PROOF OF CONSUMER DECEPTION BEFORE THE FEDERAL TRADE COMMISSION

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I. INTRODUCTION

Rising public interest in consumer problems inevitably focuses attention on the Federal Trade Commission. It seems the natural leader of the attack against consumer deception since the Commission is the one agency which already has considerable power to eliminate the causes of consumer deception. In addition to its attention-getting abilities and extensive rights of investigation, the FTC is empowered to enjoin unfair and deceptive trade practices including false or misleading advertising.[1]

But after even a brief perusal of the Commission's activities in the consumer protection arena, the observer is likely to become discouraged as to the capability of this agency to protect consumers. The effect of its performance seems negligible, for deceptive practices appear to be multiplying[2] and limitations on the Commission's capacity seem to outweigh its powers. For example, the "in commerce" limitation on FTC jurisdiction has been viewed as a restriction on the Commission's power to prosecute local merchants using deceptive practices outside the District of Columbia, although some forward movement is discernible.[3] Even where it has jurisdiction, the Commission has not pressed its false advertising program with particular vigor, relying more on complaints of competitors than on preplanned enforcement programs following up in-depth analyses of consumer needs.[4] On the other hand, recent FTC hearings, reports, and pilot projects on consumer problems suggest that a different approach may be on the horizon.[5]

Despite recent charges, the most significant obstacle to FTC prevention and prosecution of consumer deception through false advertising is probably not a

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[1] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1964), *amending* 38 Stat. 719 (1914).

[2] *See generally, e.g.*, W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE (1968); D. CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES (1963). *See also* E. COX, B. FELLMUTH, J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969).

On the other hand, we may just be more aware of such practices. For a more sanguine appraisal of FTC performance, but limited to false advertising cases, *see, e.g.*, Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548 (1964). The impact of FTC activity is, of course, impossible to quantify on the basis of available data. *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1097 (1967).

[3] *Compare* FTC v. Bunte Bros., 312 U.S. 349 (1941), *with* Bankers Securities Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961).

[4] *See* H.R. 3236, 81st Cong., 2d Sess. 16-17 (1951); Gimbel Bros., 60 F.T.C. 359, 375 (1962) (dissenting opinion).

[5] *See, e.g.*, Federal Trade Commission, *Notice of Hearings on National Consumer Protection and Education*, 33 FED. REG. 15232 (1968); FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILORS (1968); FEDERAL TRADE COMMISSION, REPORT ON THE DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM (1968), *the latter two are summarized in* 5 TRADE REG. REP. ¶¶ 50,194, 50,205 (1968).

lack of prosecutorial vigor. Rather, it is procedural problems that plague the Commission.[6] Lacking preliminary injunctive powers except in the case of false food and drug advertisements—itself an unused power—the FTC is impotent to prevent deceptive practices until after trial and administrative appeals. Respondents freely rely upon procedural devices such as the Commission's willingness to entertain interlocutory appeals on an almost automatic basis to delay and postpone such cases endlessly. Two to three years is not an uncommon period between complaint and issuance of a cease and desist order; more than a decade is not unheard of. In recent years the FTC has expanded voluntary compliance, advisory opinion, and similar programs; but these provide scant protection against the persistent, recalcitrant firm. Unless the FTC can prosecute the hard-liners effectively and swiftly, it can hardly expect their competitors to cooperate and willingly place themselves at a significant disadvantage.

The FTC will not become an effective force in the area of consumer protection until its procedural problems are faced and resolved. Many suggestions have been made. Commissioner Elman has recommended that federal district attorneys be empowered to prosecute routine consumer deception cases, leaving the Commission free to develop the law in significant test cases.[7] Although this suggestion deserves to be explored carefully, its current prospects for adoption seem slim. In the last session of Congress, the Senate passed legislation giving the FTC preliminary injunctive powers upon application to a federal district court in consumer deception cases; but the House failed to act and this proposal must now be approved by both houses in the 91st session if it is to become law.[8] While not to be decried, consideration still needs to be given to whether this suggestion is really too meek. Why not, for example, give the FTC power to issue a preliminary injunction in consumer fraud cases subject to court review? After probable cause has been found by the Commission and substantial public harm is likely, it does not seem an unfair burden to require the respondent to show cause why an injunction should not issue in a consumer deception case.[9] Interpretations of the "in commerce" limitation on the FTC seem ripe for considerable expansion.[10] Other possibilities also need to be considered. For example, an earlier suggestion that violations of section 5 create civil remedies needs implementation.[11] The FTC might experiment with summary administrative procedures for trying consumer deception cases as an alternative to the injunction remedy or as a solution for the problem of prosecuting routine cases. Despite the current judicial popularity of expanding rights to hearing and opportunities to be heard, neither "due process" nor

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[6] Many of these problems are summarized in *Developments in Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1063-96 (1967).

[7] Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 A.B.A.J. 609 (1967).

[8] *See* S. 3065, 90th Cong., 2d Sess. (1968).

[9] *But cf.* Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 493 n.263 (1964).

[10] *Id.* at 456-57; G. ALEXANDER, HONESTY AND COMPETITION 3-4 (1967).

[11] *See* Bunn, *National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949).

common sense requires a full trial-type hearing in every case. The development of less time-consuming but fair procedures in false advertising cases is an immediate need.[12] As an adjunct to voluntary compliance programs the Commission should develop standards for fair consumer contract practices, authorizing equitable merchants to advertise the fairness of their practices.[13] Just as automobile manufacturers are finally starting a race to safety, so should merchants be encouraged to compete in the honesty of their sales.

Experimentation should become the hallmark of FTC action. As one suggestion in this regard, this article examines the problem of proof of consumer deception in FTC false advertising cases and suggest as an alternative the expanded use of scientific surveys and standards for the interpretation of such surveys. The ideas here are tentative; they need to be tested in a few cases before being encased in new FTC rules. Nor would adoption of this suggestion in all particulars itself significantly relieve the problems of delay and ineffectiveness in FTC consumer protection cases. On the other hand, sweeping condemnation of FTC personnel and procedure is no solution. What is needed and what this article attempts is to examine critically one problem area of FTC enforcement and to make specific suggestions which can be tested, refined, and adopted as Commission rules.

II. FTC PROSCRIPTION OF FALSE ADVERTISEMENTS[14]

A. *Basic Issues in a False Advertising Case*

The framework of a false advertising case is deceptively simple. In addition to satisfying elementary jurisdictional requirements—such as finding that the advertisement was "in commerce," that the Commission's challenge is in the "public interest," and that a "material" misrepresentation has occurred—proof of a false advertising charge involves three substantive questions. First, what did the respondent promise by its advertisement? That is, what consumer understanding was created by the advertisement? Second, at what level of consumer intelligence is the advertisement to be tested? Third, is the promise of the advertisement as understood by the audience with this particular intelligence true or false? If neither misleading nor false, no order is issued; if otherwise, the challenged ad and similar practices are enjoined in perpetuity.

[12] *Cf.* Statement accompanying Trade Regulation Rule for the Prevention of Unfair and Deceptive Advertising and Labeling of Cigarettes, June 22, 1964, at 137, *reprinted in* Lemov, *Administrative Agency News Releases: Public Information Versus Private Inquiry*, 37 GEO. WASH. L. REV. 63, 76 n. 68 (1968); Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1210 (1968).

[13] *Cf.* Department of Defense Directive No. 1344.7, Personal Commercial Affairs (May 2, 1966), *reprinted in Hearings on S. 5 (Truth-in-Lending Act 1967) Before a Subcommittee of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 243 (1967).

[14] No attempt is made here to set forth the intricacies of Commission precedent and practice in false advertising cases. Others have reviewed FTC false advertising law with care and length. *See, e.g.*, Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 438 (1964) [hereinafter cited as Millstein]; Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548 (1964); *Developments in Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967); Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018 (1956). *See also* G. ALEXANDER, HONESTY AND COMPETITION (1967). Rather, this section merely summarizes FTC false advertising law and procedure in order to establish a basis for considering a survey proposal.

Although this article concentrates on methods which are or can be used to prove consumer understanding of a challenged advertisement, these techniques are explainable only after the issues raised by the second and third questions, *i.e.*, the level of consumer intelligence and the truth of the representation, have been explored briefly in context.

B. *The Level of Consumer Intelligence and the Truth of the Claim*

Little attention is paid in FTC hearings to the audience reached by the advertisement and to the intelligence of that audience. This issue is generally significant only upon court review of an FTC order. Even then, it has been satisfied easily because the FTC is given almost unlimited discretion to determine what are unfair or deceptive acts or practices. Several factors contribute to this result. As an administrative agency, the FTC is delegated the function of determining what ads should be prohibited under the unfair or deceptive standard; in this area courts are prone to defer to Commission expertise. In addition the FTC need not show that consumers were actually deceived; it need only prove that the ad has the capacity to deceive. Once a sufficient public interest in prosecuting the matter has been found—again, a Commission determination seldom questioned by the courts—the FTC order generally is upheld as long as it is possible that someone of "any intelligence level could find and believe a misleading connotation."[15]

An extreme but commonly cited case illustrating this point is the FTC's successful prosecution of a claim that a hair coloring product could "color hair permanently."[16] The Commission claimed that the respondent's use of the term "permanent" was misleading since hair not yet grown when the product was applied would still grow in with its natural color. But the Commission did not show that anyone had been misled. Rather, it relied upon one consumer's testimony that some women might misunderstand the ad as implying that hair would subsequently grow in with the artificial color—even though she herself knew better! In upholding the Commission's order the court routinely noted that the advertisement could be prohibited because the FTC Act is "for the protection of the trusting as well as the suspicious. . . ."[17]

It is not surprising, then, that in the typical proceeding neither the complaint counsel nor the respondent dwell on the issue of consumer intelligence. This does not mean that the FTC has acted blindly and prohibited all advertisements that may mislead someone. To be sure, it has banned ads which seemingly could be misunderstood only by the "credulous" or "fools."[18] But most of these cases can be explained on other grounds[19] or can be justified by looking at the particular group to whom the ad is directed.[20] Others can be explained simply as time-worn cases of another day. Thus, in recent years the

[15] Millstein at 460.
[16] Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944).
[17] *Id.* at 582.
[18] See cases cited in G. ALEXANDER, *supra* note 14, at 8.
[19] *See Developments in Law, supra* note 14, at 1041 & n.18.
[20] *See* Millstein at 461-62 & n.98.

Commission has refused to ban advertisements of a swimming aid worn underneath a bathing suit which was claimed to be "thin and invisible" when it literally was neither,[21] of charcoal briquets with a "Hickory-Kissed Flavor" even though made from a corncob residue rather than wood,[22] or of replacement television tubes advertised as "new" when the "envelope" admittedly was made with used glass.[23]

Reviewing courts will not uphold an FTC advertising ban unless there is "substantial evidence" that the ad's claim is false or misleading. To prove his case, complaint counsel must show (1) that the product or service is not as effective as claimed and as understood by the hypothetical consumer at the selected intelligence level, (2) that the product's performance is different from the claim, or (3) that the claim cannot be verified. Where the complaint counsel's assertions of deception are supported by expert testimony, trade witnesses, or surveys (in cases of testimonial claims such as "twice as many dentists prefer toothpaste X"),[24] the Commission's order will not be disturbed.

C. *Consumer Understanding*

Where the meaning of a challenged advertisement is relatively clear, FTC standards for assessing consumer comprehension of an ad are simple to apply. The advertisement is viewed as a whole; it is tested by the general impression it creates. Since ads are generally read quickly and carelessly, literal truth is no defense to a charge of deception if a casual reading conveys a misleading impression.

Advertisements underlying litigated cases are often ambiguous rather than clear since they tend to convey both true and misleading claims. Here the quest for a rational and workable measure of consumer understanding has proved elusive. Where the misleading claim is likely to be dominant in the mind of the consumer reading the advertisement, the ad is treated as if this were the claim. But the central meaning may be less obvious. Secondary meanings, qualifications, and limitations in the ad, as well as failures to disclose the whole truth, all contribute to the difficulty of ascertaining what the consumer understands from an advertisement. In these situations current FTC procedures do not satisfactorily resolve the issue of consumer understanding.

Part of the difficulty lies in the illogical division of the proof of consumer deception into the twin issues of consumer intelligence, which is often resolved by considering that question in isolation without reference to the ad itself, and consumer understanding of the attacked advertisement at that intelligence level. It seems unrealistic to set the standard of consumer intelli-

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[21] Heniz W. Kirchner, FTC Dkt. No. 8538 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,664 (1963).

[22] Quaker Oats Co., FTC Dkt. No. 8160 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,713 (1963).

[23] *Compare* Westinghouse Elec. Corp., FTC Dkt. No. 8545 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,497 (Initial Decision 1963), *with id.* ¶ 16,792 (Commission Opinion Dismissing Complaint 1964).

[24] *See* Bristol-Myers Co. v. FTC, 185 F.2d 58 (4th Cir. 1950).

gence without regard to the focus or placement of the advertisement. Until this bifurcated analysis is rejected, the FTC should at least first determine the actual, likely, and possible audience of the advertisement and then determine the intelligence level of this group. In other words, advertising aimed at children, busy businessmen, or women fearful that they are pregnant should be tested by a different standard than automobile ads directed at the public generally. In recent years the Commission has implicitly recognized this point,[25] but not as a standard procedure. However, even this modification of the usual FTC approach to the problem of consumer deception does not explain why the question of consumer intelligence is separated from the question of consumer understanding. Why should the Commission concern itself with the level of consumer intelligence in deciding whether an advertisement should be banned? Common sense would seem to suggest that the Commission determine the audience reached or likely to be reached by the advertisement, and then proceed to measure this audience's understanding of the representation made by the ad without the intermediate and irrelevant step of determining the audience's intelligence.

Two unrelated events may explain the Commission's methodology. First, in reacting to early stringent judicial control over FTC advertising bans, later reviewing courts may have leaned too far in the opposite direction in upholding Commission proscriptions of false advertising.[26] The emphasis in judicial opinions is thus on protecting the credulous, the trusting, and even wayfaring fools. But this only explains judicial reluctance to interfere with an administrative agency's fact determination; it does not justify FTC reliance on this irrelevant approach when the credulous are not shown to be a significant element in an ad's audience.

Second, and perhaps more significant, has been the "evidence" or, more accurately, the lack of evidence supporting FTC findings of consumer understanding. The Commission's reliance on assumptions of consumer deception appears unexplainable unless one accepts the view that administrative agencies invariably select the route of least resistance. Although perhaps this is the explanation, a more likely rationalization is that this approach to the issue of consumer understanding is a by-product of the methods relied upon by counsel to support findings of consumer understanding.

To prove his case the complaint counsel has several options.[27] In most cases he will present no evidence on the issue of consumer understanding and preference and will argue instead that the FTC *knows* from its experience and expertise how consumers interpret respondent's labels and advertising. As an

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[25] *See* cases cited in *Developments in Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1041-42 nn.10-13 (1967).

[26] Nor have courts pressed the FTC to improve its fact-finding procedures. *See, e.g.*, J. B. Williams Co. v. FTC, 381 F.2d 884, 890 (6th Cir. 1967): "The Commission is not bound to the literal meaning of the words, nor must the Commission take a random sample to determine the meaning and impact of the advertisements."

[27] *See, e.g.*, School Services, Inc., FTC Dkt. No. 8729, 3 TRADE REG. REP. ¶ 18,576, at 20,906 (1968); Quaker Oats Co., *supra* note 22.

alternative to this intuitive or hunch approach, the complaint counsel may try to avoid proving consumer understanding by transferring the burden to respondent by seeking *official notice* of consumer understanding and preference. Here the complaint counsel will rely on such factors as the obviousness of the "fact" and prior similar FTC holdings. The complaint counsel may point to *dictionary definitions* as indicating the meaning of advertising terms and hence of public understanding. More directly, he can seek the *testimony* of the purchasing *public* as to their understanding of the ad. Sometimes *trade experts* are called upon to offer their understanding of consumer understanding. Finally, a seldom used technique is the *scientific survey* which samples the universe of consumers reached by the respondent's labels and advertisements and ascertains consumer understanding and preference.[28]

Despite this array of possible methods of proving consumer understanding, complaint counsel generally rely on the intuitive approach, arguing that the FTC has sufficient experience and expertise to know how consumers interpret respondent's labels and ads. As one commentator concluded, "[G]enerally the Commission will find that an advertisement promises what the Commission itself believes it promises, notwithstanding dictionary definitions, the testimony of consumers and experts, or the results of surveys."[29] These practices have continued in the face of mounting criticism. However, the implied suggestion that the Commission should rely on such "evidence" as dictionary definitions, consumer testimony or partisan surveys misconceives the defect of the intuitive approach.

None of these methods for determining public deception is satisfactory. Each has drawbacks which outweigh possible advantages when compared with available or potential alternatives.

The *intuitive* or *hunch* method is an unsatisfactory explanation to the respondent (and the public) of why an advertisement is unlawfully deceptive. It encourages frequent and endless appeals. Although the FTC's judgment is invariably upheld under this approach, the cost of party dissatisfaction, administrative delay, and fruitless appellate contests makes it undesirable, except where the deception is obvious or clear and any other method seems redundant and wasteful.

Dictionary definitions serve no purpose other than for scoring argumentative points. As a tool for determining consumer understanding or deception they are irrelevant and unreliable. A dictionary definition can tell what is a possible or preferred interpretation of words in an advertisement, not how it

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[28] Former hearsay objections to the admissibility of survey evidence have waned as standards for survey administration and reliability have been developed and as the hearsay objection to evidence admitted in FTC hearings has been limited. Arrow Metal Prods. Corp., 53 FTC 721, 727, 733-34, *aff'd per curiam*, 249 F.2d 83 (3d Cir. 1957); Rhodes Pharmacal Co. v. FTC, 49 F.T.C. 263 (1952), *aff'd*, 208 F.2d 382, 386-87 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 940 (1955); *see, e.g.*, Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322 (1960); H. BARKSDALE, THE USE OF SURVEY RESEARCH FINDINGS AS LEGAL EVIDENCE (1957).

[29] Millstein at 470.

has, is, or will in fact be understood.[30] Moreover, the context of the advertisement—verbally, textually, and visually—may even suggest a definition directly contrary to that given in the dictionary.

Trade understandings likewise reflect a specialized view or historical fact but do not necessarily suggest consumer understanding.

The *consumer parade* to the witness stand needlessly prolongs the hearing, is likely to be inaccurate, and serves no purpose other than to demonstrate a known fact—that somewhere, somehow it is possible for inventive counsel to find someone who will interpret an advertisement as counsel wants.[31] Such testimony provides no accurate clue—much less an indication—of consumer understanding. There is no assurance that these witnesses reflect the views of all or even a majority of consumers; they may just as well be isolated understandings or merely inconoclastic thoughts.

The Commission's practice of relying on *official notice* to establish consumer understanding is useful only where the point is obvious or the identical issue has been considered in other cases. Once the Commission has established consumer preference and understanding in previous adversary proceedings, it is efficient and fair to presume that no change has occurred so long as the respondent has an opportunity to prove either that the earlier finding was erroneous or has no application in this case. If based on solid evidence, past experience justifies this transfer of the burden of proof to respondent. But the official notice method of establishing consumer understanding has very limited applicability to FTC false advertising cases. It has commonly been relied upon to show consumer preference for American-made goods, except in connection with perfumes and similar products, and for new as opposed to

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[30] Dr. Bergen Evans, Professor of English at Northwestern University, convinced a hearing examiner of this point in one case: "In his testimony, Dr. Evans emphasized that dictionaries do not attempt to dictate to the public how words should be used; rather, the function of a dictionary is simply to record how words are in fact used by the public." Quaker Oats Co., FTC Dkt. 8160, p. 4 slip opinion (Initial Decision 1962).

[31] Dr. Hans Zeisel, a Professor of Law and Sociology at the University of Chicago Law School, summarized the defects of such "public testimony" in *Quaker Oats:*

> The first requirement of a public opinion survey, he stated is that the persons interviewed must constitute a representative sample of the public or the particular segment involved. They must be chosen by lot or chance or some other method of "random" selection. The second requirement is that the interviews with the persons chosen must be unbiased, that is, disinterested.
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> Neither of these principles, Dr. Zeisel said, was followed here. The witnesses were offered only because it was found by the respective parties that the individuals entertained the views expressed by them; there was no attempt at random sampling. Moreover, Dr. Zeisel stated, the interviews with the individuals were not unbiased. The individuals were aware of the pending litigation, the issue involved, and that their testimony was desired by the party interviewing them. In summary, Dr. Zeisel testified, the testimony of the witnesses indicated nothing more than that the particular individuals entertained the views expressed by them. The testimony in his opinion afforded no basis whatever for an inference that any substantial portion of the public entertained similar views.

Id. at 6-7. *See also* James S. Kirk & Co., 12 F.T.C. 272, 289 (1928) (criticism of testimony of 700 consumer witnesses). The Commission, however, still relies heavily upon consumer witnesses. Consumer Prods. of America, FTC Dkt. No. 8679, 3 TRADE REG. REP. ¶ 18,059, at 20,488-90 (1967), *aff'd*, 400 F.2d 930 (3rd Cir. 1968), *cert. denied*, 89 S. Ct. 877 (1969). *See also* Waterbury, *Opinion Surveys in Civil Litigation*, 44 TRADEMARK REP. 343, 347 (1954).

reconditioned or used articles.[32] In the vast majority of false advertising cases involving claims of performance or price savings it has little relevance.

Least objectionable but still unsatisfactory is the reliance on *partisan surveys* to demonstrate consumer understanding and deception or nondeception. Properly prepared and conducted, a survey should indicate consumer understanding of particular advertising appeals. Requirements that survey "raw data" be made available to opposing counsel and that the Commission accept surveys only insofar as they are based on relevant questions may prevent unfairness or misuse of the survey. Until the FTC establishes sensible ground rules for the preparation and presentation of surveys in cases where consumer understanding is a significant issue, however, the partisan survey is an unduly risky, expensive, and time-consuming method for one party to prove a single issue in the case.[33] Moreover, partisanship and accurate surveys are an unlikely mixture.[34]

III. NONPARTSIAN SURVEYS TO PROVE CONSUMER UNDERSTANDING[35]

These objections to current techniques for proving consumer understanding are not incurable. Consumer understanding of a challenged advertisement need not remain a mystery to be resolved, if at all, only after lengthy and costly proceedings. Instead, regularized procedures should be adopted to encourage or require reliance on independent, nonpartisan surveys to establish consumer understanding and to prove or disprove consumer deception. The survey should be developed under the hearing examiner's guidance after consultation

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[32] *See, e.g.*, Delco Carpet Mills, Inc., FTC Dkt. No. 8692 [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,705 (Hearing Examiner Interlocutory Order 1966); Manco Watch Strap Co., 60 F.T.C. 495 (1962). But the scope of facts which can be "noticed" is limited. *Compare* Brite Mfg. Co. v. FTC, 347 F.2d 477 (D.C. Cir. 1965), *with* Dayco Corp. v. FTC, 362 F.2d 180 (6th Cir. 1966).

[33] The Commission has a penchant for relying upon respondent's survey evidence to support the Commission's finding of consumer deception. In Rhodes Pharmacal, *supra* note 28, respondent's survey was introduced to show that 91% of 300 surveyed consumers were not misled by advertisements of Imdrin, a palliative for arthritis or rheumatism. Although unsatisfied with the questionnaire format, the Commission relied upon the

> survey [as] show[ing] that nine percent of those questioned stated that the advertisements represented that Imdrin would provide a treatment and cure for arthritis and rheumatism. This number alone would constitute a sufficient showing of the deceptive nature of respondents' advertisements. Upon this record the Commission is of the opinion that the hearing examiner correctly held that respondents represented that Imdrin would provide a treatment and cure. . . .

49 F.T.C. at 283; *accord*, Benrus Watch Co., FTC Dkt. No. 7352 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,541 (1963) (respondent's survey showing 86% of consumers surveyed properly understood meaning of preticketing system relied upon by FTC to support finding of deception because 14% of public misled).

[34] Surveyors notoriously find what they are hired to find. They can rarely tolerate the searchlight of cross-examination. They can prove opposite results with equal ease. . . . Too often surveys are conceived in darkness and strike only in the dark; too often they can accomplish nothing when exposed. Generally, the wishes of those who hire surveyors become father to the surveyors' findings.

> This is why the preferable and honest method of polling is under the direction of a court through the submission of fair questions and propounded by the court in full consultation with both sides. Under such conditions surveys can be useful.

United States v. General Motors Corp., 1967 Trade Cas. ¶ 72,229, at 84,463 (N.D. Ohio).

[35] A similar suggestion, in part, was proposed for judicial proceedings in Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322 (1960); *accord*, United States v. General Motors Corp., 1967 Trade Cas. ¶ 72,229 (N.D. Ohio). After describing the function and limits of survey evidence, Professor Zeisel's attention was directed primarily to eliminating the hearsay objection to such evidence—which should not be a concern in FTC hearings.

with both complaint and respondent's counsel; the examiner would control the materiality and relevance of particular questions and thus save the parties the expense and embarrassment of useless evidence. Attractive as this suggestion sounds, it will become only a tool for additional interlocutory appeals and delay unless specific FTC rules set forth: (1) the type of case in which such a prehearing survey is appropriate, (2) standards for survey administration and for drafting survey questions, and (3) criteria for measuring the significance of these survey results. The examiner's rulings cannot be allowed to be subject to the incessant and interminable interlocutory appeals so common in Commission practice today. If these appeals are to be denied, however, the rules or accompanying explanations must consider the basic issues involved.

A. *The Hearing Examiner's Discretion*

Just as FTC Rules now require a prehearing conference for exchange of witness lists, documentary evidence, and similar matters to simplify and expedite the trial of FTC hearings, so should the Rules require that when the question of consumer understanding is in issue in a false advertising case, the examiner may, in his discretion, order that a survey be taken by an independent expert, with the costs being assessed against the losing party or shared by the FTC and respondent.[36] However, such an order should not follow automatically whenever a false advertising charge is filed and a complaint issued, since the issue of consumer understanding or deception may not warrant the cost or delay of an independent survey. Past cases involving identical facts may have established the consumer understanding, in which case the official notice technique considered earlier may be appropriate. Also, the blatant falsity of the advertising may suggest that a survey is unnecessary.[37] In other words, the examiner must be allowed to exercise his discretion in ordering nonpartisan surveys where the dispute regarding consumer understanding is not frivolous and where its resolution would be aided by development of reliable survey evidence.

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[36] The cost of such a survey would probably not exceed $25,000 in most cases (depending upon the range of error permitted).

> The expense of conducting a national probability survey depends upon the absolute level of misunderstanding which constitutes "deception" and the degree of certainty desired that the data obtained establishes that the level has been reached. For example, if it were held that an advertisement would be considered unacceptable if it misled 15% of its readers, a sample of 1,275 consumers would be required to establish that an obtained 17% misleading level sufficiently exceeded (.05 confidence level) the upper 15% limit. A typical probability sample will cost from $15 to $20 per person included in the sample. Telephone interview with William Green, Gallup & Robinson, Princeton, N.J., Feb. 9, 1967.

Developments in Law—Deceptive Advertising, 80 HARV. L. REV. 1005, 1077 n.120 (1967). The cost of most false advertising cases to each party far exceeds this sum. *See, e.g.*, Note, *The Federal Trade Commission and Reform of the Administrative Process*, 62 COLUM. L. REV. 671, 704 (1962) (cost of legal fees of a settlement negotiation with FTC may exceed $25,000; trial costs of an antitrust action before the FTC, exclusive of record, often runs $175,000); Howrey, *The Federal Trade Commission—Present Problems and Suggested Changes*, 10 ABA ANTITRUST SECTION 40, 46 (1957). Thus, reliance on surveys could substantially reduce the current cost of many false advertising cases—if the Commission also established (as suggested below) standards, and subsequently, threshold limits of consumer deception. In other words, once the survey is taken, the case will often be ready for legal argument and not require extensive and expensive trial proceedings.

[37] *See, e.g.*, Stanley Labs., Inc. v. FTC, 138 F.2d 388 (9th Cir. 1943).

Despite the desirability of a Rule change requiring surveys where appropriate, it is arguable that hearing examiners need not await this development before ordering nonpartisan surveys. Examiners may have the power to direct consumer surveys under FTC Rule § 3.21(a), which authorizes prehearing conferences to consider, among other things, "Such other matters as may aid in the orderly and expeditious disposition of the proceeding, ..."[38] In addition, an examiner could rely on his authority to conduct adjudicatory hearings, which includes the duty and power "to take all necessary action to avoid delay in the disposition of [the] proceedings. . . ."[39]

B. *Administration of the Survey*[40]

If the third-party survey is to resolve the issue of consumer understanding, the examiner will have to exercise direction over the development of the survey questionnaire and the sample selection. The parties must be allowed to challenge the survey technique and results. The survey expert should, of course, prepare the exact format of the questions to insure that the desired information is elicited without incorporating an unwanted bias into the results. But these questions should be developed by the expert, with the guidance of the examiner, only after extensive consultation with the parties to determine the general questions to be asked and the consumer understanding to be probed.

The advantage of having the parties and the examiner involved in the initial preparation is obvious. Any objections can be raised at the time when the questions can still be modified; failure to do so should be a waiver of such objections. Moreover, the examiner can rule immediately on the materiality and relevance of the questions, a function already assigned the examiner as part of the FTC's prehearing conference procedure. The cost of useless or unusable surveys is also avoided.

On the other hand, the disadvantage that an erroneous ruling by an examiner may result in an irrelevant survey does not justify allowing interlocutory appeals from such rulings. The FTC's substantial existing precedents

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[38] 16 C.F.R. § 3.21(a)(6) (1968).

[39] FTC Procedures & Rules of Practice § 3.42(c), 16 C.F.R. § 3.42(c) (1968).

[40] Professor Zeisel has suggested several safeguards:

(1) All sampling plans, instructions to field workers, questionnaires and other survey instruments ought to be available as evidence of its design.

(2) The survey staff, from the director down to the ultimate field workers, should be available for questioning as to the survey's manner of execution. The survey interviewees, as a rule, ought not to be required to testify.

(3) The survey evidence should be presented by an expert witness.

(4) If a survey is planned during the course of the litigation, the court should explore the possibility of having the survey conducted by stipulation of parties through an agreed-upon or court appointed impartial expert. At that time, such technical requirements as size of sample and other specifications could also be stipulated. If this should not prove feasible, a litigant intending to offer a survey in evidence should be required to notify his opponent early enough to enable him to become an observer in its development. If the survey was completed *prior* to the commencement of the litigation, it should be disclosed to the adversary well in advance of the trial.

Zeisel, *supra* note 35, at 345-46. *See also* H. ZEISEL, SAY IT WITH FIGURES (4th ed. 1957); H. BARKSDALE, *supra* note 28; H. HYMAN, SURVEY DESIGN AND ANALYSIS (1955); M. JAHODA, RESEARCH METHODS IN SOCIAL RELATIONS (1951); M. PARTEN, SURVEYS, POLLS AND SAMPLES (1950); Sorenson & Sorenson, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U.L. REV. 1213 (1953).

detailing relevant consumer understanding in false advertising cases are sufficient guidance to reduce the likelihood of such error; the cost of delay from interlocutory appeals also outweighs the advantages of obtaining Commission guidance at this point. However, especially in the early cases tried under this procedure, the examiner can avoid such problems by ruling, when feasible, that questions sought to be included by only one of the parties should also be part of the survey questionnaire.

Although the survey expert should be the one to decide the appropriate manner of taking the survey and the statistical method for selecting the sample, the question of who should be included in the universe of those sampled also involves a critical legal issue that must be decided in advance of the study. All possible problems cannot be anticipated. Nevertheless, it seems likely that most disputes here will revolve around whether the sample should be limited to those (1) who were reached by the advertisement, (2) to whom it was directed, or (3) who might be reached by the ad. It could also be argued that the universe should include only (4) those whom the advertisement reached who also purchased the product or (5) those most likely to be deceived as a result of background, training, or experience who are also in the group who might be reached. The cautious approach would be to include in the universe sufficient numbers so that valid subsamples could be taken of each of these subgroups. Where cost is not prohibitive this may be appropriate. Current FTC decisions in false advertising cases, and common sense, suggest that the proper sample should include those who were in fact or were likely to be reached by the challenged advertisement.

This procedure does not guarantee the admissibility of the survey into evidence. The raw data of the survey must be available to the parties in advance of the hearing. Unless stipulated as an exhibit by both parties, the survey should be presented by its director to establish the validity of the question format, the interviewing technique, the sample selected, and the mathematical support for the range of error suggested.[41] Supporting survey personnel must also be available for cross-examination. Once it is established that the survey technique and sample are valid, the survey should become part of the record and should serve as support for findings of consumer understanding.

C. *Interpretation of Survey Findings*

Admitting the survey into the record does not solve all problems. Still to be decided are: What do the survey findings mean? How should they be used? Has the survey established that the consumer was or is likely to be de-

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[41] *See* United States v. General Motors Corp., 1967 Trade Cas. ¶ 72,229, at 84,462 (N.D. Ohio):

> Defendant will be entitled to test the accuracy of the surveys and to demonstrate the respects in which it deems the surveys to be faulty. In order for defendant to do this, it must have an opportunity to determine and demonstrate to the Court exactly how, and under what circumstances, the survey questions were formulated and the survey was carried out. . . . [T]he only fair avenue of defense open to the defendant is a full attack on the composition of the Government's survey. This avenue cannot be, and will not be, constricted by the Government's refusal to disclose the architectural and constructive details of its survey.

ceived by the respondent's advertising? Does the ad meet current standards of acceptable advertising honesty?

First, reliance on nonpartisan surveys should mean that all other evidence of consumer understanding is redundant and excludable. Once the survey is introduced the hearing should proceed quickly to the legal issues involved or to a consideration of the other substantive issue, whether the representation is true.

Second, the survey will establish whether any consumers either have been or are likely to be deceived by the advertisement as well as the approximate number in each category. Deception of a sufficient number of consumers will satisfy the "public interest" or "materiality" requirements of prosecutions under section 5 of the FTC Act.

Third, a properly conducted survey will indicate not only the number but also the significance of the deception resulting from the respondent's advertisement. It will show not only the raw numbers and the per cent of the sample who were deceived but also the extent or basis of their deception. This latter demonstration—the scope and significance of the consumer misunderstanding —should control Commission use of survey findings.

In preparing this article, it was first thought that the best approach would be to suggest a basic standard for consumer deception. For example, in *Benrus Watch Co.*,[42] the respondent's consumer survey demonstrated that eighty-six per cent of the public properly understood the meaning of its preticketing system but that fourteen per cent were misled by it. The Commission relied on this survey to find deception on the ground that fourteen per cent was too much. One might conclude from this case that an advertisement which misleads fourteen per cent of the public is deceptive and will be prohibited. Then the only questions are whether one is satisfied with this standard and whether the respondent's advertisement falls under it. The practical result is to establish a *per se* rule of consumer deception analogous to the horizontal and vertical merger rules extant today.

The difficulty with this suggestion, and the reason it is not urged here, is that FTC experience with consumer surveys is too limited to justify reliance upon set figures as demonstrating sufficient deception for a false advertising charge without permitting rebuttal evidence or argument. Nor is this difficulty avoided by ruling that the standards create only a rebuttable presumption. This approach accomplishes little except to add pages to the parties' briefs. In addition to treating the survey as just another item of evidence supporting or rejecting certain inferences, the presumption approach merely adds another step in the analysis. A more significant defect in the *per se* and presumption approaches is their inability to account for and respond flexibly to the varieties of harm resulting from different kinds of deceptive advertising. The scope and significance of the harm should affect the level at which the threshold of prohibited deception is established. Where the challenged deceptive practice

[42] FTC Dkt. No. 7352 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,541 (1963).

involves consumer health or safety, it seems clear that almost any deception (one per cent or two per cent, certainly not more than five per cent) will justify issuance of a cease and desist order unless the impact is trivial or insignificant. On the other hand, economic harm such as that resulting from misleading modeling or dancing school advertisements, inaccurate product or firm descriptions, or undesirable sales promotions is less serious and these cases would justify an order only after substantial consumer deception such as ten per cent or fifteen per cent was shown. By comparison, commercial harm cases, which often masquerade as consumer harm cases, such as those involving disclosure of a product's foreign origins or of whether charcoal briquets are manufactured from a wood or corncob base, would seem to require a survey finding that thirty per cent or forty per cent of the consumers in the appropriate universe were deceived by the respondent's advertisement.

This brief analysis suggests only a rough approximation of where possible standards should be set for evaluating consumer surveys. The need for a flexible rather than an automatic analysis of such findings seems apparent. It also suggests several factors that the Commission should consider when evaluating consumer surveys and when determining whether a cease and desist order is justified. They include:

1. What is the *type of harm* resulting from or affected by the deceptive advertising? Does it involve consumer health or safety, his economic status, or each of these?
2. *Who* are those most likely to be deceived or harmed by the deceptive advertising? Are they consumers or business competitors? Or, are they likely to be low, middle, or upper level income consumers? Or, are they likely to be small, independent businessmen or one of the corporate giants?
3. How *substantial is the harm* likely to be? In addition to the impact of the responses to the first two categories mentioned, this factor involves such questions as: How many consumers are (or are likely to be) affected by this advertising? What is the size of the typical purchase made as a result of the challenged advertisement? How significant was the promise in the advertisement to the making of the purchase?
4. Is a *separate public interest* and harm involved in addition to the individual harm noted above? For example, does the advertisement encourage the sale of an expensive and unneeded encyclopedia, and is it likely that the purchasing consumer will become subject to garnishment or similar proceedings?
5. What is respondent's *culpability?* Is the deception a result of misstatement of facts, nondisclosure of relevant information, or part of a pattern of deceptive practices?

These suggested factors obviously do no exhaust the field; nor will they necessarily govern every case. Hopefully, they do offer a rational basis for evaluating and applying survey findings of consumer understanding when determining whether a challenged advertisement should be prohibited or permitted.