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Holding Media Responsible for Deceptive Weight-Loss Advertising

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HOLDING MEDIA RESPONSIBLE FOR DECEPTIVE WEIGHT-LOSS ADVERTISING

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ABSTRACT

In Fall 2002, the Federal Trade Commission held a Workshop exploring the problem of misleading weight-loss promotional pitches. After the agency spent decades cleaning up deceptive advertising, the weight-loss industry continues to be replete with such tactics. In an attempt to more aggressively attack those deceptions, the FTC used the Workshop as a forum to suggest

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that media should play a more active role in screening ads for diet products and programs. Some saw this as an implied threat that the agency may begin holding media liable for publishing those ads. Media protest that this forces them into the *de facto* role of regulators, and could create a chilling effect, leading fearful media to censor speech that is not deceptive. This article explores the FTC's legal authority and the constitutional viability of making media responsible for the role they play in delivering these deceptive weight-loss messages to the public and finds no obstacles in the agency's path.

I. INTRODUCTION

Many people in the United States are too fat¹ and many who are not grossly overweight wish they were thinner.² The medically recommended way to lose weight is to eat less and exercise more,³ and many honest commercial programs advocate reduced caloric intake and increased physical activity as the prescription for healthy weight loss and maintaining thin physique. But most overweight Americans want to get sexier bodies without the pain of exercise or depriving themselves of their favorite foods and, contrary to reality, many commercial products claim that this can be done.⁴ Between 1990 and 2003, the

¹ As of 1999, the Surgeon General's office estimated that 61% of adults in the United States were either overweight or obese, with an additional 13% of children falling into those categories. Office of the Surgeon General (2001), *The Surgeon General's Call To Action To Prevent and Decrease Overweight and Obesity*, at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/toc.htm>. A 1999-2000 study of 4,115 adults by Flegal, et al., found that 67.2% of men and 61.9% of women had a Body Mass Index that qualified them as either overweight or obese. Katherine M. Flegal, et al., *Prevalence and Trends in Obesity Among US Adults, 1999-2000*, 288 JAMA 1723 (2002). The Centers for Disease Control and Prevention 1999-2000 National Health and Nutrition Examination Survey found almost two-thirds of adults in the U.S. are overweight, with 31% being "obese." *The Supersizing of America: The Federal Government's Role in Combating Obesity and Promoting Healthy Living*, 108th Cong., 2d Sess. (June 3, 2004) (statement of Lester M. Crawford, acting Commissioner, Food and Drug Administration).

² Phil B. Fontanarosa, *Patients, Physicians, and Weight Control*, 282 JAMA 1581 (1999). Clearly, an enormous segment of the American public holds concerns about their weight, whether their desire is to be thinner or simply to ward off the possibilities of adding to their present girth. See, e.g., Mary K. Serdula, et al., *Prevalence of Attempting Weight Loss and Strategies for Controlling Weight*, 282 JAMA 1353 (1999). That study of 107,804 adults aged 18 and above, conducted in 1996, found that 28.8% of men and 43.6% of women reported they wanted to lose weight. *Id.* In addition, strategies that included dieting were reported among men and women who sought only to maintain their current weight. *Id.* Those who reported goals of maintaining their weight accounted for another 35.1% of men and 34.4% of women. *Id.*

³ Serdula et al., *supra* note 2.

⁴ For example, the "Enforma System" is composed of two products: "Fat Trapper" and "Exercise in a Bottle." These products have been promoted, in part, using infomercials. Claims used in the infomercials included, "With Enforma, you can eat what you want and never, ever, ever, ever have to diet again," "you can enjoy all these delicious foods like fried chicken, pizza, cheeseburgers, even butter and sour cream, and stop worrying about the weight," and that Enforma

Federal Trade Commission (FTC) brought more than 100 enforcement actions for false or deceptive weight-loss advertising claims.⁵ In spite of that valiant effort, the Commission seems impotent in stemming the tide of the seemingly never-ending supply of companies making misleading or downright impossible advertising claims. A staff report found that, as of 2001, more than half of weight-loss ads contain one or more deceptive claims.⁶ To make matters worse, from the point of view of both the FTC and consumer advocates, some of these deceptive ads have appeared in reputable publications, potentially lending them added credibility.⁷

Historically, the Food and Drug Administration (FDA) had authority to regulate this industry, but Congress largely divested that authority in 1994 with the passage of the Dietary Supplements Health and Education Act of 1994 (DSHEA).⁸ While makers of “drugs” must get pre-marketing approval that the product is safe and effective, under the DSHEA, makers of a new “dietary supplement” need only give the FDA advance notice that the new product will be sold.⁹ While the FDA retains the authority to ban a dietary supplement product

“helps your body to burn more calories while you're just standing or sitting around doing nothing - even while you're sleeping.” *FTC v. Enforma Natural Products, Inc.*, No. 04376JSL(CWx)(C.D. Cal. April 26, 2000). A product called Miracletab claims, “With Miracletab diet pill, you can lose up to 90 lbs and be 8 sizes smaller in 90 days. Best of all . . . you don't need to exercise or diet.” See <http://www.miracletab.com>.

⁵ J. Howard Beales, *The Commission's Role in Policing Deceptive Marketing of Dietary Supplements, Prepared Statement of the Federal Trade Commission Before the Committee on Commerce, Science and Transportation*, United States Senate (October 28, 2003), available at <http://www.ftc.gov/os/2003/10/dietarysupptest.pdf>. See also, FEDERAL TRADE COMMISSION, FEDERAL TRADE COMMISSION ADVERTISING CASES INVOLVING WEIGHT LOSS PRODUCTS AND SERVICES, 1927 – FEBRUARY 2003 (2003), available at <http://www.ftc.gov/opa/1997/9703/dietcase.htm>.

⁶ A study of 300 weight-loss ads taken from a variety of media revealed that 40% of the ads almost certainly contained false statements and 55% had at least one representation that is very likely false or, at the very least, was made without adequate substantiation of its truthfulness. FEDERAL TRADE COMMISSION, WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS, September (2002), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

⁷ For example, the ads in the Commission's study included some drawn from the following magazines: *Redbook*, *Ladies Home Journal*, *Marie Claire*, *Cosmopolitan*, *Family Circle*, and *McCalls*, as well as newspapers from across the United States. *Id.* at 3, 21.

⁸ Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.). Although the net effect of this Act was to diminish FDA ability to protect the health of citizens, in its findings supporting this Act Congress explicitly stated a purpose to protect the free flow of products that may enhance the public health. Its findings specifically noted, “(13) although the Federal Government should take swift action against products that are unsafe or adulterated, the Federal Government should not take any actions to impose unreasonable regulatory barriers limiting or slowing the flow of safe products and accurate information to consumers” and “(15)(A) legislative action that protects the right of access of consumers to safe dietary supplements is necessary in order to promote wellness.” *Id.*

⁹ 21 U.S.C. § 343(r)(6) (2000).

that later proves dangerous, removal of the product from the market requires the FDA to prove that the product is unsafe or otherwise adulterated.¹⁰ Thanks to the DSHEA, dietary supplements that are merely ineffective, but not dangerous, essentially fall outside the regulatory purview of the FDA.¹¹ This leaves the FTC as the *de facto* regulatory arm of the federal government to protect the public from deceptive weight-loss claims. Not surprisingly, since passage of the DSHEA, the dietary supplement industry has experienced dramatic growth,¹² with the weight-loss industry accounting for \$34.7 billion in 2000, and probably much more by now.¹³ From the sheer size of this industry, and the number of products involved, the consumer protection task seems overwhelming.¹⁴

As the last line of defense, the FTC has developed a plan to protect consumers from the more unscrupulous elements of the weight-loss industry. This agency has limited resources, so its plan relies on others to do part of the work. Not surprisingly, it has proved to be the source of some controversy. However, this plan is a good one, and, as we will show, there is no legal reason why the Commission should not pursue it.

¹⁰ The DSHEA explicitly shifted the burden of proof to the FDA. 21 U.S.C. § 342(f)(1) (2000).

¹¹ Trisha L. Beckstead, *Caveat Emptor, Buyer Beware: Deregulation of Dietary Supplements Upon Enactment of the Dietary Supplement Health and Education Act of 1994*, 11 SAN JOAQUIN AGRIC. L. REV. 107 (2001). Some critics have suggested that the DSHEA even creates an environment where dangerous supplements may be sold without timely intervention by the FDA, and that consumers might assume the products are safe because the government has allowed them to be sold. See, e.g., Jennifer Sardina, Note, *Misconceptions and Misleading Information Prevail--Less Regulation does not Mean less Danger to Consumers: Dangerous Herbal Weight Loss Products*, 14 J.L. & HEALTH 107 (2000).

¹² Robert G. Pinco & Todd H. Halpern, *Guidelines for the Promotion of Dietary Supplements: Examining Government Regulation Five Years After Enactment of the Dietary Supplement Health and Education Act of 1994*, 54 FOOD DRUG L.J. 567, 567 (1999).

¹³ Julie Bryant, *Fat Is a \$34 Billion Business*, ATLANTA BUSINESS CHRONICLE, Sept. 21, 2001, available at <http://www.bizjournals.com/atlanta/stories/2001/09/24/story4.html>. That figure is the one cited by the FTC. *Supra* note 6, at 2. The actual, current, figure is difficult to pin down. A more recent article states a higher \$39.8 billion figure. Patricia Winters Lauro, *As Waistlines Expand, So Does Advertising for a Range of Weight Loss Programs and Products*, N.Y. TIMES, Jan. 13, 2003, at C12. However, an article from well over a decade ago makes reference to "the \$37 billion diet industry." Molly O'Neill, *A Growing Movement Fights Diets Instead of Fat*, N.Y. TIMES, Apr. 12, 1992, at 1.

¹⁴ FTC officials have acknowledged that the immensity of the task is not lost on the sellers either. The realization of government's inability to effectively deal with all the deceptive claims, especially with new ones popping up almost daily on the Internet, even helps to encourage sellers to make such claims. Greg Winter, *Fraudulent Marketers Capitalize On Demand for Sweat-Free Diets*, N.Y. TIMES, Oct. 29, 2000, at 1.

II. THE COMMISSION'S GOALS FOR SELF-REGULATION

Given the enormity of this responsibility, the FTC's approach was to ask for help through increased industry self-regulation.¹⁵ Self-regulatory processes can be quite effective, and every false or deceptive advertising claim halted by the business organizations themselves is one less problem for government to address. But in this case, much of the Commission's focus has been on one particular link in the advertising chain – getting the mass media to stop deceptive ads before they are printed or broadcast.¹⁶ After all, U.S. mass media vehicles have no obligation to carry an advertisement they do not want in their publications.¹⁷

In the mid-to-late 1990s, a series of conferences and workshops run by the FTC Bureau of Consumer Protection included media managers around the country and attempted to encourage the media to do more to screen deceptive advertising out of their broadcasts.¹⁸ These meetings were well attended, but a speaker at one meeting¹⁹ pointed out that the FTC's goals were not the same as

¹⁵ See, e.g., Sheila F. Anthony, *Combating Deception in Dietary Supplement Advertising*, Address to the Food and Drug Law Institute 45th Annual Educational Conference (April 16, 2002), available at <http://www.ftc.gov/speeches/anthony/dssp2.htm>. “The industry must step up to the plate and take a more active role in policing those in their industry who are engaged in fraud and deception, and are giving the entire industry a black eye.” *Id.* But as Andrea Levine, of the Better Business Bureau's National Advertising Division notes, “When you have someone selling snake oil, self-regulation probably isn't the best form of control.” Winter, *supra* note 14.

¹⁶ Robert Pitofsky, *FTC to Media: Screen Ads Better*, ADVERTISING AGE, April 29, 1996, at 30; Paul Davidson, *FTC Pressures Media to Reject Bogus Diet Ads*, USA TODAY, Nov. 21, 2002, at B3; Caroline E. Mayer, *FTC Wants Media to Help Block Deceptive Weight Loss Advertising*, WASH. POST, Dec. 9, 2003, at A11. FTC Commissioner Sheila Anthony even made statements that sounded a bit like a veiled threat to hold media companies liable if they did not act more aggressively to screen the advertisements submitted to them for publication. Ira Teinowitz, *Monitoring Ad Claims: Media Companies Spark Ire of FTC Commissioner*, ADVERTISING AGE, April 22, 2002, at 62; Randal M. Shaheen, *Should Media Outlets Be Held Liable for Deceptive Advertising?* LEGAL BACKGROUNDER, July 11, 2003.

¹⁷ Media can and do reject advertisements when it serves what they perceive to be their own best interests. For a few examples, see Jill Rachel Jacobs, *CBS' Ad Censorship Cracks Super Bowl Spirit*, NEWSDAY, Jan. 28, 2004, at A28; Bill Hoffmann, *MTV Puts Foot Down Over Steamy Advert for Shoes*, N.Y. POST, Nov. 28, 2000, at 91; Nancy Millman, *Networks Blue-Pencil an Ad's Spoof of Censors*, CHI. SUN-TIMES, Feb. 14, 1992, at 49; Cal Thomas, *Censorship of Abortion Ad is Unfair to Voters*, BUFF. NEWS, Jan. 7, 1998, at 3B. The sole exception is in the area of political candidate advertising, where broadcast media have been required by federal law to carry commercials they might have preferred not to run. See Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L.J. 85 (1996); Milagros Rivera-Sanchez & Paul H. Gates, Jr., *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267 (1994).

¹⁸ For example, one especially aimed at media was the FTC, *Conference on Preventing Fraudulent Advertising* (April 21, 1995) (transcripts available at <http://www.ftc.gov/bcp/adcon/adintro.htm>).

¹⁹ *Ad Clearance: Stopping Fraud Before It Starts*, (Sept. 26, 1997) (Conference). Dr. Rotfeld,

those of the media managers. He asked how many audience members were there to learn about ways to spot misleading claims. Only one or two hands went up. He then asked how many were concerned with avoiding lawsuits by advertisers, based on their acceptance policies. Almost everyone raised a hand.²⁰ Certainly some media companies might be very concerned with potential harm to their audience members, but it would be a gross error to presume that their practices are typical. Actually, as you will see, the evidence suggests this is rare.

The single most common reason for advertising rejections by vehicles tends to be a fear of offending the audience.²¹ Put simply, the media manager's job performance is evaluated on the basis of company revenue, i.e., the business' profitability. So even the most socially conscious manager's policy is driven by some mix of greed and fear, wanting to attract as many advertisers as possible while simultaneously hoping the volume, style, or content of the ads will not drive away the audience. Refusing an advertisement results in a direct income loss while carrying ads that drive away the audience makes the publication less attractive to advertisers, thereby attracting fewer advertisers and commanding lower prices.²² And the reality is that media audiences *want* to hear about weight-loss products. Indeed, the demand is onerous. Just try to find a single issue of a "women's" magazine that carries no article about ways to lose weight.²³

These competing pressures are not unique, or new. In the 19th Century, the early magazines were generally reluctant to carry advertising, *any* advertising.²⁴ After the Civil War, the consumer demand for patent medicines of dubious quality and dangerous after-effects exerted a strong force on publishers.²⁵

one of the authors herein, attended that conference. The account described is based upon his personal observations during that meeting.

²⁰ HERBERT JACK ROTFELD, *ADVENTURES IN MISPLACED MARKETING* 119 (2001).

²¹ See generally Jef I. Richards & John H. Murphy, II, *Economic Censorship and Free Speech: The Circle of Communication Between Advertisers, Media, and Consumers*, 18 J. CURRENT ISSUES & RES. ADVER. 21 (1996); Ronald K. L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993); C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992); Ronald Paul Hill & Andrea L. Beaver, *Advocacy Groups and Television Advertisers*, 20 J. ADVER. 18 (1991).

²² ROTFELD, *supra* note 20 at 119; Herbert J. Rotfeld, *Power and Limitations of Media Clearance Practices and Advertising Self-Regulation*, 11 J. PUB. POL'Y & MKTG 87 (1992).

²³ Michael Pashby, Executive Vice President and General Manager of Magazine Publishers of America, searched their database and found that in the past year – of the magazines in the database – there were 1,300 articles about weight loss. This, he indicated, was about double the number of a decade earlier. Media Panel transcript, available at <http://www.ftc.gov/bcp/workshops/weightloss/transcripts/transcript-175-232.pdf>, at 230.

²⁴ Kim B. Rotzoll, *The Coming of the Ads: The Evolution of "National" Advertising as an Outgrowth of the American Economic Development, 1860-1900*, in PROCEEDINGS OF THE 1980 AMERICAN ACADEMY OF ADVERTISING NATIONAL CONFERENCE 29 (J. E. Haefner ed., 1980).

²⁵ *Id.* at 30.

As Kim Rotzoll, a professor of advertising at the University of Illinois, noted, “[T]he previously haughty cultural magazines reluctantly lowered their standards and let the flood [of advertising] enter their pages. *Century* and *Harpers* were soon carrying a surge of patent medicine advertising to an audience perfectly willing to accept a message of the latest ‘cure’ along with their *belles-lettres*.”²⁶ Media audiences wanted to hear about these products, and the products, in turn, gained credibility from the appearance in these prestigious vehicles. The advertising was published and the magazines survived. There is no reason to conclude the advertising harmed the images of those publications.²⁷

More recently, broadcast television stations and cable networks carried many infomercials that promoted questionable products or medicinal claims, while masquerading as more-trusted news or talk shows.²⁸ Often the stations did little or nothing to question the advertisers’ sales claims or otherwise restrict the new format’s inherent propensity for deception. When questioned, cable or station managers frequently reported that audiences wanted the information in the programs, and they saw no reason to fear any audience backlash to their vehicle’s image.²⁹ Amidst all of this was the ever-constant presence of products, from tummy vibrators to “fat busters,” promising quick weight loss with almost no effort.³⁰

In 2002, despite earlier failures to nudge media to provide more help in stopping deceptions, and with resource limitations blossoming into a significant problem, the Commission again sought industry help. On November 19, 2002, the FTC held a workshop designed to encourage greater self-regulation of deceptive weight-loss advertising.³¹

²⁶ *Id.* at 31.

²⁷ STEPHEN FOX, *THE MIRROR MAKERS: A HISTORY OF AMERICAN ADVERTISING AND ITS CREATORS* (1984).

²⁸ Barry Meier, *Is It a Television Show or an Ad? Hard to Tell Nowadays*, ST. PETERSBURG TIMES, Feb. 3, 1990, at 4D.

²⁹ Rader Hayes & Herbert J. Rotfeld, *Infomercials & Cable Network Programming*, 1 *ADVANCING THE CONSUMER INTEREST* 17 (1989); Patrick R. Parsons & Herbert J. Rotfeld, *Infomercials and Television Station Clearance Practices*, 9 J. PUB. POL’Y & MKTG. 62 (1990).

³⁰ See, e.g., Sally Squires, *Shell Game*, WASH. POST, March 28, 2000, at Z12; Molly Martin, *The Big Pitch – Lurking Behind a Persuasive Infomercial Can Be Hidden Costs and Hassles*, SEATTLE TIMES, July 25, 1999, at 8.

³¹ Federal Trade Commission, *Deception in Weight Loss Advertising: A Workshop* (November 19, 2002), (transcript and other materials available at <http://www.ftc.gov/bcp/workshops/weightloss/>).

III. THE WORKSHOP

The Workshop began with a Science Panel of ten distinguished medical experts³² discussing a list of common advertising or label claims made for various pills, balms, drinks and other products that offer weight-loss solutions for people who remain sedentary and well-fed. After a discussion on the scientific research related to various specific and often-repeated claims, an FTC Staff member acting as moderator asked the panelists to express their opinions about if and when any of these claims could be true. For virtually every claim that these products help people lose weight without diet or exercise, the panelists gave unanimous agreement that such claims cannot ever be true, with some rare and limited exceptions under limited or unlikely technical conditions.³³

That afternoon, an Industry Panel of business leaders and trade association officers³⁴ discussed their own self-regulation activities. Some of the weight-loss companies on this panel had implemented internal codes of ethics, and some industry trade associations have written guidelines for members. The transcripts reveal a very positive session,³⁵ but even though the self-regulatory codes are followed by some industry members, they obviously are irrelevant to

³² Anthony L. Almada, President and Chief Scientific Officer of IMAGINutrition; Dr. George Blackburn, Associate Professor of Surgery and Nutrition at the Harvard Medical School; Dr. Denise Bruner, Chairman of the Board of the American Society of Bariatric Physicians; Dr. Harry Greene, Vice President and Medical Director of Slim Fast Foods Company; Dr. Steven Heymsfield, Director of the Human Body Composition Laboratory and Weight Control Unit at St. Luke's-Roosevelt Hospital Center and Professor of Medicine at Columbia University; Dr. Van Hubbard, Director of the Division of Nutrition Research Coordination and Chief of the Nutritional Sciences Branch of the Division of Digestive Diseases and Nutrition, National Institute of Diabetes and Digestive and Kidney Diseases, at the National Institutes of Health; Dr. Judith Stern, Professor in the Departments of Nutrition and Internal Medicine, Division of Clinical Nutrition and Metabolism at the University of California-Davis; Dr. Lawrence Stifler, President of Health Management Resources; Dr. Thomas Wadden, Professor of Psychology and Director of the Weight and Eating Disorders Program at the University of Pennsylvania School of Medicine; and Dr. Susan Yanovski, Director of the Obesity and Eating Disorders Program at the National Institutes of Health.

³³ Science Panel transcript, available at <http://www.ftc.gov/bcp/workshops/weightloss/transcripts/transcript-13-112.pdf>. Most of the session was dedicated to discussing the validity of a claim, the science implicated, and then polling each member of the panel, and then moving to the next claim. *Id.* at 27-111.

³⁴ Brad Bearson, General Counsel of ICON Health & Fitness, Inc.; John Cordaro, President and CEO of the Council for Responsible Nutrition; Andrea Levine, Director of the National Advertising Division of the Council of Better Business Bureaus; Michael McGuffin, President of the American Herbal Products Association; Elissa "Lisa" Myers, President and CEO of the Electronic Retailing Association; David Seckman, Executive Director and CEO of the National Nutritional Foods Association; Lewis Shender, Vice President and General Counsel of Jenny Craig, Inc.; and Dr. Harry Greene, Vice President and Medical Director of Slim Fast Foods Company.

³⁵ Industry Panel transcript, available at <http://www.ftc.gov/bcp/workshops/weightloss/transcripts/transcript-117-174.pdf>.

many.³⁶ After all, if this were not the case, this Workshop would not have been necessary. But the reality is, if the companies represented by these Industry Panel members do follow those codes, there is little they can do. They have no power over their competitors. The United States anti-trust laws effectively prevent the Jenny Craig company or National Nutritional Foods Association, two organizations represented on this panel, from forcing other businesses to cease deceptive claims about their products.³⁷ In other words, they have little power to affect the amount of deceptive advertising in the marketplace, except to the extent that their own company was involved in such practices. Consequently, the role of this Panel apparently was – like the Science Panel – predominantly that of fact-finding, not to play a front line role in the fight against deceptive weight-loss claims.

The workshop ended with a Media Panel, which consisted of media managers, representatives of media trade associations, and academic scholars with expertise on the mass media and self-regulation.³⁸ As with the workshops in the 1990s, Media seemed to be a prime target for the Commission in planning this workshop. Like the other Science and Industry Panels, this group could provide information and insight into the weight-loss advertising process.

But unique to the Media Panel was its ability to broadly *influence* that process. After all, a magazine, newspaper, or broadcaster can refuse to run any ads it finds unacceptable, and that potentially can affect the advertising of a large number of companies. And the media associations do often publish non-binding guidelines for their members, which can influence a significant number of publications.³⁹ So if these groups made a concerted effort to screen out deceptive weight-loss advertising content, the problem would be greatly reduced. But it is doubtful that the Commissioners or their staff were pleased with the responses from these media professionals. Indeed, Commissioner Sheila Anthony later expressed her disappointment with the media panel:

³⁶ Rotfeld, *supra* note 22.

³⁷ See generally Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 U. DAYTON L. REV. 471 (1994). See also Rotfeld, *supra* note 22.

³⁸ John Kimball, Senior Vice President and Chief Marketing Officer of the Newspaper Association of America; Ellen Levine, Editor-in-Chief of Good Housekeeping magazine; Don McLemore, Vice President of Standards at New Hope Natural Media; Wilbert Norton, Dean of the College of Journalism and Mass Communication at the University of Nebraska-Lincoln; Michael Pashby, Executive Vice President and General Manager of Magazine Publishers of America; Joseph Ostrow, Cabletelevision Advertising Bureau; Herbert Rotfeld, Professor of Marketing at Auburn University; and Frederick Schauer, Professor of Government at Harvard University.

³⁹ This does not, however, guarantee uniform compliance. During the Workshop, Joseph Ostrow stated that about 17% of his association's members used the guidelines, while 83% used some other standards. Media Panel transcript, *supra* note 23, at 187.

The final panel included representatives of the newspaper, cable TV and magazine industries. In some ways, I was most disappointed by this panel. With the exception of Good Housekeeping, most of the media representatives admitted they do not pre-screen ads. While they may screen ads for taste, and they may choose not to run categories of ads—such as for alcohol, tobacco or guns—they appear not to examine, or even care, whether or not a particular ad claim is obviously false. I, for one, found this very disturbing.⁴⁰

And an unspoken threat seemed to remain that either media do more to preempt deceptive weight-loss claims, or risk being treated as co-conspirators.⁴¹

Although these advertisements appear repeatedly in multiple issues of newspapers and magazines, and over a period of days or weeks on television or radio, the media people talked of deadlines and the logistical problems of screening the large number of advertising submissions.⁴² Even though nearly all of them attended the morning Science Panel session, when a clear list of never-true often-repeated claims was presented,⁴³ they argued it was hard to spot the deceptions even for these claims because they are not experts. A good example of this is a comment by Michael Pashby of the Magazine Publisher's Association:

[I]f you're talking about ad clearance, you're presupposing that people are actually reading the ad. I don't think that is common within the magazine industry. They look at the ad. They look at the ad for suitability of placement, particularly – I mean, the obvious thing is nudity, that was mentioned before. For certain publications, that's perfectly acceptable to find nudity within

⁴⁰ Sheila Anthony, *Let's Clean Up the Diet-Ad Mess*, ADVERTISING AGE, February 3, 2003, at 18.

⁴¹ Ira Teinowitz, *Publishers: FTC Could Spur Rejection of All Ads for Diets*, ADVERTISING AGE, November 25, 2002, at 8. However, the FTC's director of the Bureau of Consumer Protection, Howard Beales, stated, "We aren't looking for media companies to set up an elaborate review process, [w]e want a simple reading. There are always gray areas, but that doesn't mean you can ignore the black and white." *Id.* Nonetheless, even prior to the Workshop Commissioner Anthony had hinted that media companies might be held liable if they did not take a more active role in stopping these ads. See Teinowitz, *supra* note 16.

⁴² Media Panel transcript, *supra* note 23.

⁴³ For example, after discussing the merits of claims suggesting "[c]onsumers who use the advertised product can lose substantial weight without reducing caloric intake and/or increasing their physical activity," a poll of the Science Panelists found that 9 of the 10 experts believed that this is not possible, given the current state of science. Science Panel transcript, *supra* note 33, at 82-98.

advertisements. In others, it's absolutely not. And it's an easy thing to notice and to reject.⁴⁴

The implication, of course, is that their own standards can be caught at a glance, but discerning deceptive weight-loss claims from those that are not deceptive would require the clearance people to actually read the advertisement; an onerous burden, to be sure.

In reality, while the Media Panelists appeared less than eager to assume more responsibility for filtering out deceptive weight-loss claims, their publications and stations still find the time and ability to screen out advertising that might offend their readers, listeners or viewers, *even if it requires the same sort of judgment*. Don McLemore, of New Hope Natural Media, talking about “blatant claims” that would not be accepted for publication at his company said, “For example, the diet slippers are not – it’s not a product that would appeal to our constituency or our readers, so our ad salespeople immediately reject that.”⁴⁵ His focus was not on the deceptiveness of the claims for diet slippers – a form of shoe insert claimed to cause weight-loss⁴⁶ which the Science Panel that morning had unanimously declared to be untrue,⁴⁷ but rather on the fact that his readers would not be interested in this item.

Panelists also raised the concern that trying to force media to more aggressively scrutinize weight-loss advertising could lead to wholesale censorship of the product category.⁴⁸ This, basically, is an argument that FTC pressure could result in a “chilling effect.”⁴⁹ In other words, fear of liability might cause media to overreact. But, again, it is equally clear that fear of offending readers with advertising has not caused these media to reject all advertising. The desire for advertising revenue apparently has helped to temper any overreaction that

⁴⁴ Media Panel Transcript, *supra* note 23, at 189.

⁴⁵ *Id.* at 195.

⁴⁶ One brand is the Get Slim Slippers, which claim to cause weight loss by using the principles of reflexology and magnet therapy. See <http://www.getslimslippers.com/>.

⁴⁷ Science Panel transcript, *supra* note 33, at 81.

⁴⁸ Mr. Pashby remarked:

I think what happens when you start to look at ads and you try to make a judgment, what a publisher will tend to do is to categorically reject advertising; i.e., reject it by category. So, rather than try to make a judgment of saying this is correct and this is not correct, Slim America is correct or is not correct, Slim Fast is correct or is not correct, they will reject all of this type of advertising, all advertising within the weight loss category.

Media Panel transcript, *supra* note 23, at 203.

⁴⁹ *Id.* at 217. But Professor Schauer did add, “Chilling is about uncertainty,” and he went on to suggest that if the FTC were to provide sufficiently concrete direction, thereby reducing uncertainty on the part of the publications, the less chilling there would be. *Id.* at 218.

would “chill” the acceptance of most advertisements. Apparently, where there is a will there is a way.

It also was suggested that while *Good Housekeeping* magazine is able to aggressively screen for deceptive advertising, it spends approximately \$2.4 million each year to do so, which far exceeds the total revenue of most magazines.⁵⁰ The point not made, however, is that *Good Housekeeping* goes much farther than any other publication or broadcast station in this regard, because it has built its reputation around the extensive testing conducted by the *Good Housekeeping* Institute and the resulting guarantee of the *Good Housekeeping* Seal of Approval, and the advertisers are willing to pay the added cost to fall under the umbrella of credibility thereby created.

The Panelists, while resisting the burden of screening ads, did make some positive recommendations about how to diminish these deceptive claims or make consumers better able to see through them. One such suggestion was for the FTC to provide editorial information to media that might lead to news stories debunking the ad claims, thereby educating the public.⁵¹ It also was suggested that the Ad Council might create public service announcements, and the Council of Better Business Bureau’s National Advertising Review Council (NARC), the advertising industry’s primary self-regulatory system, also might be enlisted to help.⁵² One of the most interesting ideas was proposed by Don McLemore, that once the FTC found an ad to be deceptive, it should announce to the public in what publications the ad appeared.⁵³ This certainly would act as a disincentive for publications to carry ads that might later prove to be an embarrassment.

The amount of self-screening currently being done by the media varies tremendously, from those that do almost no screening to those that aggressively guard against deception and impropriety.⁵⁴ It should be noted that those who participated on the Media Panel probably do not represent a representative cross-section of the publishing industry. After all, publishers or trade association officers willing to come to Washington for such a workshop are not the typical business practitioners. By their very actions they are actively assuming a leadership role in self-regulation. This only serves to cast a brighter spotlight on the

⁵⁰ *Id.* at 203.

⁵¹ *Id.* at 225-27.

⁵² *Id.* at 229. For more information on the NARC and its work, see John McDonough, 25 *Years of Self-Regulation*, ADVERTISING AGE, Dec. 2, 1996, at c1.

⁵³ Media Panel transcript, *supra* note 23, at 228. Mr. Pashby, however, balked at this idea. *Id.* at 229.

⁵⁴ That same point was made nearly four decades ago regarding newspapers in *Developments in the Law-Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967), noting, “The degree to which newspapers review and reject objectionable advertising is predictably variable. Some newspapers report rejecting many thousands of dollars worth of copy, while others turn down only a few ads in a year.” *Id.* at 1152.

general theme of resistance from this Panel, though. If the industry's leaders in self-regulation are hesitant to admit any responsibility in preventing the publication of deceptive weight-loss claims, that does not bode well for the less honorable members of that community.

To survive in a competitive marketplace, any publisher or broadcaster must have an eye on the company's bottom line, and self-regulation costs time and money. To reject an advertiser with money in hand requires either fear or courage. *Good Housekeeping* is unique, in that it has established self-regulation as a cornerstone, an asset, of its business instead of treating it as an expense. Indeed, all of the businesses represented here are unusually vested in the idea of self-regulation. Most companies need a compelling reason to turn away money.

If the FTC hopes to see greater media scrutiny of ads, it needs to give managers a strong incentive for such screening, and the best incentive is to hold media companies liable for knowingly carrying deceptive claims. By simply compiling the list ("the List") of "definitely deceptive" claims agreed upon by members of the Workshop's Science Panel, the media can be put on notice that such claims are illegal. If they do not already have one, this would provide a strong reason for the media managers to care about their readers, listeners or viewers and prevent them from being misled. At that point, their profit motive would be invoked by the necessity to protect those profits.

IV. COULD THE FTC HOLD THE MEDIA LIABLE?

There is nothing under current law to prohibit the FTC from requiring some accountability from the media. For a variety of reasons, some have argued that FTC regulation of advertisements at the media channel level is problematic,⁵⁵ yet careful review of case and statutory law suggests there is no significant obstacle to this approach.

A. *FTC Authority*

Statutory authority in this instance is fairly straight-forward. The Federal Trade Commission Act (FTCA)⁵⁶ as amended over the years prohibits unfair methods of competition and unfair or deceptive acts or practices.⁵⁷ It specifically empowers the Commission to prevent persons, partnerships or corporations from using unfair methods of competition and unfair or deceptive trade

⁵⁵ E.g., Robert B. Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705, 705 (1977).

⁵⁶ Federal Trade Commission Act, 15 U.S.C. §§ 41-77. (2004).

⁵⁷ *Id.* at § 45(a)(1), stating, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

acts or practices.⁵⁸ That mandate is broad enough to give to the agency rather expansive powers for protecting both consumers and competitors.⁵⁹

In addition, and especially relevant for the current issue, the FTCA has a separate provision regarding “false advertisements” applying to “food, drugs, devices, services, or cosmetics” that prohibits “any person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement . . . by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics.”⁶⁰ Since weight-loss products tend to be either “foods,” which is how the “dietary supplement” exemption in DSHEA is classified,⁶¹ or “devices,”⁶² in the case of items like shoe inserts, this part of the FTCA seems clearly applicable. Consequently, the Act makes the *dissemination* – obviously including *publication* – of false advertising for weight-loss products an unfair or deceptive act or practice, and therefore illegal.⁶³

Whether relying on the Commission’s basic authority over unfair and deceptive acts and practices, or on the more specific prohibition regarding “false advertisements,” it would be difficult to argue that FTC actions against media for publishing deceptive weight-loss claims would be *ultra vires*.⁶⁴ The more difficult issue is whether putting such a burden on media is constitutional.

⁵⁸ *Id.* at § 45(a)(2).

⁵⁹ Indeed, at times that power has been perceived as too broad, leading to abuses of the authority with which the agency had been entrusted. *See, e.g.*, MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 69-117 (1982); Mark E. Budnitz, *The FTC’s Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371 (1997). At the same time, however, it should be noted that in the course of its history the FTC likewise has been impugned at times for a perceived failure to use its powers, *e.g.*, EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, “THE NADER REPORT” ON THE FEDERAL TRADE COMMISSION (1969).

⁶⁰ 15 U.S.C. § 52(a)(1)(2).

⁶¹ 21 U.S.C. § 343(a)(2004). *See*, Margaret Gilhooley, *Herbal Remedies and Dietary Supplements: The Boundaries of Drug Claims and Freedom of Choice*, 49 FLA. L. REV. 665, 666 (1997); Amber K. Spencer, *The FDA Knows Best ... Or Does It? First Amendment Protection of Health Claims on Dietary Supplements*: *Pearson v. Shalala*, 15 BYU J. PUB. L. 87, 88 (2000);

⁶² 21 U.S.C. § 321(h).

⁶³ Chester S. Galloway, *The First Amendment and FTC Weight-loss Advertising Regulation*, 37 J. CONSUMER AFF. (forthcoming 2003).

⁶⁴ Violation of the FTCA “false advertisements” prohibition automatically constitutes an unfair or deceptive act or practice, and can be regulated as such. 15 U.S.C. § 52(b). In addition, there is a provision holding violators of this section guilty of a misdemeanor under certain circumstances, but publishers and broadcast licensees are specifically exempted from that section as long as they are willing to provide the FTC with the advertiser’s name and address. *Id.* at § 54(a)(b). But note that this statutory exemption, by its mere existence, implies that Congress did not intend publishers and broadcasters to be exempt from other provisions of the FTCA.

B. First Amendment Consequences

Until the mid-1970s, there would have been no question about the constitutionality of any government actions restricting weight-loss ads, because commercial advertising was wholly unprotected under the First Amendment.⁶⁵ For the first century and a half after ratification of the First Amendment, the courts found no need to even consider whether advertising was a form of “speech” within the meaning of that provision. So, when in 1942 the Supreme Court finally received an advertising case in *Valentine v. Chrestensen*,⁶⁶ it had no difficulty jumping to the conclusion that this was not a form of protected expression.

That all changed in 1976 when the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*⁶⁷ explicitly declared commercial speech to be covered by the First Amendment.⁶⁸ It did not, however, offer this protection without some reservations,⁶⁹ and a couple of years later it expressed that fact by noting “common-sense” differences between commercial and noncommercial speech.⁷⁰ This resulted in a hierarchy of speech that placed political expression at the top – and most protected – position on that hierarchy. Commercial speech landed near the bottom, just above pornography.⁷¹

⁶⁵ See Jef I. Richards, *Is 44 Liquormart a Turning Point?* 16 J. PUB. POL'Y & MARKETING 156, 156 (1997); Herbert J. Rotfeld, *Regulation of the Free – Advertising and the First Amendment*, 2 POL'Y STUD. REV. 474 (1983).

⁶⁶ 316 U.S. 52, 54 (1942).

⁶⁷ 425 U.S. 748, 770 (1976).

⁶⁸ *Id.* at 770. Upon considering the state of Virginia's prohibition on advertising prices for prescription drugs, the Court concluded, “[T]he justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.” *Id.*

⁶⁹ “In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.” *Id.*

⁷⁰ The Court explained:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

⁷¹ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992), where Justice Stevens later observed, “[P]olitical speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court tried to more specifically delineate the boundary between permissible governmental regulation and protected commercial speech, providing a test through which any regulation must pass to be deemed constitutionally sound.⁷² The first step of that test is the one most relevant to our current inquiry. It asks “[W]hether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”⁷³ The experts have declared claims on the List blatantly false,⁷⁴ so under the *Central Hudson* test they would fall squarely outside the perimeter of the First Amendment.

Since then, the Court has done some significant re-thinking of its approach to commercial speech. Its most recent perspective was expressed in *44 Liquormart, Inc. v. Rhode Island*,⁷⁵ where the Court backed away from its earlier pronouncements, saying, “The special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the ‘commonsense distinctions’ that exist between commercial and non-commercial speech.”⁷⁶ Justice Stevens, writing for the Court, presented an entirely new formulation and justification of the commercial speech doctrine, explaining that the only reason commercial speech has received less protection than other forms of speech is because the government needs the freedom to regulate to ensure a fair bargaining process in the marketplace.⁷⁷ Where com-

and fighting words receive the least protection of all.”

⁷² 447 U.S. 557, 566 (1980).

⁷³ *Id.* If the speech is misleading or regarding an illegal product or service, it can be regulated without concern for the remainder of the *Central Hudson* test. The court justified this, saying, “[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.” *Id.* at 563.

⁷⁴ See *supra* text at notes 33 and 43.

⁷⁵ 517 U.S. 484, 502 (1996).

⁷⁶ *Id.*

⁷⁷ See *id.* at 501. Justice Stevens explains that just because speech is commercial does not mean it automatically receives reduced scrutiny under the First Amendment and says:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Id.

mercial speech regulation is done for reasons other than assuring fair bargaining, it is treated with the same level of scrutiny reserved for more highly respected forms of speech, receiving the “special care” reserved for such speech.⁷⁸

In the current circumstance, the FTC is concerned about weight-loss advertising wholly because of deceptive sales claims. This goes straight to the heart of the fair bargaining process, thereby affording this variety of speech the lower-level protections that permit government broader latitude in restricting otherwise free expression.

However, any effort to regulate content decisions by the media, even aimed only at false and deceptive advertisements, still raises significant First Amendment issues. Even though false and deceptive advertisements clearly can be regulated under the *Central Hudson* test, to argue that a regulation prohibiting media channels from accepting false or deceptive weight-loss advertisements from producers of dietary supplements is *ipso facto* constitutional overlooks a crucial issue. Such a regulation would shift the burden of determining the veracity of such advertisements to the channels of communications, thereby forcing media into a judicial role, determining which ads are constitutionally protected and which are unprotected. As a general rule, the media have no obligation to confirm or otherwise verify the accuracy of advertisements. But there are exceptions to this rule.

In *New York Times Co. v. Sullivan*, the Court held that a defamed *public official* may not recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁷⁹ But while the *Sullivan* doctrine has come to stand for the proposition that a media channel may not be held liable in tort for an advertisement absent knowledge of its falsity,⁸⁰ in reality the court did not reach that far.⁸¹

First, though *Sullivan* involved advertising, it did not entail *commercial* speech but rather “editorial advertisements.” Political or social commentary has always been viewed as occupying a preferred position within the First Amendment framework, unlike commercial speech. The Supreme Court has never issued a blanket prohibition against imposing liability on the media absent intentional conduct. To the contrary, the Supreme Court in *Gertz v. Welch* specifically declared that absent public notoriety, states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory

⁷⁸ *Id.*

⁷⁹ 376 U.S. 254, 280 (1964).

⁸⁰ See e.g., *Olivia N. v. Nat’l Broad. Co.*, 126 Cal. App. 3d 488, 494 (Cal. Ct. App. 1981).

⁸¹ See generally, L. Lin Wood & Corey Fleming Hirokawa, *Shot by the Messenger: Rethinking Media Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 49-50, 56 (2000).

falsehoods injurious to a private individual.⁸² The only constitutional limit placed on the states', or for that matter, the federal government's, ability to impose tort liability on media outlets is one of strict liability.⁸³ In other words, *Sullivan* does not mean the government is prohibited from imposing tort liability on media for defamation. And, indeed, since the scope of that case was confined to defamation, it certainly cannot be read as prohibiting government from imposing liability on the media for complicity in other illegal activity, such as deceptive advertising.

While some courts have held that the media owe no duty to the public to investigate the veracity of advertisements,⁸⁴ other courts have reached different results. The cases presenting the strongest argument for imposing such liability are those where the advertisements involved lead, or can lead, to lethal consequences. More than one in recent years has concerned advertising that concerns murder-for-hire.

C. *Hiring a Hit Man*

Soldier of Fortune Magazine (SOF) has provided several test cases for the courts to define the boundaries of media liability. For example, in *Eimann v. Soldier of Fortune Magazine*, SOF published the following personal services ad in 1984, placed by John Wayne Hearn:

EX-MARINES - 67-69 'Nam vets - Ex-DI, - weapons specialist
- jungle warfare, pilot, M.E., high risk assignments, U.S. or
overseas. (404) 991-2684.⁸⁵

Hearn subsequently killed a woman, having been hired by her husband.⁸⁶ The woman's mother and son filed a wrongful death action against SOF, alleging the magazine was negligent in publishing the ad.⁸⁷

Although Hearn testified he and a partner placed the ad to recruit veterans, with no intent to solicit criminal employment, about 90 percent of those

⁸² 418 U.S. 323, 347 (1974) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

⁸³ *Id.*

⁸⁴ *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 923 (E.D. La. 1987).

⁸⁵ 880 F.2d 830, 831 (5th Cir. 1989). The term "Ex-DI" was explained at trial as meaning ex-drill instructor. "M.E." likewise was explained as meaning multi-engine airplanes. Hearn also testified that "high risk assignments" referred to bodyguard or security specialist duty. *Id.*

⁸⁶ *Id.* at 832.

⁸⁷ *Id.*

who responded expressed interest in hiring him for illegal activities.⁸⁸ Hearn's was just one of many such ads that had appeared in SOF, and evidence showed that between seven and nine of them had been tied to crimes or criminal plots.⁸⁹ The magazine's president and staff, however, testified they had no knowledge or suspicion that some of those classified ads were tied to criminal plots.⁹⁰

SOF's defense included an argument that the First Amendment prohibits imposing a duty on publishers to investigate advertisers and ads.⁹¹ The court sidestepped that issue, though, by confining its analysis to the allegation that SOF was negligent.⁹² Although the court found the magazine might have some duty to protect against a threat of serious harm from the advertisements run in its pages, it concluded the burden on SOF in policing ads like this was too onerous in light of the ambiguous nature of Hearn's ad and "the pervasiveness of advertising in our society."⁹³ In drawing that conclusion, the court placed weight on both the fact that Hearn's original purpose was recruitment rather than soliciting illegal employment, as well as an expert witness' testimony regarding multiple potential interpretations of such an ad.⁹⁴ The court remarked, "We conclude that the standard of conduct imposed by the district court does not strike the proper balance between the risks of harm from ambiguous advertisement and the burden of preventing harm from this source under these facts."⁹⁵ Under these circumstances, the court declined to impose liability on SOF.⁹⁶

This decision might provide a sense of comfort for publishers, but it would be false security. While the opinion might be read as insulating media

⁸⁸ *Id.* at 831.

⁸⁹ *Id.* at 832.

⁹⁰ *Id.* at 833.

⁹¹ *Id.* at 834.

⁹² *Id.* The court stated, "We need not address SOF's first amendment attacks on the judgment to resolve this appeal." *Id.* at 836.

⁹³ *Id.* The court stated:

The range of foreseeable misuses of advertised products and services is as limitless as the forms and functions of the products themselves. Without a more specific indication of illegal intent than Hearn's ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity.

Id. at 838.

⁹⁴ *See id.* at 831, 833. Dr. Park Deitz, a forensic psychiatrist, had analyzed the ads and the SOF readership. He admitted that while many of the code words in the ad, like "gun for hire," had meaning to many SOF readers, in the end he had given up trying to distinguish lawful from unlawful ads, finding the distinctions too ambiguous. *Id.* at 833.

⁹⁵ *Id.* at 837.

⁹⁶ *Id.* at 838.

from responsibility for scrutinizing ads, the court never addressed the constitutional issues here, while courts in other SOF cases specifically confronted those concerns and reached far different conclusions.

In *Norwood v. Soldier of Fortune Magazine*, two classified advertisements appeared in the print publication, in 1985, offering “gun for hire” services from two different advertisers. One ad stated:

GUN FOR HIRE. 37 year-old-professional mercenary desires jobs. Vietnam Veteran. Discrete and very private. Bodyguard, courier, and other special skills. All jobs considered. Phone (615) 891-3306 (I-03).

The other advertisement offered:

GUN FOR HIRE. NAM sniper instructor. SWAT. Pistol, rifle, security specialist, body guard, courier plus. All jobs considered. Privacy guaranteed. Mike (214) 756-5941 (101).⁹⁷

Ultimately, it was alleged that Larry Elgin Gray hired both of those men to kill Norman Douglas Norwood.⁹⁸ Norwood sought damages for injuries he incurred as a result, including SOF as a defendant.⁹⁹

SOF argued the First Amendment provided the magazine a shield against civil suits.¹⁰⁰ The District Court, ruling on a motion for summary judgment, rejected that proposition.¹⁰¹ It noted that even if the First Amendment protects the publication from prior restraint, it guarantees no immunity from subsequent punishment.¹⁰² This court also concluded that reasonable jurors could find such lawlessness was foreseeable by the magazine, given the wording in the ads.¹⁰³ Consequently, SOF could indeed be held liable for injuries sustained by Mr. Norwood.¹⁰⁴ The “foreseeability,” obviously, represents a con-

⁹⁷ 651 F. Supp. 1397, 1398 (W.D. Ark. 1987).

⁹⁸ *Id.* at 1397-98.

⁹⁹ *Id.* at 1397.

¹⁰⁰ *Id.* at 1398.

¹⁰¹ *Id.* at 1403.

¹⁰² *Id.* at 1402. In doing so, the court recites the words of Sir William Blackstone, “The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published.” *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1403.

trast with the “ambiguity” found in *Eimann*, leading to an equally contrasting outcome.

In yet another case, *Braun v. Soldier of Fortune Magazine, Inc.*,¹⁰⁵ a Vietnam veteran placed an ad offering his services as a professional mercenary in 1985.¹⁰⁶ He ultimately was hired to assist, and did assist, in a murder.¹⁰⁷ The victim’s children filed suit against SOF for negligently publishing an ad that created an unreasonable risk of the solicitation and commission of a violent crime.¹⁰⁸ Even before it accepted that ad, the magazine previously had been contacted by law enforcement officials about crimes linked to other personal service ads that had appeared in the publication.¹⁰⁹

The Eleventh Circuit Court of Appeals, affirming the District Court’s decision, held that under Georgia law a publisher may be held liable if it fails to exercise reasonable prudence in determining whether an advertisement “on its face” represents a “clearly identifiable unreasonable risk” to the public.¹¹⁰ Note that the court did not state a knowledge requirement, only that the advertisement alerts the publisher that it represents an *unreasonable risk* to the public. The court determined, in effect, that the publisher needed no special intuition to recognize that this ad probably constituted an offer of criminal activity.¹¹¹ The magazine’s failure to act with reasonable prudence proved fatal to its First Amendment defense.

In all three of these SOF cases, the courts consistently turned to a balancing of the risks of harm against the burden placed on the publication. And none of them suggest SOF must investigate every advertiser and pass judgment on the legitimacy of each ad it receives. Indeed, the court in *Braun* noted that while SOF owes “a duty of reasonable care to the public, the magazine publisher

¹⁰⁵ 968 F.2d 1110 (11th Cir. 1992).

¹⁰⁶ *Id.* at 1112.

¹⁰⁷ *Id.*

¹⁰⁸ The advertisement stated:

GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 682 Village Loop Road, Gatlinburg, TN 37738.

Id. This ad was placed by Michael Savage, who also placed one of the advertisements in the *Norwood* case.

¹⁰⁹ *Id.* at 1113.

¹¹⁰ *Id.* at 1116.

¹¹¹ Citing the District Court decision, the court concluded: “We agree with the district court that ‘the language of this advertisement is such that, even though couched in terms not explicitly offering criminal services, the publisher could recognize the offer of criminal activity as readily as its readers obviously did.’” *Braun v. Soldier of Fortune*, 749 F. Supp. 1083, 1085 (M.D. Ala. 1990). *Id.* at 1121.

does not have a duty to investigate every ad it publishes.”¹¹² Although the factual conclusion in *Eimann* differed from *Braun* and *Norwood*, the real issue in all three cases is whether the magazine was in a position to recognize or foresee unreasonable risk, such that a balance was struck where the burden on SOF was relatively small and the risk to the public was relatively high.

SOF is not the only publication that has been considered in this context. For example, in *Rice v. Paladin Enterprises, Inc.*,¹¹³ the Fourth Circuit Court of Appeals held *Paladin*, the publisher of a book entitled “Hit Man: A Technical Manual for Independent Contractors,” might be held civilly liable for aiding and abetting the murder of three people killed in accordance with the instructions contained in the book.¹¹⁴ James Perry, who committed the murders, was hired by Lawrence Horn to kill Horn’s family.¹¹⁵ Mr. Perry’s possessions included a copy of the book in question.¹¹⁶ Other than purchasing two publications from *Paladin*, neither Perry nor Horn had any contact with *Paladin*, the defendant in this case.¹¹⁷

Just as false and deceptive advertising lacks constitutional protection, the *Rice* court held that the *Hit Man* constituted the constitutionally unprotected act of aiding and abetting criminal conduct, and similarly was not protected by the First Amendment.¹¹⁸ Accordingly, the court denied defendant’s motion to dismiss the case, and remanded it for trial.¹¹⁹ Like *Braun*, the publisher could reasonably foresee that the subject material represented an unreasonable risk of harm, so the First Amendment afforded no shield from civil liability.¹²⁰

There are cases, too, that reach beyond the murder-for-hire scenario to affect other forms of advertising. For example, in *Ragin v. New York Times*

¹¹² *Id.* at 1113.

¹¹³ 128 F.3d 233 (4th Cir. 1997).

¹¹⁴ *Id.* at 267.

¹¹⁵ *Id.* at 239.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 241.

¹¹⁸ Acknowledging the Supreme Court’s pronouncement in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), protecting speech that teaches or advocates violence, the Fourth Circuit decision recites a long history of cases that draw a line between speech that advocates versus speech that becomes an integral part of a criminal act. The court notes, for example, that virtually every jurisdiction has found the First Amendment to be no defense to charges of aiding and abetting violations of the tax laws. *Rice*, 128 F.3d at 245-46. While *Brandenburg* dealt with abstract advocacy, speaking and burning a cross at a Ku Klux Klan rally, the present case concerned step by step, detailed, instructions clearly created to aid someone “contemplating or in the throes of planning murder.” *Id.* at 249.

¹¹⁹ *Id.* at 243.

¹²⁰ *Supra* note 118.

Co.¹²¹ a group of black people sued the newspaper alleging real estate advertisements in the *Sunday Times* over a twenty year period featured thousands of human models, with virtually none of them being black, thereby constituting discrimination.¹²² The District Court rejected an argument by the *Times* that the First Amendment barred imposing liability on the paper for publishing these ads.¹²³ Pointing to the Supreme Court's *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*¹²⁴ declaration that commercial speech concerning unlawful activity is not protected by the First Amendment,¹²⁵ the court saw no obstacle to holding the newspaper responsible.¹²⁶

The *New York Times* argued that policing real estate ads for signs of racial preference would represent an undue burden for publishers, but the court countered:

It is not clear that monitoring real estate advertisements for indications of discriminatory preference would be so onerous. The *Washington Post*, a newspaper of some consequence in a metropolis of some size, had no difficulty in agreeing with comparable plaintiffs to require specified black representation in different kinds of advertisements; recordkeeping of real estate display sections for three years; and enforcement by means of notices to advertisers, monitoring compliance, and prohibition of advertisements if the advertiser did not comply, all the while keeping copies of such notices for plaintiffs' inspection. I have a parochial reluctance to conclude that what the *Washington Post* can do to eliminate all the ads unfit to print, the *New York Times* cannot do.¹²⁷

On appeal, the Second Circuit agreed with that assessment when noting that the *Times*' "Standards of Advertising Acceptability" already require the paper to monitor ads submitted for publication, looking for a wide range of violations.¹²⁸ That court remarked, "Given that this extensive monitoring – for purposes that are both numerous and often quite vague – is routinely performed, it strains credulity beyond the breaking point to assert that monitoring ads for

¹²¹ 726 F. Supp. 953 (S.D.N.Y. 1989), *aff'd*, 923 F.2d 995 (2d Cir. 1991).

¹²² *Id.* at 954.

¹²³ *Id.* at 962-63.

¹²⁴ 413 U.S. 376 (1973).

¹²⁵ *Ragin*, 726 F. Supp. at 962-63.

¹²⁶ *Id.* at 964.

¹²⁷ *Id.*

¹²⁸ *Ragin*, 923 F.2d at 1004.

racial messages imposes an unconstitutional burden.”¹²⁹ Again, the degree of burden placed on the publication is key to the constitutionality of the liability imposed on it.¹³⁰

In case after case, courts are willing to find that media have some responsibility toward the public for the advertisements they publish, despite fears about treading on the guarantees of the First Amendment. Similar responsibility has been found with regard to advertising agencies which, like media, often protest that they are mere conduits for their clients, in no position to know every truth about a product, and unable to handle the enormous burden of scrutinizing every claim for accuracy.¹³¹ The distinctions between media and ad agency are trivial, since both play a role in delivering the deceptive message. At some juncture both the ad agency and the media vehicle aid and abet the commission

¹²⁹ *Id.*

¹³⁰ *But cf.*, Matthew G. Weber, *Media Liability for Publication of Advertising: When to Kill the Messenger*, 68 DENV. U. L. REV. 57 (1991). Weber argues *Ragin* should not be used as justification for placing liability on publications, largely because publishers are not in the same position to know the truth as the advertisers, nor do they have the economic incentive to assume the large burden of policing advertisements. His argument, though, does not consider situations where, as in the case of weight-loss claims, the advertisers' indiscretions are clear and easily recognized by a publisher.

¹³¹ The court in *Colgate-Palmolive Co. v. FTC*, responding to such a claim by the Ted Bates advertising agency, declared, “We see no reason why advertising agencies, which are now big business, should be able to shirk from at least prima facie responsibility for conduct in which they participate.” 326 F.2d 517, 523-24 (1st Cir. 1963), *rev'd on other grounds*, 380 U.S. 374 (1965). This echoed the remarks of FTC Commissioner Elman concerning the Bates protest of liability, in the agency's original decision on this case, “[E]ven though a respondent does not directly engage in unlawful activity, it may be held to have violated the Act if it has provided others with the means of doing so.” *Colgate-Palmolive Co.*, 59 F.T.C. 1452, 1471 (1961), *vacated*, 310 F.2d 89 (1st Cir. 1962), *enforced*, 62 F.T.C. 1269 (1963), *rev'd*, 326 F.2d 517 (1963), *rev'd*, 380 U.S. 374 (1965). A similar conclusion was reached when the FTC included an advertising agency in its order holding the maker of Screts throat lozenges liable for deceptive advertising, declaring that the agency knew or should have known of the deception. *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (1968). *See also*, *Carter Products, Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963); *Standard Oil Co. of Cal. v. FTC*, 577 F.2d 653 (9th Cir. 1978); *Continental Baking Co., Inc.*, 83 F.T.C. 865 (1973), *modified*, 532 F.2d 207 (2d Cir. 1976).

Applying this same basic principle to false advertising actions under the Lanham Act, the court in *Gillette Company v. Wilkinson Sword, Inc.*, held that “where an advertising agency participated in the creation, development, and propagation of a false advertising campaign with knowledge of its falsity”, the agency should be held jointly and severally liable for damages caused by the campaign. 795 F. Supp. 662, 664 (S.D.N.Y. 1992).

It even is possible for an agency to be found guilty of criminal liability for its part in deceptive advertising. This occurred, in fact, in a case involving a weight-loss product. The product, “Regimen Tablets,” was promoted by “false or fraudulent pretenses, representations and promises” in violation of the mail and wire fraud statutes. The agency that handled the account, Kasstor-Hilton, Chesley, Clifford & Atherton, Inc., was a co-defendant in the case and found guilty at trial. *See United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

of illegal activity, contrary to their claims of total immunity. As Debra Alligood remarked several years ago, looking at this problem in the context of racially biased real estate advertising, "There is a point at which failure to monitor slips from mere negligence to recklessness and from there quickly into malice. It is at this latter end of the continuum that principal liability for the creation of an exclusionary message ought to be imposed on newspapers."¹³²

This problem is reconciled, and a line drawn, by invoking a balancing of those competing risks: the risk of criminal activity and its resulting harms weighed against the risk of burdening the press and its concomitant harm to free speech.¹³³ That same balancing of risks is fairly easy to apply in the weight-loss advertising context.

D. Weight-loss Advertising Risks and Burdens

The risks associated with weight-loss advertising are high, and well established. With more than half of weight-loss advertisements being deceptive in whole or in part,¹³⁴ and the weight-loss industry now exceeding \$35 billion in revenue,¹³⁵ the monetary loss attributable to such ads clearly is enormous. This is theft on a grand scale. But perhaps even more significant is the false hope those claims give people who often are desperate for help and who may suffer serious despair when the product fails to deliver. It is even possible that some of these ads may contribute to dangerous behavior, such as eating disorders.¹³⁶ In

¹³² Debra L. Alligood, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements*, 40 *UCLA L. REV.* 199, 231 (1992).

¹³³ The court in *Braun*, specifically refers to Judge Learned Hand's analysis of due care owed by a barge owner where the absence of a bargee contributes to damages resulting from the barge breaking away from its moorings. *Braun v. Soldier of Fortune*, 749 F. Supp. 1083, 1115 (M.D. Ala. 1990); *See also* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). In that case Judge Hand presented this as a simple mathematical formula:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.

Id. at 173.

¹³⁴ FEDERAL TRADE COMMISSION, *supra* note 6.

¹³⁵ Bryant, *supra* note 13.

¹³⁶ Besides the potential for these products and their advertisements to lead dieters to skip meals or eat meals that do not permit ingestion of some nutrients, some of these products are

addition, this widespread deception casts a cloud of suspicion over honest competitors.¹³⁷

The burdens of the proposed approach, on the other hand, are low. With a clear list of patently false claims provided to media managers by the FTC, they would be hard pressed to assert they had no way of knowing the advertising contained deceptive statements. And such a clear list was, in fact, compiled from the discussion of the Science Panel at the Workshop. The following claims, it was concluded, are not scientifically feasible at this time:

- Consumers who use the advertised product can lose two pounds or more per week (over four or more weeks) without reducing caloric intake and/or increasing their physical activity.
- Consumers who use the advertised product can lose substantial weight while still enjoying unlimited amounts of high calorie foods.
- The advertised product will cause permanent weight loss (even when the user stops using the product).
- The advertised product will cause substantial weight loss through the blockage of absorption of fat or calories.
- Consumers who use the advertised product (without medical supervision) can safely lose more than three pounds per week for a period of more than four weeks.
- Users can lose substantial weight through the use of the advertised product that is worn on the body or rubbed in to the skin.

herbal diet remedies which may have undocumented effects. Ephedrine, for example, was heavily promoted as a diet product until at least 42 deaths were connected to the use of that ingredient. Jennifer Sardina, *Misconceptions and Misleading Information Prevail – Less Regulation Does Not Mean Less Danger To Consumers: Dangerous Herbal Weight Loss Products*, 14 J.L. & HEALTH 107 (2000). There is even the potential that someone may rely on dietary supplements to treat a disease. Cameron Simmons & Melissa Simmons, *Drugs and Dietary Supplements: Ramifications of the Food, Drug, and Cosmetic Act and the Dietary Supplement Health and Education Act*, 2 W. VA. J. L. & TECH. 1.3 (Feb. 14, 1998), available at <http://www.oralchelation.net/data/1994DietaryAct/data7b.htm>.

¹³⁷ Indeed, this particular consequence was a theme that ran through comments by Industry Panelists, and it may have served as the impetus for some of them to participate in the panel. FEDERAL TRADE COMMISSION, DECEPTION IN WEIGHT-LOSS ADVERTISING WORKSHOP: SEIZING OPPORTUNITIES AND BUILDING PARTNERSHIPS TO STOP WEIGHT-LOSS FRAUD 19-20 (Dec. 2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf> (summarizing the comments by Industry Panelists).

- The advertised product will cause substantial weight loss for all users.
- Consumers who use the advertised product can lose weight only from those parts of the body where they wish to lose weight.¹³⁸

This likely is not an exhaustive list of absolutely fraudulent and easily identifiable weight-loss claims, but it provides a good starting place. The FTC brought these particular claims to the table at the Workshop ostensibly because they constituted some of the most common forms of deceptive diet claim in current or recent use in the marketplace.¹³⁹

Consequently, the media companies could not claim they are being unduly burdened in having to conduct research and determine if the claims are true, since the research has already been done for them by the FTC and its panel of scientific experts. Spotting the undesirable advertising statements from this list would be as easy as expanding some employees' duties that already include blocking statements managers fear might offend their audience, such as the defamation of a deity or use of a ten-letter word for a sexual activity. Most publications and broadcast stations already have someone, or even an entire department, responsible for ensuring that certain lines are not crossed.¹⁴⁰ Some have rather extensive lists of products, claims, and images that are not permitted within their media vehicle, or are subject to certain limitations.¹⁴¹ The burden,

¹³⁸ *Id.* at 31. The panelists limited their consideration to "nonprescription drugs, dietary supplements, creams, wraps, devices, and patches" and did not include in their assessment the possibility that such claims might be possible for "prescription drugs, meal replacement products, low calorie foods, surgery, hypnosis, or special diets such as the Atkins diet or very low calorie diets." *Id.* at 2. Consequently, the burden on media would be limited to scrutinizing ads only where they entail products that fall into that first category, further limiting the onus on media.

¹³⁹ A notice previously had been published in the Federal Register, announcing the planned workshop and including this list of diet claims as part of its agenda and inviting public comment as to whether the current state of science would render them false. Public Workshop: Advertising of Weight Loss Products, 67 Fed. Reg. 59,289 (Sept. 20, 2002), available at <http://www.ftc.gov/os/2002/09/weightlossfrm.htm>. No comments were received, and no scientific evidence was submitted, prior to the workshop. FEDERAL TRADE COMMISSION, *supra* note 137, at 2.

¹⁴⁰ See, e.g., Patrick R. Parsons et al., *Magazine Publisher and Advertising Manager Standards for Acceptable Advertising*, 10 J. CURRENT ISSUES & RESEARCH ADVER. 199 (1987); Herbert J. Rotfeld et al., *Television Station Standards for Acceptable Advertising*, 24 J. CONS. AFF. 392 (1990); Herbert J. Rotfeld & Avery M. Abernethy, *Radio Station Standards for Acceptable Advertising*, 24 J. BUS. RES. 361 (1992); Jan LeBlanc Wicks, *Does Infomercial Clearnace Vary by Managerial, Organizational and Market Factors*, 38 J. BROAD. & ELEC. MEDIA 229 (1994); Herbert J. Rotfeld et al., *Newspapers' Standards for Acceptable Advertising*, 36 J. ADV. RES. 37 (1996).

¹⁴¹ Although media companies do not always put their policies in writing and in some cases are quite guarded about disclosing those policies, the *Courier-Journal* and the *Louisville Times* newspapers in Louisville, Kentucky, published advertising policies several years ago in booklet form.

then, will be minimal. Actually, at least a few of the more responsible media companies were screening such claims long before this recent FTC initiative.¹⁴²

Over the years preceding the November workshop, both the FTC and FDA amassed a substantial volume of information pertaining to false and deceptive weight-loss advertising, reviewing countless advertisements and finding specific types of often-repeated claims to be false or deceptive. As confirmed by the Workshop's Science Panel, certain claims appear beyond the realm of reasonable possibility, making it easy for the media managers to identify a deceptive advertisement at a glance. And if that succinct list is not adequate guidance for the publication's designated screening person, both the FTC and the FDA have provided plenty of additional sources of information, including a booklet designed to provide guidance to media.¹⁴³ But you can observe for yourself in the list above, the degree of expertise needed to pass judgment on these claims is not overwhelming. As one FTC staff member commented, "You don't need to be a chemist to know these claims are false. This is not rocket science."¹⁴⁴

Whether accomplished through a trade regulation rule or case-by-case, media should be put on notice that that weight-loss claims on the list will be construed as *prima facie* evidence an ad is deceptive, and that any newspaper, magazine, broadcast station, or other media outlet accepting an advertisement

It consisted of more than 24 pages of very small type with 80 main headings, some with numerous subheadings. Headings cover everything from advertising for surrogate mothers to meat products, from depictions of the U.S. flag to the use of testimonials or the disparagement of competitors. Some of the specifics include that abortion services advertising "may be acceptable" but requires prior approval, and that air conditioner advertising is required to clearly state the BTU rating. THE COURIER-JOURNAL & THE LOUISVILLE TIMES, ADVERTISING ACCEPTANCE (Jan. 1985).

¹⁴² In 1983 NBC television dedicated 1 ½ pages of its 18 page printed ad guidelines to the topic of weight reduction and control advertising. One excerpt from that document shows that the company was aware of the same problems addressed at the Workshop:

2. As a general matter, effective weight loss for persons who are moderately overweight will result from regular exercise and reduced calorie intake. Advertising for weight reduction products and services should thus avoid implications that: a) a product in itself can cause weight loss without cutting caloric intake; or b) one's appetite will be completely satisfied.

NATIONAL BROADCASTING CORPORATION, NBC BROADCAST STANDARDS FOR TELEVISION: ADVERTISING GUIDELINES (May 1983).

¹⁴³ FEDERAL TRADE COMMISSION, RED FLAG BOGUS WEIGHT CLAIMS: A REFERENCE GUIDE FOR MEDIA ON BOGUS WEIGHT LOSS CLAIM DETECTION (2003), available at <http://www.ftc.gov/red-flag/>. And in addition to the list of claims presented here, a list of known problematic products that use those claims, such as diet patches, fat blockers, and starch blockers, can be found in FEDERAL TRADE COMMISSION, FOOD AND DRUG ADMINISTRATION & NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, DHHS PUBLICATION No. (FDA) 92-1189, THE FACTS ABOUT WEIGHT LOSS PRODUCTS AND PROGRAMS (1992), available at <http://www.cfsan.fda.gov/~dms/wgtloss.html>.

¹⁴⁴ Diane Toroian, *Stations Here Defend Policy On Ads About Weight Loss*, ST. LOUIS POST-DISPATCH, Dec. 13, 2002, at A1.

containing a listed claim may be subject to enforcement action. Wide distribution of this list to media obviates any claim of ignorance or innocence on the publication's part. As advertising agencies can be held accountable where they knew or should have known that a claim is misleading,¹⁴⁵ there simply is no justification for insulating media from a similar degree of responsibility.

V. TRUST ME, I'M YOUR GOVERNMENT!

Consumers generally hold some degree of skepticism toward advertising and advertising practitioners.¹⁴⁶ This high level of suspicion, however, does not vitiate the need for government oversight of advertising practices. Indeed, consumers continue frequently to be deceived. Their mistrust seems to be generalized rather than directed at specific advertisements. They still respond to ads that offer products or services that meet some need they possess. One likely reason they continue to trust in so many ads is that they trust the government to protect them; the pervasive assumption that "they couldn't say it if it wasn't true." Another reason, as FTC Commissioner Anthony has suggested, "I think consumers trust the media to screen ads at some level, especially those consumers who have a relationship with a particular medium, such as a subscription to a newspaper or magazine."¹⁴⁷ Unless and until the Commission begins treating media as accomplices in deception, consumers are not justified in trusting either.

In lieu of relying on the federal government and media to protect them, consumers' only recourse is to institute private legal action upon finding they have been deceived. While injured consumers may not bring private enforcement actions under the FTCA,¹⁴⁸ they frequently can pursue private remedies

¹⁴⁵ *Supra* note 131.

¹⁴⁶ Calfee and Ringold looked at surveys spanning several years and found, consistently, that in each study about 70% of consumers claimed not to believe what they read in advertising. John E. Calfee & Debra Jones Ringold, *The 70% Majority: Enduring Consumer Beliefs About Advertising*, 13 J. PUB. POL'Y & MKTG. 228 (1994). Also, since 1976 the Gallup organization has conducted an annual Poll that asks people to rank the honesty and ethics of various professions. It finds, with equal consistency, that advertising practitioners are among the least trusted. *See, e.g.*, Ronald M. Schwartz, *Pharmacists again top Gallup poll*, 215 AMERICAN DRUGGIST 15 (1998); David W. Moore, *Firefighters Top Gallup's "Honesty and Ethics" List*, Gallup News Service (Dec. 5, 2001).

¹⁴⁷ Sheila F. Anthony, *Let's Clean Up the Diet-Ad Mess*, ADVER. AGE, Feb. 3, 2003, at 18.

¹⁴⁸ *FTC v. Klesner*, 280 U.S. 19 (1929) declares:

Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer.

under state laws.¹⁴⁹ In fact a state statute, unlike its federal counterpart, might even address the issue of media liability. An example of this is found in Texas, where its statute prohibiting deceptive advertising includes the following exemption from liability:

Nothing in this subchapter shall apply to the owner or employees of a regularly published newspaper, magazine, or telephone directory, or broadcast station, or billboard, wherein any advertisement in violation of this subchapter is published or disseminated, *unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive, or misleading acts or practices* declared to be unlawful by this subchapter, or had a direct or substantial financial interest in the sale or distribution of the unlawfully advertised good or service. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.¹⁵⁰

In this instance, by sending the above list to media, the FTC also would give publications “knowledge of the false, deceptive, or misleading acts or practices,” thereby providing consumers with an opportunity to hold media accountable for any losses. Failure of the Commission to put media on notice, then, not only limits federal action but also may impede private remedial actions.

But private litigation is expensive and inefficient, and it tends to happen after the damage is done. Where weight-loss advertising is involved, substantial and even irreparable physical and psychological injury may occur before the consumer has a cause of action. Aside from the advertiser, only the FTC and media are in a position to prevent such injury from ever happening.

As this is being written, in no case of deceptive advertising has the FTC ever taken action against any media vehicle that carried the message. No investigations have been announced and no cases initiated. On the problems of weight-loss advertising, no trade regulation rules have been proposed. Clearly, throughout its long history, the Commission has been reluctant to bring enforcement actions against mass media vehicles. In fact, quite recently, the FTC sent letters to at least nine print publications that ran weight-loss ads using claims from the List of known deceptions, but the agency also stated it was not

Id. at 25.

¹⁴⁹ Many states have laws, sometimes called “little FTC acts,” prohibiting deceptive advertising claims. *See, e.g.,* Jef I. Richards, *FTC or NAAG: Who Will Win the Territorial Battle?* 10 J. PUB. POL’Y & MKTG. 118, 125-26 (1991); Mary Gardiner Jones, *The Federal Trade Commission in 1968: Times of Turmoil and Response*, 7 J. PUB. POL’Y & MKTG. 1 (1988). Numerous of those allow private lawsuits against violators. *E.g.,* TEX. BUS. & COM. CODE ANN. § 17.50 (2004).

¹⁵⁰ TEX. BUS. & COM. CODE ANN. § 17.49(a) (2004) (emphasis added).

planning to take legal action against those publications.¹⁵¹ “No enforcement” continues to be official policy.

In the short run, there exists the illusion that actual FTC actions might not be needed. The mere publication of this or any similar strategy for persuading media channels to act more responsibly has had a deterrent effect, because businesses respond to threats of government actions that *might* happen, or so goes the logic. Unofficially, FTC staffers have personally noticed that the Commission's attention to this issue apparently has compelled some large vehicles to stop accepting the most egregious of dietary supplement advertising claims.¹⁵² Whether this is the result of intimidation or moral leadership is debatable. Doubtless there are some publications and broadcasters that try to do the right thing, and if someone points out where they can improve they will take corrective measures. However, many of these products are still being actively promoted on cable networks, as well as in a multitude of magazines and newspapers. And even those media vehicles that currently screen these ads may not be so diligent after the public spotlight is removed from this issue. As time passes without any actions against the vehicles, businesses may return to their past practices. Unless actual litigation cost and potential liability exposure exceed advertising revenue, any change is likely to be small, limited, and short-lived.

VI. CONCLUSION

In spite of the FTC bringing case after case against advertisers in this industry,¹⁵³ regulation is doing a poor job of protecting consumers from weight-loss ads. There is no doubt that, while there certainly are honest players in the market, fraud is rampant among those catering to the common, and often desperate, desires to lose weight. The size of this market is enormous, and the need is so deep in some consumers that they are ready and willing to pay almost whatever is demanded for a quick and simple weight-loss solution. These conditions have created a perfect breeding ground for unscrupulous con men (or women) seeking a get-rich-quick scheme. In fact, it has served in that capacity for a very long time, with no perceptible change.

Deception in weight-loss advertising is nothing new. You can look through old magazines from decades ago and find the same fraudulent claims that are so common today. There are few industries where the falsities are so blatant, or so potentially dangerous to consumer health, and probably none

¹⁵¹ Ira Teinowitz, *FTC Warns Publishers About Phony Diet Ads*, *ADVER. AGE*, Nov. 9, 2004, available at <http://www.adage.com/news.cms?newsId=41927#>. The nine publications named were *Cosmopolitan*, *Woman's Own*, *Complete Woman*, *USA Weekend*, *Dallas Morning News*, *San Francisco Chronicle*, *Cleveland Plain Dealer*, *Albuquerque Journal* and *TeleRevista* magazine.

¹⁵² Based on personal conversations the authors have had with FTC staff members.

¹⁵³ *Supra*, note 5.

where blatant lies are so pervasive. There is little doubt that the FTC's efforts to curb those deceptions have largely failed and that new strategies are needed. But its resources are far too limited to adequately deal with this problem by itself, unless it can find a more cost-effective means of stemming the tide of lies. The reality is that the media are easier to catch than the thousands of fly-by-night sellers of diet products. They can and should be held accountable for trafficking in known deceptions. Although calling media on the carpet for their complicity in these deceptions is unlikely to be a panacea, it does hold the promise of supplementing the Commission's efforts. And until all regulatory opportunities are explored, the FTC does not deserve the public's trust.