufficient quantities to have any therapeutic effect; second, the procedure for using the mouthwash (gargling) is ineffective for transporting the mouthwash to critical areas of the body; third, even if the mouthwash were to reach critical areas, it would be impotent because it could not penetrate the tissue cells; fourth, clinical studies showing the mouthwash to be effective were unreliable; fifth, Listerine kills millions of germs, but germs do not cause colds, and the mouthwash also leaves millions of germs in the mouth; and sixth, Listerine has no more effect on the symptoms of a sore throat than has gargling with salt water. Warner-Lambert Co. v. FTC, 562 F.2d 749, 753-54 (D.C. Cir. 1977).

15. The cease and desist order was three-pronged. First, Warner-Lambert was ordered to abandon all advertising campaigns stating that Listerine would cure colds and sore throats. Second, the order was applied to the claim that Listerine is a treatment for the symptoms of colds and sore throats. Third, the FTC ordered Warner-Lambert to cease and desist from advertising Listerine unless the advertisement contained the statement: "Contrary to prior advertising, Listerine will not help or prevent colds or sore throats or lessen their severity." Warner-Lambert Co., 86 F.T.C. 1398, 1514 (1975). The corrective advertising aspect of the order was made applicable to the next ten million dollars of Listerine advertising. This represented an amount equal to the average annual Listerine advertising budget from April 1962 to March 1972. 562 F.2d at 752, n.1.

of a violation, the FTC reasoned that corrective advertising is required when a lengthy deceptive advertising campaign creates a false belief that consumers will remember, even after the misrepresentation has ended.[16]

Although it upheld the FTC's authority to order corrective advertising, the court of appeals modified the Commission's order.[17] Finding substantial evidence[18] in the record to conclude that the advertisements were deceptive, the court held that the FTC had the power to impose corrective advertising,[19] and that such a remedy was not precluded by the legislative history behind the Federal Trade Commission Act.[20] Acknowledging the

16. Warner-Lambert Co., 86 F.T.C. 1398, 1499 (1975). Warner-Lambert commenced Listerine advertising containing the claims in 1921. 562 F.2d at 749, 752. The FTC found that a study conducted by Warner-Lambert, combined with expert opinions, proved that a majority of the consumers questioned retained the deceptive beliefs from Listerine and that the retention rate would remain high for at least five years. *Id.* at 762-63 n.65.

17. The original order read: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." Warner-Lambert Co. v. FTC, 562 F.2d at 763. The court, however, deleted the opening clause and hinted that such a preface might be an appropriate humiliation in an egregious case. *Id.*

18. Generally an agency's findings will be upheld if they are supported by substantial evidence on the record viewed as a whole. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

19. 562 F.2d at 756. Warner-Lambert contended that corrective advertising orders impinge upon the first amendment right to freedom of speech. The court disagreed, emphasizing that the first amendment is not a barrier to government regulation of deceptive advertising. *Id.* at 758. *See id.* at 768-71 (supplemental opinion on petition for rehearing of first amendment issue). *See also* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (state can insure clean and free flow of information); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (statutory bans on advertising prescription drug prices violate the first amendment); Bigelow v. Virginia, 421 U.S. 809 (1975) (commercial speech is protected by the first amendment). *But see* G. ROSDEN & P. ROSDEN, 1 THE LAW OF ADVERTISING, 9-43 (1977) (corrective advertising violates the doctrine against prior restraint).

20. 562 F.2d 749, 758. The court stated that the difference between corrective advertising and affirmative disclosure is one of verbiage which has no legal import:

> The nature of the violation, and the nature of the remedy required, are no different whether one says that future truthful *ads* will be "deceptive" when viewed against the backdrop of earlier advertising, or that future *sales* to customers who have been misled by earlier advertising will constitute the deceptive practice [affirmative disclosure], or, . . . that 'there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief [that arose from prior deceptive advertisements]' [corrective advertising].

Id. at 761 n.59 (citing JA 894). The Federal Trade Commission Improvement Act of 1975, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 57b(b) (1976)), which authorizes the FTC to bring suits in federal court to redress injury by "recission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice." *Id.* The court dismissed Warner-Lambert's argument that this section is a grant to a court of power to order notification establishing that the Commission itself does not have the power to order public disclosure. 562 F.2d at 757. Noting that Congress specifically provided that the amend-

lengthy time lapse[21] between the complaint and the appealed decision, the court concluded that modern methods of advertising have extracted the teeth from the cease and desist order.[22] Therefore, after positing standards for the imposition of a corrective advertising remedy, the court upheld the FTC's choice.[23] In his dissent, however, Judge Robb asserted that the legislative history of the Act and its amendments indicated that Congress never intended for the FTC to have the power to order corrective advertising.[24] Since the Commission's power to issue a cease and desist order is statutorily limited to the prevention of future illegal acts, he maintained that corrective advertising, insofar as it attempts to alleviate the effects of past deception, is not permissible.[25]

I. EXPANSION OF THE FTC'S CEASE AND DESIST POWER

Section five of the Federal Trade Commission Act was intended to stop unfair methods of competition before competitors and the public could be injured.[26] The courts initially confined FTC remedies to comport with a strict reading of section five, concluding that the Commission was not empowered to act as a court of equity.[27] Thus, early FTC remedies prohibited only those competitive methods used by business to gain an unfair

ments should not be construed to affect any authority of the Commission under any other law, the court concluded that the legislative history did not remove corrective advertising from the class of permissible remedies. *Id.* at 758. *See* CONF. REP. NO. 93-1408, 93d CONG., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7774.

21. *See* Note, *Corrective Advertising Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477, 482-83 (1971) (3-5 year delay is common from complaint to final order).

22. Warner-Lambert Co. v. FTC, 562 F.2d at 761-62 & n.60. When a simple cease and desist order is the sole method of enforcing violations, advertisers have nothing to lose but attorney's fees. This often leads to extended litigation and appeals. Moreover, the advertiser is able to employ the deceptive practice to its economic advantage until the order is final.

23. The court delineated a two-step test for determining whether corrective advertising is an appropriate remedy. First, did the advertisement play a substantial role in creating or reinforcing a false belief about the product? And second, will this belief be retained after the cessation of the deceptive advertisement? *Id.* at 762.

24. *Id.* at 765-66 (Robb, J., dissenting).

25. *Id.* at 764, 768. Theorizing that in the case of corrective advertising there will be nothing to correct in the text of the advertisement after compliance with the cease and desist order, Judge Robb concluded that the order in this case was unlike permissible affirmative disclosure orders which were utilized when advertisers would use copy in future advertising that was similar to the deceptive ads. *Id.* at 768.

26. *See* 51 CONG. REC. 11455 (1914) (Remarks of Senator Cummins, Chairman of the Senate Foreign and Interstate Commerce Committee); FTC v. Raladam Co., 283 U.S. 643 (1931).

27. *See, e.g.*, FTC v. Eastman Kodak Co., 274 U.S. 619 (1926) (Commission has no authority to require that a company divest itself of the ownership of businesses which it acquired prior to action by the FTC).

advantage.[28] FTC authority subsequently was expanded to include consumer protection in 1938.[29] In light of the congressional intent to protect both consumers and competing businesses, courts gradually sanctioned expanded Commission authority to regulate other practices within its purview.[30] Since the FTC had the statutory authority to deal with myriad deceptive acts,[31] the courts permitted broader cease and desist orders.[32]

Because protection of competitors and the public provided the touchstone for the cease and desist order, the FTC viewed its role as prophylactic.[33] Accordingly, in order to prevent future deception, the Commission enlarged the scope of its orders to include all aspects of a violator's operations.[34] Similarly, orders were allowed to reach not only the particular deceptive act and advertising scheme employed by the violator, but all variations that could be used in the future.[35]

---

28. *Id.*

29. *See* the Wheeler-Lea amendments, note 2 *supra.*

30. *See, e.g.*, FTC v. Dean Foods Co., 384 U.S. 597 (1966) (FTC has authority to seek injunctive relief from courts under the All Writs Act, 28 U.S.C. § 1651 (1970)). *Cf.* Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) (CAB has broad cease and desist power).

31. *See* FTC v. Dean Foods Co., 384 U.S. 597 (1966).

32. *See* Johnson Products Co. v. FTC, 549 F.2d 35 (7th Cir. 1977) (valid cease and desist order even though violations charged in the complaint relate to less than all of the respondent's products); Niresk Indus. Inc. v. FTC, 278 F.2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960) (FTC order prohibiting company from using deceptive practice applies to all products company sells).

33. *See* Spiegel Inc. v. FTC, 494 F.2d 59, 62 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974) (proof of actual injury is unnecessary to support a cease and desist order).

34. *See* note 32 *supra.*

35. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965) (use of three different television commercials employing the same deceptive practices is sufficient basis to frame cease and desist order broadly enough to prevent similar illegal practices in the future); Erickson v. FTC, 272 F.2d 318 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960) (order prohibiting manufacturer of scalp treatment from making representations that the preparation could arrest baldness in connection with that particular preparation or any other preparation for use in treatment of hair was not too broad); Consumer Sales Corp. v. FTC, 198 F.2d 404 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953) (order prohibiting use of advertising scheme in which box tops were exchanged for "discount" merchandise not overbroad when the practice had been discontinued, if the FTC determines that it is necessary to prevent the revival of the deceptive practice).

The Commission employed the terms "deceptive" and "unfair" as criteria for cease and desist orders, first developing its power under deceptive practices to include excision of trade names that misrepresented products. *See* FTC v. Algoma Lumber Co., 291 U.S. 67 (1933); FTC v. Royal Milling Co., 288 U.S. 212 (1933). More recently, the FTC has sought to prevent unfair practices which are not deceptive. *See* FTC v. Sperry-Hutchinson Co., 405 U.S. 233 (1972); FTC v. Mandel Bros. Inc., 359 U.S. 385 (1959); FTC v. National Lead Co., 352 U.S. 419 (1957); L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971). For a discussion on the distinction between the development of regulation of unfair and deceptive acts, *see* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 665, 680 (1977). The FTC also has ordered businesses to perform acts that nor-

Nonetheless, the courts have limited the scope of cease and desist orders on numerous occasions. In *Alberty v. FTC*[36] the District of Columbia Circuit held that the Commission could require only that a product be truthfully represented. In *Alberty*, the FTC found that a pharmaceutical, advertised as having an overall therapeutic effect on blood, had no beneficial impact except in the case of simple iron deficiency anemia.[37] In addition to ordering the standard cease and desist remedy, the FTC mandated that future advertisements include information on the causes of lassitude and the product's effect on those conditions.[38] This affirmative disclosure order was excised on appeal, and the court concluded that the FTC could not mandate additional negative statements except when representations required further explanation, or when the consequences of using a product required a warning.[39] The court did not recognize any relation between a derogatory addendum to an advertisement and the purpose of preventing deception.[40] Indeed, the *Alberty* court emphasized that the purpose of the FTC Act was to prevent falsity, not to encourage informative advertising.[41] The court added that since the Commission's role was to prevent deception, the blanket power to order derogatory disclosures would effectively transfer market control to the FTC, which could, in its discretion, require a particular advertiser to state precisely the limited benefits of its product and inform consumers exactly what the product will not do.[42]

---

mally would have been within the discretion of management. *See* Charles Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); Luria Bros. & Co., Inc. v. FTC, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968). Courts, however, have refused to enforce FTC orders which usurp the freedom of management to make those decisions which plot the course of the company, because such orders are considered an unwarranted infringement on free enterprise. *See generally* Zenith Radio Corp. v. FTC, 143 F.2d 29 (7th Cir. 1944); N. Fluegelman & Co., Inc. v. FTC, 37 F.2d 59 (2d Cir. 1930).

36. 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950).

37. *Id.* at 37. The typical advertisement read: "When you are weary, tired, run down, just dragging yourself around with no ambition left, when every effort you make seems to leave you weak and spent then try Oxoris Tablets, a tonic for the blood." *Id.*

38. The Commission ordered the defendant to disclose affirmatively "that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases the preparation will not be effective in relieving or correcting it." *Id.*

39. *See* note 6 *supra.*

40. 182 F.2d at 39. The court theorized that "Almost every advertisement of food, drug or drink, no matter how accurately described and carefully limited in claims" would be subject to affirmative disclosure of its particular shortcomings if the Commission's rule were allowed to stand. *Id.*

41. *Id.* The court characterized the purpose of the FTC Act as a negative restriction on falsity which has little to do with the affirmative task of encouraging properly informative ads.

42. Courts have ignored the language in *Alberty* which proscribes affirmative disclosures. Instead, the *Alberty* holding is rationalized as requiring a finding that failure to make disclosures is deceptive before the FTC can mandate that derogatory statements be placed in

Affirmative disclosure orders have been upheld, however, where there was a need to prevent future deception inherent in the advertising scheme.[43] In *Waltham Watch Co. v. FTC*,[44] the Commission ordered a successor to the original Waltham Watch Company to disclose that its imported clocks, sold under the trade name "Waltham," were not made by the original, well known domestic watch manufacturer.[45] Upholding the order, the court apparently reasoned that any clock advertisement by the new corporation bearing the trade name "Waltham," would be inherently deceptive unless it contained the affirmative disclosure that the original company no longer manufactured clocks.[46] Asserting that the congressional objective of prohibiting deception would be frustrated if the FTC could not order disclosure, the Seventh Circuit sanctioned the Commission's use of discretion in formulating such orders.[47] The court implied that even an arsenal of remedies would permit advertisers to find another means or scheme of deception if they lacked affirmative disclosure orders.[48]

Since *Waltham*, the FTC has enlarged the scope of its affirmative disclosure power still further by requiring advertisers to state on occasion that

---

advertisements. *See, e.g.*, Feil v. FTC, 285 F.2d 879 (9th Cir. 1960); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960). *See also* note 6 *supra.*

43. *See, e.g.*, Haskelite Mfg. Corp. v. FTC, 127 F.2d 765 (7th Cir. 1942) (order requiring disclosure that trays which have simulated wood surfaces are actually covered with paper).

The FTC has also required affirmative disclosure if purchasers have incorrect beliefs concerning the nature of a product in the absence of disclosure. *See* Mohawk Rfg. Co. v. FTC, 263 F.2d 818 (3d Cir.), *cert. denied*, 361 U.S. 814, (1959) (order to disclose oil sold at service stations was recycled from crank-case oil because customer assumed that it was manufactured from pure crude oil); Mary Muffet, Inc. v. FTC, 194 F.2d 504 (2d Cir. 1952) (order to include fabric composition in clothing labels because consumer assumed that rayon clothing was made from silk); Segal v. FTC, 142 F.2d 255 (2d Cir. 1944) (per curiam) (order to disclose that lenses were made in Japan because consumers assume that unmarked goods are American made).

44. 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963).

45. *Id.* at 31. The original Waltham Watch Co. was located in Waltham, Massachusetts and was founded in 1849. Before 1957, the company ceased manufacturing clocks, and during that year a Delaware corporation with the same name was organized as a "spin-off" of the original. The new corporation had acquired all of the goodwill of the old Waltham Watch Co. In 1959, the new company contracted with a corporation to have clocks imported from West Germany, and devised an advertising campaign which attempted to sell the imported clocks as a product of the old company. *Id.* at 29-31.

46. *Id.* at 31.

47. "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952), *quoted in* 318 F.2d at 32.

48. 318 F.2d at 32.

a product or device does not achieve results.[49] Despite this expansion, courts have warned the FTC to exercise caution in mandating the affirmative disclosure of a negative statement that lists all functions a product is unable to perform.[50] Such orders, however, have been approved if the advertisement is deceptive due to the omission of facts which are material in light of the representations made in the copy.[51] Deception in the advertisement itself also has been a basis for affirmative disclosure, even if future advertisements would be truthful.[52] Thus, according to the particular circumstance of the violation, the FTC currently can impose the affirmative disclosure remedy in many situations dealing with admissions, omissions, and both positive and negative disclosures.[53]

---

49. *See* J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967). In *Williams*, the FTC ordered the manufacturers of Geritol, a medication intended to cure tiredness, to disclose that the product would not be effective in cases in which the anemia is caused by factors other than a vitamin or iron deficiency, and that iron deficiency anemia is not the cause of tiredness in a great majority of cases. *Id.* at 892. Concluding that the advertisement falsely represented the efficiency of the product, the Sixth Circuit upheld the order. *Id.* at 890. The *Williams* court noted that the order did not amount to negative advertising, and characterized the remedy as informative because "it merely presents to the consumer an opportunity to make an intelligent choice." *Id.* The court, therefore, concluded that in light of misrepresentations concerning the product's efficiency, the order was necessary. *See also* Feil v. FTC, 285 F.2d 879 (9th Cir. 1960) (order requiring manufacturer of a bed-wetting remedy to disclose that the product was effective only in cases of enuresis not caused by organic diseases or defects); Ward Laboratories, Inc. v. FTC, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960). (disclosure that baldness remedy effective in cases not of the male pattern variety, after finding nearly all cases of baldness fall within the male pattern category); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960) (affirmative disclosure for baldness remedy).

50. *See, e.g.*, Ward Laboratories, Inc. v. FTC, 276 F.2d at 954. "Merely because a remedy is useful for only one ailment is no reason to demand an accompanying statement of all the ills for which it is not beneficial." *Id.*

51. *Id. But see* FTC v. Simeon Management Corp., 532 F.2d 708 (7th Cir. 1976) ("reasonable belief" that viewers are misled is insufficient to constitute proper showing for an injunction).

52. *See* Royal Baking Powder Co. v. FTC, 281 F. 744 (2nd Cir. 1922) (truthful ads were still deceptive because they did not advise consumers that their reasons for buying the company's baking powder in the past no longer applied); All-State Indus. of N.C., Inc., 75 F.T.C. 465 (1969), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970) (requiring disclosure by creditors that instruments of indebtedness might be assigned to a third party thereby resulting in a substantial alteration of the buyer's rights and liabilities).

53. *See* Feil v. FTC, 285 F.2d 879, 897 (9th Cir. 1960). Congress has passed various statutes which require disclosure on labels and in advertisements. The FTC has the authority to enforce these statutes. *See* Truth in Lending Act of 1968, Pub. L. No. 90-321, 82 Stat. 146, (codified at 15 U.S.C. §§ 1601 to 1666j (1976)); Fair Packaging and Labeling Act of 1966, Pub. L. No. 89-755, 80 Stat. 1296, (codified at 15 U.S.C. §§ 1451 to 1461 (1976)); Textile Fiber Products Identification Act of 1958, Pub. L. No. 85-897, 72 Stat. 1717, (codified at 15 U.S.C. §§ 70 to 70k (1976)); Fur Products Labeling Act of 1951, Pub. L. No. 82-110, 65 Stat. 175, (codified at 15 U.S.C. §§ 69 to 69j (1976)); Wood Products Labeling Act of 1939, Pub. L. No. 76-850, 54 Stat. 1128, (codified at 15 U.S.C. §§ 68 to 68j (1976)).

In spite of these developments, the imposition of these remedies involves certain considerations. Generally, the Commission has broad discretion to develop a solution as long as the remedy bears some reasonable relation to the deceptive practice.[54] Because courts have confined their review of Commission decisions solely to an abuse of discretion, they have permitted the FTC to insure cessation of deceptive practices by allowing it to frame orders which reach all possible practices and schemes.[55] The general requirement that the remedy reasonably relate to the violation acts as a guarantee against recurring deception, while it allows the FTC to ultilize its expertise to develop orders that will bar further violations. In keeping with the view that Congress intended the FTC to regulate all deception, courts recognize the expertise of the Commission in fashioning a suitable remedy.[56] But despite their deference, courts have continually placed upper limits on the scope of FTC remedies. For example, since the FTC's role is strictly regulatory, the Commission's orders cannot impose criminal or civil liability as punishment for section five violations. Thus, the FTC's orders have related to present and future deception and not to past illegal acts, since a remedy aimed at a past representation is regarded as compensatory in nature.[57] Furthermore, it has been argued that because FTC orders are not to be punitive, they should only prohibit current deceptive

---

54. *See* FTC v. National Lead Co., 352 U.S. 419 (1957); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946). *But see* ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976) (courts can narrow FTC orders by deleting those portions for which a reasonable relationship to the offending conduct is found lacking). Earlier decisions struck down remedies if less drastic means would accomplish the same results. *See* FTC v. Royal Milling Co., 288 U.S. 212, 217 (1933) (excision of trade name should not be ordered unless there is no other means to remedy deception).

55. *See* P.F. Collier & Son Corp. v. FTC, 427 F.2d 261 (6th Cir. 1970), *cert. denied*, 400 U.S. 966 (1971) (FTC allowed to close all roads to the prohibited goal so that an order may not be bypassed); *but see* Gold Tone Studios Inc. v. FTC, 183 F.2d 257 (2d Cir. 1950) (abuse of discretion standard).

56. *See* Carter Prods. Inc. v. FTC, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884, *reh. denied*, 361 U.S. 921 (1959); Jacob Seigel Co. v. FTC, 327 U.S. 608, 612-13 (1946). Some commentators criticize the characterization of the FTC as an expert body:

> Up to a point, the alleged expertise is a legal fiction: A commissioner, no matter how erudite, does not become an expert by presidential appointment with the advice and consent of the Senate, no more than a soldier becomes a gentleman by virtue of being commissioned, although the commission itself so states.

ROSDEN & ROSDEN, *supra* note 19, at 9-36.

57. *See* P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1954). The Commission's power does not enable it to mandate that businesses make monetary restitution for deception. *See* Heater v. FTC, 503 F.2d 321 (9th Cir. 1974) (ordering refunds to past consumers is different from ordering affirmative disclosures to correct misconceptions future customers may hold). Also, the FTC does not possess the power to close one of many businesses advertising deceptively in an industry. FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967), (citing Moog Industries Inc. v. FTC, 355 U.S. 411 (1958)).

practices and attempt to prevent their future occurrence.[58]

II. CORRECTIVE ADVERTISING: "AND NOW, A WORD AGAINST OUR SPONSOR"[59]

In the face of precedent confining Commission orders to future practices, the *Warner-Lambert* court allowed an order clearly aimed at correcting the effects of past deception.[60] Concluding that there is no conceptual difference between affirmative disclosure and corrective advertising, the *Warner-Lambert* court likened the order at issue to the remedy devised in *Waltham* by stating that the reason for disclosure was identical.[61] The District of Columbia Circuit asserted that in both cases the cumulative impact of all prior deceptive advertising necessitated future disclosure.[62] Likewise, the court compared the purposes of the orders and concluded that in both cases it would be deceptive and unfair to allow consumers to continue to purchase the product based upon beliefs created by past misrepresentations.[63] The nature of the *Warner-Lambert* order is distinguishable, however, in that it attempts to correct past deception despite the truthfulness of future advertising. Judge Robb, in his dissent, believed this distinction to be controlling. He concluded that *Waltham*-type orders were designed to remedy inherently deceptive advertising by requiring that the false representations be corrected in future schemes using similar copy.[64] In contrast, he noted that *Warner-Lambert*-type orders, which assume a totally truthful advertisement after the cease and desist order, require a correction when there is nothing to correct.[65] Thus, Robb concluded that the orders cut against precedent by seeking to correct past deception.

In contrast to the conceptual problems posed by the majority's attempt to reconcile corrective advertising with affirmative disclosure, the FTC has adopted a more clearcut approach. Rather than viewing corrective advertising as a remedy aimed at past deceit, the FTC maintains that the orders effectuate section five purposes because the lingering effects attending deceptive advertisements are themselves violations that can be prohibited.[66]

---

58. *See* New Standard Pub. Co. v. FTC, 194 F.2d 181 (4th Cir. 1952).

59. *See Comment, And Now A Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 CAL. L. REV. 1416 (1972).

60. Warner-Lambert Co. v. FTC, 562 F.2d 749, 764 (D.C. Cir. 1977). *See also* Note, *supra* note 21, at 491.

61. 562 F.2d 749 at 761.

62. *Id.*

63. *Id.*

64. *Id.* at 768.

65. *Id.*

66. Warner-Lambert Co., 86 F.T.C. 1398 (1975); Firestone Tire & Rubber Co., 81

Thus, when the basis for corrective advertising is viewed as a remedy for a future violation, there is no precedential problem. The *Warner-Lambert* court recognized the Commission's theory when it asserted that both future deceptive ads viewed against earlier advertising and future sales to consumers who have been misled by past deceptive schemes are violations.[67] Its subsequent rejection, however, of the Commission's theory in favor of the thesis blending affirmative disclosure and corrective advertising remedies is unwarranted and creates serious problems in the subsequent application of either alternative.

Although the D.C. Circuit concluded that the *Warner-Lambert* remedy is identical to the order sanctioned in *Waltham*,[68] the court decreed that corrective advertising would require a different justification than affirmative disclosure. The touchstone for imposing a corrective remedy is whether the false scheme will leave lingering deceptive beliefs after the advertising ceases.[69] The retained beliefs requirement differs from the affirmative disclosure test announced in *Alberty*.[70] The *Warner-Lambert* test, in effect, requires that there be a showing of retained false beliefs, the proof of which can be singularly difficult.[71] In addition, a remedy aimed at the after-effects of deceptive advertising may extend far beyond FTC regulatory authority, because the purpose of such an order would have the effect of punishing the advertiser for past wrongful conduct.[72]

On its face, the type of remedy used in corrective advertising seems to cut against court directives proscribing compensatory and punitive FTC orders.[73] Corrective advertising has been categorized as commercial harakiri because it results in a loss of market share for the violator.[74] How-

---

F.T.C. 398 (1972) (corrective advertising order is not retrospective if its purpose and effect is to terminate continuing injury to the public). The distinction between the actual act or practice and the residual effect of the prior act or practice is not clear-cut because deception does not stop when the advertising campaign ceases. Thus, truthful ads have the ability to deceive by simulating a latent image of the product which remains misrepresented, or by reinforcing consumer habits that were wrongfully induced. *See* Note, *supra* note 21, at 493.

67. 562 F.2d at 761 n.59.

68. *Id.* at 761. *See* notes 43-48 and accompanying text *supra*.

69. *Id.* at 762. *Warner-Lambert* sanctioned the FTC's determination of the criteria for imposition of corrective advertising. The court concluded that the requirement reasonably related to the particular deception sought to be remedied. *Id.* at 762.

70. *See* note 6 *supra*.

71. 562 F.2d at 768. In his dissent, Judge Robb rejected this expansion which "goes far beyond the prevention of "illegal practices in the future" because the test would apply to almost any advertisement which, is the subject of a cease and desist order. He concluded that such an extension must be left up to Congress. *Id.*

72. *Id.* at 764.

73. *See* note 57 and accompanying text *supra*.

74. *See* Bower, *New Developments in FTC Remedies*, 41 ANTITRUST L.J. 465, 470 (1972).

ever, if there is a finding, as in *Warner-Lambert*, that there are residual effects from deceptive advertisements, the corrective remedy seems warranted in light of the congressional mandate to correct all deception.[75] Thus, the need to accommodate competing policies through formulated guidelines is readily apparent. In discussing the specific order involved, however, the *Warner-Lambert* court does little to define its standards. The court gave little deference to the fact that a corrective advertising order may be overinclusive and thus not reasonably related to the violation when applied to a totally different advertising scheme for the same product.[76] Indeed, in this situation, a corrective advertising order would have more compensatory than regulatory effect. Given the need for more definitive standards, the court should have delineated those circumstances in which a corrective remedy would be appropriate and required a reasonable relation between the future advertising and the retained deceptive belief.

Nevertheless, the *Warner-Lambert* court had little difficulty imposing the corrective order because the retained-effect test was easily satisfied by a twenty-year advertisement.[77] *Warner-Lambert*, however, seems to be a rare case. Few advertising schemes are utilized for an equally long period of time.[78] Most advertising campaigns last no more than one year and have considerably less retained effect than those lasting for a longer period.[79] Furthermore, in *Warner-Lambert*, there was a finding of retained deceptive beliefs.[80] It is very difficult to prove the nature and amount of retained beliefs after an advertising scheme has ceased.[81] Thus, the FTC

75. *See* note 3 *supra*.

76. This situation may occur, for example, if Warner-Lambert advertises its product solely as a breath freshener.

77. The Commission found both creation of a false belief and retention of this deceptive idea. *See* note 16 *supra*.

78. Warner-Lambert Co. has been holding Listerine out as a remedy for colds since 1921. Warner-Lambert Co. v. FTC, 562 F.2d 749, 752.

79. Because retained effects are speculative, the subject matter retained is limited, and the duration of the retention is proportionate to the time period of the scheme, some scholars conclude that it is impossible to show a residual effect in advertisements of ordinary products which have a relatively short life span on the market. *See* ROSDEN & ROSDEN, *supra* note 19, at 9-29, 9-31.

80. 562 F.2d at 762.

81. We do not believe that the residual effect will prove to be present for any substantial period and with a significant percentage of prospective buyers. We say that we do not believe that such lengthy effect can be shown, but we must admit that we do not know. A scrutiny of surveys that have been made seems to show that the conditions of the surveys were unreliable or not suited for thispurpose, and that no surveys have been made that concentrate on . . . finding out whether and how long people retain specific . . . claims in an advertisement. It follows that we do not believe that the evidence that is necessary can be demonstrated.

ROSDEN & ROSDEN, *supra* note 19, at 9-41.

may have to assume the existence of retained beliefs in order to impose corrective advertising, and *Warner-Lambert* expressly sanctions this approach.[82] By permitting the FTC to assume the existence of lingering effects, the court invents a fiction to reach an end or to correct a harm that may not even exist.

Should the FTC assume the existence of retained deceptive ideas when, in fact, they are not present, the sole purpose of the order would be remedial, aimed at punishing past violators. Clearly such an order would exceed the Commission's powers. On the other hand, the presence of this assumption may well serve as an effective deterrent to deceptive practices. Prospective violators, who otherwise might successfully hide behind the difficulties in proving retained effects, may reconsider employing deceptive schemes knowing that the assumption of lingering effects eases the Commission's burden of proof. Yet despite this salutary effect, the question of the Commission's power to invoke the corrective remedy still remains.

III. CONCLUSION

Practically, a corrective advertising order may be the only method to dispel beliefs which linger after the cessation of a deceptive advertising violation. The problem with other remedies is one of delay.[83] While most advertising schemes are designed to run for one year or less, the FTC procedure for investigation and prosecution typically drags on for years.[84] Thus, an advertiser can afford to employ deceptive practices until the campaign is over and lose only attorney's fees.[85] Given the time delay, the Commission cannot compete on an equal basis with the ingenuity and persuasiveness of large advertising campaigns.[86] If the FTC follows the rea-

82. *See* note 9 *supra*. The court stated that it might be appropriate "in some cases to presume the existence of . . . [creation of lingering false beliefs] for corrective advertising." 562 F.2d 762.

83. *See* Note, *supra* note 21, at 487 (corrective advertising has no effect on the fly-by-night, one-shot advertiser).

84. *See* Pitofsky, *supra* note 35, at 693. *See also* Carter Prod., Inc. v. FTC, 268 F.2d 481 (9th Cir. 1959) (16 years of investigation and trial to compel company to drop reference to "Liver" in "Carter's Little Liver Pills").

85. While the average FTC case endures for two years until final order, most advertising schemes last only a year. Although attorney's fees may be considerable, larger corporations would earn profits far exceeding attorney costs by employing the deceptive schemes. Smaller businesses may not be able to take advantage of the impotency of FTC remedies because they earn substantially lower profits and run considerably less advertising.

86. Inadequate remedies such as the cease and desist order allow violations of § 5 of the FTC Act at will by deceptive advertisers. *See* Pitofsky, *supra* note 35, at 692. Since the FTC budget permits few prosecutions, corrective advertising should be imposed as a deterrent. *See* REPORT OF THE ABA COMMISSION TO STUDY THE FTC, 19-20 (1969) (Because of

soning of *Warner-Lambert* in future cases, it can impose a corrective order without having to prove that the public retains deceptive beliefs about the product. Utilizing such a powerful remedy may be oppressive, however, and the Commission must be careful to limit the scope of such orders solely to eliminating retained beliefs.

Stephen M. Silvestri

---

limitations on the FTC's budget, there were fewer than 500 investigations per year from 1965 to 1969).

In 1972, the FTC filed a statement with the Federal Communications Commission (FCC) advocating, as an adjunct to the fairness doctrine, the adoption of a counter-commercial program whereby "prime time" advertising would be made available to anyone who could purchase it for the purpose of rebutting some of the controversial or special claims made by commercial advertisers. The FTC also suggested that such time be made available even to those who could not afford to purchase it. *See* 50 TEX. L. REV. 448 (1972). The FCC refused to adopt this proposal. For the text of the proposal and discussion, see Scanlon, *The FTC, the FCC and the "Counter-Ad" Controversy: An Invitation to "Let's You and Him Fight?"*, 5 ANTITRUST L. & ECON. REV. 43 (1971). For proponents' and critics' arguments, see OPPENHEIM & WESTON, UNFAIR TRADE PRACTICES & CONSUMER PROTECTION CASES AND COMMENTS, 617-18 n.14 (3d ed. 1974). *See also* note 59 *supra*.