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**DEVELOPING RATIONAL STANDARDS FOR AN
ADVERTISING SUBSTANTIATION POLICY**

*By Charles Shafer**

I. INTRODUCTION

American annual consumer expenditures of nearly two trillion dollars involve approximately sixty-four percent of the country's Gross National Product.¹ A substantial portion of those consumer purchases result in some sort of dissatisfaction.² The term "consumer dissatisfaction" represents a large continuum of feelings ranging from mild disappointment to all consuming rage.³ Con-

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1. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 432 (105th ed. 1984) [hereinafter cited as ABSTRACT]. The figure given for consumer expenditures (\$2,156,000,000,000) is the amount for "Personal Consumption Expenditures" which includes the "market value of goods and services purchased by individuals and nonprofit institutions, and [the] value of food, clothing, housing, and financial services received by them as income in kind." *Id.* at 435.

2. Professor David A. Rice reports that the "annual cost to consumers of marketplace fraud and deception run[s] into billions of dollars." D. RICE, CONSUMER TRANSACTIONS 18 (1975). He describes the consumer marketplace as "problem-fraught rather than problem-free." *Id.* at 19. Consumer dissatisfaction is particularly difficult to quantify in monetary terms because only one-third of actual complaints are reported to government agencies. Professor Rice refers to this as the "tip-of-the-iceberg phenomenon." *Id.* at 1 (Supp. 1978). A recent national survey concluded that 14% of the population was aware of having been deceived in the marketplace at least once during a one-year period. A wide variety of deceptive practices were cited, including sales of defective products, overcharges, use of misleading advertising, and misrepresentation of financial arrangements. A. BEST, WHEN CONSUMERS COMPLAIN 101 (1981).

3. The National Advisory Commission on Civil Disorders attributed some of the civil violence of the 1960's to certain populations' beliefs that they suffered from constant abuses by local merchants who both charged exorbitant prices and sold inferior

sumer dissatisfaction is a serious societal problem for a variety of reasons. It indicates a misallocation of scarce resources.⁴ It can be a significant factor in producing the perception that the economic and political institutions are unfair, ineffective, or unresponsive. That perception can have wide ranging political ramifications.⁵ Finally, it may be an indication of genuine political and economic unfairness.⁶

Consumer dissatisfaction is often caused by advertising or other marketing practices that create unrealistic expectations on the part of consumers regarding the properties or effectiveness of products or services. Advertising, both true and untrue, plays a significant role in determining how consumer dollars are spent. Approximately seventy-billion dollars are spent annually on advertising.⁷ Therefore, the part that advertising plays in consumer misapprehension regarding the properties or effectiveness of products⁸ deserves our attention.

A number of governmental institutions and substantive legal doctrines have been established to resolve consumer disputes and to prevent consumer dissatisfaction. The Federal Trade Commission (Commission) often is considered the prime federal agency protecting consumers from false advertising. The Commission administers a number of statutes which seek to protect consumers in the marketplace;⁹ the most inclusive of those laws is Section Five of the Federal Trade Commission Act (FTCA) which prohibits "unfair and decep-

quality goods. Such exploitation was a traceable cause of civil unrest. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 274 (1968).

4. See *infra* notes 181-82 and accompanying text.

5. See, e.g., L. NADER, NO ACCESS TO LAW 4 (1980) ("We have also found that . . . consequences of a lack of access of judicial remedy have had a serious effect on the machinery of government, on the mental health of Americans, and on the crime rate.") Ms. Nader further explains that the absence of an efficient complaint processing system leads to a search for alternatives to the law. *Id.*

6. The prior text sentence refers primarily to the response of people who believe that they have been treated wrongly. This text sentence is included to highlight the fact that even those who are not the subject of unfairness may not find unfairness acceptable. See, e.g., D. CAPLOVITZ, THE POOR PAY MORE (1963).

7. ABSTRACT, *supra* note 1, at 567.

8. Throughout this paper, purchases of products under a misapprehension will include goods, realty, and services purchased under a misapprehension regarding usefulness for the consumer's needs.

9. For Commission regulations under statutes other than the Federal Trade Commission Act, see 16 C.F.R. § 300 (Wool Products Labeling Act); § 301 (Fur Products Labeling Act); § 303 (Textile Fiber Products Identification Act); § 304 (Hobby Protection Act); § 305 (Energy Policy & Conservation Act); § 500 (Fair Packaging & Labeling Act); § 700 (Magnuson-Moss Warranty Act) (1984). The Truth in Lending Act provides for Commission enforcement. 15 U.S.C. § 1607(c) (1982).

tive acts and practices.”¹⁰ This language has been used for eighty-four years as the basis of the Commission’s jurisdiction to regulate advertising.¹¹ The Commission has regulated advertising by enacting a variety of Trade Regulation Rules¹² and by ordering various advertisers to “cease and desist” advertising campaigns that the Commission determines are deceptive.¹³

Traditionally, identification of an advertisement as deceptive¹⁴ involved a determination that the advertiser was making false claims about the nature of the product.¹⁵ The Commission has employed

10. Section 5 of the FTCA is codified at 15 U.S.C. § 45 (1982). Subsection 5(a)(1) presently reads as follows: “Unfair methods of competition, in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” 15 U.S.C. § 45 (1982).

11. The Federal Trade Commission was established by Congress in 1914. The original purpose behind establishment of this independent regulatory agency was to enforce the emerging public antitrust policy. The statute creating the Commission declared that “unfair methods of competition” were unlawful and empowered the Commission to prevent such conduct. Act of Sept. 26, 1914, ch. 311, § 45(a)(1), 38 Stat. 717, 719 (1914). The phrase was selected to avoid the implication that the statute simply codified the common law unfair competition doctrine. See 51 CONG. REC. 12,145 (1914) (statement of Rep. Hollis). From the beginning of its existence, the Commission interpreted that language as preventing untruthful advertising. See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919). That interpretation of the statute was never entirely successful. Although courts acknowledged that “unfair methods of competition” encompassed more than was outlawed by prior antitrust statutes and common law, they also held that the Commission must demonstrate that there was some harm done to “competition,” rather than consumers, by the practice it was opposing. In other words, the Commission had to find that competitors had lost business because of the advertising. See, e.g., *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931). Because untruthful advertising was likely to harm a competitor of the advertiser by taking sales away from the competitor, it was usually easy to establish such conduct as harmful to competition.

Nevertheless, in 1938, Congress amended § 5 of the FTCA to explicitly outlaw “unfair or deceptive acts or practices.” Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified at 15 U.S.C. § 45(a)(1) (1982)). Hence, the authority of the Commission to move against false advertising was not in doubt.

The Commission’s authority is illustrated by the following statement: “The definition is broad enough to cover every form of advertisement deception over which it would be humanly practicable to exercise governmental control. It covers every case of imposition on a purchaser for which there could be a practical remedy.” H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937).

12. The authority of the Commission to enact Trade Regulation Rules is found at 15 U.S.C. §§ 46(g), 57a(91)(B) (1982).

13. The authority of the Commission to issue cease and desist orders is found at 15 U.S.C. § 45(b) (1982).

14. Although § 5 of the FTCA also provides the Commission with jurisdiction over unfair practices, and the Commission has recognized the failure to substantiate advertising claims as an “unfair” practice, it is appropriate to discuss advertising substantiation only in the context of deceptive acts or practices. That point is more fully developed in notes 80-101 *supra* and accompanying text.

15. See, e.g., *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (1944); *Meredith Corp.*, 101 F.T.C. 390 (1983).

another approach to the concept of deception. An advertiser violates the FTCA by making claims about a product when the advertiser does not have a reasonable basis to believe the claim, i.e., the advertiser lacks sufficient substantiation for the claim. This "reasonable basis doctrine" forms the root of what is known as the Commission's advertising substantiation program.¹⁶ That program involves (or has involved) collecting and disseminating to the public the substantiation for particular advertising claims, as well as penalizing advertisers who make claims without a sufficient substantiation for those claims.

The advertising substantiation program often is recognized as a significant aspect of the Commission's consumer protection efforts.¹⁷ Nearly all complaints, decisions, and consent orders involving deceptive advertising at least partly are based on the doctrine that advertisers should have substantiation for claims.¹⁸ The advertising substantiation program was the subject of one of the two major policy statements regarding consumer protection that have been issued by the Commission during the Reagan administration.¹⁹

A number of issues regarding the application of the substantiation requirement remain unresolved. Those issues involve: identifying the standard for determining the appropriate level of substantiation by advertisers, deciding whether substantiation developed after a claim is made should be considered, deciding whether the Commission should proceed by rule or adjudication in establishing the substantiation requirement, and deciding whether the substantiation materials should be available to the public. After a brief history of the substantiation requirement, this article will establish a theoretic-

16. The reasonable basis doctrine was first explicitly announced in Pfizer, 81 F.T.C. 23, 62 (1972). To the extent that the Commission has a "program," it can be traced to a Commission resolution announcing that advertisers will be expected to produce substantiation on request. 36 Fed. Reg. 12,058 (1971).

17. See, e.g., F. MILLER & B. CLARK, CASES AND MATERIALS ON CONSUMER PROTECTION 23 (1980) (describing activities of advertising substantiation program as "some of the most important activities of the Commission relating to advertising"); Federal Trade Commission, Advertising Substantiation Program, Request for Comments, 48 Fed. Reg. 10471, 10472 (1983) [hereinafter cited as Request] ("The Commission remains committed to this principle, which has been an important element of the Commission's program for deterring unfair and deceptive claims and preserving public confidence in advertising.").

18. See *infra* note 53.

19. THE FEDERAL TRADE COMMISSION POLICY STATEMENT REGARDING THE ADVERTISING SUBSTANTIATION PROGRAM (undated) [hereinafter cited as SUBSTANTIATION STATEMENT]. This statement was appended to the decision in Thompson Medical Co., 104 F.T.C. 648,839 (1984). The other policy statement deals with the definition of deception itself. THE FEDERAL TRADE COMMISSION POLICY STATEMENT ON DECEPTION (1983) [hereinafter cited as DECEPTION STATEMENT].

cal basis for that requirement. That basis will be used to resolve the issues which have arisen.

II. HISTORY OF THE ADVERTISING SUBSTANTIATION PROGRAM

In 1971 the Commission issued a resolution requiring advertisers, upon request, to submit whatever substantiation in support of safety, performance, efficacy, or comparative price claims that was in their possession at the time the claims were disseminated.²⁰ The authority for this procedure was Section 6(b) of the FTCA²¹ and hence these surveys were referred to as "Section 6(b) rounds" or "industry rounds." The questionnaires could be far reaching, asking for substantiation for expressed and implied claims and even for competitors' claims.²² Originally, the Commission established this requirement to make information available to consumers to enable them to make more rational buying decisions and to encourage competitors to challenge unfounded advertisements.²³

20. Federal Trade Commission, Special Reports Relating to Advertising Claims, 36 Fed. Reg. 12,058 (1971) [hereinafter cited as Reports]. This may have been partly in response to a petition received by the Commission in 1970 requesting that it promulgate a rule requiring national advertisers to make available to the Commission, and through the Commission to the public, the scientific information they had developed to support advertising claims. FEDERAL TRADE COMMISSION, EVOLUTION AND EVALUATION OF THE AD SUBSTANTIATION PROGRAM SINCE 1971 5 (Dec. 1, 1978) [hereinafter cited as EVOLUTION].

21. Section 6(b), Federal Trade Commission Act, Pub. L. No. 996-37 (1979) is codified at 15 U.S.C. § 46(b) and provides in pertinent part as follows:

[The Commission shall also have the power to] require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce . . . to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports, or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals. . . . Such reports and answers shall be made under oath, or otherwise as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe. . . .

15 U.S.C. § 46(b) (1982).

22. See *infra* notes 307-12 and accompanying text for a description of the questionnaires.

23. The Commission identified five policy reasons in support of its action:

1. Public disclosure can assist consumers in making a rational choice among competing claims which purport to be based on the objective evidence and in evaluating the weight to be accorded to such claims.
2. The public's need for this information is not being met voluntarily by advertisers.
3. Public disclosure can enhance competition by encouraging competitors to challenge advertising claims which have no basis in fact.
4. The knowledge that documentation or the lack thereof will be made public will encourage advertisers to have on hand adequate substantiation before claims are made.

However, consumers and consumer groups were reported to have demonstrated little interest in the information after it was made available to the public.²⁴ Instead, the program became little more than an adjunct of Commission litigation against advertisers.²⁵ After analyzing the information submitted, the Commission could institute an action against the advertiser for engaging in an unfair and deceptive trade practice, i.e., making a claim without substantiation.²⁶

Congress assured the demise of the advertisement substantiation program as a vehicle for increasing the fund of product information available to the general public by sharply limiting the ability of the Commission to make public the information it obtained in the 6(b) rounds.²⁷ The Commission no longer may release to the public information gathered pursuant to a process "a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. . . ."²⁸ Because at least one purpose of the 6(b) request²⁹ is the determination of whether the seller has violated Section 5 by failing to possess substantiation for any advertising claims, information gathered as part of the program no longer may be made public.³⁰

5. The Commission has limited resources for detecting claims which are not substantiated by adequate proof. By making documentation submitted in response to this resolution available to the public the Commission can be alerted by consumers, businessmen, and public interest groups to possible violations of Section 5 of the Federal Trade Commission Act.

Reports, *supra* note 20.

With the adoption of this resolution, the Commission served automobile manufacturers with substantiation orders and has since conducted twenty-nine industry rounds. See Request, *supra* note 17, at 10471; EVOLUTION, *supra* note 20, at App. A.

24. See *infra* notes 335-36 and accompanying text.

25. EVOLUTION, *supra* note 20, at 12.

26. See, e.g., Ford Motor Co., 87 F.T.C. 756 (1976).

27. The original authority of the Commission to release the substantiation materials to the public was based on the following provision: "[The Commission shall have the power to] make public from time to time such portions of the information obtained by it hereunder as are in the public interest. . . ." 15 U.S.C. § 46(f) (1982). In Section 3(a)(2) of the Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, § 3(a)(2), 94 Stat. 374, 375, the following amendment was made to 15 U.S.C. 46(f): "Provided, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . ." 15 U.S.C. § 46(f) (1982).

28. *Id.* at § 57b-2.

29. In fact, as discussed above, this had become the primary reason for collecting the data.

30. It does not appear that the Congress or the Commission anticipated this result of the amendment when it was being considered.

The requirement that advertisers against whom no misconduct has been alleged must supply substantiation for claims is novel in the law. A few Commission Trade Regulation Rules apply the policy of requiring the submission of advertising substantiation.³¹ A few states also have imposed such requirements.³² Congress once considered a "Truth In Advertising Act"³³ which would require manufacturers to supply substantiation for their advertising claims upon consumer demand and which would make it unlawful to disseminate an advertisement without having documentation available.³⁴

Closely allied to the policy of requiring advertisers to collect substantiation materials is the policy of requiring advertisers to have a certain level of support for claims. In 1972, the Commission, in *Pfi-*

31. See, e.g., Rules for Using Energy Costs & Consumption Information Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act, 16 C.F.R. § 350.8(a) (1984) (requires manufacturers to submit reports to Commission listing annual energy cost or energy efficiency ratings of appliances and methods of exacting these ratings); Labeling and Advertising of Home Insulation, 16 C.F.R. § 460.9 (1984) (manufacturers must keep records of methods used to test R-values); 16 C.F.R. § 306.6 (1984) (refiners, producers, and distributors of gasoline must keep records of octane ratings); 16 C.F.R. § 255.1(a) (Guide for Use of Endorsements and Testimonials in Advertising states that testimonials cannot contain information which "could not be substantiated." The language does not make clear whether prior substantiation is required.); 16 C.F.R. § 255.2 (advertiser should be able to substantiate that consumer endorsements are representative of consumer opinions in general); 16 C.F.R. § 255.3 (drug endorsements must be substantiated).

32. See, e.g., CAL. BUS. & PROF. CODE § 17508 (West Supp. 1983) (advertiser whose claims are based on effectiveness of product must provide facts on which claims are based); WIS. ADMIN. CODE § 124.09 (1983) (persons making price comparisons must substantiate basis on which price comparison was made). The Law Department of Colorado recently focused attention on misleading comparative price discount advertising in one industry by requesting approximately 30 retailers to substantiate "implied" regular prices from which items are discounted. Letter from Penelope E. Brown, Colorado Consumer Protection Unit Legal Assistant, to Charles Shafer (Feb. 15, 1984). The Ohio Administrative Code declares it an unfair and deceptive act or practice for a supplier to fail to document the specific factors relied upon to arrive at a sufficient supply of an advertised good to meet consumer demand when a raincheck is not given. OHIO ADMINISTRATIVE CODE § 109:4-3-03-(C)-(7) (1983). The Ohio Attorney General's Office has used its subpoena power to require a supplier to document claims made in advertisements. Letter of Anthony J. Celebrezze, Jr., Ohio Attorney General, to Charles Shafer (March 6, 1984).

33. S. 1512, 93d Cong., 1st Sess. (1973), 119 CONG. REC. 11,527-29 (1973).

34. The statute would have provided that:

It shall be unlawful for any person to disseminate . . . any advertisement concerning the safety, performance, efficacy, characteristics, or comparative price of any product or service unless documentation is available at the principal office of such person in the United States for public inspection, including the furnishing of copies of such documentation to any person requesting such documentation. . . .

Id. at 11,528.

zer, Inc., first set forth the proposition that an advertiser violated the FTCA by making a claim without possessing sufficient information to constitute a "reasonable basis" for that claim.³⁵ In *Pfizer* the respondent had been marketing a sunburn treatment called "Un-Burn" by a variety of advertisements which the Commission concluded made two affirmative product claims: Un-Burn actually anesthetizes nerves in sunburned skin and Un-Burn stops pain fast.³⁶ Although the Commission determined that the staff had not proven successfully that Pfizer lacked a reasonable basis for the claims, the Commission held that it would be an unfair practice to make such claims without a reasonable basis.³⁷

There is no real common law antecedent for the proposition that merely making a claim without substantiation (whether the claim is true or false) is actionable. Although there is a tort doctrine that it can be fraudulent to make a statement without the confidence implied in the statement,³⁸ that doctrine is merely a substitute for the scienter requirement in common law deceit actions,³⁹ not a substitute for the requirement that the statement itself must be untrue in order for it to be actionable. There are some earlier Commission decisions which foreshadow the reasonable basis doctrine. In an early case, an electronics school was charged with exaggerating the possibilities of getting jobs in the TV industry after graduation from the school. The court upheld the Commission, even though the agency presented no evidence that the school was wrong in predicting the possibility of future jobs, because the advertiser could not substantiate its claims.⁴⁰ In a case involving an inflatable swimming device, the manufacturer requested the Commission to grant a continuance to give the manufacturer time to develop substantiation for the challenged claims.⁴¹ Although the case was ostensibly decided on the basis of rules requiring prompt action by the Commission, the Commission stated:

While we are not deciding the instant case on such a ground, we are inclined to think that an advertiser is under a duty, *before* he makes any representation which, if false, could cause injury to the health or personal safety of the user of the advertised product, to make reasonable inquiry into the truth

35. *Pfizer, Inc.*, 81 F.R.C. 23, 64 (1972).

36. *Id.* at 65.

37. *Id.* at 62.

38. RESTATEMENT (SECOND) OF TORTS § 526(b) (1977) [hereinafter cited as RESTATEMENT].

39. *See supra* note 135 and accompanying text.

40. *De Forest's Training, Inc. v. FTC*, 134 F.2d 819, 821 (7th Cir. 1943).

41. *Kirchner*, 63 F.T.C. 1282, 1293 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964).

or falsity of the representation. He should have in his possession such information as would satisfy a reasonable and prudent businessman, acting in good faith, that such representation was true. To make a representation of this sort, without such minimum substantiation, is to demonstrate a reckless disregard for human health and safety, and is clearly an unfair and deceptive practice.⁴²

Later, in *Pfizer, Inc.*, the Commission announced the doctrine but refused to apply it; however, the Commission since has found a number of advertisers liable for making unsubstantiated claims.⁴³ The scope of the reasonable basis doctrine has been discussed and revised in a recent series of cases involving over-the-counter analgesic products and in a Commission policy statement.⁴⁴

The policy of requiring a certain level of substantiation for claims has surfaced in other contexts. The Commission has included substantiation requirements in some rules. The Commission's Guides Against Deceptive Pricing, adopted in 1967, require advertisers to be "reasonably certain" that a substantial number of sales are made at the price to which it compares its own.⁴⁵ A retailer should have "at least a general knowledge of the prices being charged in his area."⁴⁶ Franchisers are required to have a reasonable basis for representations made to potential franchisees.⁴⁷ A few state consumer protection laws also include substantiation requirements.⁴⁸ A sub-

42. *Id.* at 1294.

43. The Commission has issued 24 litigated orders and 132 consent orders. Request, *supra* note 17, at 10471.

44. See *infra* notes 107-34 and accompanying text.

45. 16 C.F.R. § 233.1(a) (1986).

46. 16 C.F.R. § 233.3(e) (1986).

47. 16 C.F.R. § 436.1(c)(2) (1978).

48. See, e.g., Wis. § 100.21(2)(a) (West Supp. 1983) (no person may make energy savings claim without reasonable and currently accepted scientific basis for claim when claim is made; making energy savings or safety claim without reasonable and currently accepted scientific basis is unfair method of competition); Conn. Dept. of Consumer Protection Reg. § 42-110b-28(b)(17) (1977) (new and used car dealers are required to have reasonable belief in truth of their representations and sufficient information upon which that belief can be based); La. Public Health & Safety Reg. § 617(A)(1) (1978) (requires representations concerning effect of drugs or devices to be supported by demonstrable scientific facts); Wis. Trans. § 139.03(2) (1983) (Automobile dealers who make representations "concerning the motor vehicles it offers for sale, the services it provides or other aspects of its business operation, shall possess detailed evidence of the validity and accuracy thereof, which evidence shall be furnished . . . upon request.").

The statutes of a number of states explicitly state that courts should look to Federal Trade Commission decisions and policies for guidance. See, e.g., ALASKA STAT. § 45.50:545 (1983); FLA. STAT. ANN. § 501-204(2) (West Supp. 1983); MASS. GEN. LAWS ANN. ch. 93A, § 2(b) (Law Co-op 1977); UTAH CODE ANN. § 13-11-2(4) (1983). These states could find, therefore, that the failure to have a reasonable basis for advertising claims is a violation of their state deceptive practices acts. There are, however, no

stantiation requirement conceivably could be read into section 43(a) of the Lanham Act, which provides competitors with a remedy for deceptive advertising.⁴⁹ A number of advertising agencies and the major television networks have advertising review policies of their own.⁵⁰ These policies are an effort to avoid network or agency liability for deceptive advertising and, at least in the case of networks, to keep the peace with clients who compete with one another.⁵¹

reported cases so holding. A number of state attorneys general do assume that a reasonable basis requirement is part of their states' law. *See, e.g.*, Letter of Allen C. Hoberg, North Dakota Assistant Attorney General, to Charles Shafer (Feb. 10, 1984); Letter of Curt Loewe, Minnesota Consumer Services Unit, to Charles Shafer (Feb. 9, 1984) (Commission regulations regarding advertising substantiation are cited in suits brought under Minnesota's Consumer Fraud Statute); Letter of Paul C. Douglas, Nebraska Attorney General, to Charles Shafer (Feb. 9, 1984) (attempts to convince courts that advertiser's inability to substantiate claim is unfair or deceptive act in itself); Letter of Frank J. Kelley, Michigan Attorney General, to Charles Shafer (Feb. 6, 1984) (while statute does not specifically require substantiation, as practical matter, in non-judicial resolution of problems substantiation of claims becomes issue).

49. The statute provides that:

Any person who shall affix, apply or annex, or use in connection with any goods or services, . . . a false designation of origin, or any false description or representation, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any false description or representation.

15 U.S.C. § 1125(a) (1982). Two cases have addressed the issue. In *Johnson & Johnson v. Quality Pure Mfg.*, 484 F. Supp. 975 (D.N.J. 1979), a television commercial was challenged because it claimed that the defendant's shampoo had the same characteristics as the plaintiff's shampoo. The plaintiff charged that the defendant "lacked a fact foundation" for the claim. The court stated it was "satisfied that [the statute] provides a private cause of action to enjoin such advertising when the defendant has made the claim without a good faith basis, grounded on substantial pre-existing proof, to support it." *Id.* at 983. However, in *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241 (D. Del. 1980), the court held that it could not accept Toro's argument that it is entitled to prevail on a claim under § 43(a) simply by showing that a defendant's advertising claim was unsubstantiated. The plain language of § 43(a), which prohibits false rather than unsubstantiated representations, requires that a plaintiff establish not merely that defendant's claim lacked substantiation but also that it is false or deceptive. *Id.* at 253.

50. *See, e.g.*, National Broadcasting Company, Remarks in Response to the FTC's Request for Comments about the Advertising Substantiation Program 3 (undated) (Commission's Request available in 48 Fed. Reg. 10471) [hereinafter cited as NBC] (Broadcast Standards Department started in 1934); CBS, Inc., Remarks in Response to the FTC's Request for Comments about the Advertising Substantiation Program 2 (July 15, 1983) (Commission's Request available in 48 Fed. Reg. 10471) [hereinafter cited as CBS] (Department of Program Practices established in 1959). The advertising agencies currently sponsor the National Advertising Review Board. There are a variety of other associations, model codes, and standards committees which can be traced back to the early 1910's. 119 CONG. REC. 11527, 11528 (1973) (Statement of Sen. Moss).

51. *See, e.g.*, CBS, *supra* note 50, at 2 (emphasizing that network does not want to be viewed as "quasi enforcement agency"); NBC, *supra* note 50, at 18 (substantiation program is part of their effort to mediate challenges of one sponsor's advertisements by another). With regard to the liability of advertising agencies, *see, e.g.*, *Porter & Dietsch v. FTC*, 605 F.2d 294, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (considers agency's knowing participation in deception); *Ogilvy & Mather Int'l, Inc.*, 101 F.T.C. 1,

The Commission also has made advertising substantiation requirements part of cease and desist orders where the advertiser has been found guilty of deception. Often this is done under the theory that the Commission may "fence in" advertisers who have engaged in deceptive practices and who the Commission fears will find some way of evading an order which merely requires the advertisers to cease engaging in the deceptive conduct found to have occurred. For example, in *Tashof v. FTC*, the United States Court of Appeals for the D.C. Circuit approved a requirement that a seller of eyeglasses refrain from selling any merchandise at a "discount" price unless it first takes a "statistically significant survey" that shows the prevailing price is "substantially" higher than its price.⁵² Because the Commission commonly includes in all complaints filed under § 5 of the FTCA allegations that claims are both untrue and unsubstantiated, this writer has difficulty distinguishing "deception" and "substantiation" cases.⁵³

In 1983 the Commission requested all interested parties to submit comments on a variety of questions regarding the advertising substantiation program.⁵⁴ A number of manufacturers, retailers, advertising agencies, television networks, and other parties submitted comments on the program. After reviewing those comments, the Commission issued a policy statement revising some aspects of the program.⁵⁵ The Commission formally abandoned resort to

15 (1983) (agency is liable for deceptive claims; claims must be substantiated but agency may rely on expert judgment of client); *McCaffrey & McCall, Inc.*, 101 F.T.C. 367, 369 (1983) (agency must obtain substantiation for all claims; no permission to rely on client's judgment).

52. 437 F.2d 707, 715 (D.C. Cir. 1970). See also *Camp Chevrolet*, 84 F.R.C. 648 (1974) (order required substantiation by competent scientific tests because manufacturer had made false claims regarding nature of tests shown television audience).

53. A review of all advertising cases beginning with Volume 100 of FTC Reports shows that all cases with a substantiation charge also have a charge that the claim is untrue. Only five cases involving untruth do not have a charge of lack of substantiation. See *Kimberly Int'l*, TRADE REG. REP. (CCH) 22,282 (Aug. 19, 1985); *Jim Clark's Beef, Inc.*, TRADE REG. REP. (CCH) 22,013 (May 3, 1983); *Encyclopedia Britannica, Inc.*, 100 F.T.C. 500 (1982); *Nat'l Ass'n of Scuba Diving Schools, Inc.*, 100 F.T.C. 439 (1982); *American Motors Corp.*, 100 F.T.C. 229 (1982).

The Commission's rationale is particularly difficult to ascertain because every case since 1982 involved a consent order, except for the over-the-counter analgesic cases discussed in this article. Therefore, no facts are presented other than those that can be gleaned from the complaint.

54. Request, *supra* note 17. The Summary of the Commission staff's review of the comments is included in ADVERTISING SUBSTANTIATION PROGRAM, ANALYSIS OF PUBLIC COMMENTS AND RECOMMENDED CHANGES (July 23, 1984).

55. SUBSTANTIATION STATEMENT, *supra* note 19; Remarks of William Miller III, Chairman, FTC on FTC's Ad Substantiation Program 3 (Wash. D.C., March 23, 1984) [hereinafter cited as Miller]. William Miller III was President Reagan's first appointee as

"rounds" as a device for determining whether advertisers have substantiation. Hence, the Commission will question all advertisers on an individual basis and will not make the nature of investigations public.⁵⁶ The Commission reiterated the policy of requiring substantiation prior to making products claims.⁵⁷ The Commission decided that post claim substantiation should be considered in determining the public interest⁵⁸ in proceeding against an advertiser, evaluating the adequacy of pre-claim substantiation, and fashioning an appropriate remedy.⁵⁹

III. JUSTIFICATION

A. Deception

To evaluate Commission policy and to resolve issues arising under the advertising substantiation program, it is important to first clearly articulate the justification for substantiation requirements. Despite the fact that substantiation policies have received considerable attention, there has not been a clear understanding of the role advertising substantiation plays in the Commission's fight against deceptive advertising. Commission cases devote little space to setting forth the connection between the failure to have a prescribed level of substantiation for claims and the prevention of unfair or deceptive advertising. In the Commission's most recent policy statement on the substantiation program, the only attempt to clarify the underlying rationale of the substantiation requirement is the Commission's reasoning that false claims of substantiation are proof that a claim is "material."⁶⁰ However, that does not justify a substantiation requirement that is independent of a requirement that the advertising claims be true. Moreover, an advertiser may make an unsubstantiated claim because the advertiser does not believe the claim is material, such as the type of claim considered "puffing." A good deal of the difficulty in articulating the standard to be applied can be traced to this failure to clarify the goals of the program. There are two ways in which the requirement that advertisers pos-

Chairman of the Commission. He has recently been named Director of the Office of Management and Budget.

56. SUBSTANTIATION STATEMENT, *supra* note 19, at 6.

57. *Id.* at 7.

58. The FTCA requires that Commission action be brought in the public interest. 15 U.S.C. § 45(b) (1982).

59. SUBSTANTIATION STATEMENT, *supra* note 19, at 6.

60. "[C]onsumers would be less likely to rely on claims for products or services if they knew the advertisers did not have a reasonable basis." SUBSTANTIATION STATEMENT, *supra* note 19, at 2.

sess adequate substantiation is significant in combatting deceptive advertising.

First, expressed or implied claims of substantiation are significant to consumers because they relate to the likelihood that a claim is true. It may be difficult or impossible to determine whether many claims are or are not in fact true.⁶¹ For example, many personal computers are sold with the claim that they will be of benefit to a child's ability to compete in school or to succeed in later life.⁶² Because we cannot be sure of our ability to predict the future, it is probably impossible to determine whether such claims are true. Some claims may be susceptible to reasonably objective proof, but the results will vary from consumer to consumer. For example, a pain reliever may work faster for particular types of pain or particular consumers. No consumer could know without trying such a product how it will perform.

Finally, claims may be difficult or impossible for consumers to evaluate even after purchase. Comparative product claims may not be subject to evaluation unless the consumer engages in extensive testing, which is virtually impossible. In all of the above situations, consumers realize that there is no way to be sure if claims are "true" or "false." Consumers understand that they are taking a risk.⁶³ Yet the above situations represent those in which deception is most likely.⁶⁴ When consumers believe that advertisers have tested prod-

61. In FTC BUREAU OF CONSUMER PROTECTION, MEMORANDUM, ADVERTISING SUBSTANTIATION 15-18 (Nov. 8, 1982) [hereinafter cited as MEMORANDUM], it is argued that consumers are deceived when a purchased product has a smaller likelihood of success than they thought.

Consumers will not necessarily assume that the advertised outcome will occur with certainty. Support claims are valuable because they give consumers a basis for estimating the chances that they will actually receive the advertised benefit. *Id.* at 4.

62. See, e.g., *Ally Execs Derail Commodore Criticism*, ADVERTISING AGE, October 31, 1983, at 64; *T I Takes Education Track*, ADVERTISING AGE, October 3, 1983, at 1; Galanter, *Honing in on Computers*, PSYCHOLOGY TODAY, September, 1984, at 30.

63. To the extent that consumers do not understand that a risk is being taken, we could conclude that the advertising has convinced consumers that there is an extremely high probability that the advertising claims will prove true.

64. One line of thought which might suggest where deception occurs began with Philip Nelson, who divided goods into search and experience goods. Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974) [hereinafter cited as *Advertising*]; Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970) [hereinafter cited as *Information*]. Goods which consumers prefer to investigate before purchasing are search goods. *Information*, *supra* at 372. Nelson gives the contrasting examples of canned tuna and a dress. A consumer cannot tell much about the tuna before purchase. Therefore, it is an experience good. A consumer can, however, examine a dress thoroughly before purchasing. Nelson states that advertising for search goods often provides direct information about the product. The most important information conveyed about experience goods "is simply that the brand advertises." *Advertising*, *supra* at 730. Nelson states that "the major control that consumers have over the market for experience

ucts prior to making claims, they believe that the products more likely will perform as advertised. In this way, the advertising substantiation doctrine is a specialized form of Commission action against deceptive implied claims in advertising. The implied claims concern the likelihood that a particular statement is true.

This justification of the advertising substantiation doctrine is related to Commission action regarding the use of testimonials and endorsements in advertising.⁶⁵ In 1975, the Commission adopted an industry guide regarding the use of endorsements and testimonials.⁶⁶ The Commission requires that endorsements reflect the hon-

qualities is whether they repeat the purchase of a brand or not." *Id.* The conclusion he reaches is that it is not necessary to have any legal protection for misleading advertising. In the case of search goods, consumers can conduct an adequate inspection and, in the case of experience goods consumers, should expect to need to test out the product. *Id.* at 741. In fact, he suggests that advertising regulation may be counterproductive because it will cause people to have an unreasonably high expectation for truthfulness in advertising. *Id.* at 750.

Two refinements of Nelson's work are relevant here. One involves adding a new category: credence goods. The other involves recognizing search, experience, and credence qualities in all goods. The concept of credence goods is contrasted with search and experience goods. See Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & ECON. 67 (1973). Whereas the value of some goods can be ascertained by the search process before purchase or by experience after purchase, the value of some goods cannot be ascertained by the normal consumer at all. The example given is an automobile repair shop. Often a customer must rely on the word of the repair shop that a given part is needed and that it works well. The market for credence goods is one in which fraud is more likely. The writers suggests a variety of factors which would make fraud less likely, e.g., where the seller is operating at capacity, where the seller expects a long term relationship with the buyer which would be harmed if the fraud were uncovered, and where there is a warranty of some sort. *Id.* at 76.

These concepts are made more helpful to us by recognizing that they represent qualities which can be present in all goods and that they represent relative points on a continuum rather than discrete qualities. See Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 531 (1979). Jordan and Rubin point out that as qualities in goods move along the continuum from search to credence the likelihood of fraud increases. *Id.* at 531. It is more likely, then, that there will be fraud to the extent that advertising messages contain claims that consumers never practically can evaluate, such as the speed of headache remedies, the likelihood of future conditions, and the importance that a particular product plays in the success of an athlete. See, e.g., *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 698 (3d Cir. 1983) ("Because consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders, becomes a significantly more influential source of consumer beliefs than it would otherwise."). This may be a way of saying that the most deceptive messages would be those that focus on the "credence" qualities that are present in all commodities. Joskow, *Comments on Peltzman*, 24 J. L. & ECON. 403, 450 (1981).

65. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980) (presentation of testimonials implies that typical users experience same results).

66. 16 C.F.R. § 255 (1985). Industry guides were adopted prior to the clear statutory grant of rulemaking power. Violation of a guideline does not have the same consequences as violation of a rule.

est opinions of the endorser and that an endorser's qualifications be as represented.⁶⁷ For example, in 1937 the Commission proceeded against an encyclopedia publisher for falsely claiming testimonials for its publication.⁶⁸ While a consumer is concerned with how useful an encyclopedia will be, rather than with who likes the encyclopedia, the consumer realizes that at the time of purchase he or she can make a judgment regarding only the likelihood that the product will serve the purpose for which it is purchased. The endorsements persuade the consumer in making that judgment. The regulation of the truth or falsity of statements is not of direct concern to consumers. The regulation of testimonials and endorsements is, therefore, not the regulation of the truth or falsity of statements, but the regulation of implied claims regarding the likelihood that product quality claims are true.

A second theoretical basis for the advertising substantiation program is that it is part of the Commission's effort to attack conduct of advertisers which may not necessarily involve actual misstatements about a particular product, but which, if allowed, would create an environment in which a significant amount of misstatements are likely to be made. Essentially the rationale is as follows: If one makes claims without knowing whether they are true or false, it is more likely that the claims will be false than if one only makes claims on the basis of relevant information regarding the product. In this regard the truth or falsity of a particular claim is not relevant. Even if the claim is true, the advertiser has engaged in a deceptive practice, if the advertiser has failed to test the claim before disseminating it. Hence, the purpose of the program is to achieve a higher level of accuracy in all advertisements by compelling sellers to conduct better testing of potential claims.⁶⁹ The FTCA comprehends

67. 16 C.F.R. §§ 255.1(a), 255.3(a) (1985).

68. *FTC v. Standard Educ. Soc.*, 302 U.S. 112 (1937); *see also* *Hall & Ruchel, Inc.*, 32 F.T.C. 229 (1940) (representations that product endorsed by physicians and scientists were false).

69. Robert Pitofsky has stated:

[I]f the advertising substantiation rule is justifiable at all, it is for reasons not touched upon in Commission opinions. A prior substantiation rule should trigger a *process* of advertising review . . . which should help to eliminate or curtail the quantity of inaccurate information in the market place. Enthusiastic marketing people would no longer be able to put off demands for substantiation with the response that the data will be made available when and if needed but would have to accumulate substantiating evidence before making the claim.

Pitofsky, *Advertising Regulation and the Consumer Movement*, in *ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION* 27, 36 (D. Tuerck ed. 1978).

such a policy by proscribing "deceptive" acts as opposed to merely proscribing "deception."

It is also important to emphasize that in this context, consumer expectations with regard to the amount of substantiation are not relevant. Regardless of the amount of substantiation consumers expect advertisers to have, the Commission is making an independent judgment of the amount of substantiation sellers making particular kinds of claims should have. Proscription of industry practices that *may* lead to deception can be found in a number of Commission actions. For example, in *FTC v. Colgate-Palmolive Co.*, the court held that it was a deceptive trade practice to represent that a televised demonstration provided visual proof of a product claim when the televised demonstration did not do so, even if the claim itself was true.⁷⁰ Colgate television advertisements claimed to show that "Rapid Shave" shaving cream enabled a razor to shave sandpaper. Actually, in the televised demonstration, the substance that appeared to be sandpaper was a simulated paper made of plexiglass to which sand had been applied. Although the product actually could shave sandpaper, if real sandpaper had been used it would have appeared to television viewers as just plain paper.⁷¹ Additionally, the mock-up allowed a shorter time span between application and shaving than did the sand paper. The court and the Commission had difficulty articulating the harm. Although there was an implicit lie (i.e., "what you are seeing is sandpaper being shaven"), viewers probably would not have been concerned that the demonstration was actually that of sandpaper being shaven as long as the product could perform as claimed.⁷² Therefore, the lie did not harm consumers in that instance. Rather, the decision can be seen as based on fears regarding the power of television advertising to deceive people. One way to guard against that risk would be to have a firm, clear rule that viewers should always be informed when there is any kind of simulation.⁷³

70. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

71. *Id.* at 376-77.

72. This assumes that viewers care that they would have been able to shave sandpaper.

73. Robert Pitofsky defends the *Colgate* decision on the ground that the issues which a "mock-up defense" would generate "may tend to complicate and lengthen an otherwise simple fraudulent demonstration case." Pitofsky, *supra* note 69, at 691. This theory may be the same as that presented in the text. The theory defends a finding of deception on the basis that if the conduct were allowed, proving deception would be too difficult. Phony "mock-ups" have not been pursued by the Commission since *Colgate*. *Id.* at 692. Another case which illustrates this concept of deception involved misrepresentation regarding a gasoline additive. The use of language like "Here's proof" and "You're about to see proof" and the appearance in the demonstration of

Another example of proscription of industry practices that may lead to deception is seen in the Commission's Vocational School Rule, which, *inter alia*, required proprietary vocational and home study schools to provide pro rata refunds to students who withdrew from their courses.⁷⁴ The United States Court of Appeals for the Second Circuit partially invalidated the rule because the penalties were not to be based on specific misstatements by the schools.⁷⁵ The court invalidated the refund and job placement provisions of the rule.⁷⁶ The court was in essence unable to see a non pro-rata refund policy as deceptive. However, it can be viewed as deceptive in the sense discussed above. The Commission was concerned about a multitude of deceptive statements, each of which would be difficult to detect and proscribe with sufficient clarity. Moreover, to enforce a proscription of each individual deceptive statement would require constant monitoring by the Commission.⁷⁷ The pro-rata refund provision, therefore, placed the risk on the school that stu-

complicated measuring instruments and white-coated technicians contributed to an impression that scientific testing was behind the advertising. Yet the televised demonstration far exceeded the actual effects of the additive. Although there was no proof that the additive could not fulfill the claims, the court concluded that the conduct was deceptive. Here again the Commission apparently was most concerned that the unchecked use of the television medium would make the presence of untrue claims more likely. *Standard Oil Co. of Cal.*, 84 F.T.C. 1401, 1472 (1974).

74. 16 C.F.R. § 438.4 (1984). The rule also provided that schools must provide information to prospective students concerning the schools' graduation and placement records. The rule extended the "cooling off period" on vocational school enrollments contracts to fourteen days. *Id.* at 438.3. *See* Vocational Schools Trade Regulation Rule Statement of Basis and Purpose, 43 Fed. Reg. 60,796 (1978) [hereinafter cited as Vocational Statement].

75. *Katherine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 664 (2d Cir. 1979).

76. *Id.* at 662-65. The court invalidated the refund and job placement provision of the rule. The court objected to that provision on two grounds. First, the court stated that the Commission had not defined with adequate specificity the unfair or deceptive acts or practices which the provision prevented. *Id.* at 662. (The statutory provision requiring that the deceptive act be stated with specificity is at 15 U.S.C. § 57(a)(1)(B) (1982)). The court held that the statutory requirement of specific definition of the deceptive acts "would be meaningless if the only unfair acts or practices defined in the rule were possible future violations of [the Commission's] remedial requirements." *Id.* Second, the court rejected the Commission's position that the rule was intended to combat a variety of deceptive practices because the rule "penalizes every vocational school for every student" dropout regardless of the reason for dropping out. The court held that there was "no rational connection between the Commission's universally applicable refund requirements and the prevention of specifically described unfair and deceptive enrollment practices." *Id.* at 664.

77. The Commission found that:

Among the most prevalent of such misrepresentations are exaggerated or false statements concerning a school's equipment and facilities; the quality of instruction provided; the availability of part-time employment opportunities during the course; refund policy provisions; and accreditations and government approval of courses.

dents would discover after beginning courses that the school was not for them. This would be an incentive for the school to be as truthful as possible.⁷⁸

The courts' restricted reading of the FTCA's requirements with regard to trade regulation rules stems from the failure of the court to recognize that the absence of the procedures mandated by the Commission was "deceptive," because that absence tended to induce deception even though the absence of the procedures is not in and of itself deception. Moreover, many Commission rules had already set out required conduct, the absence of which would not necessarily constitute deception.⁷⁹

B. Unfairness

The FTCA prohibits unfair as well as deceptive acts and practices.⁸⁰ In fact, the first case to set forth the "reasonable basis" doctrine was premised on the concept of unfairness and not deceptiveness.⁸¹ Subsequent cases, however, have grounded substantiation requirements in deception or have suggested that "unfairness" and "deception" are interchangeable.⁸² Both a recent

Two additional types of misrepresentations have a particularly serious impact on the prospective enrollee's ability to make a rational purchase decision. First, schools often dissuade students from reflecting on their decision to enroll by falsely claiming that rigid enrollment deadlines exist. . . .

Second, schools have misrepresented the selectivity of their admissions process through false claims about the use of an admissions screening committee.

Vocational Statement, *supra* note 74, at 60,799.

78. *Gibbs*, 612 F.2d at 663, 678. "No longer will schools be able to derive any significant financial benefit from engaging in unfair or deceptive enrollment practices." Vocational Statement, *supra* note 74, at 60,799.

79. For example, advertisements providing care information that does not meet the specific requirements of 16 C.F.R. § 423 (1985) (Care Labeling of Textile Wearing Apparel) would not be deceptive in the sense of conveying misleading information; however, they would be deceptive in the sense of violating the FTCA.

80. 15 U.S.C. § 45 (1982). At times the Commission has labeled conduct as either "unfair" or "deceptive." Usually, however, the Commission describes conduct as either unfair or deceptive and leaves it at that.

81. *Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972). In *Pfizer*, the Commission suggested that the advertising was unfair because it was more economically efficient to require advertisers, rather than consumers, to test claims.

82. *See, e.g., Stihl, Inc.*, 101 F.T.C. 840, 843 (1983) (complaint alleged advertising practices constituted unfair and deceptive acts). *But see Porter & Dietsch v. FTC*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (substantiation requirements grounded only in deception). The Commission seems to believe that there is no distinction between the two:

The application of the "reasonable basis" test, based on deception, is to be distinguished from the Commission's review of the question of advertising substantiation in the context of our recent decision in *Pfizer*,

Commission decision and a recent Commission policy statement suggest a return to "unfairness" as a theoretical basis for the program.⁸³

However, because both of the justifications for a reasonable basis requirement involve the Commission's authority to proceed against "deceptive" practices, there is no need to ground the policy in the Commission's authority over "unfair" practices. It is important to establish that basing the program on unfairness does not aid in justifying Commission action. This is due to the less than successful struggle on the part of the Commission and the courts to give meaning to the word "unfair." In 1964 the Commission proposed the following definition:

[T]he factors that determine whether a particular act or practice should be forbidden [as unfair] are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).⁸⁴

This standard was once cited favorably by the United States Supreme Court.⁸⁵ The Commission has proposed other standards for identifying unfairness, including one in 1978 which appeared to

Inc. . . . There we considered the impact of unsubstantiated, affirmative product claims as a matter of marketplace fairness; our decision was grounded exclusively on the unfairness Whether an advertisement is analyzed from the standpoint of unfairness or deception, however, the standard for evaluating the substantiating material and test which is applied is the same—does the substantiation provide a reasonable basis to support the claim.

National Dynamics Corp., 82 F.T.C. 488, 550 n.10 (1973), *modified*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974) (emphasis added).

It is not clear whether *National Dynamics* represents a departure from the economic efficiency justification as a basis for the *Pfizer* court's finding of unfairness.

83. See Substantiation Statement, *supra* note 19; see also Thompson Medical Co., 104 F.T.C. 648, 839 (1984).

84. Cigarette Rule Statement of Basis & Purpose, 29 Fed. Reg. 8324, 8354-55 (1964).

85. *FTC v. Speery & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972). The Commission has paraphrased the three factors that it considers in applying the unfairness prohibition as: "(1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous." Letter of the FTC to Senators Wendell Ford and John Danforth (Dec. 17, 1980), *reprinted in FTC Act Amendments and Authorization*, TRADE REG. REP. (CCH) No. 598, at 35 (May 31, 1983) [hereinafter cited as Letter].

retreat from the second set of factors listed above. The restated test was:

- (1) Whether the acts or practices result in substantial harm to consumers. In making this determination both the economic and social benefits and the losses flowing from the challenged conduct must be assessed, and (2) Whether the challenged conduct offends public policy.⁸⁶

In a recent response to a Congressional inquiry regarding the parameters of the unfairness concept, the Commission set forth a series of considerations which more closely paralleled the standards set forth in 1964. The Commission stated that the most important criteria was "unjustified consumer injury."⁸⁷ Such injury must be substantial; it "must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces, and it "must be [an injury] which consumers could not reasonably have avoided."⁸⁸

One writer has surveyed Commission unfairness cases in an effort to develop some guides as to where the Commission is likely to find unfairness.⁸⁹ His survey suggests that the standard is used when there is some harm other than untruthfulness and most often when there is some activity which prevents efficiency in the market place.⁹⁰ He concludes by agreeing with the United States Supreme Court that the term unfair "does not admit of precise definition"

86. Advertising of Ophthalmic Goods and Services, Statement of Basis and Purpose, 43 Fed. Reg. 23992, 24000-01 (1978).

87. Letter, *supra* note 85, at 35.

88. *Id.* at 36-37. The standard is obviously economic (cost/benefit) in nature, but with perplexing use of words like "substantial" and "reasonably." The Commission implies that even if the injury outweighs the benefits of not preventing it, there might be Commission inaction if the injury is not substantial or if the consumer has not acted reasonably, the substantialness and reasonableness to be judged by some other criteria. Those other criteria are not set out.

89. Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission (1981)*, 81 Wis. L. Rev. 107 (1981).

90. For example, the withholding of material information might be unfair if the "lack of easily obtainable comparative information had eliminated sellers' incentives to compete by offering a better grade of product." *Id.* at 117.

One example given is the Commission's requiring manufacturers and distributors of insulation material to determine and publicize the "R-Value." That was necessary because

it would be prohibitively expensive for consumers to measure or observe the effectiveness of different brands of insulation on their own. At the same time, no seller had sufficient incentive to provide the information because it would first have to bear the entire expense of educating consumers as to the significance of the R-Value, an expense which would later benefit other firms as well.

Labeling and Advertising of Home Insulation, Statement of Basis and Purpose, 44 Fed. Reg. 5018, 5022 (1979).

and that its meaning must be arrived at by "the gradual process of judicial inclusion and exclusion."⁹¹ Many other people have made similar statements when attempting to give the term some meaning.⁹² In fact, even the Commission, attempting to convince Congress that the term had some definable meaning (at least in application), began its discussion conceding that the term itself gives little guidance as to its meaning, but arguing that Congress understood this when it intentionally selected the term.⁹³

Congress may change its mind. Concern about the inability to arrive at a comprehensible definition of "unfair" has led to criticism that the term is too vague and that, therefore, the Commission's application of it may be too unpredictable.⁹⁴ Congress has, for example, restricted the use of the regulation of advertising directed at children on the basis of unfairness⁹⁵ and has flirted with the idea of prohibiting all regulation of advertising on the basis of unfairness,⁹⁶ including prohibiting a statutory definition of unfairness.⁹⁷

Another example of conduct which does not involve untruthfulness, but which is wrong, because it prohibits the efficient operation of markets or because it violates some other standard of propriety, is conduct which restricts consumers' post-purchase rights. Craswell, *supra* note 89, at 131.

91. *Id.* at 153 (quoting *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931)).

92. "In the twelve years since the Court's ruling in *S & H*, the FTC has not clarified the meaning of the unfairness standard by carefully documented studies or thoughtful explanations of why particular practices are unfair to consumers." Gellhorn, *Trading Stamps, S & H, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903 (1983).

93. Letter, *supra* note 85, at 34-35. See, e.g., *All-State Indus. of N.C., Inc.*, 75 F.T.C. 465, 490 (1969).

94. See, e.g., *Federal Trade Commission Reauthorization 1983, Hearings before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy & Commerce*, 98th Cong., 1st Sess., 14, 18, 22, 23, 27 (1983) (Statements of James C. Miller III, David A. Clanton, and Patricia P. Bailey) [hereinafter cited as *Hearings*]; *FTC Amendments & Authorizations*, TRADE REG. REP. (CCH) No. 598, at 5 (May 31, 1983); *FTC Act Amendments*, [1982] TRADE REG. REP. (CCH) No. 545, at 16, 51 (June 7, 1982); *FTC Act Amendments*, [1982] TRADE REG. REP. (CCH) No. 561, at 13 (Sept. 27, 1982); Craswell, *supra* note 89, at 3 n. 7.

95. Section 11(a) of the 1980 FTC Improvement Act prevents the Commission from promulgating any rule regarding children's advertising on the basis of unfairness. *Federal Trade Commission Authorization*, TRADE REG. REP. (CCH) No. 436, at 6 (May 6, 1980). The amendment is now codified at 15 U.S.C. § 57c (1982).

96. In 1982, the Senate Committee on Commerce, Science, and Transportation proposed that § 5 be amended to provide that, "[T]he Commission shall have no authority . . . to prohibit or otherwise regulate any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce." *FTC Act Amendments* [1982] TRADE REG. REP. (CCH) No. 545, at 34 (June 7, 1982) (emphasis added).

97. In 1982 and 1983, the House Committee on Energy and Commerce proposed the following definition of unfairness:

An act or practice in or affecting commerce shall be considered to be an unfair act or practice . . . if

The nebulousness of the concept of unfairness results from the lack of an indication of the harm or the type of conduct at which it is directed. Despite the difficulty in achieving precision in defining "deception," that basis for an action at least identifies the nature of the harm it seeks to avoid (i.e., people having incorrect information) and the nature of the conduct it seeks to prohibit (i.e., communications which convey incorrect information). Where the standard the Commission uses is nebulous, it is politically easier to attack actions based on that standard. To adequately protect consumers, Congress may have to resort to such an indeterminate word through which diverse harms can be attacked.⁹⁸ The Commission need not rely on "unfairness" for support of the advertising substantiation doctrine,⁹⁹ because the program in all of its phases deals with the prob-

(i) such act or practice causes or is likely to cause substantial injury to consumers, and

(ii) such substantial injury (I) is not reasonably avoidable by consumers; and (II) is not outweighed by countervailing benefits to consumers or to competition which result from such act or practice.

Any determination under the preceding sentence regarding whether an act or practice is an unfair act or practice shall take into account, in addition to other relevant factors, whether such act or practice violates any public policy as established by Federal or State statutes, common law, practices in business or industry, or otherwise. This subparagraph shall not have any force or effect, and shall not be taken into account, in connection with the enforcement of any State law which prevents persons, partnerships or corporations subject to the jurisdiction of the State from engaging in unfair acts or practices.

FTC Amendments & Authorizations, TRADE REG. REP. (CCH) No. 598, at 5 (May 31, 1983); *FTC Act Amendments* [1982] TRADE REG. REP. (CCH) No. 561, at 19 (Sept. 17, 1982).

In 1982, the Senate Committee on Commerce, Science and Transportation proposed the following definition:

[U]nfair acts or practices are acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.

FTC Act Amendments [1982] TRADE REG. REP. (CCH) No. 561, at 79 (Sept. 17, 1982).

Congressional opposition to action based on the concept of unfairness may be motivated by concerns about the specific interests that are threatened by the Commission. The concern about unfairness is being expressed at the same time that a large number of special interests are seeking and receiving Congressional protection from the Commission. See, e.g., S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA* 159-69 (1983); M. PERTSCHUCK, *REVOLT AGAINST REGULATION* 69-117 (1982).

98. See, e.g., *FTC Act Amendments & Authorizations*, TRADE REG. REP. (CCH), No. 598, at 42 (May 31, 1983). An example of a type of practice which may be unfair but could not be considered deceptive involved including free samples of razor blades in advertising supplements to home delivered newspapers, without any protective packaging that would keep children from using them. Philip Morris, Inc., 82 F.T.C. 16 (1973).

99. The Commission in Pfizer, Inc., concluded that advertising without a reasonable basis is unfair. The Commission based its conclusion on an economic analysis, reasoning that it is often more efficient for sellers to test claims than for consumers to

lem of incorrect consumer information, as established above.¹⁰⁰ First, the advertising substantiation doctrine does involve untruthful statements, albeit often implied, that advertisers have information they do not in fact have, and that an advertising claim is being made with a certain degree of confidence.¹⁰¹ Second, the doctrine involves conduct which makes untrue statements more likely to occur. It is therefore unnecessary, and may be counterproductive, to discuss advertising substantiation in terms of unfairness, a vague and often ill-favored concept.

C. *Summary: "Deceptive^s and Deceptive^p"*

There are two justifications for characterizing many unsubstantiated claims as deceptive. The first involves an express or implied misstatement regarding the truth of a claim. For the balance of this article, "deceptive" in this sense will be denominated "deceptive^s" (the "s" standing for "statement"). The second justification involves conduct that is likely to lead to deception. For the balance of this article, "deceptive" in this sense will be denominated "deceptive^p" (for deceptive practice).

IV. THE REQUIRED LEVEL OF SUBSTANTIATION

A. *Confusing Standards*

Since unveiling the substantiation doctrine, the Commission has not clearly articulated how much substantiation should be required of advertisers. Although the Commission generally has recognized that the same level of precision may not be appropriate for all claims for all products, there has been considerable discussion of what factors should affect the decision regarding the level of substantiation required in particular circumstances. *Pfizer, Inc.* established the general principle that advertisers should have a "reasonable basis" for their claims.¹⁰² Other cases have referred to the "amount of substantiation which would satisfy a reasonably prudent business-

test claims, and that consumers take an economic gamble when they purchase products where the seller has not confirmed claims. 81 F.T.C. 23, 62 (1972). The concern for efficiency is dealt with in the definitions of "deceptive" presented earlier. See *supra* notes 66-67 and accompanying text.

100. In recent discussions of the advertising substantiation program, Chairman Miller has spoken only in terms of deceptiveness. See, e.g., Miller, *supra* note 55.

101. This article acknowledges that the falsity of the express or implied statement regarding substantiation is not the ultimate issue in a § 5 action.

102. 81 F.T.C. 23, 73 (1972).

man;"¹⁰³ "tests or surveys using statistically valid methodology;"¹⁰⁴ or "competent and objective" material.¹⁰⁵

The lack of clarity as to what is required to satisfy the advertising substantiation requirement has been described as "reasonable basis turmoil," with "the extent of a manufacturer's obligation to substantiate its advertisements . . . unclear," and replete with "confusion, inconsistencies, and overall unpredictability."¹⁰⁶

The area in which the Commission has labored the most to develop advertising substantiation standards involves over-the-counter analgesics. In *Pfizer*, the Commission rejected the proposition that "the only reasonable basis for performance or effectiveness representations for a drug or medical product would be fully documented, adequate, and well-controlled scientific studies."¹⁰⁷ The Commission would have accepted medical literature, clinical experience, or general medical knowledge as a reasonable basis.¹⁰⁸ However, the Commission set out the following factors which affect the level of substantiation required:

- (1) the type and specificity of the claim made—*e.g.*, safety, efficacy, dietary, health, medical;
- (2) the type of product—*e.g.*, food, drug, potentially hazardous consumer product, other consumer product;
- (3) the possible consequences of a false

103. *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *modified*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

104. *Camp Chevrolet, Inc.*, 84 F.T.C. 648, 652 (1974).

105. *Jay Norris, Inc.*, 92 F.T.C. 989, 1015 (1978), *modified*, 598 F.2d 1244, 1253 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979). In *Norris*, the Commission had set forth the following requirement:

[Advertisers must base their claims on] competent and reliable scientific tests . . . in which one or more persons with education, knowledge and experience in the field conduct a test and evaluate its results in an objective manner using testimony, evaluation and analysis procedures accepted in the profession . . . [and which] accurately predict . . . the results that a consumer ordinarily would obtain using the product under normal household conditions."

Id. A similar standard is set forth in *Standard Oil Co. of Cal.*, 84 F.T.C. 1972 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 463 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

106. Comment, *The Substantiation Program: You Can Fool All of the People Some of the Time and Some of the People All of the Time, But Can You Fool the FTC?*, 30 AM. U. L. REV. 429, 455-56 (1982) [hereinafter cited as Comment]. One advertiser claims that the Commission staff "seems to believe that all claims should be subject to absolute proof." *Sears, Roebuck & Co.*, Remarks in Response to the FTC's Request for Comments About the Advertising Substantiation Program 18 (March 11, 1983) (Commission's request available in 48 Fed. Reg. 10471) [hereinafter cited as *Sears*]. The same advertiser also has said that the requirement merely means that for every claim there must be merely a document in the file. *Id.* at 16.

107. 81 F.T.C. 23, 65 (1972).

108. *Id.* at 72-73.

claim—*e.g.*, personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claims.¹⁰⁹

The Commission gave no indication as to how these factors are to be evaluated, weighed, and applied in practice.¹¹⁰

In *American Home Products Corp. v. FTC*, the court approved a very complete and exacting cease and desist order for many claims regarding superior effectiveness or superior freedom from side effects for non-prescription analgesics.¹¹¹ The order covered both claims with an implied assertion of support by scientific evidence and claims that the manufacturer had not qualified by stating that there was a substantial question regarding the claim. In *Bristol-Myers Co.*,¹¹² the Commission required at least two well-controlled clinical studies¹¹³ for “establishment” claims that any non-prescription internal analgesics were superior to other brands in effectiveness or freedom from side effects.¹¹⁴ The Commission also prohibited Bristol-Myers from making any representations concerning therapeutic performance or freedom from side effects of any non-prescription internal analgesic without a “reasonable basis” consisting of “competent and reliable scientific evidence.”¹¹⁵ In a companion case, the Commission required the makers of Bayer aspirin to have two or more adequate, well-controlled, clinical investigations to support any claim that superior effectiveness had been established, to have a “reasonable basis” for other therapeutic performance claims, and to have “competent and reliable scientific evidence” for a claim of superior freshness, purity, stability, or speed of disintegration of products.¹¹⁶

In *American Home Products Corp. v. FTC*, the Commission dealt with the advertising of Anacin. The Commission introduced two doctrines regarding the application of the substantiation requirement: the establishment claims doctrine and the substantial question doc-

109. *Id.* at 64.

110. Presumably the Commission recognized the imprecision of the rule it was establishing when it recognized that the factors were “overlapping considerations.” *Id.*

111. 695 F.2d 681, 714-15 (3d Cir. 1983).

112. 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984).

113. Well-controlled clinical tests require that the performance of the drug be compared with the performance of a “placebo.” A statistically significant sampling must be used and patients must be randomly selected for either the drug or the placebo. The test must be “double blind,” that is neither the experimenter nor the subjects must know whether the drug or a placebo is being used. *Id.* at 125-26.

114. 102 F.T.C. 21, 126 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984).

115. *Id.* at 312.

116. *Sterling Drug, Inc.*, 102 F.T.C. 395, 796, *aff'd*, 741 F.2d 1146 (9th Cir. 1984).

trine. The former was applied where the Commission found an implied or express representation that the manufacturer had scientific proof of the claim. For example, the claim that Anacin was superior to other analgesics was represented to be scientifically established because the advertisement stated that it was "medically proven."¹¹⁷ Where the advertiser made an establishment claim, the Commission required the advertiser to have two well-controlled clinical tests supporting the claim.¹¹⁸

With regard to the substantial question doctrine, the Commission identified claims for which the advertiser may have had a "reasonable basis," but for which, absent well-controlled clinical tests, there was a "substantial question" about the truth of the claim. The advertisement was deceptive if the advertiser did not inform consumers of this reason to doubt the advertiser's claim.

In 1983, four years after deciding *American Home Products Corp. v. FTC*, the Commission decided *Bristol-Myers Co.*,¹¹⁹ which involved the advertising of Bufferin, Excedrin, and Excedrin P.M. and *Sterling Drug, Inc.*,¹²⁰ which dealt with the advertising of Bayer Aspirin, Bayer Children's Aspirin, Cope, Vanquish, and Midol. In each case, the Commission found that some claims, such as the claim that the product would relieve tension, were deceptive because they were made without substantiation by a "reasonable basis."¹²¹ Moreover, the establishment claims were deceptive because they were made without an even higher level of substantiation, that is two well-controlled clinical tests. In some instances, the representation of scientific establishment was express, such as "scientific tests show that in the first critical moments Bufferin delivers twice as much pain reliever as simple aspirin."¹²² The Commission pointed out that it was irrelevant that none of the advertisements actually used the word "established."¹²³ In some instances, the representation of scientific establishment was implied, such as the use of a graphic display of Excedrin's chemical formula.¹²⁴ The Commission discarded the substantial question doctrine, reasoning that it resulted in a re-

117. 695 F.2d 681, 690 (3d Cir. 1982) (amended 1983).

118. *Id.*

119. 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984).

120. 102 F.T.C. 395, *aff'd*, 741 F.2d 1146 (9th Cir. 1984).

121. 102 F.T.C. 21, 375, *aff'd*, 738 F.2d 554 (2d Cir. 1984).

122. *Id.* at 92-93.

123. *Id.* at 372. Other examples of establishment language are "It has been clinically observed that . . .," "medical evidence," and claims that ingredients are "medically endorsed." *Id.* at 21.

124. The Commission held that the use of the words "medically endorsed" and the formula image imbued the ads with an aura of scientific support. *Id.* at 271. Nevertheless, the Commission found that the use of glass models of people with

quirement that the standards the Commission applied to establishment claims would apply to all claims.¹²⁵ In other words, the Commission feared that the substantial question doctrine blurred the distinction between establishment claims and non-establishment claims.¹²⁶

However, after handing down the *Bristol-Myers Co.* and *Sterling Drug, Inc.* decisions, the Commission adopted a new policy statement with regard to the advertising substantiation program.¹²⁷ That policy statement provides that advertisers will be expected to have whatever level of support they expressly or impliedly state they have for a particular claim.¹²⁸ When it is not clear what level of support consumers expect an advertiser to possess, the Commission will determine the amount of substantiation to require by considering "the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable."¹²⁹

The most recent of the analgesic advertising substantiation cases is *Thompson Medical Co.*,¹³⁰ which involved Aspercreme, a topical cream rub marketed as a remedy for relief from arthritis pain. In *Thompson*, the substantiation doctrine was applied, according to the Commission, in conformance with the Commission's new guidelines. First, the Commission dealt with a number of claims that were alleged to be deceptive. For example, the advertiser claimed that

Bufferin and aspirin tablets crumbling in the stomachs and reforming in their heads did indicate that Bufferin's superior speed had been scientifically established.

125. *Id.* at 307.

126. The Commission believed that if it was considered a violation to fail to disclose a lack of substantiation, then that was identical to requiring the substantiation.

127. SUBSTANTIATION STATEMENT, *supra* note 19. At the outset the Commission stated that advertisers must have substantiation for objective product claims. *Id.* at 2. Because the Commission outlines a reasonable basis standard (divorced from consumer expectations) later in the statement, it is not clear what relationship this introductory paragraph has to the rest of the statement. It may be that the Commission was limiting the entire substantiation requirement to "objective" claims, although that term is not defined. However, it may have the unfortunate effect of removing the substantiation requirement from claims regarding consumer satisfaction that may be equally significant to consumers.

128. The Commission gave as examples of express claims of substantiation language such as "tests prove," "doctors recommend," and "studies show." Of course, it is not clear what kind of substantiation is expressly claimed by such vague language as "tests show."

129. SUBSTANTIATION STATEMENT, *supra* note 19, at 5. Chairman Miller labeled the consequences to consumers of false claims and the benefits of true claims as the most important. Miller, *supra* note 55, at 3.

130. 104 F.T.C. 648 (1984).

Aspercreme contains aspirin and is more effective than orally ingested aspirin.

The Commission now considers a claim deceptive only if the petitioner proves that the claim is "likely to mislead."¹³¹ In *Thompson*, the Commission held that there are two ways to prove "likely to mislead." One is to prove that the claim is not true and the other is to prove that the claim is an objective product claim, made without a reasonable basis. Thus, the Commission also considered the "claim" that the advertiser had a particular level of substantiation for the product as one of the allegedly deceptive claims. The Commission appeared to consider the advertising substantiation doctrine as an aspect of its adjudication of allegations of deceptive claims. If the Commission was finding that all objective claims are likely to mislead if not substantiated, then the Commission was applying the "substantial question" doctrine, which it rejected in *Bristol-Myers Co.*¹³²

The Commission also considered separately allegations that Thompson did not have a reasonable basis for claims that Aspercreme is an effective drug for the relief of arthritic pain. To determine the level of substantiation to require where the advertiser has made no claim of substantiation, the Commission held that it would examine the same factors outlined in the policy statement.¹³³ After examining the six factors, the Commission decided that two well-controlled clinical tests were required. The Commission also held that claims could be made if approved by the FDA, although the claims were based on less than two well-controlled clinical tests.¹³⁴

While it appears that the Commission has been shifting its standards and rationales, it also appears that in advertising claims for over-the-counter analgesics, two well-controlled clinical tests are required for most product claims. Unfortunately, the cases give little guidance concerning the amount of substantiation required for advertising of other products.

B. Standards Based on "Purposes of" Requirement

1. Deceptive^s Behavior

Questions about the amount of substantiation to require are answered by maintaining a focus on the two purposes of the advertis-

131. *Id.*

132. See *supra* notes 119, 121-26 and accompanying text.

133. *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984).

134. The Commission refused to adopt the traditional approach of characterizing some claims as "establishment claims." Rather, it chose to deal with those types of claims under its discussion of deception.

ing substantiation program suggested above, i.e., proscription of both deceptive^s and deceptive^p conduct. When viewing the program as aimed at deceptive^s behavior, the true concern of the consumer is not whether the claim of substantiation (express or implied) is true, but whether the claim regarding the effectiveness of the product is true.

Given this goal of the substantiation requirement, identifying deceptive statements is important. It is necessary to have a test for deception to establish a test for advertising substantiation. Unfortunately, the Commission has been no clearer in defining deception than it has been in defining reasonable basis. Therefore, it is necessary to propose a standard for labeling deception.

a. *Defining Deception*

Although the deceptive advertising mission of the Commission is an extension of the common law actions of fraud and deceit, Congress intended the term "deceptive" to proscribe more conduct than is included in traditional fraud or deceit actions.¹³⁵ Neverthe-

135. See *supra* note 11. The following is the generally accepted definition of the tort of deceit:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

RESTATEMENT, *supra* note 38, at § 525.

With regard to the knowledge of the speaker, the tort of deceit presumably requires that the misrepresentation be intentional. That requirement has been relaxed in a variety of ways which place greater risks on the seller. The RESTATEMENT now contains the following:

- A misrepresentation is fraudulent if the maker
- (a) knows or believes that the matter is not as he represents it to be,
 - (b) does not have the confidence in the accuracy of his representation that he states or implies, or
 - (c) knows that he does not have the basis for his representation that he states or implies.

Id. at § 526 (Conditions Under Which Misrepresentation is Fraudulent Scierter). See, e.g., *Pumphey v. Quillen*, 102 Ohio App. 173, 141 N.E.2d 675 (1955), *aff'd*, 165 Ohio St. 343, 135 N.E.2d 328 (1956).

Subsections 526 (b) and (c) reduce the difficulty of proving scierter. They also introduce a note of negligence into the scierter requirement. Although negligent misrepresentation technically is not covered by deceit, the making of a statement without a basis for it can be seen as a negligent act. W. PROSSER, *THE LAW OF TORTS* § 107, at 711-12 (4th ed. 1971) [hereinafter cited as PROSSER]. See RESTATEMENT, *supra* note 38, at § 528 ("A representation that is believed to state the truth but which because of negligent expression states what is false is a negligent but not a fraudulent misrepresentation.") There appears to be an intentional misstatement, i.e., the misstatement of assurance in the main statement. Because few buyers will act on a statement made equivocally, a court likely would find any statement as one with an implied statement of confidence.

less, the essential policy underlying actions in deceit and actions against deceptive practices is the same: sellers should not be able to induce consumers to purchase goods or services by making untrue statements. This is a goal which goes to the heart of our economic system, a goal that presupposes that the "market" will allocate the production and distribution of goods and services.¹³⁶ The success of such a system depends on the presence of accurate information.¹³⁷

Therefore, some policy distinction must be made to determine when RESTATEMENT § 528 applies.

Moreover, courts have also found statements made with reckless disregard of the truth as fraudulent. *See, e.g.,* Rosenberg v. Howle, 56 A.2d 709 (D.C. 1948) (actual knowledge of untruthfulness of representations unnecessary); James & Gray, *Misrepresentation—Part I*, 37 MD. L. REV. 286, 298 (1977); Note, *Deceit and Negligent Misrepresentation in Maryland*, 35 MD. L. REV. 650 (1976). This can be interpreted as the application of a presumption arising from the court's disbelief that the defendant really did not know that a statement was false. "When one asserts a fact as of his own knowledge, or so positively as to imply that he has knowledge, when he knows that he has not sufficient information to justify it, he may be found to have the intent to deceive." Pumphrey v. Quillen, 102 Ohio App. 173, 181, 141 N.E.2d 675, 681 (1955) *aff'd*, 165 Ohio St. 343, 135 N.E.2d 328 (1956). *See* Note, *supra* at 654. In other words, once it is demonstrated that a defendant should have known that the statement was false, a defendant would have to prove that he actually did not know it was false. Presumably, in such situations, a court would likely find the defendant liable.

With some unevenness, courts have also adopted theories of negligent and innocent misrepresentation. *See, e.g.,* W. PROSSER, THE LAW OF TORTS § 107, at 711-12 (4th ed. 1971); Hill, *Damages for Innocent Misrepresentation*, 73 COL. L. REV. 679, 688-92 (1973); Note, *supra*, at 654; *see also* Restatement, *supra* note 38, at § 552, § 552C. An innocent misrepresentation might apply only where the seller is in a much better position than the buyer to know that the statement was false. In some cases, relaxed scienter requirements are based on the nature of the injuries suffered. *See, e.g.,* RESTATEMENT, *supra* note 38, at § 402B (strict liability for harm caused to consumer purchase of goods). The law of express warranty is also a law of innocent misrepresentation or strict liability. U.C.C. § 2-313 (1978). Under the UCC an express warranty must be part of the basis of the bargain and many of the limitations of contract warranty law apply. *See, e.g.,* U.C.C. § 2-313; 2-318 (1978).

136. *See* Beales, Craswell & Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. & ECON. 403, 492 (1981); Jordan & Rubin, *supra* note 64, at 532; *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1026 (1967) [hereinafter cited as *Developments*]. Chairman Miller stated, "Advertising simply cannot fulfill its potential in our market system if consumers cannot rely on the truthfulness of the messages disseminated to them. The role for the government is to engender such trust by making sure it is warranted." Remarks of James C. Miller III, Chairman, Federal Trade Commission, Before American Advertising Federation 1, 4 (June 4, 1984); Remarks of James C. Miller III, Chairman, Federal Trade Commission, Before the San Francisco Advertising Club 6 (September 30, 1983) [hereinafter cited as Miller]. To the extent that advertising causes consumers to purchase products they would not otherwise purchase there is a misallocation of resources. Society would be better able to satisfy the wants and needs of people who had accurate information.

137. Accurate information is one of the assumptions made in models of the free market.

There are two significant distinctions between actions in deceit and actions against deceptive practices. The first distinction is that deceit is concerned with a particular transaction and deception is concerned with conduct involving many transactions. Secondly, unlike deceit, deception can involve conduct in which no one yet has been harmed.¹³⁸ Therefore, in a deception action it is not possible to inquire into what the seller said and intended and what the buyer actually heard, thought, and wanted.¹³⁹ In a deceit action, the question of whether the seller's statement is true or false presents no analytical difficulty. To determine whether the consumer's reliance was reasonable in a deceit action, courts may be able to apply, even if intuitively, a rational standard, such as determining which party was better able to avoid the risk. Common law deceit jurisprudence is not easily transferrable to deception. For example, inquiry into the meaning of an advertisement is complicated because a single advertising statement can be interpreted in different ways by many individual consumers. There is no dispute as to the representation made by those statements expressly contained in an advertisement, but the Commission claims that many representations are implied in an advertisement.¹⁴⁰ It is one thing to say that implied statements may be actionable and another to determine what statements are implied in an advertisement.

The Commission relies upon a variety of techniques to establish the meaning of an advertisement. Often the Commission makes its

138. As a civil law action, one of the elements of deceit is damage. See *supra* note 145. The same is true of negligent and innocent misrepresentation and warranty actions.

139. The seller's intent as well as the buyer's reliance on the seller's words are relevant in deceit. See *supra* note 135.

140. As in the law of deceit, a seller can be responsible for the variety of meanings which an advertisement may convey. See *RESTATEMENT, supra* note 135, at § 527. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (presentation of testimonials implies that typical users have same experience); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962) (reference in shoe circular to physical ailments could be taken by reader to be unqualified assertions of therapeutic worth); *FTC v. Morrissey*, 47 F.2d 101, 103 (7th Cir. 1931) (use of name of fruit on label might imply that it is ingredient if clear indication of actual ingredients is not provided). Even trade names themselves can be misleading. See, e.g., *Carter Prod., Inc. v. FTC* 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959) (ordering word "liver" deleted from name "Carter's Little Liver Pills"); *Elliot Knitware v. FTC*, 266 F.2d 787 (2d Cir. 1959); ("Cashmora" labelling on sweaters that contained no cashmere was not deemed deceptive per se); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944) (labeling skin cream "Rejuvenescence" implies it will rejuvenate the skin . . . or restore youth . . .). The implied meanings often are referred to as deceptive omissions. See, e.g., *American Motors Corp.*, 100 F.T.C. 229 (1982) (deceptive omission of information regarding Jeep's handling and maneuverability). This approach is often expressly stated in many state deceptive practices acts. See, e.g., *Md. Commercial Law § 13-301(3)* (1983) (Supp. 1983) (must state material fact if failure to do so is deceptive).

own independent judgment of the meaning of an advertisement.¹⁴¹ The Commission relies upon the "general impression" of an advertisement, rather than the literal meaning of each individual assertion in an advertisement.¹⁴² Sometimes dictionary definitions are cited.¹⁴³ In other cases, the testimony of experts or consumer witnesses are used.¹⁴⁴ Increasingly, "scientific" surveys are used.¹⁴⁵

All of these methods demonstrate the ways in which some people might interpret an advertisement. They are not accompanied, however, by a standard for determining which interpretations are "meanings" against which the Commission should protect. Especially because advertisements are viewed independently of any analysis of the intent of the advertiser,¹⁴⁶ the issue is not what the sender of the message was trying to say, but what the recipient understood the seller to say. The "meaning" of an advertisement is,

141. See, e.g., *J. B. Williams Co. v. FTC*, 381 F.2d 884, 886 (6th Cir. 1967). Gellhorn refers to this as the "intuitive" or "hunch" approach. Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559, 565 (1969). See also, Brandt & Preston, *The FTC's Use of Evidence to Determine Deception*, 41 J. MKTG. 54 (1971) (although 95% of Commission's decisions are based on Commission's impression of sales representations, Commission increasingly looks to "external" sources).

142. See, e.g., *American Home Prod. Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1983).

143. See, e.g., *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944).

144. One often-cited and particularly imaginative use of consumer testimony involved an advertisement which stated that a hair coloring would be "permanent." A consumer witness acknowledged that some might take the word to mean that new hair would grow in with the artificial color after treatment but that she knew better. *Gelb v. FTC*, 144 F.2d 580, 582 (2d Cir. 1944). Sometimes consumer testimony is rejected. *Leonard F. Porter, Inc.* 88 F.T.C. 546, 596 (1976) (a particular consumer's testimony is "not a reliable guide to typical consumer assumptions"); *Gimbel Bros.*, 61 F.T.C. 11051 (1962).

145. In the past, the Commission has expressed a reluctance to examine survey results. See, e.g., *J. B. Williams Co.*, 381 F.2d 884 (6th Cir. 1964); *Ford Motor Co.*, 87 F.T.C. 756, 794 (1976). But more recently the Commission has stated that where consumer survey data is available it is "incumbent upon us . . . to consider it." *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). See also *Bristol-Myers Co.*, 85 F.T.C. 688 (1975); *IIT Continental Baking Co.*, 83 F.T.C. 865, *modified*, 83 F.T.C. 1105 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976). The Commission has recently relied upon consumer survey results in granting requests to modify orders. See, e.g., *Encyclopedia Britannica, Inc.*, 100 F.T.C. 500 (1982); *Reader's Digest Assoc., Inc.*, No. C-2075 (IFTC Sept. 30, 1983).

146. See, e.g., *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *D.D.D. Corp. v. FTC*, 125 F.2d 679, 682 (7th Cir. 1942); *Pep Boys v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941); *Gimbel Bros. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941). Similarly, in state consumer protection proceedings, plaintiffs are not required to prove intent to deceive or knowledge of the deception on the part of the business. See, e.g., *Bell v. Kent-Brown Chevrolet Co.*, 1 Kan. App. 131, 561 P.2d 907 (Ct. App. Kan. 1977); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (Ct. App. Wash. 1976); *Slaney v. Westwood Ave., Inc.*, 366 Mass. 688, 322 N.E.2d 768 (1975).

therefore, created by the reader.¹⁴⁷ Dictionaries provide only a preferred meaning for words. Surveys suggest only the number of people who attach a particular meaning to a particular statement. Because any statement can be interpreted to have more than one meaning, when the Commission establishes the meaning of an advertisement, it actually is determining which of the many interpretations of a message are "reasonable." A challenge of the Commission's proposed meaning of an advertisement is in reality a challenge of the desirability of protecting those people who derive that meaning from the ad.

Another issue in Commission litigation is often articulated as the level of consumer intelligence that is relevant in analyzing an advertisement. A number of phrases have been used to indicate that advertisements must be judged by the standard of their ability to deceive not just intelligent consumers, but also the less acute. A sampling of the phrases used includes the expressions of intent to protect "the trusting as well as the suspicious,"¹⁴⁸ "the average individual,"¹⁴⁹ the "buying public,"¹⁵⁰ and the "ignorant, the unthinking, and the credulous."¹⁵¹ Nevertheless, the Commission recognizes that there must be some lower limits on the consumer "intelligence" to be protected. In one case, the Commission stated that, "An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subjected among the foolish or feeble-

147. "[E]ven the literal meaning of a sentence is at bottom a matter of semantic convention, and it could certainly be argued that the meaning of a sentence (and of its surrounding context) can be defined only by reference to what its audience takes it to mean." Beales, *supra* note 136, at 497.

148. *See, e.g.*, Gelb v. FTC, 144 F.2d 580, 582 (2d Cir. 1944); Giant Food, Inc., 61 F.T.C. 326, 346 (1962).

149. *See, e.g.*, Ford Motor Co., 120 F.2d 175, 182 (6th Cir. 1941); American Home Prod. Corp. v. FTC, 695 F.2d 681, 689 (3d Cir. 1983) (It is not necessary to read advertisements in such a way to "preclude the Commission from taking action against advertisements that, when read with scrupulous care by vigilant and literal minded consumers, could be seen to be making true claims.").

150. *See, e.g.*, Kalwajtyz v. FTC, 237 F.2d 654, 656 (7th Cir. 1956).

151. *See, e.g.*, Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961) ("The Commission should look not to the most sophisticated reader, but rather to the least."); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1943); FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937); *see also* Parker Pen Co. v. FTC, 159 F.2d 509, 511 (7th Cir. 1946) ("Commission's duty is to protect the casual, one might say the negligent, reader, as well as the vigilant and more intelligent discerning public"); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940) ("It may be that there was no intention to mislead and that only the careless or the incompetent could be misled. But if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err herein,' it is not for the courts to revise their judgment.").

mindened."¹⁵² There are a number of other ways of articulating the standard. For example, the Commission has held that many claims are puffing.¹⁵³

Despite attempts to indicate that there is some lower limit to Commission protection, the Commission has protected particularly vulnerable groups.¹⁵⁴ Unfortunately, neither the general statements with regard to consumer intelligence, nor the vulnerable group policy, suggest a clear standard for determining whether an advertisement is deceptive. The general statements do not contain any clue as to the policy considerations that would guide such a determination. Stating the policy in terms of attacking advertisements which deceive "vulnerable" groups does not provide a solution to the problem of identifying those situations where Commission intervention is appropriate, because a single person deceived by a particular advertisement would be a vulnerable group of one. Moreover, the Commission would still have to determine how many members of an identified vulnerable group must be deceived to warrant a conclusion that an advertisement is deceptive.

The problem is that *some* people probably interpret an advertisement to make a representation about a product and this representation is not true. *Some* people are fooled by the advertisement and *some* of them buy the product. The issue is how to determine whether that *some* deserve government intervention.¹⁵⁵

152. *See, e.g.*, *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 676 (2d cir. 1963) (no violation if ordinary reader, to be misled, must have "not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy").

153. *See, e.g.*, *Kidder Oil Co. v. FTC*, 117 F.2d 892 (7th Cir. 1941) (claims that product is "perfect" and enables car to go an "amazing distance" are puffing); *Liggett & Myers Tobacco Co.*, 55 F.T.C. 354, 368 (1958) (statements that cigarette was "milder" and "soothing" were not puffing; Commission did not indicate whether pun was intended).

The Commission also must demonstrate the materiality of the statement. This materiality usually can be an aspect of the requirement for causation. The United States Supreme Court has defined deception as the "misrepresentation of any fact so long as it materially induces a purchaser's decision to buy." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965) (emphasis added). In FTCA cases as in tort, materiality more often is considered as an element of the reasonableness of the reliance. *See, e.g.*, *James & Gray, Misrepresentation—Part II*, 37 MD. L. REV. 488, 493 (1978).

154. *See, e.g.*, *Hudson Pharmaceutical Corp.*, 89 F.T.C. 82, 86 (1977) (using Spiderman to advertise vitamins); *Tri-State Driver Training, Inc.*, 88 F.T.C. 417 (1976) (deceiving unemployed by promising jobs).

155. *See* Beales, Craswell & Salop, *supra* note 136, at 495-96 ("[T]he legal definition of deception does not require any such stopping place, nor does it offer any principles to suggest where a good stopping place would be.") The authors point out that under existing definitions of deception "every advertisement in the country [is] potentially deceptive." *Id.* at 495.

A number of proposals have been made to use empirical research to make these judgments.¹⁵⁶ Ernest Gellhorn has proposed that whenever there is a dispute regarding the interpretation of an advertisement the Commission should request that independent surveys resolve the issue.¹⁵⁷ The surveys should indicate not only the number of people deceived, but also the significance of the deception.¹⁵⁸ Gellhorn recognizes problems with deciding what to do with the statistics once they are gathered. He rejects establishing *per se* rules, such as that an advertisement is actionable if more than 14% of the people are deceived, because, "The scope and significance of the harm should affect the level at which the threshold of prohibited deception is established."¹⁵⁹ He suggests that when there is possible health or safety harm, an advertisement is actionable if 1% or 2% (not more than 5%) of the people are deceived; when there is only economic harm, 10% or 15% deception is tolerable.¹⁶⁰ Unfortunately, he does not reveal how he arrived at those particular figures.¹⁶¹

The failure to recognize the need for a workable standard by which to evaluate empirical research appears in other similar proposals as well.¹⁶² When reaching the question of how to evaluate

156. Chairman Miller was anxious to see empirical research used in Commission decision making. See Miller, *supra* note 136. The Commission, beginning with the studies to determine the residual effects of Listerine advertising, showed an interest in belief-based measures to judge the level of deception. Armstrong, Gurol & Russ, *Defining and Measuring Deception*, in *ADVERTISING: A REVIEW AND EVALUATION IN CURRENT ISSUES AND RESEARCH IN ADVERTISING: 1980* 28 (J. Leigh & R. Martin eds. 1980). The Commission recently used survey evidence presented by the Reader's Digest to modify its order prohibiting the publisher from including in sweepstake's promotions "simulated checks, currency . . . [or] any confusingly simulated item of value. Reader's Digest Assoc., 102 F.T.C. 1268 (1983). The Digest presented the results of an elaborate survey in which interviewers traveled door to door to observe recipients impressions to the advertising pieces. Request to Reopen and Modify Consent Order, Reader's Digest Assoc., 102 F.T.C. 1268 (1983).

157. Gellhorn, *supra* note 141, at 567-72.

158. *Id.* at 571.

159. *Id.*

160. *Id.* at 572.

161. To be fair, it must be conceded that he uses the figures only as examples. But he fails to provide the standard by which real figures should be derived.

In one case where there were surveys indicating that at least 15.3% of the "tire purchasers" were deceived by an advertisement which involved "safety" claims, the Commission indicated that the deception was not actionable. Firestone Tire and Rubber Co., 81 F.T.C. 398, 453-55 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). Rather than accept the survey findings the Commission went to great length to discredit them, thus indicating that the scope of deception demonstrated by the survey did not seem impressive.

162. Commissioners often have advocated the use of advertising copy tests without explaining what standards would be used to evaluate the results of such tests. See, e.g., the testimony of Commissioner Clanton. *Hearings, supra* note 94, at 84. For example,

the research, writers suggest that the Commission must determine the appropriate consumer intelligence level.¹⁶³ The difficulty with that approach is that the use of behavior research is advocated because such standards as "intelligence level" provide little guidance. There is no basis on which to arbitrarily select a percentage for misleadingness. Although the Commission has used survey research data,¹⁶⁴ it has never articulated a reason for finding that where a particular percentage of consumers interpret an advertisement in a particular way, the advertisement is or is not deceptive.¹⁶⁵

The Commission has attempted to promulgate a more workable definition of deception. In 1982, Commission Chairman Miller proposed to Congress that Section 5 be amended to include the following:

- A deceptive act or practice is a material representation that:
- (a) Is likely to mislead consumers, acting reasonably in the circumstances, to their detriment; or

Comment, *supra* note 106, suggests use of behavioral research to evaluate advertising. But the writer never explains how the behavioral research is to be used. Another writer suggests that the Commission not be concerned with how consumers *might* interpret an advertisement, but how they do interpret it. Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 KANS. L. REV. 625 (1969). Pollay suggests the use of rigorous research methodologies, but he recognizes that a judgment must be made in evaluating the research. *Id.* at 637. See Armstrong, *supra* note 156, at 33 (there is no simple answer to question of how much deception we will tolerate). One FTC Commissioner expressed the view that the appropriate standard was that the amount of harm would be greater than the cost of Commission enforcement. Thompson, *Memorandum to the Federal Trade Commission*, (available in 7 ANTITRUST L. & ECON. REV. 27 (1974-75)).

In modifying the Reader's Digest Order, (*see supra* note 156) the Commission not only did not question the validity of using door to door interviews to determine consumer reaction to a mailing piece but also did not attempt to translate the Digest's statistics into a quantity of harm resulting from deception.

163. See, e.g., Mann & Gurol, *An Objective Approach to Detecting and Correcting Deceptive Advertising*, 54 NOTRE DAME LAW. 73 (1978). Mann & Gurol conducted a survey to establish the ability to determine deception, but could say only that the deception score should be measured for the "relevant group," meaning the proper "intelligence level," and that the Commission must establish a threshold score for various products and categories, beyond which an advertisement is considered deceptive. The writers suggest that the threshold score should be based on the scope and significance of the possible harm. *Id.* at 100 & n.160.

164. See, e.g., Encyclopedia Britannica, Inc., 100 F.T.C. 500 (1982) (consent order which appears to tolerate deception at level of 25%); Bristol-Myers Co., 85 F.T.C. 688, 745 (1975) (2-4% held to be "patently insubstantial"); I.T.T. Continental Banking Co., 83 F.T.C. 865 (1973) (10-14% is deceptive); In re RJR Foods, Inc., 83 F.T.C. 7 (1973) (consent order which appears to tolerate deception at level of 5%); Firestone Tire & Rubber Co., 81 F.T.C. 398, 461-62 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973) (1.4% not deceptive, 14% is deceptive); Benrus Watch Co., 64 F.T.C. 1018, 1032 (1964) (14% is deceptive); Rhodes Pharmacal Co., 49 F.T.C. 263 (1952) (9% is deceptive).

165. See *supra* note 162.

(b) the representor knew or should have known would be misleading.¹⁶⁶

Congress refused to adopt that change. On October 14, 1983, the Commission announced a very similar enforcement policy statement with regard to deceptive acts or practices.¹⁶⁷ It stated that, "the FTC will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."¹⁶⁸ The statement is defended by the majority of the Commission as nothing more than a restatement and synthesis of prior law.¹⁶⁹ Two members of the Commission view it as an attempt to limit the Commission's ability to protect consumers.¹⁷⁰

There are two aspects of the statement which appear to be significant.¹⁷¹ The first is the requirement that only consumers acting rea-

166. See Letter from James C. Miller III to the Honorable Robert Packwood (October 14, 1983) (Attached dissenting statement of Commissioner M. Pertschuk at 4) [hereinafter cited as Miller Letter]. The Chairman revived the proposal in 1983. Hearings, *supra* note 94, at 6.

167. Miller Letter, *supra* note 166.

168. *Id.* at 4.

169. *Id.* at 2; *Federal Trade Commission Oversight Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. (1984)* (Prepared Statement of James C. Miller III, Chairman FTC at 9) [hereinafter cited as Miller Statement].

170. Letter from P. Bailey & M. Pertschuk to the Hon. John D. Dingell (Feb. 28, 1984) (attached analysis of deception) [hereinafter cited as Bailey]. Their objections were included later in a law review article. The National Association of Attorneys General opposed the Commission's proposed amendment of § 5 because many state statutes require following Commission interpretations of the FTCA when interpreting state consumer protection acts. NAT'L ASS'N OF ATTORNEYS GENERAL, RESOLUTIONS AT ANNUAL MEETING, MACKINAC ISLAND, MICHIGAN 11 (July 15-18, 1982). Many state consumer protection statutes include provisions stating that the legislature intended that in construing the act the courts will be guided by the interpretations given by the Commission and the Federal Courts to Section 5(a)(1) of the FTCA. See *Federal Trade Commission Oversight Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. (1984)* (Prepared statement of John T. Montgomery, Chief of Mass. Consumer Protection at 6) [hereinafter cited as Montgomery]. The chairman of the House Subcommittee on Commerce, Transportation, and Tourism also strongly opposed the statement. *Florio Assails New F.T.C. Policy on Ads*, N.Y. Times, Oct. 23, 1983, at 29, col. 1.

171. Actually the statement is divided into three parts:

I. There must be a representation, omission, or practice, that is likely to mislead the consumer. Miller Letter, *supra* note 166, at 4.

II. The Act or Practice Must Be Considered From the Perspective of the Reasonable Consumer. *Id.* at 7.

III. The Representation, Omission or Practice must be Material. *Id.* at 15 (Note that the above have been renumbered for purposes of this discussion. In the original statement, roman numeral I is introductory.)

The conclusion that the words "likely to mislead" refer to materiality is based on the fact that in the section dealing with Part I, the Commission only outlines the *kinds* of

sonably be protected. The Commission thinks that this formulation of words more clearly sets the standard for the types of misrepresentations that are actionable, while the minority thinks that phrases such as protecting the "trusting as well as the suspicious" are clearer statements of what is actionable.¹⁷² The Commission considers a "reasonable" interpretation of an advertisement to be one shared by a "significant and representative segment of the population exposed to the claim."¹⁷³ According to the Chairman, the reasonable consumer standard "simply requires that we interpret ads as ordinary consumers do."¹⁷⁴ He states that the Commission consciously rejected a standard based on a "substantial number" of consumers being misled, because it is not clear how many consum-

practices which may be actionable (e.g., affirmative misrepresentations, omissions, bait and switch) and does not deal with the meaning of the word "likely" or how we would determine likeliness. *Id.* at 4-7. However, in Part III, the Commission states that "A material misrepresentation or practice is one which is likely to affect a consumer's choice of . . . a product." *Id.* at 15-16 (emphasis added). See also *id.* at attached concurring statement of Commissioner George W. Douglas. In his prepared remarks before the House Subcommittee on Commerce, Transportation and Tourism, Chairman Miller refers to "likely" as a substitute for "tendency or capacity." He sees both as differing from a requirement of finding "actual deception to conclude that a violation of section 5 has occurred." Miller Statement, *supra* note 169, at 9. Further, the Commission equates materiality with damages: "[I]njury and materiality are different names for the same concept." Miller Letter, *supra* note 166, at 19. This is somewhat of a deviation from traditional tort analysis in which materiality is an aspect of causation and could exist without actual injury. The Commission's analysis would be satisfactory if the Commission would accept that whenever consumers buy a product based on inaccurate information (and that inaccurate information was material to their decision), the Commission would consider the misstatement actionable. In fact, the Commission would require some showing of a significant public harm (e.g., a substantial number of people buying a product worth \$1.00 for \$2.00) and would not act where there was no such harm (e.g., even if a substantial number of people bought a product because it believed that a celebrity endorser used the product where the product was in fact worth the price and did what it claimed to do). Moreover, deception requires harm sufficient to warrant public intervention. All three concepts (the reasonableness of the consumer, the materiality of the claim, and the amount of damage) are ways of approaching the same question: how much consumer purchasing under a misapprehension is tolerable before the claim is actionable (or when are we going to assign the risk of consumer purchases under a misapprehension to the seller and when to the buyer)?

172. See, e.g., *Gelb v. FTC*, 144 F.2d 580, 582 (2d Cir. 1944).

173. See Miller Statement, *supra* note 169, at 9, 10. The use of the word "representative" is puzzling. In *Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (2d Cir. 1963), the Commission said that "A representation does not become 'false and deceptive' merely because it will be unreasonably understood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." Presumably this means that if a sample of the population is chosen the sample should be representative of the total population.

174. Miller Statement, *supra* note 169, at 10. He rejects the idea that using a "reasonableness" standard denies protection to unsophisticated or gullible consumers by repeating that "it simply requires that the Commission interpret claims as people ordinarily do." *Id.*

ers constitute a substantial number and because such a standard would prevent protection of even a few people misled by "the most blatant fraud."

However, "substantial" is no more indeterminate than "reasonable." Like the concept of "substantial number,"¹⁷⁵ the term "reasonable" is indeterminate and can be given meaning only in application.¹⁷⁶

The second significant aspect of the statement involves the need for a finding of materiality. The words "likely to mislead" and "to the consumer's detriment" are intended to convey some rigor in connecting the "misstatement" with some harm. The Commission believes that the word "likely" is a replacement for language to the effect that a finding of only a "tendency to mislead" is sufficient. The Commission thinks that the words "tendency to deceive" or "capacity to deceive" are "incantations" and tautological, while "likely to mislead" is more informative. Whether the Commission believes that the use of this language would have led to a different result in past cases is not clear. In other words, the Commission has

175. The term substantial at least has the advantage of coming closer to expressing a policy of governmental interference where the benefits of such interference (the amount of harm prevented) exceed the cost. Therefore, use of the word "substantial" would be more consistent with the commission majority's expressed goal.

176. Mark Silbergeld, director of the Consumers' Union Washington office, stated that:

To say that the Commission must make a determination on what a reasonable consumer in the circumstances would do leaves the person who is looking for guidance as to whether a particular ad is deceptive . . . just as unclear as he or she may be under the body of existing case law.

Hearings, supra note 94, at 198.

Although the common law speaks in terms of "reasonableness" of reliance, that word is used as an indication that the trier of fact (traditionally the jury) should determine whether the statement is actionable. See *supra* note 135 and accompanying text. PROSER, *supra* note 135, at § 37. The Commission Consumer Protection Division speaks of "reasonableness" as "an ancient and honorable legal doctrine. . . ." MEMORANDUM, *supra* note 61, at 11 (emphasis added). In fact, both the Commission and the dissenters articulate goals which lead to some sort of economic cost benefit analysis.

This writer believes that the debate is political, not legal. The Commission has made *a priori* judgments regarding costs and benefits of particular rules without testing them. It then has decided that past advertising regulation is inefficient. The Commission also has made the kinds of value judgments discussed earlier and has decided that particular groups no longer warrant protection. It may be that the Commission's use of the word "reasonable" as a label for the results it reaches in deception cases is a political device to defend a change in the Commission's direction while placing opponents in the unenviable position of claiming to favor an "unreasonable."

The majority may fear that the word "reasonable" will imply that the Commission will proceed only where a successful tort action could be supported. Where there are very subtle implied claims or where the individual loss is quite small, a tort action would have been unlikely.

not demonstrated how it would apply the word "likely" to specific cases which were disposed of under the "tendency" standard.

The use of the words "likely" and "reasonable" may in fact have connotations which result in a higher standard.¹⁷⁷ The troublesome aspect of the Commission's statement and the minority's objection is not the use of the word "reasonable,"¹⁷⁸ it is that both avoid a more rational approach to deceptive advertising cases. Despite the progress that has been made in the social sciences in understanding advertising, and despite the Chairman's own stated preference for the use of empirical research in deception cases,¹⁷⁹ the Commission appears to be merely substituting one indeterminate word for another, rather than attempting to establish the levels of certainty required and the procedure for revealing and weighing the value choices necessary to label conduct deceptive.¹⁸⁰

However, Commission findings of deception appropriately may be tied to a cost benefit analysis. Such an analysis promotes the goal of economic efficiency in the regulation of advertising. In fact, it appears that both the Commission majority and its dissenters are supportive of this goal.¹⁸¹ Economic analysis suggests that govern-

177. Although the Commission now says that the policy statement is just a restatement of prior law, the policy statement is based on a Bureau of Consumer Protection memorandum in which it is indicated that this is a new standard which would lead to a different result in a significant number of cases. See BUREAU OF CONSUMER PROTECTION, MEMORANDUM DEFINING DECEPTION 3-6, 27-29 (undated).

The Commission minority objected to the use of the "likely" to mislead language because it "may hamstring the Commission in preventing injury that had not yet occurred" and introduce complex evidentiary problems in stopping even clearly misleading advertisements.

Apparently the use of "likely" is a change from a planned requirement for "actual" injury, but Commissioner Pertschuk believes it will lead to the same result. See Miller Hearings, *supra* note 94, attached dissenting statement of Commissioner M. Pertschuk, at 7. The chief of the Massachusetts Consumer Protection Division believes that the Commission's language serves to alter the burden of proof on the issue of materiality. Montgomery, *supra* note 170, at 15.

Miller Hearings, *supra* note 94, attached dissenting statement of Commissioner M. Pertschuk, at 6.

178. In fact, in outlining the unfairness standard, the Commissioner under Pertschuk chairmanship used the word "reasonable." Letter of the FTC to Senators Wendell Ford and John Danforth (Dec. 17, 1980), reprinted in *FTC Act Amendments and Authorization*, TRADE REG. REP. (CCH) No. 598, at 37 (May 31, 1983).

179. See, e.g., Miller, *supra* note 136, at 6.

180. To speak of degrees of determinancy would be more accurate. It has been often demonstrated that no legal rule is determinate. See Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. REV. 1, 14-19 (1984).

181. There is reason to believe that the Commission originally had some sort of cost benefit analysis in mind in the use of the reasonableness standard. Hearings, *supra* note 94, at 10. For example, Commissioner Douglas stated that, "The purpose of the reasonable consumer standard is simply to ensure that the Commission does not prevent most consumers from hearing useful information . . ." Miller Letter, *supra* note

ment intervention is necessary only where the market itself is unable to yield "efficient" results.¹⁸² At a later point in this article, it will be demonstrated that efficiency is not necessarily the only legitimate goal of government. However, as a point of departure, it will be helpful to begin by considering the effect of deceptive advertising and Commission regulation in terms of the value of economic efficiency. From a societal viewpoint, to the extent that advertising causes consumers to purchase products they would not otherwise purchase, there is a misallocation of resources. The society would satisfy better the wants and needs of consumers who had accurate information. However, if the goal is "efficiency" (i.e., reducing misallocation of resources), that efficiency is denied only if avoiding the consumer's mistake costs less than the mistake itself. Therefore, efficiency occurs when the party who can avoid the purchase under a

166, attached statement of Commissioner George W. Douglas, at 2 (without it members of Commission could block useful ads at their whim).

This suggests an intent on the part of the Commission to consider the cost of the regulation. Also, the Commission's statement is based on a memorandum by the Bureau of Consumer Protection which advocates that the Commission should pursue only "reasonable" constructions of advertising which would operate "efficiently." MEMORANDUM, *supra* note 61, at 11. Mr. Timothy Muris, the Director of the Bureau of Consumer Protection at the time the memorandum was prepared and its presumed author, has stated that, "Our guiding principles are based on economics. . . ." Remarks of Timothy J. Muris Before the National Association of Manufacturers (March 10, 1983).

Although the Commission statement is couched in language to indicate that it is not a deviation from past Commission policy, the tests for deception, particularly the use of the words "reasonable" and "likely," are the same as those set forth in the memorandum which acknowledges itself to be a correction of past abuses.

In that memorandum advertising regulation is discussed in terms of the costs and benefits of restricting information. MEMORANDUM, *supra* note 61, at 10. As indicated above, members of the Commission objected strenuously to the new policy statement. See Miller Letter, *supra* note 166, attached dissenting statement of Commissioner M. Pertschuk; Bailey, *supra* note 170. They preferred that the Commission determine whether a substantial number of consumers are misled regardless of whether they are acting "reasonably." Bailey, *supra* note 170, at 37-52. The dissenters argument appears to be closer to an empirical standard. That is, rather than make a judgment regarding how sensibly people being misled are behaving, the seller should be responsible for a significant amount of misapprehension caused by the advertisement. Surprisingly enough, then, the dissenters are closer to articulating an economic standard than the majority. When we realize that the majority had an economic standard in mind when it used the word "reasonable," it becomes unclear just what the dispute is all about.

It is argued that the use of the word "reasonable" in tort may represent an economic standard. See, e.g., POSNER, *infra* note 182, at 125.

182. Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1663, 1665 (1974). Efficiency is defined as exploiting resources in a way that yields maximum value. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). See Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 BRIT. J. L. & SOC'Y 158, 169 (1980) ("This departure from the ideal outcome of the perfectly competitive market is referred to as market failure and is a necessary efficiency condition for legal intervention.").

misapprehension at the least cost is made liable for the harm caused by that purchase.¹⁸³ The law should "mimic" the market, by assigning the risk of loss to the party who can avoid the loss at the least cost.¹⁸⁴

For the balance of this article, it will be assumed that the costs of the policy decision to prevent some form of advertising conduct should be based on the amount the victims of the policy lose as a result of the policy's enactment and that the benefits should be determined by the amount the beneficiaries gain.¹⁸⁵ "Victims" of a policy can include advertisers as well as consumers who do not benefit from the policy. "Beneficiaries" are the consumers who would have purchased a product or service but for the policy.

The cost to the consumer of avoiding the harm might be spending a few minutes at the store examining the product. It could also involve seeking information from other sources. Obtaining access to some sources may involve significant costs. Obtaining access to other sources, such as *Consumer Reports*, may be less costly.¹⁸⁶ The

183. Polinsky, *supra* note 182, at 1663. The buyer is made "liable" if he is given no remedy. The rule as stated can be interpreted to protect less sophisticated consumers because they would have to go to an extremely high expense to protect against the risk. They, therefore, would be less likely to be the cheapest cost avoider. The rule as stated is the rule proposed for unintentional torts. It is derived by applying the "Learned Hand formula" (i.e., the defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident's occurring, exceeds the burden of the precautions that the defendants might have taken to avert it) to both the defendant and plaintiff (i.e., contributory or comparative negligence). See POSNER, *supra* note 182, at 122-24.

184. Polinsky, *supra* note 182, at 1657.

185. This analysis is based on an analysis by Professor Markovitz. See Markovitz, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984). There is some dispute as to how to measure costs and benefits. Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). This has been discussed as the "offer/ask problem" in regard to arriving at the proper formula. For example, to measure costs one could compute the amount necessary to pay the losers (victims) for implementation of the policy (the amount that would be offered) or the amount that the victims would pay to prevent implementation of the policy (the amount they would ask to pay). As indicated in the text Professor Markovitz argues that the former is appropriate because the "offer" amount, if given, would put the losers back to the status quo. With regard to the beneficiaries of the policy, the "ask" amount would be the amount they would request to reject the policy and the "offer" amount would be what they would be willing to pay for implementation of the policy. Professor Markovitz endorses the "offer" amount for the above reason. The benefit of this rule is, therefore, often equal to the costs of the practice being prevented. If consumers' losses of \$1,000 are prevented by the rule, that is a benefit of the rule. Of course, one of the costs of the rules could be benefits of the practice that is being regulated. If the rule causes information to be denied to consumers and results thereby in certain consumers losing the benefits of the product, that is a cost of the rule.

186. When we say that a consumer could not avoid the harm, we probably mean that for some consumers to avoid the harm would require an exorbitant expense, e.g., going

cost to the advertiser of avoiding the harm might be to alter his advertising in such a way that it fails to inform some customers of the product's availability or to create lengthier and more expensive advertisements. Government regulation of advertising is appropriate where the type of deception is more efficiently avoided by sellers.

The harm that the Commission seeks to avoid results from a consumer purchasing a product under some misapprehension. If an advertisement suggests that a product will provide a particular benefit, which in fact it will not, a consumer who believes the advertisement and purchases the product suffers harm.

Even when individual transactions in which the market does not provide an "efficient" result can be identified, government intervention can be governed by an efficiency standard, i.e., public resources should not be misallocated.¹⁸⁷ Thus, government intervention is not appropriate unless it is "efficient." The benefits of the intervention must outweigh the costs of the intervention. This has been recognized as the appropriate standard in the passing comments of various writers.¹⁸⁸ The costs of regulation (where that action is an Commission order to cease and desist) include the actual costs of the government investigation and prosecution of the action. It also must include the costs of the respondent's defense, because our concern is with the total amount of resources consumed by society in preventing the practice.¹⁸⁹ Another cost is the extent to which

back to school to learn how to read better. That might explain protection for "vulnerable people." Concern that this standard would lead to governmental intervention in too many situations is dealt with by limiting Commission action to those situations where it is warranted by the costs to society. It could also describe situations where most consumers could avoid a particular harm only by going to exorbitant expense, e.g., having a lawyer or engineer with them.

187. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 63 (1969). See Veljanovski, *supra* note 182, at 169 ("It is not a sufficient condition because the costs of intervention, both direct and as a consequence of other misallocations it gives rise to, may outweigh any efficiency gains.")

188. For example in *Developments*, *supra* note 136, at 1042, the writer states that a "lowest intelligence" standard . . . seems appropriate if the few who might be deceived can be protected without significant intrusion on the interests of the advertiser and the undeceived majority of the public." See also Pollay, *supra* note 162, at 637 ("The final judgment will eventually be the difficult problem of striking a balance between the potential social cost resulting from misperceptions of some consumers and potential social gain resulting from effective undistorted communication of information from the advertiser to the balance of the consumers."). Beales, Craswell, & Salop, *supra* note 146, at 501, suggest that "an advertisement is deceptive if it fails to disclose the information that would be optimal under the circumstances. Optimality is based on a cost benefit analysis of requiring additional information." This is a basis, however, for designing strategies for requiring additional information in advertisements. *Id.*

189. In fact, when there is a final cease and desist order, its costs must include a pro rata share of all cease and desist investigations which do not culminate in cease and

the government prevents advertisers from conveying useful information to consumers.¹⁹⁰ It should be emphasized that our society is concerned with not just the cost of preventing the particular advertiser who is the subject of a particular cease and desist order from conveying a particular piece of information, but the cost of preventing all advertisers from conveying information as a result of the government's determination of the level by which all advertising will be judged. On one level, the cost of preventing advertisers from conveying useful information might be relatively easy to calculate. The consent order in *Reader's Digest Association* stated that Reader's Digest could not use any simulated item of value in sweepstakes promotions.¹⁹¹ Therefore, a cost of the order would be application of that rule to other sweepstakes promotions.¹⁹² However, it may be necessary to abstract cease and desist orders to a higher level. For example, if the Commission says that an advertiser's action is deceptive because 12% of the consumers are misled, the cost is banning all advertisements that reach that level.

The benefit of the rule calculates the total harm caused by the prohibited practices. The harm includes not just the cost of products purchased that would not have been purchased but for the deceptive advertisement but additional harm caused as well. This explains Professor Gellhorn's proposal that a lower level of deception should be actionable where health and safety claims are involved.¹⁹³ Presumably, physical injury caused by a tire not performing as promised at high speed can lead to exceptionally high costs. But that may not be true for all "health" claims. Where a sun burn ointment does not stop sun burn "pain" as fast as expected the costs may not be so high. Therefore, the health and safety concept may be good as a guide but not as a rule.¹⁹⁴ The concept of a cost

desist orders as well as a pro rata share of all successful respondent's expenses for lawyering which forestall cease and desist orders.

190. See *infra* notes 230-60 and accompanying text for a discussion of this type of cost.

191. *Reader's Digest Assoc.*, 79 F.T.C. 696 (1971).

192. The rules were not applied to other sweepstakes' promotions, which was one of Reader's Digest's grounds for complaining. See *infra* note 224. See, e.g., Request to Reopen and Modify Consent Order, Exhibit D, *Reader's Digest Assoc., Inc.*, No. C-2075 (FTC Sept. 30, 1983) (demonstrating the many other sweepstakes which used simulated items of value). For purposes of determining the value of a particular rule some rationality in the process must be assumed, i.e., the same rule will be applied to all similarly situated.

193. See Gellhorn, *supra* note 141 at 572.

194. The distinction between personal injury and economic loss is often made in consumer protection law. See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); U.C.C. §§ 2-318 (Alternatives A & B), 2-719(3) (1978); RESTATEMENT, *supra* note 38, at § 402A.

benefit analysis, explains why lower levels of deception should not be actionable. Using a Commission example, the number of people who believe that Danish Pastry is made in Denmark is probably few enough that the harm is extremely slight.¹⁹⁵ The costs of correcting that misapprehension may not be warranted by the benefits. Placing a small notice "Not Made In Denmark" probably would not help many of those people who are deceived and prohibiting the use of the term Danish Pastry entirely would confuse large numbers of people seeking the item. A decision to relate Commission action to such an analysis would help rationalize Commission decisions. For example, the empirical research that estimates the number of consumers misled by an advertisement would be useful in determining the benefits of restricting the advertising message. Such a policy does away with the need for such moralistic and indeterminate words as "reasonable." Moreover, it relates to one of the purposes of Commission advertising regulation: protecting the integrity of the marketplace. To the extent that the goal is economic an economic standard is appropriate.

Economic analysis accepts achieving "efficiency" as an appropriate goal for public policy. Such a policy, however, does not affect the relative allocation of resources in society.¹⁹⁶ Yet it is a legitimate goal for government to reallocate resources from the most fortunate to the less fortunate. This is an obvious goal of poverty programs that make no pretense of doing anything beside providing money or goods and services to people based on the recipient's low income.¹⁹⁷

195. *Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964).

196. P. BURROWS & C. VELJANOVSKI, *THE ECONOMIC APPROACH TO LAW* 12 (1981) "The desirability of efficiency as a goal thus requires a value judgment as to the justness of the underlying distribution of income and property rights . . . [E]fficiency itself is not such a 'momentous achievement from the point of view of social welfare. A person who starts off ill-endowed may stay poor and deprived . . .'" One writer demonstrates that the wealth maximization goal of efficiency is "biased against the poor and in favor of the wealthy." Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect A Bigger Slice?* 8 HOFSTRA L. REV. 671, 678 (1980). See Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUDIES 103, 108, 109 (1979) (economic analysis can be seen as "a theory the law seeks to optimize the use and exchange of whatever rights people start out with").

197. See, e.g., N.J. STAT. ANN. § 30:4C-1 (West 1983) (prevention and correction of dependency and delinquency among children should be accomplished so far as practicable through welfare services which will seek to continue living of such children in their own homes.); Food Stamp Program, 7 U.S.C. § 2011 (1982) ("To alleviate . . . hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.").

It may be a legitimate question whether even government regulation of advertising could find a justification in reallocation of resources. Many economists believe that where there is a contractual or market relationship it may be difficult or impossible to use the legal system to redistribute income, since raising the standard of performance for sellers will mean higher costs for consumers.¹⁹⁸ But this observation treats sellers and buyers each as a single class. It may, however, be desirable to protect some buyers at the expense of other buyers. Thus a legal rule that protects the gullible by saving them \$1,000 may cost other consumers \$2,000. But if we concluded that the gullible were poor or otherwise disadvantaged, we may decide for policy reasons that it is worth the cost. Efficiency is just one of many potential values that society may choose to further through governmental intervention.

The public does not necessarily judge the wisdom of governmental activity strictly on the basis of economics or wealth maximization, even though they may make many personal decisions on that basis.¹⁹⁹ People are often willing to sacrifice for society in general or for disadvantaged groups in society when they can be sure that others in society are doing their share. For example, one writer is puzzled by the fact that he favors government policies for conservation and protection of the environment but he drives a car that leaks oil. He instinctively realizes that a small effort on his part will have little impact but he is willing to pay for the environment if it is part of a significant societal effort. Therefore, he would favor laws that make his wasteful conduct illegal.²⁰⁰

The poor as a group are particularly susceptible to advertising claims.²⁰¹ Costly, higher standards of honesty in advertising may be a particularly effective way of helping those who began life at a significant disadvantage.²⁰² Helping the disadvantaged by raising ad-

198. A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 109 (1983). The legal system is redistributing income if one group in society must go to some extra expense so that another group is not deceived. There is, then, an indirect transfer. One group is paying to educate another.

199. Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic*, 23 ARIZ. L. REV. 283, 286 (1981).

200. *Id.*

201. J. HOWARD & J. HULBERT, ADVERTISING AND THE PUBLIC INTEREST: A STAFF REPORT TO THE FEDERAL TRADE COMMISSION 34 (1973).

202. *Id.* at 35 (poor and disadvantaged have special information needs are not currently well met). Professor Arthur H. Travers, Jr. has noted that current interest in consumer affairs has coincided with the development of a national concern with the persistence of poverty in America. Travers, *Forward*, 17 KAN. L. REV. 551, 553 (1969). "[S]tudies have shown that a disproportionate number of the victims of consumer frauds have been the sick and the old and the poor." *Id.* at 555.

vertising standards assists them in a more helpful manner than just transferring money.²⁰³

The above discussion refers to the use of government regulation to reallocate resources in order to alleviate some of the imbalances in society. This deals with disadvantages that *actually* exist. Another value that consumer protection promotes is the *perception* of fairness on the part of citizens with regard to the economic and political institutions of society. That perception is an important aspect of the glue that holds society together. Although not necessarily identifiable in cost benefit terms, the appearance of fairness may be an important value to pursue.²⁰⁴

The above discussion helps to highlight the difference between economic analysis itself²⁰⁵ and efficiency goals in the advertising regulation context.²⁰⁶ Even if we do not always accept the normative goal of efficiency the analysis will be helpful. The economic analysis requires the Commission to be as precise as possible regarding the costs and benefits of proposed regulation.²⁰⁷ Since the regulation of advertising involves regulation of business marketing where most of the benefits and costs are monetary in nature, economic analysis is more valuable than in areas where it is more difficult to quantify in monetary terms. But even where the costs of regulation exceed the benefits, a thorough analysis will reveal other values to be achieved and will help determine whether the cost of achieving those values is warranted.²⁰⁸

203. The food stamp program is another example of this kind of assistance. It may also explain the category of vulnerable groups whom the Commission has desired to protect. In each individual transaction the "vulnerable" person is probably not the cheapest cost avoider but the economic costs of the regulation may be greater than the economic benefits. Nevertheless the "vulnerable" status may be an indication that this is a group that society wishes to protect at some cost.

204. See *supra* notes 3-5 and accompanying text.

205. Economic analysis in this context refers to the empirical science that predicts the likely outcome of particular legal rules. BURROWS, *supra* note 196, at 6. Economic analysis can be used to predict the costs and benefits of assigning the risk of buyer's misapprehensions. See, e.g., *id.* at 7. It is a legal impact study "which attempts to identify and quantify the effects of law on measurable variables."

206. See, e.g., *id.* at 11. (normative allocation efficiency approach to law usually proceeds by stating objective of law as minimization of social cost of an activity by providing incentives that deter uneconomical losses).

207. See, e.g., *id.* at 15 ("The economic approach places at the forefront of discussion the need to choose and costs and benefits of alternative choices which must always be a relevant consideration where resources are limited.").

208. *Id.* at 16-17. ("If there is a conflict between efficiency and justice the nature of the trade-offs can be illuminated by economic analysis; and since the attainment of justice usually involves the use of resources the economic approach can contribute to normative discussions by providing information on the cost of justice.").

Deception then should be defined as those statements for which the cost of prevention would be warranted by the benefits in terms of reduced consumer misapprehension of such prevention. Such a policy would require the Commission to estimate the costs of preventing advertisers from making certain claims and the benefits of protecting particular consumers.

One advantage of the policy endorsed here is that it requires the Commission to clearly articulate the social policies and values that are being employed. As indicated a pure cost benefit analysis is not appropriate.²⁰⁹ But it is better to clearly state that a particular cost or benefit is being given greater weight (e.g., protection of a particular group is or is not worth the cost) than to hide behind vague terms like "reasonable."²¹⁰ Another advantage is that the Commission would be forced to clearly articulate the way it is using social science rather than just to present a lot of numbers and to announce the result.²¹¹ The Commission should reveal the conclusions it is drawing from the available information. Therefore, even though the Commission would not have "perfect" information it would have to be rational in its extrapolation from what it has.²¹² That reasoning would then be available for public scrutiny. This would allow more intelligent analysis and criticism of Commission actions. Finally the Commission would be able to use empirical research developed in one context for decision in another.

b. Applying the Definition

In the advertising substantiation program, the potentially deceptive statement is the implied statement regarding the likelihood that the product will conform to the advertised claim.²¹³ The definition of deception used in this article concerns those situations where the benefits of clearing up misconceptions regarding the likelihood that

209. In fact Professor Markovitz points out that a cost benefit analysis in some situations would give the ambiguous result that both rejection and adoption of the policy are cost benefit justified. See Markovitz, *supra* note 185.

210. Governmental institutions should reveal the "real" reasons for decisions rather than hide behind the excuse that the "law" requires the decision. The policy advocated in this article would require the Commission to acknowledge its value choices rather than hide behind words such as "reasonable" or "deceptive." See Singer *supra* note 180 at 51-54.

211. See *supra* note 165 and accompanying text.

212. Neither the Commission, advertisers nor academia can yet determine with precision the degree to which consumer purchase decisions are effected by particular advertising messages.

213. This should be distinguished from the level of substantiation claimed, which is the reference point under current Commission policy. See SUBSTANTIATION STATEMENT, *supra* note 19.

a product conforms to a claim are warranted by the costs of preventing that misconception. The benefits of preventing such statements will be based on the money that would be spent on a product under such a misapprehension that would not be spent if consumers correctly understood the likelihood that the product met a specified standard.

The benefit analysis should be based on genuine research into consumer expectations and not on a vague assertion that consumers expect all claims to be substantiated.²¹⁴ Studies of the effects of various kinds of messages can be used for application in particular cases. Many commentators would agree with many of the "indicia" of substantiation that the Commission has found in prior cases.²¹⁵ For example one writer has shown that the effect of substantiating material such as "tests show" or "laboratory tests show" is clear: "[I]n most cases [consumers] perceive substantiated claims as more reliable and helpful than unsubstantiated claims." Comparison advertisements may imply "factual information, often in the form of scientific tests or independent research has been gathered" as a basis for the comparison claim.²¹⁶ A Commission staff report stated

214. The Commission argues that all claims carry with them the implied claim of substantiation. See, e.g., Pfizer, Inc., 81 F.T.C. 23, 59 (1972); Reports, *supra* note 20; Miller, *supra* note 55, and is often uncontested by advertisers themselves. See, e.g., Firestone Tire & Rubber Co., 81 F.T.C. 398, 444 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). This article rejects the Commission's argument. The problem with the Commission's argument and all who make it is that all of those who make it find it necessary to qualify the need for substantiation for all claims in ways that detract from a coherent analysis. For example, the Consumer Protection Division advocated distinguishing between subjective and objective claims. See MEMORANDUM, *supra* note 61, at 67. But then a determination must be made whether claims were objective or subjective. It is easier to simply ask whether consumers interpret the ad as representing a claim of substantiation without also drawing the objective, subjective distinction. Corporations responding to the Commission request for Comments also indicated that there was no research indicating that consumers expected scientific evidence, laboratory tests, prior written certification, or other specific forms of documentation. See, e.g., Sears, *supra* note 106 at 25-26.

215. Leigh & Martin, *Comparative Advertising: The Effect of Claim Type and Brand Loyalty*, in CURRENT ISSUES AND RESEARCH IN ADVERTISING 1978 40, 50 (J. Leigh & R. Martin eds. 1978). Words like "medically proven" in one part of an advertisement are construed as applying to the main part of the advertisement. American Home Prod. Corp. v. FTC, 695 F.2d 681, 690 (3d Cir. 1983). "Recently laboratory science has perfected" a product or the product is "proven and sound" represent that the seller has scientific evidence to prove that substantially all users would benefit from the product as advertised. Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 302 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). See also Bristol-Myers Co., 102 F.T.C. 21,322 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984) ("Scientific tests show," tests show, "laboratory tests show," a picture of a computer typewriter printing out numbers while announcer speaks about scientific tests only enhances an impression of establishment but does not create it); Standard Oil Co. of Cal., 84 F.T.C. 1401, 1472 (1974), *modified*, 577 F.2d 653 (9th Cir. 1978).

216. Leigh & Martin, *supra* note 215, at 40.

that, "consumers probably infer that ads stating figures to two or three decimal points implicitly claim that substantial evidence supports those figures," and that, "novel claims concerning the technical properties of a product are likely to imply scientific testing or endorsement by a qualified expert rather than consumer surveys."²¹⁷ The Commission's concept of "establishment claims" is an effort to attach deceptive^s conduct to situations where consumer confidence in advertising claims is increased by scientific appearance and where the truth of the claim may be difficult for the Commission to determine.²¹⁸ The Commission should identify those qualities of products which are "credence" qualities.²¹⁹ As researchers have demonstrated, credence qualities are the qualities for which consumers cannot determine the truthfulness of claims. Therefore, consumers are more likely to depend on substantiation developed by others—including the advertiser—in determining the likelihood that the claim is true.

Although the Commission has begun to do some empirical research, the Commission appears to be headed in the wrong direction based on the purposes of the program outlined in this article. The Commission is apparently attempting to determine merely the level of testing consumers expect advertised products to have.²²⁰ As indicated above the Commission should be exploring the consumer expectations regarding the likelihood that claims are true. Nevertheless empirical research would be a valuable first step for the Commission, if the Commission uses the research in the context of an empirical standard such as the one advocated in this article. Moreover, the Commission must engage in research to determine the socio-economic characteristics of those who are deceived by false advertising claims.

Analysis of the benefit factors has focused on those factors that increase the number of consumers who believe a particular claim. The harm suffered by those who purchase a product under a misapprehension must also be determined. Because the analysis will be similar to that used for the deceptive^p basis of advertising substantiation, it would be better to postpone consideration of those factors. Similarly it will promote clarity to discuss the factors to consider in

217. MEMORANDUM, *supra* note 61, at 13.

218. See text accompanying notes 117-18, for an explanation of the standard applied in establishment claims.

219. See *supra* note 61.

220. The Commission has announced its intention to conduct empirical research regarding substantiation but has yet not actually conducted such tests. See *infra* note 246.

determining the costs of regulation at the same time as this article discusses the costs of regulation based on deceptive^p behavior.

2. Deceptive^p Behavior

The Commission should require some level of substantiation for all claims as a legitimate vehicle for preventing advertisers from engaging in a practice that makes the existence of deceptive claims more likely (deceptive^p conduct). If one engages in the practice of making claims without knowledge of whether they are true or false, claims more likely will be false than if one only makes claims on the basis of relevant information regarding the product. The truth or falsity of a particular claim is not relevant. Even if the claim is true, the advertiser has engaged in a deceptive practice, if the advertiser has failed to test the claim before disseminating it. The purpose of the substantiation program is to achieve a higher level of accuracy in all advertisements by compelling sellers to conduct better testing of potential claims.²²¹ The program has been successful in this regard. One internal Commission memorandum cited several reports that concluded that the advertising substantiation program had motivated a substantial portion of the advertising industry to develop substantiation before disseminating claims. The program had served to deter untruthful claims.²²²

Consumer expectations are not relevant in determining the amount of substantiation required. Regardless of the amount of substantiation consumers expect advertisers to have, the Commission is making an independent judgment of the amount of substantiation it is reasonable to expect of sellers making particular kinds of claims.²²³

221. For Robert Pitofsky's statement regarding accuracy in advertising see Pitofsky, *supra* note 69, at 36.

222. EVOLUTION, *supra* note 20, at 12, 23-24.

Some responses to the Commission's request for comments on the program have also indicated that this might be the case. In responding to the request for comments the Consumers Union stated that the program had reduced the number of claims for which there is no basis and has improved the quality of product performance claims. Consumers Union, Remarks in Response for Comments About the Advertising Substantiation Program 2 (July 13, 1983) (FTC's request available in 48 Fed. Reg. 10471) [hereinafter cited as Consumers Union]; NBC, *supra* note 50, at 4 (substantiation received for advertisements improved though they cannot determine cause).

223. This departure from a consideration of consumer expectations demonstrates a difference from the proposed standards considered by the Commission. The Commission's policy is grounded solely in considerations of consumer expectations. See, Miller, *supra* note 55, at 2. The approach proposed here resembles in some respects the substantiation policy outlined by NBC. NBC has established standards for the type of support that is appropriate depending upon the type of claim that is being made, e.g., performance claims, ingredient claims, sales and price claims. The susceptibility of the

Although a cost benefit type of analysis would also be appropriate for determining the types of substantiation to require, the factors to be weighed are slightly different. The substantiation rule requires sellers to expend resources on additional levels of testing; the cost is the cost of the testing. But where the cost of testing exceeds the value of the claim to the advertiser, the advertiser will not make that claim. Therefore, one potential cost of the program is that consumers will not be aware that products meet particular needs. The benefits are determined by the value of generating the information to consumers.²²⁴

The benefit of requiring additional testing is a function of the harm to be avoided and the likelihood that a claim may be false. The harm that is to be avoided is that consumers might purchase a product under a misapprehension regarding that product. The measure of the harm may be no more than the difference in value between what the consumer thinks he is getting and what he gets along with some incidental expenses in aggravation and repurchasing.

There are additional factors that increase the scope of the harm to be avoided. Where the failure of a product to conform to consumers' expectations causes property damage or bodily injury, the harm is greater than the price of the product. Products, which may cause greater harm, are likely to be products where a greater level of substantiation is in order. A general rule that health and safety claims deserve a higher level of substantiation.²²⁵ The only reason for creating health and safety claims as a special category is the potential for harm if the claim is not true. Where, however, even if the claim is not true there would be no significant health costs, those products or claims should be evaluated as more mundane products or claims

product to the type of testing also is considered. For example, for performance claims, although testing in normal use is preferred, large items such as washing machines can be lab tested. NBC, *supra* note 50, at 8-12. NBC claims it requires advertising claims for over the counter drugs and health related products to be supported by well-controlled clinical studies. In the case of non-comparative claims the network relies on the FDA OTC panel monogram studies. *Id.* at 11-12.

224. Note that this statement in text differs from stating that the costs must be less than the benefits. For a discussion of the proper application of a cost benefit analysis, see *supra* notes 181-235 and accompanying text.

225. See, e.g., *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 697 (3d Cir. 1983) (controlled clinical tests required for nonprescription analgesic); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *Stihl, Inc.*, 101 F.T.C. 840,851 (1983) (one controlled test required for chain saw claims based on safety considerations). In terms of consumer expectations, the Consumers Union suggested higher standards for health and safety claims as well as "large ticket items." Consumers Union, *supra* note 222, at 11-12.

are evaluated.²²⁶ In *Bristol-Myers Co.* the harm of headache remedies not conforming to the claim was in reality more limited. There were no allegations that the pills would be worse than aspirin or that they would cause harm of which consumers may not be aware. But the Commission's substantiation requirements were exacting, even though the Commission did not base its rather strict substantiation requirements on more than generalized concerns regarding health and safety claims.²²⁷

The size of the manufacturer or the size of the advertising campaign in question is another factor in measuring the scope of the harm.²²⁸ Where a small manufacturer or a limited ad campaign in-

226. Another reason for requiring a higher standard for health claims is that, "Pervasive government regulation of drugs and consumer expectations about such regulation create a climate in which questionable claims about drugs have all the more power to mislead." *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 697 (3d Cir. 1983).

227. *But see American Home Prod. Corp. v. FTC*, 695 F.2d 681, 698 (3d Cir. 1983) (health risks may be significant because "[t]he larger dosages of aspirin which AHP exhorts consumers to ingest increase the dangers of adverse side effects, with little evidence that there exist any countervailing benefits"). However, here the Commission is probably proceeding under deceptive' since many indicia of claims of testing are present in the case. Otherwise, the standard of two clinical tests may have been too harsh. Clinical tests are required of all drugs by the FDA to be sure the product is both safe and effective. For that reason, it may be sufficient to require only one clinical test if there is no concern of significant health risks. *See Comment, supra* note 113, at 469. Therefore, the citing of all of the potential health risks in taking aspirin in *American Home Products* may not have been appropriate.

Bristol-Myers raised a more troubling issue for advertising substantiation. The manufacturer suggested that it would have been appropriate for participants in studies to know the product they were using since the expectations created by the advertising may actually *cause* a reduction in pain. *Bristol-Myers Co.*, 102 F.T.C. 21, 335-36 (1983) *aff'd*, 738 F.2d 554 (2d Cir. 1984). The manufacturer argued that the placebo effect must be taken into account for medicines directed at pain. The Commission dismissed this argument summarily. *Id.* *Bristol-Myers* suggested, however, that the advertising itself is part of the product. If consumers are willing to pay an additional amount for a product that kills pain faster, does it matter that part of the effectiveness of the product is the consumers' predisposition that it will be effective? It may be that where a manufacturer makes this type of claim it should be allowed to use evidence from studies where the administrators of the test do not know the product the subject was using but the subjects do. However, the other products possibly should be accompanied with some assurances of their quality. It might also be true that if no products were allowed to advertise that their ingredients are better than aspirin, the placebo effect currently enjoyed by well marketed brands would then be enjoyed by what consumers now see to be "just plain old aspirin."

A better basis for the standards applied in the drug cases is the fact that the claims involved are easily susceptible to the type of controlled studies that the Commission required and that a "testing industry" for these products is already in place. These factors are "cost" factors; they suggest that stricter standards are appropriate for drug products because rigorous testing standards would not be prohibitively expensive).

228. One writer suggests that small manufacturers should be allowed to rely on the general state of medical knowledge or the tests of larger manufacturers. *See Comment,*

dicates that the advertising will not cause a significant amount of harm the government's regulation may not be warranted.

The likelihood that a claim is false must also be evaluated in determining the benefits of a proposed substantiation standard. Further study is likely to be cost effective to the extent that it is highly likely that it produces new information regarding the efficacy of a product. For each product it is important to determine the likelihood that further testing would reduce the harm that the product will not perform as claimed.

The actual cost of conducting tests is easily determined. The Commission, however, has not paid attention to the actual cost of testing they have required.²²⁹ Advertisers in submitting comments to the Commission provided no information on the costs of tests.²³⁰ But the cost most often referred to by the program's critics is the inhibition of the dissemination of useful information to consumers.

supra note 113, at 448. *But see* Pfizer, Inc., 81 F.T.C. 23, 68 (1972) (cannot rely on claims of competitors but might be able to rely on competitors study). *See* Cacioppo & Petty, *Persuasiveness of Communications Is Affected by Exposure, Frequency and Message Quality: A Theoretical and Empirical Analysis of Persisting Attitude Change*, in CURRENT ISSUES AND RESEARCH IN ADVERTISING 1978 97, 114 (J. Leigh & R. Martin eds. 1978) (repetition of strong arguments increases persuasive effect).

229. In Thompson Medical Co., it was found that clinical tests would cost \$30,000. The Commission contrasted this cost to Thompson's six million dollars in sales. 104 F.T.C. 648, 823-24 (1984).

Because advertising substantiation will impact advertising, a more appropriate comparison might be with a company's advertising budget. For example, Thompson Medical Co. spent 39 million dollars on advertising in 1984. Comparable figures for other advertisers discussed in this article are: Kellogg Co., \$208,000,000; Bristol-Myers, \$258,000,000; Sterling Drug, \$166,000,000; Fort \$559,000,000. *See* ADVERTISING AGE September 26, 1985, 11 and ADVERTISING AGE June 13, 1985, 11 for tables listing corporate advertising costs.

230. This statement is based on the author's examination of comments submitted to the Commission. Chairman Miller acknowledged that little information was supplied.

This criticism has been raised by the Commission,²³¹ advertisers,²³² and independent observers of the program.²³³

There are, however, a variety of factors that could limit the amount of damage that the program would cause in inhibiting the dissemination of useful information to consumers. Advertisers may obtain advisory opinions from the Commission to determine whether the advertiser has sufficient substantiation for a claim.²³⁴ Advertisers may also place disclaimers on their advertisements limiting the impact of their messages.²³⁵ However, when using disclaimers deceptive^s and deceptive^p claims would be handled differently. Where the commission is concerned that the claim of substantiation increases the impact of the advertisement, which is true in the deceptive^s situation, a disclaimer would be effective to limit that impact. However, where the Commission is concerned with the amount of substantiation necessary to support a claim—a deceptive^p consideration—a statement indicating the amount of substantiation that the advertiser actually has to support the claim may not be suffi-

231. "[O]verly burdensome substantiation requirements prevent consumers from receiving useful information." MEMORANDUM, *supra* note 61, at 28; FEDERAL TRADE COMMISSION, CONSUMER INFORMATION REMEDIES 259-60 (1979) (focus on objective claims may have led advertisers to use more subjective claims). Chairman Miller has placed special emphasis on the risks of suppressing truthful claims. See Miller, *supra* note 136, at 1.

232. Several advertisers who responded to the Commission's request for comments devoted a considerable amount of time to the problem of getting information to consumers. See, e.g., Sears, *supra* note 106, at 27 (claiming even though substantial costs may have been incurred in developing performance information for product, ultimate ad copy may be significantly "watered down" or some claims even deleted if serious concern arises over what subsequent Commission interpretation might be). Although claiming that potentially valuable information that would help reasonable consumers make an informed decision is not communicated, Sears and other industry respondents give no examples. Sears does say that a review of Sears advertising since 1971 shows that it has become generally less informative about product features and benefits, but acknowledges that this is due as much to rising advertising costs as to the Commission Ad Substantiation Program. *Id.* at 34-35.

233. See, e.g., Comment, *supra* note 106, at 437. A typical comment was the following: "Lots of the effects of the program are to drive advertising from some sort of factual claim which may or may not be verified at the time it's made (it may not be capable of being completely verified), into puffery." Tollison, "Efficiency," "Cost Benefit" and Other Key Words—The Practical uses of Economics at the FTC, 51 ANTITRUST L.J. 581, 584 [hereinafter cited as Tollison].

234. The Commission Rules of practice so provide. 16 C.F.R. § 53.16(d) (1984). See, e.g., FTC v. Colgate-Palmolive Co., 380 U.S. 374, (1965); Bristol-Myers Co., 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984).

235. See, e.g., Bristol-Myers Co., 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984) (advertiser can carefully qualify claim "so that it discloses the level of support actually possessed").

cient. The advertiser would have to modify the claim itself.²³⁶ The problem of disclaiming in deceptive^p situations is highlighted in the "substantial question" theory adopted by the Commission in the *American Home Products Corp. v. FTC* case.²³⁷ The theory, which was only one basis of liability, provided that when the seller made claims about the superiority of Anacin and Arthritis Pain Formula in the absence of two well controlled clinical studies it was deceptive to fail to state that there was a substantial question regarding the truth of the claim. The theory was presented in a confusing manner, partly because the court appeared to be papering over Commission vacillation regarding whether the theory of the case was "reasonable basis" or "substantial question."²³⁸ But the Commission's policy can be easily understood as follows: it is deceptive for the advertiser to make claims regarding the effectiveness of a drug without the appropriate amount of testing. To say merely that "we base this claim on our president's use of the product" would not be a sufficient disclaimer. But to say "there is a substantial question in the scientific community regarding this claim" would have the effect of changing the nature of the claim itself; it would minimize the scope of the claim.

Manufacturers have complained that the Commission does not allow sellers to qualify claims.²³⁹ In some instances the Commission has rejected qualifications that were contained in advertisements as ineffective. For example, when Ford Motor Company placed advertisements stating that "all 5 Ford Motor Co. small cars get over 25 mpg," the Commission required substantiation that the gasoline consumption rates were acquired through the performance an ordi-

236. A similar policy is evident in the severe limitations imposed on sellers restricting the effectiveness of express warranties. See, e.g., UCC § 2-316 (1978):

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.

Similarly some state statutes restrict sellers' ability to limit remedies for express warranties. Md. Commercial Law § 2-316.1(3) (1983) (severely restricts modifications or limitations on remedies pertaining to express warranties).

237. *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 694 (3d Cir. 1983). The "substantial question doctrine" was abandoned by the Commission. See *Bristol-Myers Co.*, 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984). As demonstrated in the text the theory was a valid complement to other aspects of the advertising substantiation doctrine and not duplicative as indicated by the Commission. The theory is an expression of the advertising substantiation doctrine directed at deceptive^p claims.

238. See *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 694 (3d Cir. 1983).

239. See, e.g., *The Kellogg Company, Remarks in Response to Request for Comments on the Advertising Substantiation Program 3* (July 14, 1983) [hereinafter cited as *Kellogg*].

nary driver typically would obtain from standard models.²⁴⁰ The Commission took this action despite the fact that the ad contained the following statement:

[T]he mileage you get depends on many factors: equipment, engine displacement, vehicle weight, local road conditions, and your personal driving style. So the mileage you get may be less or even more than the figures quoted here.²⁴¹

But this case can be explained by the sharp difference between the bold headline and the small print retraction.²⁴² The Commission, therefore, judged the likelihood that consumers would understand the significance of the disclaimer. It is doubtful that the Commission was preventing consumers from benefitting from valuable information where the advertisement actually conveyed untrue—or at least unsubstantiated—information. Moreover, to evaluate the Commission's action in terms of cost it is necessary to determine the value of the information being restricted. If the information, though true, is not really significant to the purchase decision, nothing of value is being lost. In *Ford Motor Co.*, consumers were not given information regarding expected fuel consumption costs or the relative fuel consumption costs of several cars under typical conditions. Treatment of disclaimers would be different in deceptive^s and deceptive^p cases. To the extent that the disclaimer modifies the claim, it mitigates a finding of deception in deceptive^p cases. To the extent that it modifies the assertion regarding the likelihood the claim is true, it mitigates against a finding of deceptive^s conduct.

In some cases, the Commission may have required substantiation requirements that deny consumers information they might like to have and, at the same time, may have done so in a way that prevented sellers from making a legitimate disclaimer. For example, the Commission required scientific tests as opposed to the opinion of *Road & Track* magazine that the Vega was "the best handling car." If handling is strictly a matter of opinion and if consumers are inter-

240. *Ford Motor Co.*, 87 F.T.C. 756 (remand order), *reh'g denied*, 88 F.T.C. 53 (1976), 93 F.T.C. 873 (1979).

241. *Id.* at 759. Another case that illustrates this point is *Camp Chevrolet*, 84 F.T.C. 648, 650 (1974) (respondent's advertisement was reprint of newspaper story describing mileage test and contained similar disclaimer).

242. *Ford*, *supra* note 240, at 764. The ten words in the claim ("All Ford Motor Company Small Cars Got Over 26 MPG") occupy twelve times as much space as the 37 words in the disclaimer. For the wording of the disclaimer, see *supra* text accompanying note 241 and see *id.* at Exhibit A, 759.

ested in the opinion of *Road & Track*, there is no way to convey that information to consumers.²⁴³

Close analysis reveals that prior Commission decisions have not actually prevented consumers from obtaining needed information. The *Kroger Co.* case is an example of a Commission decision that prevented an advertiser from distributing what appears to be useful information. This is a favorite example frequently used by Timothy Muris, former director of the Consumer Protection Division.²⁴⁴ Kroger, a large supermarket chain, created a "Price Patrol" in which homemakers surveyed prices of 100 to 150 items in local supermarkets. The most significant aspect of the practice that concerned the Commission was that the same Kroger official who selected the 600 products to be part of the sample also set the prices for Kroger. The Commission found that the advertisements implicitly represented that the surveys were "methodologically sound" and that the surveys were not methodologically sound.²⁴⁵ Since other surveys indicated that Kroger's prices were frequently below or equal to its competitors in many product lines, Mr. Muris cites this as an example of Commission action which denies consumers valuable information. Although the Commission has never before required studies that conform to the high standards of reliability as it has done in *Kroger*, Kroger's advertising was deceptive^s because it claimed that its price comparison information was backed up by a rigorous survey.²⁴⁶ Therefore, the Commission properly held Kroger to a higher standard of proof regarding its price comparison

243. Of course, it is a matter of empirical research whether claims of smooth "handling" effect consumers' expectation of the likelihood that the car will be easier for them to drive and whether the car comports with that expectation. However, for purposes of the "burden shifting" effect of the substantiation doctrine the advertiser does have some substantiation for the claim. But for the purpose of the deceptive practices aspect of the advertising substantiation program it may be that more expensive scientific tests are not worth the value of the information.

244. 98 F.T.C. 639 (1981), *modified*, 100 F.T.C. 573 (1982). A criticism of the case is in MEMORANDUM, *supra* note 61, at 27.

245. *Id.* at 743. However, Kroger claimed it minimized the problem somewhat by having some other person select the 100-150 product sample from the 600 product selection. MEMORANDUM, *supra* note 61, at 27.

246. *See, e.g.*, *Tashof v. FTC*, 437 F.2d 715 (D.C. Cir. 1970); *Guides Against Deceptive Pricing*, 16 C.F.R. pt. 233 (1986). Kroger claimed that it made it clear that this survey was just being conducted by housewives. *Kroger Co.*, 98 F.T.C. 639, 770 (1981), *modified*, 100 F.T.C. 573 (1982) (Commissioner Bailey dissenting). However, it is quite likely that to the consumer the statement that the study was conducted by housewives increased the perceived validity of the study. This statement gave the impression of a high degree of disinterestedness of those conducting the study. To the consumer this may *appear* to be similar to the randomness required in empirical research. This illustrates the distinction made in this article between basing substantiation requirements on the type of substantiation consumers expect (the Commission

with other stores. The argument that the Commission is denying consumers useful information must be questioned. The information is not useful if it is not true. Moreover, the critics of the opinion never consider the cost to Kroger of conducting studies that comply with the Commission's standards. Only if the cost of such studies is prohibitively high could it be argued that information is denied as a result of the Commission's rule.

The one example of an advertising substantiation program denying consumers access to valuable information is the claim by The Kellogg Company that "the public was denied information on food, health and nutrition because the Commission will not accept as adequate substantiation the type of epidemiological evidence and opinions of medical authorities that exists to support certain claims in this area." Kellogg stated that even though epidemiological studies show that populations consuming high fiber diet have a decreased incidence of certain diseases of the colon, such as diverticulosis, the Commission probably would not allow the following statement:

current scientific data tends to support the fact, if you eat a higher fiber diet, you will be less vulnerable to certain diseases.²⁴⁷

But Kellogg never requested permission to run such an advertisement and could point to no Commission decision where such a cautious, qualified statement has been prevented or where such evidence would not be permitted for such a claim.²⁴⁸ Moreover, following its assertion that the substantiation policy prevented such advertisements, Kellogg actually did run advertisements making health claims.²⁴⁹ Therefore, despite the many claims that the advertising substantiation program limits consumers access to valuable infor-

approach) and consumers expectation regarding the likelihood that the claim is true (the approach proposed in this article).

247. The Kellogg Company, Remarks in Response to Request for Comments on the Advertising Substantiation Program 3 (July 14, 1983). For a discussion of Chairman Miller's response to the Kellogg submission, see Miller, *supra* note 136, at 5.

248. In the case cited by Kellogg, *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967), the commercials portrayed Geritol as suitable for most instances of "tiredness." The relative communicative strength given to various aspects of the advertising message were considered in determining the nature of the claims actually made. Finally, Kellogg points out that the Food and Drug Administration, not the Commission, is a more likely opponent of the hypothetical claim. See Kellogg, *supra* note 239, at 3. Of course, criticism of the FDA is not criticism of the Commission.

249. Interestingly enough the advertisement appears to exaggerate the product's value in preventing cancer and glosses over other potential health problems related to the product, such as the product's high sodium content.

mation, few, if any, examples have been produced which actually prove that point.²⁵⁰

One study that tests the hypothesis that advertising regulation reduces the amount of useful information available to consumers. The study was conducted with reference to the advertising substantiation program.²⁵¹ It has been cited for the proposition that the advertising substantiation program has in fact caused advertisers to reduce the amount of factual information placed in advertisements and replaced that information with "puffery" of little use to consumers.²⁵² The study compared the advertising for two types of products that had been subject to advertising substantiation rounds (anti-perspirants and pet foods) with two types of products that had not been subjected to advertising substantiation rounds (skin lotions and prepared foods). For each product the advertising before and after the advertising substantiation round were compared. The latter group was treated as the control group to determine the effect of the Commission action on advertising.²⁵³ The study investigated a number of hypotheses that would be true if the substantiation program did reduce the amount of valuable information in advertising.²⁵⁴ The study concluded that:

250. Chairman Miller pointed out that none of the responses to a recent request for information contained any empirical evidence of the effect of the program on advertising. See Remarks of James C. Miller III, Chairman Federal Trade Commission Before the San Francisco Advertising Club 6 (September 30, 1983). See also, Tollison, *supra* note 233, at 585 ("But the most remarkable feature about the Ad Substantiation program is that nobody knows what it is doing. There never has been a careful theoretical or empirical analysis of the impact of the program.").

251. J. HEALEY, *THE FEDERAL TRADE COMMISSION ADVERTISING SUBSTANTIATION PROGRAM AND CHANGES IN THE CONTENT OF ADVERTISING IN SELECTED INDUSTRIES* (1978) (Ph.D. Dissertation, Marketing, Univ. of California, Los Angeles) [hereinafter cited as HEALEY].

252. See, e.g., Comment, *supra* note 106, at 457.

253. HEALEY, *supra* note 251, at 128.

254. Compared with the advertisements in the control group, the non-control group advertisements would undergo the following changes:

1. There would be a decrease in the number of product attributes. *Id.* at 29.
2. There would be greater emphasis given to inherently verifiable attributes. *Id.* at 29.
3. More claims would either be verifiable on face value or be clearly non-verifiable. *Id.* at 31-32.
4. There would be more claims of product comparisons rather than general product class comparisons. *Id.* at 33.
5. The "mood" of advertising would be less authoritative and more cautious. *Id.* at 34.
6. Advertisements would be either more informative or more non-informative. *Id.* at 37.

The major finding of this study was the changes in the way claims were verified in advertisements after the FTC advertising substantiation program. Specifically, in 1976 advertisements, either claims were verified within the advertisement or they were stated in an ambiguous, non verifiable manner; both occurred with higher frequency than the previously used improper way of handling claims, having them just sound verifiable. This confirmed the predictions made in 1972 by industry leaders that the advertisers would seek to avoid confronting the FTC by making claims which were either "pure pap" or very factual in nature²⁵⁵

It appears that perhaps the FTC advertising substantiation program might have served the function of making companies more conscientious about the claims made in their advertisements.²⁵⁶

On the other hand, there was some indication that the FTC advertising substantiation program may have, by default, sanctioned a rise in the use of puffery, i.e., vague and exaggerative advertising statements which cite no specific facts.²⁵⁷

There are a number of problems with this study. The study did not really involve randomly selected products or advertisements. Only print advertising was investigated; there was no consideration of broadcast advertising. A number of hypotheses were not proven and in a couple cases evidence supported the opposite conclusion.²⁵⁸ Even to the extent that the study detected changes after the institution of the program, the study did not attempt to determine whether there was a cause and effect relationship.²⁵⁹ More significantly, even if the advertising contained less factual information after the institution of the program, the study did not consider whether the information no longer available to consumer was accurate. Perhaps by compelling advertisers to resort to "puffery" the Commission is compelling them to abandon the distribution of untrue information. The study itself quoted one commentator's state-

255. *Id.* at 125.

256. *Id.* at 127.

257. *Id.* at 128.

258. The hypothesis regarding the presence of claims in the advertising was only partially confirmed. *Id.* at 120, 126. The hypothesis regarding the types of attributes that were advertised was only partially confirmed. *Id.* at 121. The hypothesis regarding the presence of verification in the advertising itself was confirmed. *Id.* at 119. The hypothesis regarding product comparisons "did not prove to be true." *Id.* at 122. The hypothesis regarding the "mood" of the advertising was only partially confirmed. *Id.* at 121. The hypothesis regarding the informative quality of the advertising was not confirmed. *Id.* In fact it was the control group advertising that became less informative. *Id.* at 126.

259. *Id.* at 128.

ment that puffery is "the ever-diminishing corner into which sellers and advertisers have been painted by consumerism."²⁶⁰ Moreover, a demonstration that advertising has become less authoritative may also be a sign of the program's accomplishments. Advertisers may be less likely to couch unsubstantiated claims in misleadingly scientific language. This is a demonstration of the positive effect of the program in limiting deceptive^s conduct.

There are a few "cost" factors in utilizing the problem which have been suggested but which are not proper considerations. The Commission apparently believes that a proper factor to consider as a cost of substantiation requirements is the "benefit to consumers if the claim turns out to be true."²⁶¹ For example, in *Sperry Corp.* the manufacturer claimed that the razor would solve the problems of razor bumps for black men.²⁶² The Bureau of Consumer Protection has argued that in demanding claim substantiation the Commission should consider the potential benefits of the claim being true.²⁶³ Another example is apparent in the advertising claim that products low in cholesterol help reduce the incidence of heart disease.²⁶⁴ The Bureau of Consumer Protection argued that if the claim is false consumers lose a few cents but if it is true consumers will have less risk of heart attack. In *Sterling Drug, Inc.*, the Commission modified an order that had originally prevented the manufacturer of Lysol from claiming that use of Lysol on environmental surfaces would reduce the risk of illness.²⁶⁵ The Commission relied upon recent evidence that some illnesses could be transmitted by contact with environmental surfaces.²⁶⁶ Chairman Miller argued that if the claim was true consumers would be healthier but if it was not true, "consumers are injured only to the extent of the cost of their Lysol purchase."²⁶⁷

Nevertheless in the context of allegations of deceptive^s behavior the concern should be with the likelihood that the claim is true. As indicated in a separate statement by Commissioner Pertschuk in *Sterling Drug*, the tests did not indicate a high degree of likelihood

260. *Id.* (quoting PRESTON, *THE GREAT AMERICAN BLOW UP* 5 (1975)).

261. Miller, *supra* note 55, at 3.

262. *Sperry Corp.*, 98 F.T.C. 4 (1981).

263. MEMORANDUM, *supra* note 61, at 27.

264. *Id.* at 20.

265. 101 F.T.C. 375,379 (1983). The modified order allowed Sterling Drug to make claims that environmental surfaces play role in transmission of viruses, if supported by competent and reliable scientific evidence.

266. *Id.* at 337.

267. *Id.* at 382 (separate statement of Chairman James C. Miller III). In each of the above cases, dramatic potential benefits are weighed against what appears to be minimal cost.

that the claim was true.²⁶⁸ Therefore, the Commission should have considered a way in which the claim could have been presented differently to consumers.²⁶⁹ In the context of allegations of deceptive^P behavior the calculation of the amount of substantiation must be based on the cost of additional testing and the potential harm to be prevented. To accept the advertiser's claimed benefit as a measure of the potential benefit of the claim being true would be illogical. Otherwise there would be an incentive for advertisers to make wildly optimistic claims. The true calculation is the probability that the claim is true and whether the claim cannot be made without testing. Moreover, in each case the harm caused by the claim may be understated. The few cents that are lost must be multiplied by the millions of purchases involved. Consumers may forego better ways of avoiding the problem for which the product is purchased. For example in the Lysol case, the advertising claims might have caused consumers to become less vigilant about the proper procedures for avoiding infection. Similarly in the "cholesterol" advertising campaign, consumers might not have taken other steps to reduce the risk of heart attack.

One last factor in determining the appropriate level of substantiation is usual industry standards.²⁷⁰ However, this is not relevant in either deceptive^S or deceptive^P actions. In deceptive^S cases, consumer expectations control. In deceptive^P actions the Commission should search for those industries where a significant amount of advertising is presented without sufficient basis and make efforts to upgrade industry standards rather than accept an industry norm of inadequate substantiation. Thus, the level of substantiation currently conducted in an industry is not an appropriate standard.

V. BURDEN OF PROOF

The proposed application of an advertising substantiation policy with regard to deceptive^S conduct upsets the traditional assignment

268. *Id.* at 383. Of course, Sterling Drug can prove it true to escape liability.

269. In fact, examination of the advertising that Lysol disseminated revealed an attempt to exaggerate the likelihood that the product performed as claimed. The tag line "Is it worth the cost?" implied that it was. For Lysol Advertising on file with University of Cincinnati Law Review, see *SSCB & Lintas Worldwide's Storyboard*.

270. See, e.g., Sears, Roebuck & Co., Remarks in Response the FTC's Request for Comments About the Advertising Substantiation Program 22 (March 11, 1983) [hereinafter cited as *Sears*] (FTC's request available in 48 Fed. Reg. 10471). It is likely that by saying the Commission would be guided by "the amount of substantiation experts in the field believe is appropriate for the claim," Chairman Miller is implying such a consideration. Otherwise, he would not need to establish it as a separate consideration along with the costs and benefits. See Miller, *supra* note 55, at 3.

of the burden of proof upon the Commission as the one attacking the advertising.²⁷¹ The requirement for substantiation in all advertising claims violates the standard burden of proof presumption because the seller is required to present proof that the product conforms to certain claims and, failing to do so, is considered liable for violating the FTCA.²⁷² Since the Commission has abandoned the program's purpose of serving as a source of information for consumers and competitors²⁷³ requests for substantiation no longer serve any purpose other than to compell advertisers to prove that they are *not* violating the law.²⁷⁴ However, none of the respondents to the Commission's request for comments stated that they objected to the demands for information because the demands raised burden of proof problems.²⁷⁵ All arguments that the program shifts the burden of proof have been made in the context of litigating the terms of cease and desist orders, not as objections to the advertising substantiation program.²⁷⁶ In one case the Commission ordered a seller of eyeglasses to refrain from claiming to sell any articles of merchandise at a "discount price". The Commission required that the seller first take a statistically significant survey that showed whether the prevailing price was indeed "substantially" higher than the seller's price.²⁷⁷ One member of the court felt that the requirement improperly shifted to the seller the burden of "proving its innocence."²⁷⁸

The law, however, does allow courts to recognize the presence of presumptions with regard to a party's obligation to meet the burden of presenting evidence. The advertising substantiation program in the deceptive^s context should be viewed not as shifting the ultimate burden of proof but rather as shifting the production burden to the

271. Commission rules provide that: "Counsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43 (1986).

272. See generally Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L. J. 1, 35-36 (1971).

273. See *infra* notes 239-43 and accompanying text.

274. In that situation the lack of substantiation would merely be discovered in the course of preparing the information for the public. Now, however, the Commission claims no other purpose for the substantiation demands than investigation of potential sources of litigation. It appears that the Commission initiates a deception case against a seller by asking the seller to prove that the advertisement was not deceptive.

275. This statement is based on the author's examination of the documents.

276. See, e.g., *Jay Norris v. FTC*, 598 F.2d 1244, 1247 (2d Cir. 1979)(petitioner sought review of Commission cease and desist order which prohibited mail order business from advertising without prior written substantiation of representations).

277. *Tashof v. FTC.*, 437 F.2d 707, 715 (D.C. Cir. 1970).

278. *Id.* at 716 (Robb concurring in part and dissenting in part).

advertiser. It is not uncommon to place the production burden on the party with access to the relevant information.²⁷⁹

Secondly, the substantiation program creates a presumption that unsubstantiated claims are not true. In the deceptive^s context the concern is with the likelihood that the claim is true. However, it may be possible to establish that where an advertiser does not possess the level of testing claimed it is likely that the claim is not true. The Commission presumes that, absent additional evidence from the advertiser, the claim is not true.²⁸⁰

The Commission must still meet the ultimate burden of proof on each issue. Once the advertiser has produced evidence of substantiation the Commission must demonstrate the degree to which consumers expect the claim to be true and demonstrate that the substantiation does not support that expectation.

The Commission may be expected to independently establish the level of substantiation needed for each claim in deceptive^p actions. Advertisers should only be required to demonstrate the level of support that they possess. The Commission still comports with the policy of placing the burden of proof on a moving party by demonstrating that it has some rational basis for the selection of advertisers from which the Commission requests information.

VI. POST CLAIM SUBSTANTIATION

Another issue raised with regard to the advertisement substantiation program is whether advertisers should be allowed to introduce post-claim evidence.²⁸¹ In situations where a claim was not substantiated at the time the advertisements were first disseminated, the seller may be able to produce substantiation for the claim when requested by the Commission. The stated policy of the Commission is that only substantiation developed at the time the claim was first disseminated is relevant.²⁸² Many advertisers complain that the

279. C. McCORMICK, *McCORMICK ON EVIDENCE* § 337, at 950 (E. Cleary 3d ed. 1984).

280. Courts have recognized similar presumptions. *See, e.g.*, W. PROSSER, *THE LAW OF TORTS* § 209 (4th ed. 1971). For example, courts were willing to presume that a statement is made with fraudulent intent when the claim is made without a sufficient basis. For references to deceit and misrepresentation cases and articles see *supra* note 135.

281. This issue is distinguished from the procedural issue involving the advertiser's substantiation at the time the advertiser disseminated the claim but, for one reason or another, did not submit it in a timely fashion to the Commission. *See* 16 C.F.R. § 3.4 (1984).

282. In *Pfizer, Inc.*, the Commission made it clear that for purposes of the ad substantiation requirement, it is essential that substantiation "be possessed [by the seller] before the claim is made." 81 F.T.C. 23, 64 (1972) (emphasis in original). *See* Reports, *supra* note 20 (Commission resolution requiring submission of substantiating materials developed "as they had in their possession prior to the time claims,

Commission's rules are too rigid and that it does not make sense to punish an advertiser who makes a true claim.

Advertisers have recommended three exceptions: implied claims, a demonstration of good faith by an advertiser, and a demonstration by the advertiser that the claim is true. The reason given for advocating consideration of post claim evidence when there are implied claims is that the advertiser at least has a reasonable argument that the claim was not actually made. In other words, at the time the seller disseminated the advertisement, the seller did not realize that a particular meaning was being inferred by the public and therefore did not develop substantiation for that meaning.²⁸³ Businesses have argued that the advertiser's "good faith" should be taken into account in determining whether post claim substantiation should be admitted. The basic argument is that where the advertiser made the claim in "good faith" nothing is to be gained by extracting a punishment if the advertiser can demonstrate a reasonable basis for the claim.²⁸⁴ When claims turn out to be true, it has been argued that it is a waste of Commission resources to prosecute advertisers who are not making deceptive statements.²⁸⁵

statements, or representations [were] made . . ."). Notwithstanding this rule, the Commission staff has considered this post claim evidence in deciding whether to recommend further proceedings against the advertiser. MEMORANDUM, *supra* note 61, at 29-30 n.57. One Administrative Law Judge has stated that post-complaint evidence proving the claims would bear on the public interest in the proceeding. *Litton Indus.*, 97 F.T.C. 1, 46 n.27 (1981). For reasons discussed in this section of this paper, that view would be incorrect. In *Porter & Dietsch*, the seller of appetite suppressants for weight control was denied the right to have an FDA report considered since it was prepared after the advertising presentation had been made. *Porter & Deitsch, Inc. v. FTC*, 605 F.2d 294, 302 n.6 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). Given the above analysis, the court was in error where the focus of the action was the truth or falsity of the advertising claims.

283. See MEMORANDUM, *supra* note 61, at 29; *Sears*, *supra* note 270, at 24 ("The post-claim results corroborating the pre-claim results confirm the reasonableness of the advertiser's reliance on the pre-claim results as well as confirm the truthfulness of the claim."); Ass'n of National Advertisers, Inc., Remarks in Response to the FTC's Request for Comments about the Advertising Substantiation Program 2 (June 22, 1983) (FTC's request is available in 48 Fed. Reg. 10471 [hereinafter cited as ANA] (recommending that where claim is not explicitly stated and is alleged by Commission to be implied substantiation developed at any time should be admissible to support the truthfulness of the claim)).

284. See *Sears*, *supra* note 106, at 23-24; *Consumers Union*, *supra* note 222, at 10 ("a flat no subsequent evidence rule where there was good faith could discourage [product evaluation]"). Timothy Muris, former Director of the Bureau of Consumer Protection, has also suggested that the Commission should distinguish between evidence developed before and evidence developed after a claim is challenged by the F.T.C. Because substantiation developed before the Commission challenged the claim is credible and is not developed to complicate Commission enforcement it should be considered. MEMORANDUM, *supra* note 61, at 30.

285. See MEMORANDUM, *supra* note 61, at 30.

Chairman Miller stated that there is "strong support for the idea that substantiation should exist before the claims are made," and the Commission has not adopted a special rule for implied claims but has outlined situations where the Commission will consider post claim substantiation. The four exceptions are when (1) evaluating the truth of the claim; (2) deciding whether there is public interest; (3) deciding the appropriate scope of the order; and (4) assessing the reasonableness of the prior substantiation.²⁸⁶

The issue of the acceptability of post claim substantiation should be analyzed separately for each of the two purposes of the advertising substantiation program identified in this article. For deceptive^s situations the purpose is penalizing advertisers who make untrue statements regarding the product itself. Advertisers should be allowed to prove that the statement is actually true; that the claimed likelihood that the product has particular benefits is true. However, for deceptive^p practices, the truth or falsity of the claim is not relevant. It is the practice of making claims without sufficient basis that is being punished. An advertiser who makes statements without knowing whether they are true or false is likely to make some false statements even if the particular statement for which he is being prosecuted turns out to be true. Pursuing unsubstantiated but true claims does not waste Commission resources because once the Commission has identified an advertiser who engages in deceptive^p conduct it is appropriate to proceed and capitalize on the investment in the investigation that brought the advertiser to the Commission's attention. Post claim substantiation should never be admissible in such cases.²⁸⁷ This is a more rational approach to the question of post claim substantiation. The Commission's four exceptions add nothing and may only serve to confuse matters.

Chairman Miller was correct in stating that it is analytically inconsistent to apply a different standard where implied claims are involved. The intent of the advertiser is not at issue in Section Five actions. The meaning of the claim is decided in the same way it would be in any other Section Five case. The advertiser must take the risk that an advertising claim will be interpreted in a variety of

286. DECEPTION STATEMENT, *supra* note 19, at 4-6.

287. The exceptions noted by the Commission are appropriate only as long as the issue of whether the advertiser had a reasonable basis at the time it made the claim is not forgotten. Interestingly enough, the one court which found making an unsubstantiated claim was a violation of the Lanham Act emphasized that substantiation had to be in the possession of the advertiser at the time the claim was made. See *Johnson & Johnson v. Quality Pure Mfg., Inc.*, 484 F. Supp. 975, 983 (D.N.J. 1979).

ways. The advertiser must have substantiation for all interpretations a substantial number of people are likely to make.²⁸⁸

VII. RULE OR ADJUDICATION

The setting of substantiation requirements may be conducted more appropriately by rulemaking as opposed to adjudication.²⁸⁹ Presumably a rulemaking proceeding is more appropriate when the Commission intends to require conduct that was not considered legally necessary until the enactment of the rule. An adjudicated order is more appropriate where the legal standard has already been established. The Administrative Procedure Act defines a rule as "an agency statement of general or partial applicability and future effect"²⁹⁰ and should be adopted by agency rulemaking procedures.²⁹¹ The Supreme Court has held that a rule within the meaning of the Administrative Procedure Act was invalid when promulgated within an adjudicatory context.²⁹² Yet the Court has given agencies considerable discretion in determining whether to proceed by rulemaking proceeding or by adjudication.²⁹³

288. A substantial number is that amount that raised it the statement to deception under § 5.

289. The original Federal Trade Commission Act did not expressly empower the agency to engage in rulemaking. Nevertheless courts recognized the agency's power to do so. See *National Petroleum Ref. Ass'n v. FTC*, 482 F.2d 672, 697-98 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). Congress explicitly granted the power in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183 (1974), codified 15 U.S.C. § 46(g) (1982).

As indicated, some Commission rules already have substantiation components. However these rules do not set forth specific substantiation requirements.

290. Administrative Procedure Act, 5 U.S.C. § 344 (1982).

291. Administrative Procedure Act, 5 U.S.C. § 553 (1982). For example, a dishonest claim is clearly a violation of the proscription of deceptive practices and therefore should be dealt with in an adjudicatory proceeding. But when the Commission wanted to require advertisers to include energy consumption information in advertising for certain electrical products, it was more appropriate to require those disclosures in a rule making proceeding. Adjudication is more appropriate where only one company is being pursued; rule making is more appropriate to change the conduct of an entire industry.

292. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). The Court upheld the reasoning of the First Circuit in *NLRB v. Wyman-Gordon*, 397 F.2d 394 (1st Cir. 1968), that a prior NLRB rule announced in an adjudicatory proceeding regarding the furnishing of employee lists was invalid. The First Circuit reasoned that it was not adopted by rulemaking proceedings, but because the NLRB had also ordered the company to supply lists in an adjudicatory context, its order could be upheld. An order to supply the lists was appropriate but a rule that lists should be furnished was not allowed. 394 U.S. at 766. *But see* *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 695 n.22 (3d Cir. 1983) (court notes that party did not allege that Commission abused its discretion by announcing substantial question test in an adjudicative rather than in rulemaking proceeding).

293. The Commission has announced rules prospectively in adjudicatory proceedings. *Pfizer, Inc.*, 81 F.T.C. 23 (1972). The Commission announced the

Rulemaking would not be as effective in the deceptive^s context because with deceptive^s conduct the advertising substantiation doctrine is only a vehicle for dealing with misleading statements regarding product claims. In the deceptive^p context rulemaking may be more appropriate because the Commission is often developing industry standards divorced from consideration of common industry practice. In deceptive^p cases the Commission could develop more coherent regulations for each industry by the use of a rulemaking proceeding. The Commission has developed cease and desist orders for individual companies based on the particular deceptive practice in which each company engaged.²⁹⁴ This has led to some confusion and inconsistency.²⁹⁵ Moreover, other products and companies have not been involved. A better procedure may be a rulemaking proceeding in which the true costs and benefits of particular standards could be explored on an industry wide basis. The Commission to a certain extent has attempted this cost benefit analysis for some industries and particular types of claims.²⁹⁶

Recently the Ninth Circuit reversed an Commission order on the grounds that the rule applied was inappropriate for a cease and desist proceeding and should have been announced as a rule.²⁹⁷ The Commission had held in the context of a cease and desist proceeding that it was a deceptive trade practice for an automobile dealer to fail to account to consumer debtors for surpluses generated from the foreclosure of repossessed cars. There, however, the court was dealing with conduct that was presumably generally accepted in the

reasonable basis standard, *id.* at 62, but did not find Pfizer liable. The Commission staff had argued that, for a product like Un-burn, a reasonable basis could only be met by controlled clinical tests. *Id.* at 73. The Commission refused to order a remand stating that "the significance of this particular case lies, therefore, not so much in the entry of a cease and desist order against this individual respondent, but in the resolution of the general issue of whether the failure to possess a reasonable basis for affirmative product claims constitutes an unfair practice. . . ." *Id.* at 73-74.

294. Advertising standards are now developing for over-the-counter drugs. See, e.g., *American Home Prod. Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1983); *Bristol-Myers Co.*, 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *Sterling Drug, Inc.*, 102 F.T.C. 395 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984), *Thompson Medical Co.*, 104 F.T.C. 648 (1984). Interestingly enough it was an over-the-counter drug, Un-Burn, which was involved in the first advertising substantiation case. *Pfizer, Inc.*, 81 F.T.C. 23 (1972). Surprisingly, in *Sterling Drug, Inc.*, 101 F.T.C. 375 (1983), the Commission modified an order dealing with claims of health benefits (the use of Lysol to prevent disease) without considering the body of Commission law in the area.

295. See, e.g., the court's difficulty in dealing with the Commission's substantial question doctrine discussed *supra* notes 237-38 and accompanying text.

296. See, e.g., *Rules for Using Energy Costs and Consumption Information Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act*, 16 C.F.R. § 305 (1986).

297. *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1982).

business and which was arguably consistent with the governing statute, the state's UCC.²⁹⁸ Even to the extent that the advertising substantiation requirement is seen as prohibiting only deceptive^p behavior, it still involves the prevention of the likelihood that deception occurs. It is unlikely that the business community would claim that the practice had been common prior to the Commission's decision.²⁹⁹

Although it was appropriate for the Commission to announce the new advertising substantiation doctrine in the course of an adjudicative proceeding, the Commission should consider whether it would be strategically better to enact rules that establish substantiation requirements for particular products or for particular types of claims.

There are some decided disadvantages in attempting to develop a rule under which to operate the advertising substantiation program. The Commission would have to define with specificity the standards for determining what constitutes sufficient substantiation.³⁰⁰ The Commission may not be able to accomplish that in a single rule that applies to all industries.³⁰¹ The Commission would have to develop an elaborate cost benefit analysis.³⁰² However, the economic costs and benefits would only be the beginning of the analysis. A political determination of the desirability of withstanding the cost would also be essential. Developing a rule might be a waste of funds since

298. See, F. MILLER & B. CLARK, CASES AND MATERIALS ON CONSUMER PROTECTION 422 (1980).

299. For the argument that it is not acceptable to use the practices of the industry involved to determine whether behavior is deceptive^p, see *supra* note 270 and accompanying text. The claims are from the business community in general and not just the particular industry of the advertiser whose advertisement is challenged.

In fact, many of the responses to the Commission's request for comments regarding the advertising substantiation program indicated that even before the announcement of the *Pfizer* doctrine they would not make claims without substantiation. See, e.g., Proctor & Gamble Co., Remarks in Response to the FTC's Request for Comments About the Advertising Substantiation Program I (July 14, 1983) (FTC's request available in 48 Fed. Reg. 10471) [hereinafter cited as Proctor & Gamble].

300. Rules must "define with specificity . . . unfair or deceptive acts or practices. . . ." 15 U.S.C. § 57a(1)(B) (1982).

301. See, e.g., *Katherine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 662 (2d Cir. 1979) (emphasizing specificity in rules). The *Gibbs* decision is discussed *supra* note 75, and accompanying text.

302. See EVOLUTION, *supra* note 20, at 36 n.84. The statement of basis and purpose that accompanies the rule must include "a statement as to the economic effect of the rule. . . ." 15 U.S.C. § 57a(d)(1)(C) (1982). Some rules must be accompanied by a "regulatory analysis" that contains an analysis of "the projected benefits and any adverse economic effects" of the rule. 15 U.S.C. § 57b-3(b)(1)(G) (1982). The contents of the regulatory analysis are not subject to judicial review. 15 U.S.C. § 57b-3(c)(1) (1982). Although not explicitly provided for by statute, presidential orders require cost benefit analysis by the Office of Management and Budget. See Executive Order 12498 (January 4, 1985), Executive Order 12291 (February 17, 1981).

there is now a developing body of case law dealing with the substantiation doctrine. A rule would not save the Commission a great deal of effort in enforcement since the Commission would still need to use the same procedures it now uses to detect violations. In addition, the agency might be abdicating to the courts its discretion to determine the advertisement's implied message and to evaluate the adequacy of the substantiation.³⁰³

An advantage of proceeding by rule is that civil penalties imposed when the practice is first detected might provide a greater deterrent than the cease and desist order which provides for penalties only when there is a violation.³⁰⁴ The FTCA does, however, permit the Commission to notify businesses not parties to the cease and desist proceeding of the nature of the cease and desist order. Persons with such notice may be liable for violating the order.³⁰⁵ However it is not clear if a general cease and desist substantiation order could be treated this way. Rather the order would have to be very specific. For example the order in Bristol Myers specified the types of claims and the required substantiation that could be made applicable to other over-the-counter analgesic manufacturers. There is no record of any Commission prosecution of violations of substantiation cease and desist orders under this provision.

303. When the Commission issues a cease and desist order it conducts an adjudicatory process to which courts grant great deference, whereas in the case of a rule violation the Commission brings the original complaint directly before the Court with no prior adjudication by the agency. See 15 U.S.C. § 45(m)(1)(A) (1982).

304. Civil penalties and restitution are available for the first violation of a rule. 15 U.S.C. § 57(a)(1)-(i) (1982). Generally no penalty accompanies a cease and desist order, 15 U.S.C. § 45(m)(1)(B) (1982), unless the Commission requires corrective advertising. See, e.g., Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). The advertiser is only subject to civil penalties if the advertiser violates a cease and desist order. 15 U.S.C. § 45(m)(1)(B) (1982). Those penalties may include restitution to consumers if it is an act or practice that a reasonable man would know is dishonest or fraudulent. 15 U.S.C. § 57b(a)(2) (1982). That section has not as yet been applied in an advertising substantiation context.

305. In 1975, the following provision was added to the FTCA. Pub. L. No., 88 Stat. 2183, 93-637 (1975):

If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action . . . against any person, partnership, or corporation which engages in such act or practice

(1) after such cease and desist order becomes final (*whether or not such person, partnership or corporation was subject to such cease and desist order*), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful. . . .

15 U.S.C. § 45(m)(1)(B) (1982) (emphasis added).

VII. INDUSTRY ROUNDS

There has been considerable debate over the appropriate way for the Commission to conduct investigations to determine the level of substantiation that advertisers have for particular claims. As indicated above³⁰⁶ soon after announcing its intention to require claim substantiation the Commission began conducting "industry rounds." These rounds involved sending requests for substantiation to all major sellers in a particular industry. In 1971, requests were sent to seven automobile manufacturers, twelve television set manufacturers, and eight dentrifice manufacturers.³⁰⁷

The industry rounds procedure underwent a number of changes since 1972. Early rounds focussed more on express claims in advertisements while in 1974 the Commission began to focus on claims implied in advertisements as well.³⁰⁸ The rounds consisted of summaries of advertisements run by the manufacturers with a series of claims which the Commission stated may be expressed or implied in the advertisement. The Commission then included the following demand:

With regard to each of these claims and without regard to whether you believe that the specified claims are contained in advertisements, state whether or not the Corporation had substantiation for each of the specified claims at the time of the initial and each subsequent dissemination of such advertising. For those claims which the Corporation maintains are substantiated, submit all documents, back-up data and any other materials that support, refute or otherwise relate to the claims. Your submission must include all substantiation, in any form upon which the claim is based and upon which the Corporation relied at the time of the dissemination of the advertising.³⁰⁹

The Commission began in 1973 to apply case selection criteria to the selection of industries and claims to investigate.³¹⁰ Another change was attempted in 1976. Rather than surveying advertisers in particular industries the Commission experimented with cross in-

306. See *supra* note 23 and accompanying text.

307. EVOLUTION, *supra* note 20, at Appendix A, pages 1-2.

308. See, e.g., Sears, *supra* note 270, at 7.

309. *Id.* at Exhibit B page 2.

310. Although a variety of criteria were explored, the following is representative of the considerations applied:

With regard to selecting products and industries the staff recommended that the Commission must

(a) focus on concentrated, oligopolistic controlled industries — dominated by a few companies;

Id. at 19.

dustry rounds in which the Commission would focus on types of claims. For example, the Commission questioned four manufacturers regarding the use of the results of preference polls in advertising³¹¹ and questioned seven advertisers regarding energy savings claims.³¹²

For reasons of budget and program emphasis no industry rounds have been conducted since 1977. The Commission has relied on a technique referred to as "informal demand letters." These letters are sent to specific advertisers in response to a review of their advertising and request substantiation of specific claims. Demand letters differ from Industry Rounds in that they do not have the force of compulsory process. If an advertiser refuses to respond to the letter, the Commission would then have to issue a Civil Investigative Demand in order to compel production of the information.³¹³

The Commission has announced that it is formally abandoning the use of industry rounds.³¹⁴ In announcing the changes in the program Chairman Miller indicated that most of the respondents to the request for comments suggested that the Commission abandon the use of industry wide rounds and concentrate on individual investigations. He concluded that the rounds were time consuming and not cost effective for advertisers as well as the Commission itself.³¹⁵

The Chairman correctly summarized the comments submitted to the Commission³¹⁶ but it is peculiar that he relied so heavily on the conclusion of *advertisers* that the industry rounds are not an appropriate procedure for the Commission.³¹⁷ The broad industry rounds do appear to have advantages that cannot be achieved by the informal demand letters. The sending of multi-firm detailed compulsory surveys seems to have a significant deterrent effect on advertisers.³¹⁸ The Commission staff has expressed the view that the

311. *Id.* at Appendix A, page 9. The advertisers were SCM Corporation, Standard Brands, Inc., Ford Motor Co., and Radio Corp. of America.

312. *Id.* This included four manufacturers (Carrier Corp., Eureka Co., Toshiba America Co., Tappan) and three advertising agencies (Young & Rubicam, Inc., N.W. Ayre, ABH International, Hakuhodo Advertising, Inc.).

313. *Id.* at 30. It is not clear whether refusal to comply with an informal demand letter would be grounds for the Commission to allege that the advertiser does not have substantiation for a claim.

314. SUSTANTIATION STATEMENT, *supra* note 19.

315. Miller, *supra* note 136, at 4.

316. ANA, *supra* note 283, at 2.

317. He refers to them as "commentators" (a word usually reserved for scholarly comments on the law) rather than industry respondents or commentators. *But see* Consumer Union, *supra* note 222, at 3 (also questions use of industry rounds).

318. The House Subcommittee on Commerce, Consumer and Monetary Affairs report on the activities of the Division of National Advertising, concluded that the

"failure to exhibit a strong enforcement presence in challenging ambiguous or unsubstantiated claims would weaken the impact of the program and encourage other advertisers to emulate the practices."³¹⁹

Neither a demand letter procedure nor a subpoena provide the Commission with the power to require specially prepared reports such as a "layperson report" which can aid the Commission or the general public.³²⁰ The industry rounds provide an excellent vehicle for the Commission to attack deceptive^P behavior.³²¹ Moreover, by requiring information of an entire industry or of advertisers which use similar advertising it is possible for the Commission to discover exactly where deception may be most prevalent. Rather than accept the argument that advertisers should use industry standards, the better approach might be to assume that it is in those industries where *all* advertisers use inadequate substantiation that the Commission's actions would be most profitable. Especially in reference to deceptive^P behavior, the one role the Commission can play is to gradually develop standards industry by industry.³²² There are particular industries in which deception is more likely to occur. It is in those industries where deception is more widespread that competitors may be less likely to attack the substantiation of other advertisers.³²³

In considering the costs and benefits of industry rounds it has been argued that the use of industry rounds may have significant costs. Chairman Miller stated that rounds were found to impose substantial costs beyond those associated with firm specific requests,

section 6(b) rounds had a beneficial deterrent effect. *EVOLUTION*, *supra* note 20, at 26 n.77.

319. *Id.* at 19.

320. Demand letters, despite their names, invite voluntary compliance. Subpoenas (or Civil Investigative Demands) can only be used to obtain documents already in the recipient's possession. Section 6(b), however, enables the Commission to require people to prepare reports. Section 6(b) is codified at 15 U.S.C. § 46(b) (1982), and is set out *supra* note 21.

321. The House Committee on Government Operations expressed the view that industry rounds had a strong deterrent effect and encouraged the Commission to revive the program. See *House Committee on Government Operations Federal Trade Commission Oversight—Rulemaking, Advertising, and Consumer Access*, H.R. Doc. 472, 95th Cong., 1st Sess. 21 (1977) [hereinafter cited as *Oversight*].

322. See *supra* text accompanying note 294.

323. In *Pfizer*, it is stated that one of the things they did was make sure they were not promising more than their opponents. 81 F.T.C. 23, 71 (1972). Only by rounds would we find that nobody in the industry has any proof for that particular claim. See *Consumers Union supra* note 222, at 3 (rounds should be used when the types of claims that are the subject of the inquiry are in widespread use).

without yielding corresponding benefits for law enforcement.³²⁴ However, not one of the advertisers who responded to the request for comments gave any indication of the costs involved in preparing industry round requests.³²⁵ This is peculiar since this is the sort of information that should be easily within their grasp. A logical conclusion is that the expense is minimal.

Another cost of the use of the industry round procedure is the extensive time it takes, both to prepare the surveys and to analyze the responses.³²⁶ The Commission began developing ways to prepare the requests in a more timely manner and it would seem that, with less necessity for clearance to circulate the letters,³²⁷ the Commission should be able to develop adequate requests early. The Commission might begin by requiring selected industries to submit advertising campaigns prior to their dissemination.

Advertisers also complain that Commission requests state that there are implied messages that the advertiser does not feel are contained in the ad. When the Commission requests substantiation the advertisers have no vehicle to contest the Commission's interpretation of the advertisement.³²⁸ However, to the extent that Commission policy with regard to determining when advertisements are deceptive and what interpretations of advertisements sellers are responsible for become clearer this should not be a problem.

It may be that as a vehicle for dealing with deceptive^s behavior, industry rounds are not necessary. The Commission could determine in advance where it believes advertisers are making claims of substantiation and can easily ask for the specific tests that relate to

324. Miller, *supra* note 136, at 4.

325. See, e.g., Sears, *supra* note 270, at 35 (acknowledges not having any "hard data" identifying the dollar cost of complying with Commission requirements). In a review of all of the industry submissions to the Commission this writer could find no estimates of the costs of complying with Commission requests. The closest is the following:

Since 1972, Proctor & Gamble has been involved in four industry substantiation sweeps dealing with 23 of our brands, and over 50 separate claims. As a result of these inquiries, we have submitted over 1000 pages of data and documents. The mere physical task of assembling this material consumed hundreds of hours and cost many thousands of dollars.

Proctor & Gamble, *supra* note 299, at 2. One reason companies may be reluctant to be specific regarding costs is that they often also state that they develop substantiation anyway. See, e.g., *Id.* at 1 ("[W]e have operated since the imposition of the 1972 'Pfizer doctrine' very much as we did before.").

326. EVOLUTION, *supra* note 20, at 31-32.

327. One way Congress could make the industry round process more efficient would be to eliminate the requirement that questionnaires be approved by the Officer of Management and Budget before they are circulated. See Paperwork Reduction Act of 1980, 44 U.S.C. § 3507 (1982).

328. Sears, *supra* note 270, at 14.

those claims. A demand letter would be sufficient for that purpose. But where we are dealing with deceptive^p behavior industry rounds may be a relatively inexpensive way of beginning the process of developing industry wide standards.

VIII. PUBLIC INSPECTION

A primary goal of the early ad substantiation program was that the public itself would be able to use the substantiation data in evaluating products and that sellers would police the advertising of competitors.³²⁹ In fact the then Chairman of the Commission hoped that, "As we increase the flow of relevant information, we may thereby increase the consumer's ability to make rational choices between competing products, and thereby diminish the necessity for formal commission action. . . ."³³⁰ For this reason an important aspect of the program when it was first announced by the Commission involved making the substantiating materials available for public inspection.

However, this aspect of the program never achieved its anticipated results. Commission records revealed that the substantiation material were infrequently inspected.³³¹ There is no indication that the available materials were used in a significant way.³³² In 1973 the Commission staff began thinking of the advertising substantiation program as an integral part of the Commission's law enforcement program. In other words substantiation should be viewed merely as one step in developing a case for litigation.³³³ The *coup de grace* was the Federal Trade Commission Improvements Act of 1980 which prevented the Commission from making any of the material public.³³⁴ The Commission has obviously accepted that verdict regarding the effectiveness of the "public education" aspect of the program since no mention of it has been made in recent statements by Commissioners or staff documents and no question regarding it appeared in the public comment notice of 1983. There are a variety of reasons for the apparent failure of this aspect of the program. Academic institutions, public interest organizations, and competitors did not analyze the documentation as the Commission had

329. See Reports, *supra* note 20.

330. Kirkpatrick, *Regulating in the Public Interest*, 26 FOOD DRUG COSM. L. J. 593, 597 (1971).

331. EVOLUTION, *supra* note 20, at 23.

332. For example, there is no evidence that the substantiating materials ever spawned a competitor or consumer suit.

333. See EVOLUTION, *supra* note 20, at 14.

334. See *supra* note 27 and accompanying text.

hoped.³³⁵ Partly this was the result of the fact that many respondents submitted vast quantities of highly technical material much of which was irrelevant.³³⁶ There also appears to have been a long time lag of at least a year between the date the advertising first appeared and the date the substantiation was available to the public.³³⁷ There was some concern that legitimate business interests in trade secrets might be endangered by the program. This was partly confirmed by the fact that competitors were the most frequent users of substantiating materials.³³⁸

The concept of requiring advertisers to make substantiation of advertising claims available to the public is not unique to the Commission's 1971 substantiation resolution. Commission cease and desist orders require substantiation materials be available to the public.³³⁹

Requiring disclosure of substantiation material is consistent with the goal of preventing deceptive^p behavior. The the extent that an advertiser knows substantiation will be scrutinized the advertiser would be more reluctant to make untrue claims. The degree of complexity of the material submitted should not be viewed as a fatal flaw in the program. It is probably unreasonable to suppose that substantiation materials will be examined by consumers themselves. Rather expert consumer intermediaries (such as the Consumers Union) would be the most likely inspectors.³⁴⁰ The Commission can require advertisers to prepare "lay summaries" or at least summaries which would make expert examination of the material submitted more fruitful.³⁴¹ Also competitors would have the expertise

335. See Comment, *supra* note 106, at 458 (citing GAO report that indicates that consumer groups expressed little interest in date).

336. "[T]he public education goal was largely frustrated because the substantiation submitted by the advertisers was too technical for the average consumer (or staff member) to evaluate." *EVOLUTION*, *supra* note 20, at 23. See also *Oversight*, *supra* note 321, at 21 (material submitted was too technical and scientific for consuming public). In proposing the Truth in Advertising Act, Senator Moss reported that some of the justification material submitted to the Commission was in foreign languages or in such volume as to make the pertinent facts impossible to find. 119 CONG. REC. 11527, 11528 (1973) (Statement of Sen. Moss).

337. *Oversight*, *supra* note 321, at 12.

338. See *EVOLUTION*, *supra* note 20. See *supra* note 9 for language added to protect trade secrets.

339. See, e.g., *Camp Chevrolet*, 84 F.T.C. 648 (1974) (consent order requiring making statistical tests or surveys of driving experience available to public).

340. This author attempted to discover the extent to which Consumers Union did or could use substantiation materials. While Consumers Union has used materials submitted to the Commission by advertisers, the organization did not know if the material had been submitted as part of the substantiation program. See Letter from Mark Silbergeld to Charles Shafer (May 22, 1985).

341. See *supra* note 21 and accompanying text. In the proposed Truth in Advertising Act, the term documentation itself was defined to include a layman's language summary

to examine substantiation materials. The fact that they have not done so seems unpersuasive. The program was in effect for less than 10 years before being completely abandoned. In fact, it appears that only recently have businesses begun litigating the falsity of competitors' claims.³⁴²

The trade secret problem also appears insubstantial. Trade secrets can only apply to the content or manufacturing process not to whether the product actually performs as promised. Where an advertiser claims trade secret protection it should be able to document the claimed effectiveness of the product. Therefore, the only problem that would arise is where a manufacturer claimed a novel ingredient (which is a trade secret) causes a result which is not susceptible to any kind of substantiation. In this limited case it would not be too burdensome to require a clear statement in the advertisement indicating proof of the claim cannot be documented.

Finally, the fact that advertisers appeared to be so uncooperative in supplying substantiation materials may be an indication that the attempt of the Commission to assemble materials for public inspection was a good idea and not a bad one. It may indicate that there are actually a significant number of advertising claims which cannot be substantiated and that advertisers do not want that information readily available for consumers. That may indicate substantial benefits are available which warrant reviving this aspect of the program and devoting some resources to properly policing it.

IX. CONCLUSION

The Federal Trade Commission under Chairman William Miller has emphasized the potentially negative effects of advertising regulation and has modified much of the regulation imposed by prior Commissions. It has done so by arguing that its policies are now more rational, empirically based and economically justified. However, careful analysis reveals that the formulations of words preferred by the current Commission are no more helpful in making rational policy decisions than those of the past. Without a standard that gives genuine guidance in evaluating empirical research, such research is of little use.

I have focused on one important aspect of the Commission's regulation of misleading advertising, the requirement that advertising

of all tests in support of all claims in the advertisement. S. 1512, 93d Cong., 1st Sess. (1973), § 3(d)(1)(A), 119 CONG. REC. 11,527-11,528 (1973).

342. Koten, *More Firms File Challenges to Rivals Comparative Ads*, Wall St. J., Jan. 12, 1984, at 27, col. 1. See also NBC, *supra* note 50, at 4.

claims be sufficiently substantiated. By considering the theoretical justifications for such a requirement this article has identified two essential foundations, the prevention of both "deceptive"^s and "deceptive"^p conduct. Since deception has primarily economic consequence, an economic standard produces guidance for the proper design and use of empirical research.

The economic standard must be tempered by a recognition that economic efficiency is only one legitimate value to be furthered by government regulation.³⁴³ Therefore the empirical research must also be designed to reveal the nature of the groups protected and formed by regulation. Regulators can then make political value choices without hiding behind the cloak of "reasonable" and "likely to mislead". I have outlined the various factors that must be isolated and considered and have demonstrated how they should be evaluated. I have shown how an analysis of deceptive^s and deceptive^p conduct must be different.

As a by product of my research I have discovered the paucity of evidence to support the constant claims that the advertising substantiation requirement has exorbitant costs. It appears that a truly rigorous empirically based policy would have led the Commission to continue rather than abandon the regulatory work of prior Commissions.

343. Richard Craswell has written a thoughtful article on deceptive advertising. Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. REV. 657 (1985). With regard to defining deception he concludes that a less mystical and more quantifiable definition is in order. He opts for the following: "An advertisement is legally deceptive if and only if it leaves some consumers holding a false belief about a product, and the ad could be cost-effectively changed to reduce the resulting injury." *Id.* at 678. He does not appear to recognize the need for the application of the other political values in the process of defining deception which I advocate.