

Michigan Law Review

Volume 70 | Issue 2

1971

Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Communications Law Commons](#), [Consumer Protection Law Commons](#), and the [Marketing Law Commons](#)

Recommended Citation

Michigan Law Review, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971).

Available at: <https://repository.law.umich.edu/mlr/vol70/iss2/5>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTES

CORRECTIVE ADVERTISING AND THE FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways

The makers of Wonder Bread have been advertising that their product "helps build strong bodies twelve ways" for as long as most people can remember. Commercial after commercial has shown representatives of the nation's youth springing to ninety per cent of their adult height, ostensibly under the product's remarkable influence. Small wonder then that Wonder Bread is today an American institution. Recently the Federal Trade Commission (FTC) dealt the product's devotees a crushing blow. The Commission charged that the bread is no more nutritious than any other bread made with enriched flour and that it contains only eight elements that could possibly help build bodies.¹

The normal procedure in deceptive advertising cases is for the Commission to order the wrongdoer to cease and desist making deceptive claims.² However, in the case of Wonder Bread,³ and more recently for several other products,⁴ the FTC has gone a step farther and proposed "corrective advertising." Corrective advertising is designed to inform consumers that previous advertising by the company was deceptive. In theory, corrective advertising expunges the effects left on the market place by deceptive advertising. In the case of Wonder Bread, these residual effects might take the form of continued consumer reliance on the bread's nutritional value and the company's continued profit from that reliance. If the FTC upholds the complaint, the company would be required to devote a portion of its future advertising to disclosing that it had made misleading nutritional claims. Wonder Bread might as a result become something less of an American institution.

1. Enriched flour has been available for 30 years, so its use in breads does not represent a significant nutritional advance. Complaint at 9, ITT Continental Baking Co. (FTC Docket No. 8860, 1971) [hereinafter Continental Baking Complaint]. The Commission alleges that the following amounts of Wonder Bread, depending upon sex and age, must be consumed daily by children in order to obtain the recommended dietary allowance of the nutrients that Wonder Bread does provide: calcium, 40 to 68 slices; iron, 18 to 33 slices; niacin, 13 to 27 slices; phosphorus, 24 to 40 slices; protein, 12 to 23 slices; riboflavin 12 to 25 slices; thiamine, 7 to 15 slices. Continental Baking Complaint, *supra* at 9.

2. The FTC's authority stems from § 5(a)-(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)-(b) (1970), which basically declares "unfair methods of competition" to be "unlawful," empowers the Commission to find "deceptive acts or practices" "unfair," and authorizes the FTC to issue cease-and-desist orders to stop the deceptive practices.

3. The Wonder Bread case involves more than just Wonder Bread. See text accompanying notes 18-20 *infra*; note 19 *infra*.

4. See, e.g., cases cited in notes 9, 10 & 17 *infra*.

This Note will outline the development and theory of corrective advertising. In particular, it will discuss the residual effects of deceptive advertising, which are the basis for a corrective remedy. The Commission's statutory authority to require corrective advertising will then be explored: the analysis will compare corrective advertising with other types of affirmative disclosure required by the Commission and relate it to the present use of divestiture as a trade regulation remedy. Finally, the possible public benefit accruing from corrective advertising will be considered, along with some thoughts on what policies the FTC should pursue in order to maximize that benefit.

I. RECENT DEVELOPMENT OF CORRECTIVE ADVERTISING

The concept of corrective advertising was first formally presented to the FTC by a group of law students. Rallying under the acronymic banner of SOUP (Students Opposing Unfair Practices, Inc.), students attempted to intervene in *Campbell Soup Co.*⁵ as representatives of what they saw as the public interest. The proceedings concerned Campbell's practice of adding marbles to its soups before showing them in television commercials. The effect of this ploy was to displace the solid ingredients and thereby give the products a deceptively rich appearance. SOUP contended that merely ordering an end to the deception would not provide sufficient protection of the public interest. They argued that consumers who had relied on the apparently bounteous nature of the soups should be informed by Campbell of the past deception.⁶ The Commission denied SOUP permission to intervene because corrective advertising, at least in the case at hand, was not worth pursuing.⁷ Campbell agreed to a simple cease-and-desist order.

Four months and one chairman later,⁸ a majority of the Commission on its own initiative endorsed the concept of corrective advertising. In two deceptive advertising cases, the Commission issued proposed complaints, which would require respondents not only to cease making allegedly deceptive claims, but also to devote twenty-five per cent of their advertising during the next year to correcting the consumer misunderstanding resulting from those claims. In *Standard Oil Co. of California*,⁹ the company was accused of overstating the antipollutant value of its gasoline additive, F-310. In *Coca-Cola*

5. [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 19,261 (FTC 1970).

6. [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 19,261, at 21,423.

7. [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 19,261, at 21,424.

8. On Sept. 15, 1970, Miles W. Kirkpatrick replaced Caspar W. Weinberger as FTC chairman. *Campbell Soup* had been decided May 25, 1970.

9. 3 CCH TRADE REG. REP. ¶ 19,352 (FTC 1970).

Co.,¹⁰ the company was cited for making deceptive nutritional claims for Hi-C fruit drink. Both companies would be required under the proposed orders to include in their corrective advertising a disclosure that the FTC had found their past advertising to contain false, misleading, and deceptive statements.¹¹

Shortly after the issuance of these proposed complaints, SOUP sought to intervene in an ongoing Commission action, *Firestone Tire & Rubber Co.*¹² At the time, hearings were beginning before a trial examiner on FTC charges that Firestone had indulged in deceptive advertising concerning the safety and prices of its tires. Armed with the *Standard Oil* and *Coca-Cola* complaints, SOUP argued that *Firestone* was another instance in which the public interest required corrective advertising. The Commission, stating that it wished to "clarify" its position in *Campbell Soup*,¹³ allowed intervention.¹⁴

In arguments before the FTC trial examiner,¹⁵ SOUP urged that Firestone be required to notify tire purchasers that safety claims previously made for the products could not be substantiated. The Association of National Advertisers, Inc., was also allowed to intervene for the purpose of presenting the case against corrective advertising. The trial examiner eventually concluded that Firestone had deceptively advertised the safety value of its tires but that a sufficient showing had not been made regarding the need for corrective advertising.¹⁶

Soon after the onset of *Firestone* hearings, the Commission began issuing other corrective advertising complaints, all aimed at major national advertisers.¹⁷ Of these, only *ITT Continental Baking Co.*¹⁸ has reached any resolution. In a significant development, that

10. 3 CCH TRADE REG. REP. ¶ 19,351 (FTC 1970).

11. *Coca-Cola Co.*, 3 CCH TRADE REG. REP. ¶ 19,351, at 21,484 (FTC 1970); *Standard Oil Co. of California*, 3 CCH TRADE REG. REP. ¶ 19,352, at 21,485 (FTC 1970).

12. 3 CCH TRADE REG. REP. ¶ 19,373 (FTC 1970).

13. 3 CCH TRADE REG. REP. ¶ 19,373, at 21,501.

14. 3 CCH TRADE REG. REP. ¶ 19,373, at 21,502. This was the first time the FTC allowed intervention by a public interest group. Of late such intervention is occurring at all levels of government and is a phenomenon worthy of study in its own right.

15. *Firestone Tire & Rubber Co.*, 3 CCH TRADE REG. REP. ¶ 19,773 (FTC 1971).

16. 3 CCH TRADE REG. REP. ¶ 19,773, at 21,814-15.

17. *E.g.*, *American Home Prods. Corp.*, 3 CCH TRADE REG. REP. ¶ 19,673 (FTC 1971) (alleged deceptive advertising of Easy-Off Window Cleaner, Easy-On Speed Starch, Aerowar Floor Wax, and Black Flag Ant and Roach Killer); *Amstar Corp.*, 3 CCH TRADE REG. REP. ¶ 19,696 (FTC 1971) (alleged deceptive advertising through false nutritional claims for Domino and Spreckels sugar); *Ocean Spray Cranberries, Inc.*, 3 CCH TRADE REG. REP. ¶ 19,477 (FTC 1971) (alleged false description of cranberry beverage as a juice and false description of the beverage's nutrient content); *Warner-Lambert Pharmaceutical Co.*, 3 CCH TRADE REG. REP. ¶ 19,838 (FTC 1971) (alleged deceptive advertising of Listerine "as a cure, preventative and treatment for colds and sore throats").

18. 3 CCH TRADE REG. REP. ¶ 19,539 (FTC 1971).

company signed a consent order in which it agreed to devote "not less than 25 per cent of the expenditures (excluding production costs) for each media in each market . . . to advertising in a manner approved by the authorized representatives of the Federal Trade Commission that Profile [Bread] is not effective for weight reduction, contrary to possible interpretations of prior advertising."¹⁹ The Profile settlement agreement made no provision for a disclosure in the advertisements that the company had been found by the FTC to have advertised deceptively. In September 1971 Continental Baking aired its first corrective advertisement for Profile, with no such disclosure.²⁰

II. THE RESIDUAL EFFECTS

In each of the corrective advertising cases that await adjudication, the Commission's case will be predicated on a showing that not only were the respondent's advertising campaigns deceptive,²¹ but also that the deception produced residual effects on the market place.²² These residual effects may be manifested through continued reliance

19. ITT Continental Baking Co., Decision and Order (FTC Docket No. 2-2015, Aug. 17, 1971). Provisional acceptance of the order was reported in ITT Continental Baking Co., 3 CCH TRADE REG. REP. ¶ 19,681 (FTC 1971). The remainder of the complaint against Continental alleging deceptive nutritional claims for Wonder Bread and Hostess Snacks, along with the other corrective advertising complaints, is yet to be adjudicated.

20. The text of the advertisement reads as follows:

Hi, (Celebrity's Name), for Profile Bread. Like all mothers, I'm concerned about nutrition and balanced meals. So, I'd like to clear up any misunderstanding you may have about Profile Bread from its advertising or even its name.

Does Profile have fewer calories than other breads? No. Profile has about the same per ounce as other breads. To be exact, Profile has seven fewer calories per slice. That's because Profile is sliced thinner. But eating Profile will not cause you to lose weight. A reduction of 7 calories is insignificant. It's total calories and balanced nutrition that count. And Profile can help you achieve a balanced meal because it provides protein and B vitamins as well as other nutrients.

How does my family feel about Profile? Well—my husband likes Profile toast; the children love Profile sandwiches and I prefer Profile to any other bread. So you see, at our house, delicious taste makes Profile a family affair.

Text of television advertisement, a copy of which is on file with the *Michigan Law Review*. The reader can judge for himself the extent to which such an advertisement will be effective in dispelling the effects of past claims.

21. It is by no means a foregone conclusion that the claims made in some of these advertising campaigns will be found deceptive. For example, Standard Oil of California seems to be prepared to argue vigorously for the merits of F-310. See their two-page response to the Commission's charges in *Wall St. J.*, Oct. 7, 1970, at 20-21 (Midwest ed.).

22. Two FTC complaints provide that if it is shown that the ban on deceptive practices "is inadequate fully to protect the public or the firms' competitors," then the FTC may require corrective advertising providing a disclosure that past practices were false or deceptive. American Home Prods. Corp., 3 CCH TRADE REG. REP. ¶ 19,673, at 21,721 (FTC 1971); Amstar Corp., 3 CCH TRADE REG. REP. ¶ 19,696, at 21,742 (FTC 1971). However, one complaint does not specify that disclosure would be required only if the ban on deception is "inadequate," the implication being that no proof of residual market effect is necessary as a basis for requiring disclosure. Warner-Lambert Pharmaceutical Co., 3 CCH TRADE REG. REP. ¶ 19,838, at 21,860 (FTC 1971).

by consumers on false information supplied by deceptive advertising or through a lasting economic advantage gained by the wrongdoer over his competitors as a result of a successful deceptive campaign.²³

SOUP's task in the *Firestone* hearing²⁴ was to demonstrate the existence of residual effects from the deceptive tire advertisements. Its arguments and evidence were directed primarily toward establishing proof of continued consumer reliance. Little attention was given to demonstrating any resulting shift in Firestone's share of the tire market. SOUP produced as an expert witness Doctor Darrell B. Lucas, a licensed psychologist and marketing expert. Doctor Lucas testified that since regular advertising reaches the prospective consumer at a time and place not appropriate for making a purchase or response, to be effective it must leave some impression upon his memory until there is occasion to buy.²⁵ This retention could be either conscious or subconscious.²⁶ However, Doctor Lucas did not feel that he could predict for any particular advertising campaign, like that of Firestone, how long memory will persist for a given performance claim.²⁷ The other intervener in the case, the Association of National Advertisers, produced a battery of experts to counter Doctor Lucas' testimony. They expressed doubt whether anyone could demonstrate that a particular representation of the performance or character of a product or service will, in fact, persist "for a given or substantial time" after use of the advertisement has been terminated.²⁸

SOUP's other expert, Doctor Douglas F. Greer, an economist, was willing to be more specific. Doctor Greer testified that advertis-

23. Of course, these two manifestations are intimately related. Consumer reliance results in retained market share through two mechanisms: (1) consumers remember and continue to rely on a deceptive claim in their buying, and (2) consumers switch to the product because of the deceptive claim and habitually buy it, even though they have since forgotten the claim that caused them to switch in the first place.

24. *Firestone Tire & Rubber Co.*, 3 CCH TRADE REG. REP. ¶ 19,673 (FTC Docket No. 8818, 1971) (excerpt of initial hearing examiner's decision).

25. Transcript at 412, *Firestone Tire & Rubber Co.*, 3 CCH TRADE REG. REP. ¶ 19,673 (FTC Docket No. 8818, 1971) [hereinafter *Firestone Transcript*].

26. *Firestone Transcript*, *supra* note 25, at 417-19. The subconscious form can manifest itself, Dr. Lucas testified, in what is known as the "sleeper effect." This means that an individual can receive impressions from a source that he does not credit as being particularly important (and advertising is often in that category). These impressions may carry over even though they are not accepted fully at the time they are made; at some later date, when the individual has forgotten the source of an impression, he may assume that it was told to him by a more important source.

27. *Firestone Transcript*, *supra* note 25, at 531-32.

28. See Initial Decision, *Firestone Tire & Rubber Co.*, FTC Docket No. 8818, at 25-30 (Aug. 17, 1971). There were those in the advertising industry who questioned whether this argument against corrective advertising was not "terrifically short sighted and self defeating" on the grounds it would make it easier for advertising's critics to say that even advertisers do not have much faith in its long-term effectiveness. Editorial, *Advertising Age*, March 29, 1971, at 12, col. 2.

ing outlays should be viewed as a form of capital investment that depreciates over time.²⁹ He put forward an econometric model that purported to measure the dollar value of the benefit that is derived in future years from a given expenditure on advertising.³⁰ Doctor Greer believed that the Firestone advertising was of the sort that would provide such future value. However, it was not possible for him, with the information and techniques at hand, to measure quantitatively the effect of a particular advertising claim on the sales of a specific line of tires.³¹

Both of SOUP's experts were thus faced on cross-examination with a demand for greater specificity to which they were largely unable to respond. Attempts by expert witnesses to demonstrate the psychological effects of advertising are handicapped by the unsettled nature of the disciplines from which their theories are drawn. Much of the testimony they do offer will meet with skepticism from those in the legal profession who are wary of such social science testimony, on the grounds that it is difficult to substantiate and subject to change.³²

Although the FTC will no doubt make some use of similar expert testimony in the various corrective advertising cases, its main argument might be expected to involve the other manifestation of residual effects—shift in market share.³³ Theories in this area may

29. Firestone Transcript, *supra* note 25, at 576.

30. For example, if Dr. Greer's model yielded a depreciation coefficient of .45, an advertising campaign on which 20 million dollars was spent during 1968 would provide future value to the advertiser approximately as follows:

Year	Per cent Retained	Value Retained
1969	45	\$9,000,000
1970	22	\$4,450,000
1971	10	\$2,000,000
1972	4	\$ 900,000

Adapted from SOUP Exhibit No. 4, Firestone Tire & Rubber Co., 3 CCH TRADE REG. REP. ¶ 19,673 (FTC 1971).

31. Firestone Transcript, *supra* note 25, at 607.

32. See Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) ("[S]ince the behavioral sciences are so very young, imprecise, and changeful, their findings have an uncertain expectancy of life. Today's sanguine asseveration may be cancelled by tomorrow's new revelation—or new technical fad.").

33. A recent development might force the Commission to argue *Coca-Cola* (see text accompanying note 10 *supra*) exclusively on a gain-in-market-share basis. Since the original complaint, Coca-Cola greatly added to the vitamin C content in Hi-C. Now, the label announces, a six-ounce serving of NEW Hi-C contains 333% of the minimum daily adult requirement for the vitamin. The company seems to be preparing to argue that past nutritional claims are no longer the source of false reliance because the product now contains so much of the vitamin that no one is being deceived. The response from the Commission would have to be that the company should not be allowed to retain a market share which is the product of years of illegal conduct. However, there could be some question, now that the product is so enriched, whether corrective advertising would ever be successful in divesting Coca-Cola of its ill-gotten market share.

well prove more easily demonstrable. National advertisers carefully study the effects of their major campaigns.³⁴ The FTC staff, with its broad investigatory powers,³⁵ can obtain the results of such studies and presumably has the economic expertise to evaluate them. Relying heavily on respondents' own research data, the Commission might attempt to demonstrate that a given increase in market share is attributable to the deceptive campaign in question. The more difficult problem might be to demonstrate that it was the deceptive *aspect* of the advertising that caused the increased sales. The argument will no doubt be made that any expenditure of millions of dollars on a promotional campaign, regardless of its content, will result in an increased share of the market. To counter this contention, the Commission may again draw on material in respondents' own files consisting of reports and opinion surveys aimed at determining what aspect of a given promotional campaign was most effective in shifting market share.

With the use of these techniques, the Commission should be able to demonstrate the existence of residual effects. Its burden of proof on this point is not likely to be a heavy one. The determination of the existence of residual effects is clearly one of fact, and pursuant to the standard for judicial review enunciated in section 5(c) of the Federal Trade Commission Act, any such determination by the FTC, if supported by evidence, is conclusive.³⁶ It is even conceivable that in reviewing Commission corrective advertising cases, the courts will allow a presumption of residual effects, based only on a demonstration that the advertising in question was deceptive. Analogous presumptions can be found in other deceptive advertising cases. It has been held that the Commission need not show that persons were actually deceived by a deceptive campaign, but only that there be the "likelihood of deception"³⁷ or "the capacity to deceive."³⁸ Simi-

34. According to the FTC, surveys commissioned by ITT Continental Baking showed that certain of its television commercials for Wonder Bread generated a significant increase in the number of consumers who rated Wonder Bread excellent or very good as compared with other breads in terms of the quality of nutrition and the value of the use of the bread by children. Continental Baking Complaint, *supra* note 1, at 14.

35. Section 6(a) of the Federal Trade Commission Act, 15 U.S.C. § 46(a) (1970), gives the FTC power

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

The FTC has already subpoenaed market-share data from Coca-Cola. The examiner denied the company's motion to quash the *subpoena duces tecum*. 3 CCH TRADE REG. REP. ¶ 19,750 (FTC 1971).

36. 15 U.S.C. § 45(c) (1970).

37. *Montgomery Ward & Co. v. FTC*, 379 F.2d 660, 670 (7th Cir. 1967).

38. *Charles of the Ritz Dist. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944).

larly, once the Commission has established that a deceptive statement has been made, it can infer that trade was diverted from competitors who did not engage in unfair methods.³⁹ Demonstration of residual effects thus should not prove to be a major obstacle.

III. CORRECTIVE ADVERTISING AS A FORM OF AFFIRMATIVE DISCLOSURE

In denying intervention to SOUP in *Campbell Soup*, the Commission indicated that any residual effects that might be present were not significant enough to justify the effort it would take to dispel them.⁴⁰ The Commission did not preclude corrective advertising requirements in future cases, given a sufficient finding of fact. Chairman Weinberger, writing for the majority, indicated a belief that corrective advertising was consistent with the Commission's long-standing practice of requiring affirmative disclosures:

[P]etitioner [SOUP] argues at length that the Commission has the power to require respondent to make affirmative disclosure in future advertisements of the deceptive practices discovered by the Commission in order to alert the public to these practices. We have no doubt as to the Commission's power to require such affirmative disclosures when such disclosures are reasonably related to the deception found and are required in order to dissipate the effects of that deception.⁴¹

To be sure, corrective advertising is a form of affirmative disclosure to the extent that it requires respondents to disclose certain information in their advertising. Much of the logic that has buttressed traditional affirmative disclosure orders supports the propriety of corrective advertising as well.

Federal Trade Commission orders of affirmative conduct, as con-

39. *FTC v. Raladam Co.*, 316 U.S. 149, 152 (1942).

40. *Campbell Soup Co.*, [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 19,261, at 21,424 (FTC 1970).

41. [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 19,261, at 21,423. The Chairman's statement referred to two recent decisions concerning affirmative disclosure, *All-State Indus., Inc. v. FTC*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970), and *Portwood v. FTC*, 418 F.2d 419 (10th Cir. 1969). In *All-State*, the respondent was an aluminum-siding and storm-window company found to have engaged in bait and switch techniques. The court upheld a Commission order that all future customers be informed, by a statement handed to them at point of sale, that any instrument of indebtedness signed by them could be assigned without notice to a third party against whom the purchaser's claims or defenses might not be available. In *Portwood*, the court upheld an FTC order requiring a mail order philatelic business to disclose in its future dealings that the recipient of unsolicited merchandise is not required to pay for it. The disclosure settled upon concerning Profile Bread in *ITT Continental Baking* (see text accompanying notes 18-20 *supra*) bears a strong resemblance to these disclosures. Corrective advertising, which would require acknowledgment that the respondent had advertised in a false and deceptive manner in the past, carries affirmative disclosure a step further.

trusted with mere prohibitions of further illegal conduct, have been the object of heightened judicial scrutiny.⁴² The leading case limiting affirmative disclosure is *Alberty v. FTC*.⁴³ In that case the United States Court of Appeals for the District of Columbia ruled that the Commission acted improperly when it required an affirmative disclosure in the advertising of iron tonic. The court objected to a required statement that "the condition of lassitude [sought to be alleviated by the product] is caused less frequently by simple iron deficiency anemia than by other causes, and . . . in such cases, this preparation will not be effective in relieving it or correcting it."⁴⁴ The court maintained that Congress had not given power to the Commission "generally to do whatever is considered by it to be good and beneficial."⁴⁵ In an unenlightening fashion the court specified the two situations in which an affirmative statement could be required: when "failure to make such statement is misleading because of the consequences from the use of the product," and when "failure to make such statement is misleading because of the things claimed in the advertisement."⁴⁶

Alberty, although never actually overruled, has not proved to be an impediment to the development of affirmative disclosure.⁴⁷ During the years following *Alberty*, the Commission, cautiously at first,⁴⁸ tacked affirmative disclosure requirements onto its cease-and-desist orders in a wide variety of situations. Perhaps because of what was perceived as the ever-present specter of *Alberty* being revived, the development of affirmative disclosure was incremental and pragmatic. As a result, the Commission and the courts have not articulated any general principles to determine when affirmative disclosure should be required. It is, however, possible to isolate four types of situations in which affirmative disclosure has been invoked: (1) protection of consumer preferences, (2) regulation of future conduct,

42. This scrutiny stems from the fact that the Commission's statutory authority is essentially negative, *i.e.*, the power to issue a cease-and-desist order. See Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b) (1970). The Commission nevertheless has not been averse to requiring affirmative conduct; it simply expresses the requirement in the negative. In the case of corrective advertising, one is enjoined from further advertising that does not contain a stipulated amount of corrective content.

43. 182 F.2d 36 (D.C. Cir. 1950).

44. 182 F.2d at 39.

45. 182 F.2d at 38.

46. 182 F.2d at 39.

47. See *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (*Albany*-type disclosure upheld against makers of Geritol); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960); *Ward Labs., Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960); *Lemke, Souped Up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 U. MICH. J. LAW REF. 180, 184 (1970).

48. See Sweeny, *False Advertising of Food, Drugs and Cosmetics*, 12 FOOD DRUG COSM. L.J. 606, 608 (1957).

(3) danger warnings, and (4) counteraction of widely held false beliefs. While this classification is overlapping and is admittedly not the only one possible, it does furnish a framework for studying how the various arguments for affirmative disclosure might be expanded to include corrective advertising.

Consumers have certain preferences in their purchases of goods. Whether or not such preferences can be rationally justified, the FTC has found that failure to disclose facts material to those preferences can be an unfair trade practice. The Commission has determined, for example, that purchasers of goose feathers prefer them new, rather than secondhand, so the latter must be labeled.⁴⁹ Similarly, finding that car owners prefer virgin crude motor oil, the Commission decided that "rerefined" oil, although chemically identical to the virgin form, must be identified.⁵⁰

Popular preferences have been divined that have little to do with the product itself but relate instead to the identity of the manufacturer, as in *L. Heller & Son v. FTC*.⁵¹ In that case the court determined that Americans have a general preference for products produced in the United States and that failure to indicate that imitation pearls were imported from the Orient was an unfair trade practice.⁵² In 1967, the Commission seemed to extend the principle of recognized consumer preferences when it issued a complaint against a group of Virginia real estate management firms.⁵³ The FTC charged that it was an unfair trade practice to fail to disclose in advertisements for apartments that the units were not available to black applicants.⁵⁴ Ostensibly, this was based on the notion that the racial policies of the management are material to potential tenants in their choice of housing.

These later cases raise the question whether the FTC is acting primarily to protect consumer preferences or whether it is actually seeking to create or encourage preferences for certain commodities

49. *Purofied Down Prods. Corp.*, 48 F.T.C. 155 (1951).

50. *Kerran v. FTC*, 265 F.2d 246 (10th Cir.), *cert. denied*, 361 U.S. 818 (1959). It could be questioned whether it is a proper allocation of Commission resources to protect this sort of irrational consumer preference. In fact, there might be a public policy favoring the use of recycled motor oil that such disclosures retard. However, there is a competing public policy that favors as much information in the hands of consumers as possible. The required labeling of rerefined oil might result in a dialogue on the relative merits of the products and, in the end, a greater degree of rationality in the market place.

51. 191 F.2d 954 (7th Cir. 1951).

52. 191 F.2d at 955.

53. *First Buckingham Community, Inc.*, [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 18,122 (FTC 1967).

54. The respondents had advertised that rentals were without restrictions as to race, color, or national origin. The complaint was subsequently dismissed when the respondents changed their rental policies. *First Buckingham Community, Inc.*, [1967-1970 Transfer Binder] CCH TRADE REG. REP. ¶ 18,357 (FTC 1968).

or services in an attempt to further broad public policies. It is difficult to view *Heller* as anything but a Commission attempt at protectionism. The discriminatory rental case also suggests an attempt to further a particular social policy through consumer choice in the market place.

Corrective advertising is itself a manifestation of a public policy favoring truthful advertising.⁵⁵ This policy might properly be promoted through the popular preference construct. In this age of heightened "consumerism," there is often a preference among buyers for the products of those who advertise truthfully.⁵⁶ The fact that a seller has been found by the Federal Trade Commission to have advertised in a deceptive manner is material to that preference. A number of American mothers, for example, might be interested in knowing that Wonder Bread does not help build their childrens' bodies twelve ways after all.⁵⁷ To the extent that opponents of corrective advertising complain of the overly damaging effects of such disclosures, they establish the existence of a consumer preference for the products of fair dealers.

Affirmative disclosure is also justified when the Commission finds that only through such disclosure can the conduct of repeated offenders be effectively regulated. This idea was most recently recognized in *All-State Industries, Inc. v. FTC*⁵⁸ and *Portwood v. FTC*.⁵⁹ A similar use might be envisioned for corrective advertising. Some businesses with past records of unfair dealing may be too small to justify rigorous FTC surveillance. In such instances, corrective advertising might be used to warn consumers so that these small operators would find it more difficult to resurrect quietly their deceptive methods.⁶⁰ In two recent cases, the Commission required

55. See *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1010 (1967).

56. Cf. *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1313 (D.C. Cir. 1968). Industry apparently believes that there is also a consumer preference for the products of manufacturers who do not foul the environment. However, much of the environmental advertising is misleading and some of it is "blatantly false." Some recent examples are the following: (1) a Southern California Edison Company advertisement depicting as a contented resident of power-plant waste a lobster said to have come from nowhere near the power plant; (2) a Standard Oil of California advertisement representing the Palm Springs Courthouse as a company research center; and (3) an advertisement stating that "Texaco prohibits the discharge of oil into the sea anywhere in the world," although a Texaco refinery spilled 200,000 gallons of diesel oil into Puget Sound in April of 1971. See N.Y. Times, Nov. 5, 1971, at 59, col. 5. Senator Spong has introduced a bill that calls for criminal penalties for deceptive advertising about products and services purporting to control air and water pollution. S. 927, 92d Cong. 1st Sess. (1971). Corrective advertising would seem to be an excellent means of handling the problem.

57. See note 1 *supra* and accompanying text.

58. 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970), discussed in note 41 *supra*.

59. 418 F.2d 419 (10th Cir. 1969), discussed in note 41 *supra*.

60. The case of the small operator presents, however, special problems for cor-

respondents to disclose past FTC findings, seemingly in an attempt to block future illegal conduct. In *Nelson James, Inc.*,⁶¹ respondents were required for the next ten years to disclose to any prospective investors in their business dealings that they had left an aggregate of \$277,768 in unpaid debts as a result of past operations.⁶² In *Robert W. Ricklefs*,⁶³ a piano retailer signed a consent order containing a provision that for one year after its effective date the firm would furnish a copy of the FTC's News Release with the order's terms to each newspaper or other medium used to promote sales.⁶⁴

Corrective advertising might likewise be invoked when firms of any size have demonstrated such a propensity for unfair dealing that consumers can be adequately protected only if they are regularly reminded that they are dealing with a firm that has engaged in massive deception in the past. For example, the FTC had issued cease-and-desist orders against Firestone's previous deceptive campaigns in 1941⁶⁵ and again in 1959.⁶⁶ It is maintained that simple cease-and-desist orders are ineffective when used against certain hard-core offenders. Such firms react by merely developing a new form of deception, which will take the FTC several more years to stop.⁶⁷ Corrective advertising, with its attendant negative publicity, is the only way to make such behavior unprofitable, given the present powers of the Federal Trade Commission.⁶⁸ In framing a remedy on the basis of past conduct, the Commission must exercise some care. The line between deterring future misconduct and punishing past acts is often a thin one and punishment is clearly beyond the ambit of FTC authority.⁶⁹

rective advertising. The existence of residual effects on the market place would be difficult to prove, while for over-all policy reasons the Commission might wish to confine corrective advertising to major campaigns by major businesses.

61. 3 CCH TRADE REG. REP. ¶ 19,629 (FTC 1971) (consent order).

62. 3 CCH TRADE REG. REP. ¶ 19,629, at 21,680.

63. 3 CCH TRADE REG. REP. ¶ 19,632 (FTC 1971) (FTC complaint and proposed order).

64. 3 CCH TRADE REG. REP. ¶ 19,764 (FTC 1971) (consent order).

65. Firestone Tire & Rubber Co., 33 F.T.C. 282 (1941).

66. Firestone Tire & Rubber Co., 55 F.T.C. 1909 (1959).

67. For example, the FTC spent over a decade attempting to force a correction in the advertising of Geritol. See ABA COMM. TO STUDY THE FTC, REPORT 43 (1969) [hereinafter ABA REPORT].

68. Currently a firm engaged in an unfair or deceptive practice may continue to do so until a FTC cease-and-desist order has become final. The time elapsing between the initiation of a Commission investigation and a denial of certiorari is likely to be at least two years. Suggestions have frequently been made that the Commission be given power to seek preliminary injunctions in the federal district court to ban the alleged deceptive practice, pending final adjudication. See ABA REPORT, *supra* note 67, at 62.

69. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). One author, in a somewhat cavalier fashion, brands the corrective advertising proposed in *Standard Oil* (see text accompanying notes 9-11 *supra*) as basically "punitive" since the order was "so excessive that punishment rather than information appears to be the goal of the

Affirmative disclosure has also been required when the Commission finds that consumers should be warned of potential bodily harm from use of a product. Warnings have been placed on everything from potentially dangerous drugs to ill-designed toys.⁷⁰ Prominent of late were the FTC-required warnings on cigarette packages.⁷¹ In considering a warning required by the Commission on a medicinal preparation, the Court of Appeals for the Seventh Circuit commented:

If the Commission, having discretion to deal with these matters, thinks it is 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 therein," it is not for the courts to revise its judgment.⁷²

If it does, in fact, fall so clearly within the Commission's province to decide when potential customers should be warned of the dangers in the use of products, there is little reason for not extending these warnings to prior purchasers who continue to rely on false safety and nutritional claims.⁷³ So that he can readjust his driving accordingly, the owner of a set of Firestone tires, for example, should be told that his car might not stop twenty-five per cent faster.⁷⁴ It is likewise not inconceivable that one's health might be impaired by literal reliance on a deceptive nutritional claim when such reliance

Commission." Lemke, *supra* note 47, at 192. He fails, however, to explicate his basis for concluding that the demands of corrective advertising were excessive. Moreover, any attempt to determine the Commission's "real intent" is nothing short of leaping into a metaphysical quagmire. One is reminded of the efforts of the Supreme Court during the 1930's to classify legislation as primarily "fiscal" or primarily "penal." See Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 759 (1934).

70. See the summary of FTC rulings in 2 CCH TRADE REG. REP. ¶ 7,549.

71. The FTC rules concerning cigarettes had a stormy history. All such rules were superseded when Congress enacted the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965), as amended, 15 U.S.C. §§ 1331-40 (1970).

72. Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

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

74. In *Firestone*, SOUP claimed that, based on the company's own survey data, 15,000 to 30,000 persons who purchased Firestone tires in 1968 would react to the deceptive advertising by driving differently than if they had tires of another manufacturer. Brief for Intervenor SOUP at 35-36, *Firestone Tire & Rubber Co.*, 3 CCH TRADE REG. REP. ¶ 19,673 (FTC 1971). SOUP also produced as an expert witness Harvey L.P. Resnick, M.D., chief of the Center for Suicide Prevention of the National Institute of Mental Health. He testified on the basis of his clinical experience that an undetermined, but small, proportion of the car-driving population may be classified as high-risk takers, who tend to use equipment up to and beyond its safety limits. *Firestone Transcript*, *supra* note 25, at 838-39. In his opinion, those high-risk takers who believed the advertising that the tires would stop 25% quicker could be expected to drive less carefully. In addition, he maintained there are a number of average-risk takers who would believe the 25% quicker claim and therefore could be expected to drive less carefully. *Firestone Transcript*, *supra* note 25, at 836-37.

takes the form of continued consumption of a product to the exclusion of more nutritional foods.⁷⁵

The only distinction between the traditional warning case and one like *Firestone* is that in the former the risk of harm is inherent in the product, while in the latter the risk was created by the seller's deception. Just as the manufacturer of a product has a duty to make it as safe as is reasonably possible,⁷⁶ one who creates a potentially dangerous situation through deceptive advertising should have a duty to take all reasonable steps to eliminate that risk.

There are occasions when a potential for misunderstanding or deception does not stem directly from assertions made by the seller but is the unavoidable result of an erroneous belief held by a significant number of consumers. In some instances, whether or not this belief was consciously fostered by the seller, affirmative disclosure may be required to free the situation of deception. This includes a broad range of affirmative disclosure cases. For example, the makers of Geritol claimed only that their product was a cure for iron deficiency anemia. Although this was true, the company was required to disclose in its advertising that iron deficiency anemia accounts for only a small fraction of the symptoms of chronic lassitude.⁷⁷

For sixty years, the Royal Baking Powder Company manufactured a product containing cream of tartar and advertised widely its superiority to phosphate baking powders. In 1919, because of the scarcity of cream of tartar, Royal changed its product to phosphate. The FTC held that it was an unfair trade practice to continue the use of the name "Dr. Price's Cream Baking Powder," even though a clause headed "A Pure Phosphate Powder" was printed in red diagonally across the back panel. In one of the early court decisions interpreting the Federal Trade Commission Act, *Royal Baking Powder Co. v. FTC*,⁷⁸ the Second Circuit upheld the Commission's requirement that the word "phosphate" be added to the product name. The court, implicitly recognizing the lag effect of advertising, ruled that it was an unfair trade practice to make sales of an inferior product on the strength of a reputation attained through sixty years of adver-

75. The FTC charged that ITT Continental Baking intentionally aimed its nutritional claims for Hostess Snacks at those mothers who had been infrequent purchasers of snack cakes. Presumably relying on such claims, nutrition-conscious buyers substituted Hostess Snacks, which are composed primarily of sugar, for other foods that they had previously fed their children. Continental Baking Complaint, *supra* note 1, at 13.

76. A manufacturer also has a duty to use reasonable care in his method of advertising and sale to avoid misrepresentation of the product. Failure to exercise such care constitutes tortious conduct. See W. PROSSER, *THE LAW OF TORTS* § 96, at 644 (1971).

77. *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

78. 281 F. 744 (2d Cir. 1922).

tising.⁷⁹ "The purpose of the Congress in creating the Federal Trade Commission," wrote the court, "was aimed at just such dishonest practices"⁸⁰

The Waltham Watch Company had manufactured a popular brand of clocks in Massachusetts for nearly a century. When it ceased operations and merged with another firm, a "spin-off" began selling imported German clocks under the "Waltham" trade name. In *Waltham Watch Co. v. FTC*,⁸¹ the Seventh Circuit upheld an FTC-required affirmative disclosure in company advertising to inform the public that the clocks were no longer manufactured by the Waltham Watch Company of Waltham, Massachusetts. In both *Royal Baking Powder* and *Waltham*, the courts clearly recognized the effects of prior marketing efforts of a firm on the present buying habits of consumers. It was deemed illegal to take advantage of this residual effect of advertising through a failure to disclose that there was no longer any basis for the consumers' beliefs. The same logic supports a corrective advertising requirement. If there is any distinction between affirmative disclosure and corrective advertising in this respect, it is that in cases like *Royal Baking Powder* and *Waltham* the products' reputations were at one time accurate, whereas in cases involving *Hi-C*⁸² and *Profile Bread*⁸³ the consumer was led to form an opinion that never had a basis in fact. Certainly there is even less justification for allowing sales based on a reputation that was initially false.

The practice of corrective advertising can be justified by many of the arguments that have been used to require other forms of affirmative disclosure. Traditionally, however, affirmative disclosure has been most concerned with preventing future deception. Corrective advertising more directly focuses on expunging the effects of past deception, in terms of continued consumer reliance and shift in market share. In theory, it would appear to represent an extension of the FTC's sphere of activity in regulating advertising. The Commission will have to demonstrate the propriety of this extension.

IV. THE EXTENT OF FTC DISCRETION TO REQUIRE CORRECTIVE ADVERTISING

Section 5 of the Federal Trade Commission Act⁸⁴ is the basis of the Commission's jurisdiction over deceptive advertising. The FTC is therein "empowered and directed to prevent . . . unfair methods

79. 281 F. at 753.

80. 281 F. at 753.

81. 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963).

82. *See* note 33 *supra*; text accompanying note 10 *supra*.

83. *See* text accompanying notes 18-20 *supra*.

84. 15 U.S.C. § 45 (1970).

of competition in commerce and unfair or deceptive acts or practices in commerce.”⁸⁵ The Commission has great latitude not only in the finding of facts⁸⁶ but also in the framing of remedies. In *Jacob Siegal Co. v. FTC*,⁸⁷ the Supreme Court laid down the standard that the Commission’s remedy need only have a “reasonable relation” to the unlawful practices found to exist,⁸⁸ a standard often relied upon.⁸⁹ The justification for allowing such wide discretion to the FTC in shaping remedies is usually based on two factors: the expertise attributed to the Commission and the broad language of the Commission’s statutory mandate. In *FTC v. Colgate-Palmolive Co.*,⁹⁰ Chief Justice Warren wrote: “[A]s an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is ‘deceptive’ within the meaning of the Act.”⁹¹

Because of this assumed expertise, courts uphold FTC actions unless there is a showing that the Commission acted arbitrarily,⁹² clearly abused its discretion,⁹³ or failed to make an “allowable judgment”⁹⁴ in its choice of remedies. Complementing the recognition of Commission expertise is the fact that the Federal Trade Commission Act, unlike the enabling acts of other administrative agencies, specifies no categories of practices within which the agency’s orders must be confined.⁹⁵ The Chief Justice further wrote in *Colgate-Palmolive*:

It is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible, “to be defined with particularity by the myriad of cases from the field of business.”

This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations.⁹⁶

85. 15 U.S.C. § 45(a)(6) (1970).

86. See *Colgate-Palmolive Co. v. FTC*, 380 U.S. 374 (1965); *FTC v. Standard Education Society*, 302 U.S. 112 (1937); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

87. 327 U.S. 608 (1946).

88. 327 U.S. at 613.

89. See, e.g., *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 276 (6th Cir.), cert. denied, 400 U.S. 926 (1970); *Kent v. Hardin*, 425 F.2d 1346, 1350 (5th Cir. 1970).

90. 380 U.S. 374 (1965).

91. 380 U.S. at 385. But see *Developments, supra* note 55, at 1039.

92. See *Carter Prods., Inc. v. FTC*, 268 F.2d 461, 497 (9th Cir.), cert. denied, 361 U.S. 884 (1959).

93. See *Independent Directory Corp. v. FTC*, 188 F.2d 468, 470 (2d Cir. 1951).

94. See *Carter Prods., Inc. v. FTC*, 186 F.2d 821, 826 (7th Cir. 1951).

95. See Comment, *Permissible Scope of Cease and Desist Orders: Legislation and Adjudication by the FTC*, 29 U. CHI. L. REV. 706, 711 (1962).

96. 380 U.S. at 384-85 (footnote omitted). In S. REP. NO. 597, 63d Cong. 2d Sess. 13 (1914), the Senate Committee on Interstate Commerce explained the lack of substantive definitions in § 5:

Corrective advertising orders that require mention of past FTC holdings find even more explicit support in another section of the Federal Trade Commission Act. Section 6(f) authorizes the Commission "to provide for the publication of its reports and decisions in such form and manner as *may be best adapted* for public information and use."⁹⁷ In *FTC v. Cinderella Career & Finishing School, Inc.*,⁹⁸ the rationale of this statutory provision was articulated:

If the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him, utilizing such prohibited conduct. Certainly advice through news media as to actions being taken by a government agency in his behalf constitutes a prophylactic step addressed ultimately to the elimination of the conduct prohibited by the statute.⁹⁹

In *Cinderella*, the plaintiff, a respondent to a FTC proposed complaint, had challenged the Commission's long-standing practice of issuing press releases on its complaints prior to any final adjudication of the charges. In denying plaintiff's request for an injunction against publicity the court made reference to the agency's broad discretion under section 6(f) to publicize its actions so as best to serve the public interest.¹⁰⁰ But perhaps more important was the court's framing of the issue:

We have no doubt that a press release of the kind herein involved results in a substantial tarnishing of the name, reputation, and status of the named respondent, throughout the related business community, as well as in the minds of some portion of the general public. . . . We are confronted, then, not with the question of whether the appellees have suffered actual damage, but whether the action of the Commission is authorized or permitted in law so as to place the appellees in the position of suffering *damnum absque injuria*.¹⁰¹

Under this formulation, it is possible that even a clearly injurious requirement as part of corrective advertising would not be labeled "punitive."¹⁰² Rather, it would be permitted as long as it was within the scope of the statutory discretion afforded the Commis-

The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would by a general declaration condemning unfair practices, leave it to the Commission to determine what practices are unfair. It concluded that the latter course would be the better

97. 15 U.S.C. § 46(f) (1970) (emphasis added).

98. 404 F.2d 1308 (D.C. Cir. 1968).

99. 404 F.2d at 1313.

100. 404 F.2d at 1314.

101. 404 F.2d at 1313.

102. See note 69 *supra* and accompanying text.

sion and served the public interest.¹⁰³ Section 6(f) could be viewed as conferring sufficiently broad discretion to allow the Commission to determine that the protection of the innocent consumer required publication of FTC findings in the "form and manner" of affirmative disclosures by respondents in their future advertising rather than by the traditional press release.

The Supreme Court in *Lorain Journal Co. v. United States*¹⁰⁴ allowed a district court similar discretion in shaping a corrective remedy in a case brought under the Sherman Act.¹⁰⁵ The defendant newspaper company had illegally refused to accept the advertising of any merchant who also advertised on a local radio station that was in competition with the paper. To inform the merchants that their advertising would now be accepted, the lower court required the defendant to insert in its newspaper each week, for twenty-five weeks, a notice "fully apprising its readers of the substantive terms of the judgment."¹⁰⁶

Lorain is an example of the common use of equitable powers pursuant to the Sherman Act to cure the "ill-effects" of illegal conduct as well as to arrest that conduct.¹⁰⁷ Only through such remedies can violators be denied future benefit from their wrongdoing.¹⁰⁸ This is also a rationale for the use of divestiture in anti-trust cases. Although not specifically provided for in the Sherman Act, divestiture is frequently resorted to in cases decided under the Act.¹⁰⁹ In *Schine Chain Theatres, Inc. v. United States*,¹¹⁰ in which the defendant was required to divest itself of a number of wrongfully acquired theatres, the Supreme Court stated:

In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal

103. The court in *Cinderella* made no reference to any specific limit to the Commission's discretion under § 6(f). However, the same court indicated in a subsequent decision that in some (unspecified) instances, an agency could be enjoined from publicizing its activities. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 940 n.14 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

104. 342 U.S. 143 (1951).

105. Section 4 of the Sherman Act, 15 U.S.C. § 4 (1970), provides:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of [this Act]; and it shall be the duty of the several United States attorneys, in their respective districts . . . to institute proceedings in equity to prevent and restrain such violations. . . .

106. See 342 U.S. at 158. In affirming the district court decree, the Supreme Court offered little insight into the standards of a publication requirement; it merely observed that the publication decree should not impose "unnecessary restrictions." 342 U.S. at 156.

107. *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950).

108. *United States v. United States Gypsum Co.*, 340 U.S. 76, 89 (1950).

109. For a general discussion of divestiture under the Sherman and Clayton Acts, see *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 330 (1961).

110. 334 U.S. 110 (1948).

conduct, those who had unlawfully built their empires could preserve them intact. . . . To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided for in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct.¹¹¹

The aims of corrective advertising are similar. As in the case of the Sherman Act violator, the "empire" of the deceptive advertiser is an illegally obtained share of the market. Corrective advertising can be seen not as a penalty, but as an attempt to prevent the wrongdoer from enjoying that empire.¹¹²

While the courts may have broad equitable powers under the Sherman Act, it does not necessarily follow that the FTC is granted the same latitude in dealing with unfair trade practices. Case law, however, does point in that direction. Although the Commission's basic power under the Federal Trade Commission Act is to be exercised through the issuance of cease-and-desist orders, the scope of such orders is broad.¹¹³ The Commission rarely recognizes the abandonment of a given practice as a defense to a cease-and-desist order.¹¹⁴ Furthermore, orders need not be confined to the particular practice that was the subject of the complaint, for the Supreme Court has stated:

If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.¹¹⁵

The discretion possessed by administrative agencies to shape remedies has in fact been analogized to the powers of a court of equity.¹¹⁶ More specifically, the powers of the Federal Trade Commission under section 5 have been likened to the equitable powers possessed by courts in antitrust cases.¹¹⁷ The scope of Commission concern under section 5 has been long recognized as encompassing many of the unfair trade practices prohibited by the Sherman Act.

111. 334 U.S. at 128.

112. See note 69 *supra* and accompanying text.

113. See note 42 *supra*.

114. See *Sears, Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919); Comment, *The Defense of Abandonment in Proceedings Before the Federal Trade Commission*, 49 GEO. L.J. 722, 724 (1961).

115. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The "prohibited goal" of the deceptive advertiser is not simply to publish a deceptive message; rather it is to profit from an increased share of the market. A cease-and-desist order alone is not a "roadblock" to that goal, assuming the deceptive campaign was successful.

116. See *NLRB v. Express Publishing Co.*, 312 U.S. 426, 433, 436 (1941); *Ekco Prods. Co.*, 65 F.T.C. 1163, 1221 (1964).

117. See *Ekco Prods. Co.*, 65 F.T.C. 1163, 1206-17 (1964) (Elman, C.).

In *FTC v. Cement Institute*,¹¹⁸ Justice Black stated: “[S]oon after its creation, the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which were also outlawed by the Sherman Act. . . . This Court has consistently approved that interpretation of the [Federal Trade Commission] Act.”¹¹⁹ Despite this overlapping of concerns, in an earlier case the Court decided that the Commission when dealing with section 5 violations does not possess all the powers of a court of equity under the Sherman Act. In *FTC v. Eastman Kodak Co.*,¹²⁰ it was determined that the Commission did not have the power under section 5 to order divestiture of stock or assets, even when such a remedy was recognized as necessary to effectively terminate the violation. The Court stated that if the respondent’s conduct has “produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted.”¹²¹ This case appears to stand in direct contradiction to later cases that repeatedly emphasize the Commission’s broad remedial powers.¹²²

Although *Eastman Kodak* has never been expressly overruled, its holding has been severely eroded.¹²³ Analogies to recent decisions would appear to support a conclusion that the Commission has under section 5(b) “a complete array of equitable remedies, including divestiture and other remedies designed to effect structural reorganization.”¹²⁴ In *Pan American World Airways, Inc. v. United States*,¹²⁵ the Supreme Court held that the Civil Aeronautics Board (CAB), pursuant to a provision in its enabling legislation modeled on section 5 of the FTC Act,¹²⁶ has the power to order divestiture.¹²⁷ The Court rejected the argument that the power given the CAB to issue cease-and-desist orders is not broad enough to include the power to compel divestiture: “[W]here the problem lies within the purview of the Board . . . Congress must have intended to give it

118. 333 U.S. 683 (1948).

119. 333 U.S. at 691-92.

120. 274 U.S. 619 (1927).

121. 274 U.S. at 625.

122. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

123. The Supreme Court stated in *FTC v. Dean Foods*, 384 U.S. 597, 606 n.4 (1966), that *Eastman Kodak* had been “repudiated” by later cases.

124. See *Ekco Prods. Co.*, 65 F.T.C. 1163, 1213 (1964) (FTC power to order divestiture under § 7 of the Clayton Act).

125. 371 U.S. 296 (1963).

126. Federal Aviation Act § 411, 49 U.S.C. § 1381 (1970), provides in part: “The Board may . . . investigate and determine whether any air carrier, foreign air carrier or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or sale thereof.” It also empowers the board to issue cease-and-desist orders, which are the only remedies referred to in the section.

127. 371 U.S. at 312.

authority ample to deal with the evil at hand."¹²⁸ The Court likened the authority of agencies in molding administrative decrees to the authority of courts in framing injunctive decrees.¹²⁹

During the same term, in *Gilbertville Trucking Co. v. United States*,¹³⁰ the Court recognized the power of the Interstate Commerce Commission to require divestiture even though that remedy was not expressly authorized in the Interstate Commerce Act.¹³¹ It relied on section 5(7) of that Act, which allows the Commission to "take such actions as may be necessary in the opinion of the Commission to prevent continuance of such [an essentially antitrust] violation."¹³² The Commission's authority was analogized to the power of the courts to order divestiture under the Sherman and Clayton Acts when they find such action is necessary for "effective relief."¹³³

Subsequent to the Supreme Court's decisions in *Pan American* and *Gilbertville*, the Sixth Circuit upheld the power of the FTC under section 5 to order a restructuring of the market place. In *Charles Pfizer & Co. v. FTC*,¹³⁴ a group of drug firms were accused by the Commission of conspiring to withhold pertinent information on the "miracle drug" tetracycline from the United States Patent Office. On the basis of incomplete information concerning the drug's uniqueness, a patent was issued allowing respondents to reap enormous profits from their resulting monopoly. The Commission found the withholding of information to be an unfair trade practice.¹³⁵ Pursuant to section 5 it ordered the respondents to issue a nondiscriminatory, nonexclusive license for the manufacture of the drug to any party requesting it.¹³⁶ The Commission order was clearly aimed at depriving the respondents of the fruits of their wrongdoing.

The Commission should be able to take similar appropriate action to restructure the market when the unfair trade practice takes the form of deceptive advertising. Although there may be other means of divestiture in deceptive advertising cases, corrective advertising, depending as it does on consumer choice, would seem to involve the least governmental tampering with the market.¹³⁷ How-

128. 371 U.S. at 312.

129. 371 U.S. at 312 n.17.

130. 371 U.S. 115 (1962).

131. Codified in scattered sections of 49 U.S.C. (1970).

132. 49 U.S.C. § 5(7) (1970).

133. 371 U.S. at 130.

134. 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

135. *American Cyanamid Co.*, 63 F.T.C. 1747, 1805-06 (1963).

136. *American Cyanamid Co.*, 63 F.T.C. 1747, 1910 (1963).

137. It is not self-evident that public programs that rely on "natural" market forces and the least government "interference" are the most effective, the most inexpensive,

ever, if corrective advertising proves ineffective, or administratively expensive, more direct means of divestiture adapted from antitrust law may be required.

Corrective advertising can be expected to accomplish divestiture only within certain limits of precision. Even if it were possible to determine precisely how much of the market was gained through deceptive advertising, corrective advertising would not return the market to its exact condition prior to the violation. No matter how effective the messages, the market distribution for bread cannot be expected to return to what it was prior to Profile's weight reduction claims. As a result of corrective advertising, the buyers of Profile Bread may turn to a new brand, or, if they are diet-conscious, stop buying bread entirely. Corrective advertising, despite such irregularities, could still make an important contribution toward accomplishing one of the central aims of commercial regulation. Like divestiture, corrective advertising might serve to prevent the wrongdoer, the disrupter of the market place, from finding his conduct profitable. Whether it will in fact so operate can only be determined after an evaluation of the effects of a number of corrective advertising orders.

V. CORRECTIVE ADVERTISING IN PRACTICE

While corrective advertising is within the ambit of the FTC's authority, its beneficial effects must be weighed against its potential for economic disruption. Unfortunately, little is known about the effects corrective advertising will have upon individual businesses. There are those who liken corrective advertising to a "corporate hara kiri."¹³⁸ One columnist reportedly suggested that it threatens the very underpinnings of the Republic.¹³⁹

Still others predict that Madison Avenue will easily meet the challenge and that corrective advertising will be either so bland that it will fail to awaken the consumer or so sincere in its apologies that it will win new customers for the deceptive advertiser.¹⁴⁰ It has been suggested that the limited experience of the Food and Drug Ad-

or even the most protective of individual liberty. Means of divestiture other than corrective advertising might better satisfy these criteria. If lack of government intervention is really the primary concern, a program of government subsidized counter-advertising by the wrongdoers' competitors might be called for.

138. See Address by Robert Pitofsky, Director of the FTC Bureau of Consumer Affairs, to Association of Advertising Agencies May 14, 1971, at 10, on file with the *Michigan Law Review* [hereinafter Pitofsky Address].

139. *Id.* at 10.

140. "If indeed it turns out that honesty sells (the thought boggles the mind) we can visualize advertisers standing in line begging the FTC to make them run corrective advertising. And then the FTC's big weapon might be to require advertisers to continue to run their old hard-sell stuff as a penalty for their misdeeds." Editorial, *Advertising Age*, Oct. 4, 1971, at 14, col. 2.

ministration (FDA) with corrective advertising tentatively indicates that its effect on the advertiser will not be devastating.¹⁴¹ The FDA has required certain drug manufacturers to place advertisements in professional journals to inform doctors of previous erroneous claims made for various preparations.¹⁴² Apparently no dramatic market shifts have occurred.¹⁴³

The first chance to assess corrective advertising in depth will come with the Profile Bread campaign, the results of which will be watched carefully.¹⁴⁴ Proponents of corrective advertising would no doubt like to see a measurable drop in the bread's sales. If the sales decline toward the level existing at the onset of the deception, the theory of corrective advertising will be validated. The unlikely event of a complete collapse in Profile's sales would pose a severe challenge to the doctrine.¹⁴⁵

The success of corrective advertising is important in another respect. Critics of the FTC have for decades noted the agency's "lack of teeth" in the area of deceptive advertising.¹⁴⁶ If corrective advertising proves to be effective but not destructive in its first use, the Commission may begin to fulfill its statutory mandate in the area of national advertising. A well-administered program of corrective advertising might cause advertisers to respond to Commission aggressiveness by upgrading their messages, rather than risking the negative publicity associated with a corrective advertising order. On the other hand, corrective advertising might have the effect of causing advertisers to delete all factual claims from their messages. Instead they would emanate a stream of drivel that could not be found false. At that point, the Commission would have to decide whether it should exercise even greater control over the content of the advertising. It might find, for example, that failure to provide sufficiently factual advertisements is an unfair trade practice.¹⁴⁷ A

141. See Pitofsky Address, *supra* note 138, at 10.

142. *Id.*

143. *Id.*

144. One explanation why the Commission agreed to the relatively mild order in the Profile Bread case (*see* note 20 *supra* and accompanying text) is that it was interested in getting any form of corrective advertising into operation in order to demonstrate that it would not, in practice, prove disastrous to a company.

145. It is also possible that sales might increase or not be affected at all. It was reported in *Advertising Age*, Oct. 4, 1971, at 14, col. 1, that the makers of Profile are pleased with their corrective advertisement and are prepared to run more than the required 25% if sales "respond."

146. See ABA REPORT, *supra* note 67, at 43.

147. The quest for greater accuracy and content in advertising is intimately entwined with increasing comprehension of the role of mass advertising in supporting oligopolistic conditions in many industries by making market entry costs prohibitive. The FTC does not appear to be at the point of directly prescribing limits on the amount of advertising. However, to the extent that advertising could be made factual, its oligopolistic effects might be reduced. Given factual advertising, the entry costs

step in this direction has already been taken with a recently proposed trade regulation rule requiring the posting of gasoline octane ratings at point of sale.¹⁴⁸

The benefit derived from corrective advertising will depend heavily on the ability of the FTC to control its use. Corrective advertising is most easily justified in the context of major national advertising campaigns where the residual effects can be reasonably identified. The Commission-initiated corrective advertising cases have been of this nature.¹⁴⁹ There is some question whether even the Firestone campaign furnished a proper vehicle for considering the merits of corrective advertising. It occurred some three years before the FTC proceedings and consisted largely of print advertising run for a relatively short period.¹⁵⁰ The Commission has been frequently accused of devoting its resources to low priority matters.¹⁵¹ Corrective advertising provides an opportunity for effective enforcement on a national level. However, like a number of good ideas before it, corrective advertising could fall victim to a myriad of petty cases.

The Commission has shown flexibility in shaping corrective advertising complaints. *American Home Products Corp.*¹⁵² concerns allegedly deceptive product demonstrations on television. Black Flag Ant and Roach Killer (with Baygon) was shown on television to have

for a firm with a distinctive product are lessened since its advertising is not buried in a welter of frivolous claims by the oligopolists. Furthermore, as oligopolists wish to avoid price competition in the sale of what are essentially the same products, present advertising allows them to create frivolous product differentiation.

148. Proposed Trade Regulation Rule § 422.1, 34 Fed. Reg. 12449 (1969). This posting might lead consumers to choose gasoline on the basis of octane rating rather than on brand identification, which, in turn, might force gasoline companies to compete on the basis of price rather than on spurious product differentiation. In a related matter, Sun Oil Company was recently cited in a proposed complaint for allegedly misrepresenting the uniqueness of its gasolines. The complaint asserts that all gasolines, regardless of brand name, will ensure efficient performance and maximum power of an engine if sufficient octane is provided. The proposed complaint calls for corrective advertising. Sun Oil Co., 3 CCH TRADE REG. REP. ¶ 19,856 (FTC 1971).

149. The one exception is a consent order obtained by the Commission several months before the Profile Bread case. In the earlier consent order, a Hawaiian television wholesaler agreed to print an advertisement retracting previous deceptive claims. The one corrective advertisement was to be placed in the same spot in the same newspaper. Matsushita Elec., Inc., 3 CCH TRADE REG. REP. ¶ 19,430 (FTC 1971).

150. For these reasons, despite the Commission's recent espousal of corrective advertising, it is by no means certain that it will overturn the trial examiner's findings in *Firestone*. See text accompanying note 16 *supra*.

151. See ABA REPORT, *supra* note 67, at 77; Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 390-417 (1964). This is not to say that the Commission should not consider using corrective advertising as a means of regulating the small operator. See text accompanying note 60 *supra*. However, it should carefully weigh such a policy against its administrative costs and in terms of the over-all priorities of the Commission in the field of deceptive advertising.

152. 3 CCH TRADE REG. REP. ¶ 19,673 (FTC 1971) (proposed complaint).

a superior roach-killing ability when compared to a competing product. If the ban on future deceptive demonstrations is ineffective, the Commission wants the demonstration conducted again so that viewers can see what happens when the company does not use a particular breed of roach that has developed an immunity to the active ingredient in "Brand X."¹⁵³

In addition to such variation in content and style, the placement, frequency, and duration of corrective advertising afford potential for a flexible approach by the Commission. It is hoped that this potential will not be lost through a mechanistic, bureaucratic approach. Yet, these variables are also the source of some problems. The basic question is how one utilizes them in a combination that will eliminate the residual effects of deception in the most precise fashion. The permutations are innumerable. If the deceptive advertising appeared only on television, should corrective advertising also be confined to television on the theory that the same audience will be reached? Or, in the case of a particularly effective televised deception that netted a significant share of the market, should corrective advertising be required in all media, and on the packaging of the product itself? The answers to these questions are not immediately apparent. Designing corrective advertising remedies will resemble the work presently done by advertising agencies. Eventually the Commission should develop its own expertise in media balance and effective production techniques as they relate to corrective advertising.

Guidelines may be developed to determine the amount of corrective advertising that is needed to respond to a given deceptive campaign. If the deception is relatively insignificant, when compared to the whole campaign for the product or service in question, corrective advertising is probably not called for. In instances of gross deception, the twenty-five per cent figure currently used by the Commission may prove too low. The amount of corrective advertising has thus far been proposed as a mathematical function of the amount of advertising by the respondent in the future.¹⁵⁴ The respondent might suspend all advertising and in this way avoid corrective advertising. On the assumption that a company's failure to advertise for a year may be as effective as corrective advertising

153. 3 CCH TRADE REG. REP. ¶ 19,673, at 21,721-22.

154. An exception to this policy has been made in a recent proposed complaint, which calls for at least one corrective advertisement to be run in each magazine in which the questioned advertising previously appeared. Sugar Assn., Inc., 3 CCH TRADE REG. REP. ¶ 19,857 (FTC 1971). Respondents are two sugar industry trade associations that have allegedly deceptively advertised that eating foods containing sugar before meals contributes to weight reduction. Robert Pitofsky, director of the FTC's Bureau of Consumer Protection, told a news conference that the new policy was necessary because the associations, unlike companies advertising their own products, might otherwise suspend all advertising for a year. N.Y. Times, Dec. 3, 1971, at 27, col. 1.

would be in restructuring the market, perhaps the FTC policy would still be vindicated.

If corrective advertising does prove effective in causing a decline in the deceptive advertiser's market share, questions concerning the proper limits for this "divestiture" will no doubt arise. In the case of a firm that has advertised deceptively from its inception, that firm's entire market share might be said to be the product of unfair trade practices. Is the goal of corrective advertising to drive such a firm out of business? Closer examination of the problem should result in a Commission attempt to determine what portion of the firm's market share is the product of the deceptive quality of the advertising. The firm would be allowed to maintain that share of the market that would have resulted regardless of the content of the advertising. However, in the case of a particularly gross deception, to which a firm owes its entire existence, perhaps the FTC should not shirk from ending that firm's operations completely.¹⁵⁵

Another problem might arise in the case of a firm that has increased its share of the market from ten per cent to thirty-five per cent through deceptive advertising, leaving its only competitor with the remaining sixty-five per cent. Should the Commission act to restore the competitor's control of ninety per cent of the market by requiring corrective advertising?¹⁵⁶ The best response to such questions is that the Commission must retain flexibility in administering corrective advertising. This remedy should not be automatically used in every case. A blanket rule of corrective advertising will not further the public interest.

Corrective advertising will make significant demands on the skills and resources of the Commission. An American Bar Association Committee Report¹⁵⁷ and the work of two skillful chairmen have resulted in an appearance of a revitalized agency.¹⁵⁸ Corrective advertising can be an important new remedy as the Commission seeks to respond to contemporary demands for consumer protection.

155. Of course, there are going to be some situations in which the misleading claims for a product have been so outlandish and the amounts spent on advertising so enormous that corrective advertising could be a mortal blow to certain brands. But that's because the false advertising created massive consumer deception—not because the remedy is not appropriate to the violation.

Pitofsky Address, *supra* note 138, at 11.

156. Cf. Crown Cent. Petroleum, 3 CCH TRADE REG. REP. ¶ 19,605 (FTC 1971); Swift & Co., 3 CCH TRADE REG. REP. ¶ 19,476 (FTC 1971).

157. ABA REPORT, *supra* note 67.

158. However, the FTC has been "reorganized" so many times before that some cynicism is justified. See ABA REPORT, *supra* note 67, at 92 (separate statement of R. Posner).