


3-15-1979

Deceptive Advertising and the Federal Trade Commission: A Perspective

Larry T. Pleiss

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Commercial Law Commons](#), [First Amendment Commons](#), and the [Remedies Commons](#)

Recommended Citation

Larry T. Pleiss *Deceptive Advertising and the Federal Trade Commission: A Perspective*, 6 Pepp. L. Rev. 2 (1979)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol6/iss2/6>

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Deceptive Advertising and the Federal Trade Commission: A Perspective

I. INTRODUCTION

As consumer advocates become increasingly aware of the assorted dangers and promotional schemes associated with products on the market, a higher degree of consciousness is awakened in both the purchasing public and the legislature. The function of the latter is to protect the public from design defects in the product and deceptions which are defrauding consumers and to assure businessmen that such practices will not unduly hinder their market. Accordingly, consumerism has recently become a popular cause which is necessary to assure protection for those who have neither the time nor the facilities to adequately protect themselves.

The primary function of advertising in the American economic system, besides stimulation of demand for products and services, is providing information for consumer decisionmaking. Recently, the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹ held that commercial speech, which includes advertising, is to be afforded first amendment protection.² However, the Court, in *dicta*, stated that in contrast to political speech, commercial speech, if misleading or deceptive, loses its first amendment protection.³ Thus, when an advertisement contains such information it does not, of course, discharge its responsibility of informing the public. *Prima facie* evidence for the existence of this breach of responsibility is provided by the development of massive amounts of regulation by the Federal Trade Commission in the past few decades.

The need to avoid deception in advertising is imperative, for its results in a misallocation of resources in economic terms, and disappointed or even injured consumers in more personal terms.

1. 425 U.S. 748 (1976).

2. *Id.* at 762. See also notes 174-91 *infra* and accompanying text.

3. 425 U.S. at 771 n.24. The elevation of commercial speech to first amendment status suggests that the courts must scrutinize Federal Trade Commission regulation of advertising more strictly now to prevent unnecessary interference with constitutionally protected speech.

Mindful of the dangers inherent in deceptive advertising, the American Association of Advertising Agencies promulgated a code of ethics for advertisers.⁴

Whereas the need to avoid deception seems rather clear,⁵ what constitutes deception is not so clear. For example, when Anheuser-Busch claims that its product "Michelob Light" has "Superior taste in a light beer" some (particularly other brewers of low calorie beer) could argue that another beer is superior. Is deception involved? What is meant by "Superior taste?" Another example shows an advertisement claiming that hair dye will color hair "permanently." If someone exposed to the advertisement believed that the dye would also color hair not yet grown (*i.e.*, that a single dye would last for decades) is the claim deceptive? How many people need to misunderstand an advertisement before deception can be said to be involved?

This comment will analyze the concept of deception, and consider who must be deceived and how meaning of an advertisement is discerned. Next, it will examine the remedies, both existing and proposed, for deceptive advertising. Finally, it will examine the reformulation of the commercial speech doctrine

4. AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, CREATIVE CODE (1962) reprinted in R. STANSFIELD, ADVERTISING MANAGER'S HANDBOOK 50-51 (2d ed. 1977). The Code provides that the members:

[I]n addition to supporting and obeying the laws and legal regulations pertaining to advertising undertake to extend and broaden the application of high ethical standards. Specifically, we will not knowingly produce advertising which contains:

- (a) False or misleading statements or exaggerations, visual or verbal.
- (b) Testimonials which do not reflect the real choice of a competent witness.
- (c) Price claims which are misleading.
- (d) Comparisons which unfairly disparage a competitive product or service.
- (e) Claims insufficiently supported, or which distort the true meaning or practicable application of statements made by professional or scientific authority.
- (f) Statements, suggestions or pictures offensive to public decency.

Id. at 51.

The code goes on to say that these are areas which are subject to honestly differing interpretation and that taste is subjective and may vary from time to time, as well as from individual to individual. It says finally that "we agree not to recommend to an advertiser and to discourage the use of advertising which is in poor or questionable taste or which is deliberately irritating through content, presentation or excessive repetition." *Id.*

5. The issue of consumer deception has two major thrusts. The most basic is that advertising deceives consumers by causing them to want products that are not good for them or yield less satisfaction for themselves or society than other types of products. This serious issue was analyzed in a research framework in Howard & Tinkham, *A Framework for Understanding Social Criticism of Advertising*, 35 J. MKTG 2-7 (Oct. 1971). A more objective issue, and the subject of this comment, is whether or not consumers are *fraudulently persuaded* by advertising activities.

under the first amendment. First, however, it will be necessary to trace the historical development of the Federal Trade Commission's regulation of advertising in order to provide a conceptual perspective for evaluating deceptive advertising.

II. THE FEDERAL TRADE COMMISSION'S REGULATION OF DECEPTIVE ADVERTISING

As sophistication of promotional techniques increased, and with it the scope of problems presented by false and deceptive advertising, the inadequacy of existing common law and statutory law to deal with these problems became manifest.⁶ With the development of major multi-state marketing areas, the desirability of uniform standards suggested the possibility of federal regulation designed to fulfill the need for comprehensive and effective regulation.

A. *The Federal Trade Commission Act*

The Federal Trade Commission⁷ was constituted in 1914,⁸ and from its inception has been the federal agency primarily concerned with the regulation of advertising.⁹ Although this function

6. At common law, false and deceptive advertising was subject to legal controls through three types of remedies. The first remedy consisted of civil actions by consumers. See generally Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 23-28 (1929). (hereinafter cited as Handler); Bohlen, *Misrepresentations as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733, 733-34, 746-47 (1929). A second remedy was available in the form of civil actions by competitors. See generally Handler, *supra* at 34-42; Comment, *Developments in the Law-Competitive Torts*, 77 HARV. L. REV. 888, 905-08 (1964). Third, criminal sanctions were available. See generally Handler, *supra*, at 28-34; Comment, *Untrue Advertising*, 36 YALE L.J. 1155, 1156-57 (1927). Although the courts were quick to condemn misleading conduct in *dicta* (see *American Washboard Co. v. Saginow Mfg. Co.*, 103 F. 281, 285 (6th Cir. 1900) (equitable relief was denied, however, the court, in *dicta*, referred to the false claims as "morally wrong and improper")), judicially imposed limitations and practical considerations of time and cost confirmed these remedies to narrow circumstances. See generally Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548, 550 (1964). The "hands-off" attitude exhibited toward trade practices of doubtful probity was rooted in the history of markets and fairs in medieval England, in which trust was neither given nor expected, and was reflected in the maxim *caveat emptor*. *Id.*

7. Hereinafter cited as "Commission."

8. Federal Trade Commission Act, Pub. L. No. 203, 38 Stat. 719 (1914) (Current version at 15 U.S.C. § 41 *et seq.* (Supp. V 1975)).

9. Works on the Commission and its regulation of advertising are legion. For some more prominent works on the Commission see generally E. COX, R. FELLMETH, & T. SHULTZ, 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION (1969); F. HENDERSON, THE FEDERAL TRADE COMMISSION (1924); Posner, *The Fed-*

has been a major party of the Commission's activity from the first complaint it filed, its jurisdiction over advertising was not the product of an explicit legislative grant of power. Indeed, it was apparently never mentioned in the extensive congressional debates preceding the Act creating the Commission but was assumed by the Commission as part of its control over "unfair methods of competition in commerce."¹⁰

The Act was intended to be an instrument against restraint of trade.¹¹ Nevertheless, the Commission commenced forthwith to regulate advertising.¹² The courts, basically, approved this activity.¹³

However, an early challenge to the Commission's regulatory attempts resulted in significant limitations upon the Commission's

eral Trade Commission, 37 U. CHI. L. REV. 47 (1969); *Symposium, The Fiftieth Anniversary of the Federal Trade Commission*, 64 COLUM. L. REV. 385 (1964). For excellent discussions of the Commission's regulation of advertising, see *Symposium, Federal Trade Commission Regulation of Deceptive Advertising*, 17 U. KAN. L. REV. 551 (1969); Jones, *To Tell the Truth, the Whole Truth . . .*, 26 FOOD DRUG COSM. L.J. 173 (1971); Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269 (1969) (hereinafter cited as Kintner); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964) (hereinafter cited as Millstein); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977) (hereinafter cited as Pitofsky). Specifically on the subject of corrective advertising and injunctive relief, see generally Cornfield, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 623 (1976); Note, *The FTC's Injunctive Authority Against False Advertising of Food and Drug*, 75 MICH. L. REV. 745 (1976).

10. Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, by 15 U.S.C. § 45 (Supp. V 1975); see Millstein, *supra* note 9, at 439. When Congress enacted Section 5 of the Federal Trade Commission Act it intentionally refused to catalogue the prohibited unfair trade practices because of possible omissions and the development of other unfair trade practices by businessmen in the future. The House Conference Report emphasized that: "[E]ven if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin all over again. If Congress were to adopt this method of definition, it would be undertaking an endless task. H.R. REP. NO. 1142, 63d Cong., 2d Sess. 18-19 (1914). Therefore, general statutory language was adopted, and the Commission was assigned the task of filling in the details through its enforcement and regulatory procedures. See generally Rublee, *The Original Plan and Early History of the Federal Trade Commission's Regulation of Advertising*, 11 ACAD. POL. SCI. PROC. 666 (1929). See also *supra* note 9, and accompanying text.

11. In *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922), the Court stated that "the case before [it] was begun under the Federal Trade Commission Act which was intended to supplement previous antitrust legislation."

12. *FTC v. Circle Cilk Co.*, 1 F.T.C. 13 (1916); *FTC v. Abbott & Co.*, 1 F.T.C. 16 (1916). See also Kintner, *supra* note 9, and accompanying text.

13. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Sears Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919). As Professor Kintner, *supra* note 9, expressed it:

[W]hile only forty-three Commission orders out of eighty-two reviewed on their merits by the courts up until 1931, were either entirely or substantially upheld, twenty-two FTC orders concerning false advertising reviewed by the courts in the same period were upheld.

Kintner, *supra* note 9, at 1274-75.

power over advertising. In *FTC v. Gratz*,¹⁴ the United States Supreme Court declared that Section 5 encompassed only unfair competitive practices condemned at common law.¹⁵ It was not until 1932 that the Commission's attempts to regulate advertising practices were afforded support by the Supreme Court. In *FTC v. Winsted Hosiery Co.*,¹⁶ the Court held that labeling goods containing less than ten percent wool as "woolen" was deceptive and that the Commission's power to regulate unfair trade practices included the right to control advertising.

Though *Winsted* seemingly cleared the way for the Commission's regulation of advertising practices,¹⁷ it soon became clear the Supreme Court's endorsement of the Commission's efforts was less than complete. In *FTC v. Klesner*,¹⁸ the Court ruled that the Commission lacked jurisdiction unless the harm to the public interest caused by unfair practice was "specific and substantial."¹⁹ Additionally, in 1931, the Court handed down a potentially catastrophic decision in *FTC v. Raladam*,²⁰ holding that the Federal Trade Commission Act was only a supplement to the Sherman and Clayton Acts and that the Commission could not issue orders prohibiting false advertising absent proof of injury to com-

14. 253 U.S. 421 (1920).

15. The Court explained that:

The words "unfair methods of competition" are not defined by statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

Id. at 427.

16. 258 U.S. 483 (1922).

17. Despite adverse rulings, the Commission continued to rule that false advertising tending to injure competitors and to deceive consumers was an unfair competition method within the meaning of the Act. See *Royal Baking Power Co. v. FTC*, 281 F. 744 (2d Cir. 1922). See also *FTC v. Balme*, 23 F.2d 615 (2d Cir. 1928), *cert. denied*, 277 U.S. 598 (1928), upholding the Commission's determination that public deception is unfair and could be prohibited by the Commission. Also, in the period prior to 1931, twenty-two of twenty-nine of the Commission's cease and desist orders involving false advertising were sustained. See Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 COLUM. L. REV. 527, 539 (1931).

18. 280 U.S. 19 (1929).

19. See note 15 and accompanying text *supra*. Adopted in *FTC v. Beech-Nut Packing Co.*, 257 U.S. at 453. See McLaughlin, *Legal Control of Competitive Methods*, 21 IOWA L. REV. 274, 284 (1936).

20. 42 F.2d 430 (6th Cir. 1930), *aff'd*, 283 U.S. 643 (1931).

petitors, regardless of public deception.²¹

Thus, the Commission was not favored by the courts from the outset. During the first four years of its existence it was reversed in twelve of sixteen cases by the Supreme Court and in forty-six of seventy-seven circuit court cases.²²

B. The Wheeler-Lea Amendment

In 1938, Congress finally came to the Commission's rescue. It legislatively overruled *Raladam* by enacting the Wheeler-Lea Amendment.²³ The Commission was given authority over unfair or deceptive acts or practices in commerce, thus extending the Act's coverage to consumers as well as competitors.²⁴ The amendment made it clear that a deceptive act or practice was illegal in and of itself, even if it did not amount to an unfair competition method. The amended Act also made it unlawful to disseminate any false advertisement "for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics . . ." and any such dissemination is made an unfair or deceptive practice in commerce within the meaning of Section 5.²⁵

The 1938 provisions also expanded the means by which the Commission could combat advertising dangerous to health, sup-

21. 283 U.S. at 647, 654.

22. BLAISDELL, *THE FEDERAL TRADE COMMISSION* 40 (1962); Note, *The Federal Trade Commission and Reform of the Administrative Process*, 62 COLUM. L. REV. 671, 679 (1962).

23. Federal Trade Commission Act § 1, 52 Stat. 111 (1938), *as amended*, 15 U.S.C. § 41 *et seq.* (Supp. V 1975). Section 5 of the Act originally provided: "Unfair methods of competition in commerce are hereby declared unlawful." The Wheeler-Lea Amendment amended Section 5 to provide: "Unfair methods of competition in commerce, *and unfair or deceptive acts of practices in commerce*, are hereby declared unlawful." (Emphasis added.) It is now settled that no competitive injury is necessary for the Commission to take action against a deceptive advertiser. *Giant Food Inc. v. FTC*, 322 F.2d 977, 985-86 (D.C. Cir. 1963). See Millstein, *supra* note 9, at 453-54. In 1975, Congress added the language "affecting commerce" to the jurisdiction basis of the Act. 15 U.S.C. § 45(a) (Supp. V 1975), *amending*, 15 U.S.C. § 45(a) (1973).

24. The Senate Report indicated the feelings of the Commission: "[T]he Commission should have the power to restrain an unfair act before it has become a method or practice, if in its discretion such restraint is in the public interest." S. REP. No. 163, 75th Cong., 1st Sess. 3 (1937). See also 83 CONG. REC. 391-92 (1938) (remarks of Congressman Lea):

One thing we propose in the pending bill [Wheeler-Lea Amendment] . . . is that it is sufficient to establish the unfair practice without showing injury to a competitor . . . Indeed, the principle of the act is carried further to protect the consumer as well as the competitor . . . and afford a protection to the consumers of the country that they have not heretofore enjoyed.

25. Federal Trade Commission Act § 12, 52 Stat. 114 (1938), *as amended* by 15 U.S.C. § 52(a) (Supp. V 1975).

plementing its existing power to issue cease and desist orders.²⁶ The Commission was granted two new sanctions, although restricted to cases involving foods, drugs, devices, or cosmetics, *i.e.*, the right to sue in federal district courts for injunctions,²⁷ and the right to impose criminal penalties in the event of damage to health.²⁸

Neither of these sanctions have been widely used. The reasons are fairly obvious: the authority to sue for temporary injunctions in cases involving foods, drugs, devices, and cosmetics, while it did not expressly dispense with the time honored prerequisite of irreparable injury, seemed to replace it with the twin requirements of "reason to believe" that an advertisement would run afoul of the statute, and contravention of the public's interest.²⁹

26. The basic mandate of the Commission is to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." Federal Trade Commission Act § 5(a)(6), 15 U.S.C. § 45(a)(6) (Supp. V 1975). The Commission's principal means of enforcing its mandate is the administrative procedure leading to a cease and desist order. The mechanics of the hearing procedure may be found in 16 C.F.R. §§ 3.41-.46 (1978). In general, however, a hearing is in the form of a trial, and the parties "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." 16 C.F.R. § 3.41(c) (1978). Under the Act, a cease and desist order becomes final:

- (1) Upon expiration of the time allowed for filing a petition for review, if such petition has been duly filed within such time, . . . or
- (2) Upon the expiration of the time allowed for filing a petition for certiorari, . . . or
- (3) Upon the denial of a petition for certiorari, . . . or
- (4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed 15 U.S.C. § 45(g) (Supp. III 1973).

A Respondent who violates a final cease and desist order becomes liable for the civil penalties provided in section 5(m), 15 U.S.C. § 45(m)(1)(B) (Supp. V 1975).

27. The Commission is authorized to petition in a federal district court for an injunction whenever it has "reason to believe":

- (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or causing the dissemination of any advertisement [in violation of § 12] and . . .
- (2) that the enjoining thereof pending and issuance of a complaint by the Commission . . . and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final . . . , would be to the interest of the public. . . .

The statute then directs that "[u]pon proper showing a temporary injunction or restraining order shall be granted without bond." Federal Trade Commission Act § 13(a), 15 U.S.C. § 53(a) (Supp. III 1973).

28. Federal Trade Commission Act § 14(a), 15 U.S.C. § 54(a) (1970).

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

In order to make this double showing, the Commission would have to have sufficiently progressed in the investigation to be able to show the existence of a probable deception.³⁰ Considering the time lapse until such action could reasonably be brought, it would still be likely that the advertising campaign in question would have been concluded.³¹ A more telling reason for not using this remedy is the uncontrovertible fact that the Commission would lose a good part of its primary jurisdiction of finding the facts and have them left undisturbed by the courts by moving for the injunctive remedy. The right and duty to find that there exists "reason to believe" that an advertisement has a tendency to deceive would devolve upon the court. Thereby, findings made by a court would tend to become binding upon the Commission. Furthermore, the statute leaves open the question of what is to happen after issuance of a preliminary injunction. It seems evident that Congress thought final action on the merits by the Commission would ensure before hearings on making the injunction final would have to be held. Nevertheless, a few suits for temporary injunction have been brought.³² However, the criminal sanction has remained virginal, despite the fact that it has been available for more than forty years.

By a rider to the Trans-Alaska Pipeline Authorization Act,³³ the Federal Trade Commission Act was amended so as to enlarge and extend the power of the Commission to obtain injunctive relief against deceptive and unfair competitive practices. Thereby, the existing authority concerning foods, drugs, devices, and cosmetics

30. *FTC v. Sterling Drug, Inc.*, 215 F. Supp. 327, *aff'd*, 317 F.2d 669 (2d Cir. 1963). *But see* *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1951).

31. Illustrative of the potential for delay is *FTC v. Rhodes Pharmacal Co.*, *supra*, note 30, in which a complaint was issued in August, 1949, yet a cease and desist order was not entered until October, 1952. That order was subsequently challenged in the Seventh Circuit and thus became "final" only after affirmation by the court in November, 1953. *See* *Rhodes Pharmacal Co., v. FTC*, 208 F.2d 382 (7th Cir. 1953), *modified*, 348 U.S. 940 (1955). *See also* *FTC v. Thomsen-King & Co.*, 109 F.2d 516 (7th Cir. 1940); *FTC v. Nat'l Health Aides*, 108 F. Supp. 340 (D. Md. 1952).

32. Note 31 *supra*. Injunctive relief was granted in at least two cases: *Travel King, Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20, 502 (FTC 1974) (promotional practices of a "psychic surgery" tour to the Philippines); *FTC v. British Oxygen Co.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 75,003-04 (FTC 1974) (an acquisition). The Commission has declined to set down any guidelines for the use of its injunctive power, 646 ANTITRUST & TRADE REG. REP. (BNA) A-6 (Jan. 15, 1974), but Thomas Posch, former Director of the Commission's Bureau of Consumer Protection, stated in an interview that the injunctive powers will not be used in any "novel" cases (as reported in 645 ANTITRUST & TRADE REG. REP. (BNA) AA-1 (Jan. 8, 1974)).

33. The amendment to Section 13 was adopted as Section 408(f) of the Trans-Alaska Pipeline Authorization Act of 1973, 15 U.S.C. § 53(b) (Supp. V 1975). *See* Halverson, *The Federal Trade Commission's Injunctive Powers Under the Alaska Pipeline Amendments: An Analysis*, 69 Nw. U.L. REV. 872 (1975) (hereinafter cited as Halverson).

was extended so as to encompass all subject matters under its jurisdiction. There are now three prerequisites for issuance of a preliminary injunction: (1) the Commission must have reason to believe that there has occurred, or is about to occur, a violation of the Act, (2) the issuance of an injunction must be in the public interest, and (3) the Commission must be likely to ultimately succeed against the alleged violations.³⁴ Indications are that the Commission will make more vigorous use of this injunctive remedy than has been its inclination in the past.³⁵ The question of whether or not the courts will relax their requirements in view of certain indications in the legislative history of the proviso³⁶ remains to be determined, particularly in view of the traditional emphasis on judicial discretion in the promulgation of injunction, especially against prospective speech.

After the Wheeler-Lea Amendment, the question was no longer "What is the Commission's jurisdictional authority to regulate

34. See text at notes 27 *supra*, and 36 *infra*.

35. See generally Note, *The FTC's Injunctive Authority Against False Advertising of Food and Drugs*, 75 MICH. L. REV. 745 (1977). See also note 33 *supra*.

36. H.R. REP. NO. 624, 93d Cong., 1st Sess. 31, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2523, 2533 states:

Section 408(f) relates to the standard of proof to be met by the Federal Trade Commission for the issuance of a temporary restraining order or a preliminary injunction. It is not intended in any way to impose a totally new standard of proof different from that which is now required of the Commission. The intent is to maintain the statutory or "public interest" standard which is now applicable and *not* to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner. This latter standard derives from the common law and is appropriate for litigation between private parties. It is not, however, appropriate for the implementation of a Federal Statute by an independent regulatory agency where the standards of public interest measure the propriety of the public interest and need for injunctive relief.

The inclusion of the new language is to define the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction. This new language is intended to codify the decisional law of the Federal Trade Commission v. National Health Aides, 108 F. Supp. 340, and the Federal Trade Commission v. Sterling Drug, Inc., 317 F.2d 669, and similar cases which have defined the judicial role to include the exercise of such independent judgment. The Conferees did not intend, nor do they consider it appropriate, to burden the Commission with the requirements imposed by the traditional equity standard which the common law applies to private litigants.

Compare *FTC v. Nat'l Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), with *FTC v. Simeon Management Corp.*, 532 F.2d 708 (9th Cir. 1976). See Halverson *supra* note 33, at 880-81 n.26. See generally note 35 *supra*, and accompanying text.

false advertising?" but, instead, became "What are the appropriate standards and techniques to be applied in determining whether advertisements are deceptive?" Emphasis focused upon protecting consumers from injury and an advertisement's effect upon the consuming public became more important than advertising methods or devices.³⁷

III. DECEPTIVE ADVERTISING

Conceptually, deception is found when an advertisement is the input into the perceptual process of some audience and the output of the perceptual process (a) differs from the reality of the situation and (b) affects buying behavior to the detriment of the consumer.³⁸ The input itself may be determined to contain falsehoods. The more difficult and perhaps more common case, however, is when the input (the advertisement) is not obviously false, but the perceptual process generates an impression that it is deceptive. A disclaimer may not pass through the attention filter, or the message may be misinterpreted.³⁹

However, it is not necessary to show *actual* deception. Just as a requirement of actual confusion in passing off cases has been replaced in most jurisdictions by requiring only a likelihood to confuse, the tendency or capacity to deceive rather than actual

37. The court in *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941) stated that: "[T]he effect of the amendment was to broaden the Commission's jurisdiction as to enable it to act where only the public interest was adversely affected by the unfair practices." *Id.* at 643-44.

38. See generally E.S. MAYNES, *DECISION MAKING FOR CONSUMERS: AN INTRODUCTION TO CONSUMER ECONOMICS* 113-16 (1976). Professor Maynes advocates the following definition for deceptive advertising.

An advertisement (or advertising campaign) is *deceptive* when both:

1. The advertisement leaves the consumer with an impression(s) and/or belief(s) different from what normally would be expected if the consumer had reasonable knowledge; and
2. The advertisement leaves the consumer with an impression(s) and/or belief(s) that is factually untrue or potentially misleading.

Id. at 117.

For an excellent analysis of the consumer decisionmaking process see ENGEL, KOLLAT & BLACKWELL, *CONSUMER BEHAVIOR* 44-66 (2d ed. 1973) (hereinafter cited as *CONSUMER BEHAVIOR*). The authors present a conceptual model which delineates the psychological variables which are of greatest significance in understanding consumer motivation and behavior (stored information, evaluative criteria, attitude toward alternatives, personality), the perceptual process (stimulus inputs into a filter, attention, comprehension, and retention), the decision process (problem recognition, internal search, external search, purchase, and outcomes), and the influence of external constraining forces (norms, family income, and so on). For an in-depth study and review of all major buying studies of the past few decades see LESSIG, *PERSONAL CHARACTERISTICS AND CONSUMER BUYING BEHAVIOR: A MULTIDIMENSIONAL APPROACH* 5-14 (1971).

39. *CONSUMER BEHAVIOR*, *supra* note 38, at 210-11. See generally Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 U. KAN. L. REV. 625, 626-32 (1969).

deception has become the testing stone under the Federal Trade Commission Act.⁴⁰

A. Who Is Deceived?

The Commission has determined that essentially all persons are to be protected, in particular those who are naive, trusting, and of low intelligence, small though the numbers may be.⁴¹ In *FTC v. Standard Education Society*,⁴² for example, encyclopedia purchasers were solicited by salesmen representing that the volumes were being given away free as an advertising plan. The customers only had to purchase a loose leaf extension service at a price of \$69.50. In actuality, the \$69.50 was the retail price of both the encyclopedia and the loose leaf service. The court held that:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty could govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.⁴³

40. *E.g.*, *Thiret v. FTC*, 512 F.2d 176, 180 (10th Cir. 1975) (false and deceptive advertising of steel siding); *Spiegel v. FTC*, 494 F.2d 59, 63 (7th Cir. 1974), *cert. denied*, 419 U.S. 896 (1974) (use of "free trial" and "percent off" in advertising had capacity to deceive); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (fictitious "manufacturer's suggested retail prices" had capacity to deceive); *Goodman v. FTC*, 244 F.2d 584, 595 (9th Cir. 1957) (fictitious "guild" designation had capacity to deceive); *Deer v. FTC*, 152 F.2d 65, 66 (2d Cir. 1945) (use of "manufacturing" in trade name had capacity to deceive); *FTC v. Raladam*, 316 U.S. 149, 151 (1942) (progenitor case for capacity to deceive requirement). *See also* Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1025-27 (1956).

41. *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962). For example, Judge Augustus Hand's often quoted remark that the Commission may, if it "thinks . . . best . . . insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah 'wayfaring men, though fools, shall not err therein,'" *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941), should be read in the context of his observation that "[w]hile we do not regard the plan used here as inevitably misleading, we think that in a good many cases it would be. . . ." *Id.* at 35. *See also* *Bantam Books, Inc. v. FTC*, 275 F.2d 680 (2d Cir. 1960), *cert. denied*, 364 U.S. 819 (1960); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944); *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942).

42. 302 U.S. 112 (1937).

43. *Id.* at 116. *See also* *Feil v. FTC*, 285 F.2d 879, 887 (9th Cir. 1960) (representations about efficacy of bedwetting "cure" made to "laity," who may be incapable of understanding their misleading character); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941), *cert. denied*, 314 U.S. 668 (1941) (noting that the average individual is unlikely to analyze carefully complicated deferred credit plans).

This same notion was later articulated in *Aronberg v. FTC*,⁴⁴ as follows:

The law is not made for experts but to protect the public—the vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearance and general impressions.⁴⁵

In *Gelb v. FTC*,⁴⁶ the low intelligence level considered by the courts reached an extreme. The Commission had prohibited the claim that a hair coloring product could color hair permanently, such that even new hair would have the desired new color. The evidence consisted of the testimony of a single woman who indicated that although she would not be so naive, some may indeed be misled by the use of the word “permanent.”

However, in 1963, the Commission rendered two decisions providing some relief to the charge that no deception can exist. In *Heinz W. Kirchner*,⁴⁷ involving an inflatable swimming aid advertisement and the claim that when the device designated “Swim-Ezy” was worn under a swimming suit it was “thin and invisible.” The Commission, who decided that it would be unlikely that a purchaser would take this claim literally, enunciated:

[T]o be sure, “Swim-Ezy” is not invisible or impalpable or dimensionless, and to anyone who so understood the representation, it would be false. It is not likely, however, that many prospective purchasers would take the representation thus in its literal sense. True, as has been reiterated many times, the Commission’s responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable . . . This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability with respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all “Danish pastry” is made in Denmark. Is it, therefore, an actual deception to advertise “Danish pastry” when it is made in this country? Of course not. A representation does not become “false and deceptive” merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.⁴⁸

The Commission again reiterated this stance regarding nonprotection of the foolish and feeble-minded in *FTC v. Papercraft*

44. 132 F.2d 165 (7th Cir. 1942).

45. *Id.* at 167. See also *Benrus Watch Co. v. FTC*, 64 F.T.C. 1018, 1032 (1964), *aff'd*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384, U.S. 939 (1966) (violation found where evidence showed fourteen percent of the audience was deceived). See generally *FTC v. R.F. Keppell & Bros.* 291 U.S. 304 (1934).

46. 144 F.2d 580 (2d Cir. 1944). Other cases reaching similarly farfetched conclusions are collected in Millstein, *supra* note 9, at 458-62.

47. 63 F.T.C. 1282 (1963), *aff'd sub nom.* *Kirchner v. FTC*, 337 F.2d 751 (9th Cir. 1964); *cf.* *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 676 (2d Cir. 1963) (no violation if the “ordinary” reader, to be misled, must have “not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy”).

48. 63 F.T.C. at 1289-90.

Corp.⁴⁹

In *Kirchner*, the Commission also indicated that advertising aimed at particularly susceptible groups will be evaluated with respect to the intelligence level of that group.⁵⁰ Thus, when children are the target, deception will be evaluated with respect to them.⁵¹ This refinement is interesting because it recognizes that people may perceive stimuli *differently*, depending on the situational context. Hopefully, the Commission and the judiciary will continue to become more refined in their perceptions of those who are to be protected.⁵²

Despite *Kirchner*, it is still true that deception is defined with respect to relatively small audience segments with above average tendencies to be deceived.⁵³ Such a posture, when pushed to an

49. 63 F.T.C. 1965, 1993 (1963). However, in *ITT Continental Baking Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,464 (FTC 1973), the Commission reviewing a Wonder Bread advertisement, noted that although "most people above the age of six might view the literal message of the 'fantasy growth sequence' with skepticism," this would not prevent a finding that the advertisement had a potential for deceiving others. See also *Eastern Detective Acad., Inc.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,727 (FTC 1971) (reaffirmation that the law protects the credulous as well as the wary).

50. See, e.g., *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941), cert. denied, 314 U.S. 668 (1941) (prospective automobile purchasers).

51. See *FTC v. Stupell Originals, Inc.*, 67 F.T.C. 173 (1965) (children). See generally Thain, *Consumer Protection: Advertising—The FTC Response*, 26 FOOD DRUG COSM. L.J. 609, 615 (1971). With regards to limitations on advertising, it is interesting to note that the Canadian Broadcasting Company decided to eliminate advertising on children's programs in 1974. 662 ANTITRUST TRADE REG. REP. (BNA) A-23 (May 7, 1974). In the United States, the Commission recently rejected proposed guides against advertising of children's premiums on television. 4 TRADE REG. REP. (CCH) ¶ 39,043 (FTC 1977). However, there have been some recent recommendations by the Commission in a staff report on television advertising to children generally. 4 TRADE REG. REP. (CCH) ¶ 38,046 (FTC 1978). See also generally NATIONAL SCIENCE FOUNDATION, RESEARCH ON THE EFFECTS OF TELEVISION ADVERTISING ON CHILDREN (1977) (provocative and informative discussion of advertising directed at children); Note, *The Need for a Seller's Fiduciary Duty toward Children*, 4 HASTINGS CONST. L.Q. 249 (1977) (among the most basic concepts in American jurisprudence is that children are to be afforded special protection. Consonant with this tradition, advertisers are imposed with a "fiduciary duty" when they address children).

Where special audiences are not involved, the low level at which the intelligence standard is set has elicited criticism on grounds that it is wasteful and makes the Commission "look fairly foolish in this business of protecting fools," Alexander, *Federal Regulation of False Advertising*, 17 U. KAN. L. REV. 573 (1969), and on constitutional grounds because an intelligence level set this low denies the advertiser freedom of speech, Millstein, *supra* note 9, at 492.

52. Cf. *F.T.C. v. Coca Cola*, 83 F.T.C. 746 (1973) (an opinion that might prove to be pivotal in regard to the standard of perception utilized).

53. See generally, Thain, *Advertising Regulation: The Contemporary FTC*

extreme, as it was in *Gelb*,⁵⁴ can mean that there is no defense against a Commission charge of deception. A small segment of the population can always be identified who will misinterpret the clearest communication. Thus, a demand that the law protect all—even the trusting and the unthinking—is indeed an extreme position.

B. *The Meaning of the Advertisement—What is the Promise?*

In reviewing the Commission's determinations of the meaning of advertisements, the courts appear at times to have narrowed the usual standards of judicial review and declared the meaning of the advertisement to be a question of fact determined by the Commission⁵⁵ or peculiarly within "the Commission's special expertise and responsibility in the premises."⁵⁶ This judicial approach to meaning, together with the court's acquiescence in the use of a low intelligence level, has left wide discretion in the hands of the Commission to ascertain the meaning of an advertiser's promise.

A few significant ground rules, however, which have been formulated by the Commission for use in advertising cases, deserve consideration. These rules, while not always automatically applied, and sometimes ignored in favor of other maxims, appear frequently enough in the cases to provide a guide to the Commission's approach to meaning.⁵⁷

Approach, 1 FORDHAM. URB. L.J. 349, 381-84 (1973); Moewe, *Consumer Class Actions and Costs: An Economic Perspective on Deceptive Advertising*, 18 U.C.L.A. L. REV. 592, 605 (1971); MacIntyre & Von Brand, *Unfair Methods of Competition as an Evolving Concept—Prelude to Consumerism*, 44 ST. JOHN'S L. REV. 597, 613 (1970).

54. See note 46 *supra*, and accompanying text.

55. In *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965), a case concerning the question whether a "two-for-the-price-of-one" offer was deceptive, the Court speaking through Justice Brennan, stated that: "[I]t is not for courts to say whether this violates the Act! The Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *Id.* at 48-49. But in 1968, Justice Black stated in *FTC v. Texaco, Inc.* 393 U.S. 223 (1968), that: "While the ultimate responsibility for the construction of the [Act] rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the [Act], are entitled to great weight." *Id.* at 226. More recently, however, in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 223, 249 (1972), the Court acknowledged that the determination that an unfair practice had been engaged in, is a conclusion, without however, explaining whether it is a conclusion of fact or one of law, although it seems that the latter was meant.

56. Note 55 *supra*. See also *Savitch v. FTC*, 218 F.2d 817, 818 (2d Cir. 1955).

57. See Millstein, *supra* note 9, at 492-93.

1. The Entire Advertisement

The advertisement will be judged by its general impression.⁵⁸ It may be that all claims made within an advertisement are literally true yet the total impression of the advertisement may still be deceptive.⁵⁹ Thus, in the leading case of *P. Lorillard Co. v. FTC.*,⁶⁰ the court ruled that Lorillard had developed deceptive advertisements despite the fact that their claims were literally true. *Reader's Digest* had run an article which indicated that all cigarettes were harmful and that the differences between them were minimal. To illustrate the point, a list of cigarettes was included with the tar and nicotine content on each noted. A Lorillard brand happened to have the lowest level of tar and nicotine although by an insignificant margin. The Lorillard campaign emphasizing the *Reader's Digest* article was therefore deemed to be deceptive.⁶¹

In another example,⁶² a television commercial for a car wax used flaming gasoline on an automobile to demonstrate that the wax could withstand intense heat. However, the gasoline was only burning for a few seconds. It was extinguished before any significant heat was generated. Consequently, the advertisement was determined to be deceptive in that the claim was not actually substantiated by the test.

2. The Ambiguous Statement

If an advertisement may be interpreted in two ways and one of them would be deceptive, the advertisement is regarded as deceptive.⁶³ The use of the phrase "government-supported" for exam-

58. See, e.g., *Sebrane Co. v. FTC*, 135 F.2d 676, 679 (7th Cir. 1943); *Liggett & Myers Tobacco Co. v. FTC*, 55 F.T.C. 354, 370 (1958).

59. See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967) (advertisement implies that most tiredness results from iron deficiency anemia); *Continental Wax Corp. v. FTC*, 330 F.2d 475, 477 (2d Cir. 1964) ("Six Month" floor wax trade name implies that wax lasts six months); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962) (advertisement implies that shoes have therapeutic value). See also *FTC v. Colgate-Palmolive Co.*, 58 F.T.C. 422, 428 (1961); *Kalwajts v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956); *Koch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953).

60. 186 F.2d 52 (4th Cir. 1950).

61. The *Lorillard* court stated that "[one] who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness of the partial truth by which it has been accomplished." *Id.* at 58.

62. *FTC v. Hutchinson Chemical Corp.* 55 F.T.C. 1942 (1959).

63. *Giant Food, Inc. v. FTC*, 322 F.2d 977 (D.C. Cir. 1963), cert. dismissed, 376 U.S. 967 (1964); *United States v. 95 Barrels, etc., of Vinegar*, 265 U.S. 438 (1924); *Potato Chip Inst. v. General Mills, Inc.*, 461 F.2d 1088 (8th Cir. 1972).

ple, could be interpreted as “government approved” and such use has been challenged.⁶⁴ In another case, the Commission held that a toothpaste’s claim that it provided “complete” protection was deceptive.⁶⁵

When a claim is extremely vague, alternative interpretations are not always obvious. An advertiser will claim, for example, that its product tones up muscles, or provides a lifetime guarantee, or is for the treatment of a disease. What do these terms really mean? It may be noted that to an advertising researcher the quantification of the number of interpretations and the extent to which each would emerge would not be an unusually difficult or costly research task. However, the Commission and the courts tend not to rely upon such techniques.⁶⁶

3. Misleading Silence

The Commission can require that a more complete disclosure be made to correct a misconception. Thus, in *J. B. Williams Co. v. FTC*,⁶⁷ the manufacturer of Geritol was required to indicate that its product was of no benefit to the great majority of people suffering from that “rundown feeling.” The advertisement in question had represented that Geritol, because of its iron content, was an effective cure for people “tired and run-down”⁶⁸ when, in fact, iron deficiency was responsible for this condition in only a small percentage of people. The court upheld the Commission’s authority to require future Geritol advertisements to disclose that:

[i]n the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation [Geritol] or by iron deficiency or iron deficiency anemia; and for such persons the preparation will be of no benefit.⁶⁹

Similarly, baldness cures have been required to indicate that baldness usually is hereditary and therefore untreatable.⁷⁰

It is interesting to consider how far pressure from the Commis-

64. *FTC v. Sterling Drug, Inc.*, 215 F. Supp. 327, 330 (S.D.N.Y. 1963), *aff’d*, 317 F.2d 669 (2d Cir. 1963).

65. *Bristol-Myers Co.*, 46 F.T.C. 162 (1949), *aff’d*, 185 F.2d 58 (4th Cir. 1950).

66. See generally Gardner, *Deception in Advertising: A Conceptual Approach*, 39 J. MKTG. 40-46 (Jan. 1975); Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 551, 559-72 (1969).

67. 381 F.2d 884 (6th Cir. 1967). *But see* *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1949), *cert. denied*, 340 U.S. 818 (1950) (misleading half-truths require a statement of what was omitted).

68. 381 F.2d at 887.

69. *Id.* at 892.

70. *Compare Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960), *with Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); *American Medicinal Products, Inc. v. FTC*, 136 F.2d 426 (9th Cir. 1943); *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942); *D.D.D. Corp. v. FTC*, 125 F.2d 679 (7th Cir. 1942).

sion for complete disclosure could go. There are a wide variety of advertised brands which differ little in substance from competitors. It is a common practice to associate a brand with an attribute of the product class.⁷¹ Should the brand be required to state in its advertisement(s) that all brands are virtually identical in this respect? For example, an aspirin advertisement may discuss the pain-relieving quality without noting the fact that all aspirin-based brands will have similar effect. It appears that the Commission is moving in this direction.⁷²

The argument for such a policy, requiring disclosure that all brands are similar with respect to a certain product attribute, is primarily that advertising is a mechanism to communicate information which will be helpful to the consumer in making a purchasing decision and that "image" advertising is not helpful. If advertising content is not informative from this perspective and in fact could lead to nonoptimal brand choice decisions, it should be curtailed. However, it may be that such a rule could, at least to some extent, reduce the product class information a consumer receives as brands lose their incentive to communicate product class attribute information. If most advertising relates to brand choice instead of product class choice, this possibility is perhaps a minor consideration. A problem associated with such a proposal is to determine if a brand does have a real differential advantage. To a market researcher who has the benefit of perceptual maps and sophisticated taste tests, a brand may seem significantly different. To a consumer, and perhaps the Commission, these differences may appear minor.

4. Materiality of the Falsehood

For an advertisement to be deceptive, it must contain a material untruth—that is, one capable of affecting purchase decisions.⁷³ It should be likely that the advertisement will result in public injury. One commentator explained the concept in these words:

'Public Interest' does not mean that a consumer must suffer damage, or

71. See generally CONSUMER BEHAVIOR, *supra* note 38, at 247-64.

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

73. *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942); *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941). See also Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1056 (1967).

that it must be shown that goods purchased are unequal to the value expended. Rather, 'public injury' results if the advertisement has a tendency to induce action (such as purchase itself) detrimental to the consumer that might not otherwise have been taken. If such action could not have been induced by the claim (even though false), there is no 'public injury.' This requirement comports with the express provision of Section 15 of the FTC Act, as amended, that the advertisement must be misleading in a material respect to be actionable.⁷⁴

In *FTC v. Colgate-Palmolive Co.*,⁷⁵ the Court applied the materiality requirement to modify a Commission decision.⁷⁶ The case involved the shaving of simulated sandpaper: sand on plexiglass. The advertisement appeared to demonstrate the moisturizing qualities of Palmolive Rapid Shave. The Commission noted that in fact sandpaper could only be shaved after a lengthy period of soaking and thus the advertisement was deceptive. This type of deception was material in that consumers were likely to rely upon the demonstration in making purchase decisions. However, the Commission went further and noted that the use of a sand on plexiglass mockup would have been prohibited even if Rapid Shave could shave sandpaper as represented.⁷⁷ The court of appeals rejected the sweeping language of the complaint, arguing that mock-ups are permissible if they do not affect purchase decisions.⁷⁸ As a result, the Commission revised its opinion to indicate that only mock-ups and props that are intended to visually demonstrate a quality material to the selling of the product are prohibited.⁷⁹ Thus, mashed potatoes could be used in television commercials in scenes depicting ice cream consumption (ice

74. See Millstein, *supra* note 9, at 485; see also Moore, *Deceptive Trade Practices and The Federal Trade Commission*, 28 TENN. L. REV. 493, 502 (1960). It should be noted that another ground for the need for materiality is the fact that the law abhors dealing with matters which are irrelevant or *de minimis*. See Greyser, *Advertising: Attacks and Counters*, 50 HARV. BUS. REV. 22, 28 (1972).

75. 380 U.S. 374 (1965). See generally, Note, *The Federal Trade Commission: Deceptive Advertising and the Colgate-Palmolive Company*, 12 WASHBURN L. J. 133 (1973).

76. Prior opinions include *Colgate-Palmolive Co. v. FTC*, 326 F.2d 517 (1st Cir. 1963); *In re Colgate-Palmolive Co.*, 62 F.T.C. 1269 (1963); *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89 (1st Cir. 1962); *In re Colgate-Palmolive Co.*, 59 F.T.C. 1452 (1961).

77. See Note, *Effective Guidance Through Cease and Desist Order: The T-V Commercial*, 38 IND. L. J. 442, 445 (1963).

78. *Colgate Palmolive Co. v. FTC*, 310 F.2d 89 (1st Cir. 1962). The court of appeals felt it was the Commission's intention to prohibit all simulated props in television commercials. The court believed that "[w]here the only untruth is that the substance [the viewer] sees on the screen is artificial, and the visual appearance is otherwise, a correct and accurate representation of the product itself, he is not injured." *Id.* at 94.

79. 62 F.T.C. 1269 (1962). The same court of appeals again found the Commission's order unsatisfactory and refused to enforce it. 326 F.2d 517 (1st Cir. 1963). The Commission appealed and the Supreme Court held the Commission's order was a good-faith attempt to incorporate the legal principles contained in the court of appeal's first order. The Commission corrected the inference that mock-ups were illegal *per se*. 380 U.S. 374 (1965).

cream melts rapidly under lights) if the texture and color of the prop are not emphasized as selling points of the product.⁸⁰

5. Subjective Claims—"Puffing"

A rather well-established rule of law is that trade "puffing" is permissible. There are essentially two forms of puffery. The first is a subjective statement of opinion as to a product's quality using such terms as "best" or "greatest." Nearly all advertisements contain some measure of this type of puffery. Examples include the following: "You can't get any closer"; "Coca-Cola is the 'Real Thing'"; "State Farm is all you need to know about insurance"; "Bayer Works Wonders"; "Super Shell"; etc.⁸¹ None of these statements have been proven to be true but neither have they been proven false. They all involve some measure of commercial exaggeration.

The second form of puffery is gross exaggeration extended to the point of outright fantasy which is obviously not true. Esso does not really put a "Tiger in Your Tank"; a Green Gaint selling vegetables is rare; and though it is possible to have little men sailing around your toilet bowl hawking "Tidi-Bowl," such sightings are infrequent.⁸²

In 1946, the court set aside a Commission ruling in *Carlay Co. v. FTC*,⁸³ holding that a weight reduction plan which claimed to be "easy" to follow was deceptive. The court commented that:

[W]hat was said was clearly justifiable . . . under those cases recognizing that such words as "easy," "perfect," "amazing," "prime," "wonderful," "excellent," are regarded in law as mere puffing or dealer's talk upon which no charge for misrepresentation can be based.⁸⁴

Over the years the puffery defense has been frequently relied upon. However, the courts have ruled in many cases that the claim goes beyond puffery to real deception.⁸⁵ The question is,

80. See generally Comment, *Illusion or Deception: The Use of 'Prop' and 'Mock-ups' in Television Advertising*, 72 YALE L. J. 145 (1963).

81. See Pitofsky, *supra* note 9, at 677.

82. *Id.*

83. 153 F.2d 493 (7th Cir. 1946).

84. *Id.* at 496.

85. See *Liggett & Myers Tobacco Co.*, 53 F.T.C. 354, 375 (1958) ("milder" cigarette is one that is less irritating; "soothing and relaxing" held categorical claim for cigarettes, not puffing). *FTC v. Sewell*, 240 F.2d 228 (9th Cir. 1956), *rev'd per curiam*, 353 U.S. 969 (1957) (claim that shoe insert improved "poise and balance" and improved "foot action" found not puffing).

then, what is "puffing?"⁸⁶ One answer is that the definition seems to be changing with the passage of time. A claim that would have been regarded as subjective opinion and legitimate puffery years ago might now be viewed in a different light. Consumerism has forced a new orientation which affects when a puffery defense will be regarded as appropriate.

In *FTC v. Tanners Shoe Co.*,⁸⁷ the Commission denied the puffery defense, noting that:

It was stipulated that it is not literally true that respondents' shoes will "assure" comfort or a perfect fit to all individuals. However, respondents contend that such representations constitute legitimate trade puffery and are not false representations within the meaning of the law The representation that the product provides support where it is most needed clearly carries an orthopedic or health connotation, and it is undisputed that respondents' shoes are not orthopedic . . . but are stock shoes. It would appear that such a representation is false in attributing to the product a quality which it does not possess rather than exaggerating a quality which it has.⁸⁸

In *In re Colgate-Palmolive Co.*,⁸⁹ the respondent claimed that the advertisement, involving the sandpaper shaving demonstration, was merely fanciful exaggeration. The Commission's decision noted that to term the demonstration puffery was "inconsistent with the prevalent judicial and administrative policy of restricting, rather than expanding, so-called puffing."⁹⁰ This case gives further evidence that the puffery defense is much less reliable today than it has been in the past. It should be noted that while the number of exceptions to the puffery defense are few, the situation can be compared to the forest which has lost a few trees: it still exists. However, the time can come when the remaining trees no longer constitute a forest.

86. R.B. Sherian in the play *The Critic*, Act I, described puffery in this manner:

Puff: . . . 'twas I first enriched their style—'twas I first taught them to crowd their advertisements with panegyric superlatives, each epithet rising above the other . . . From me they learned to inlay their phraseology with variegated chips of exotic metaphor: by me too their inventive faculties were called forth: yes, sir, by me they were instructed to clothe ideal walls with gratuitous fruits—to insinuate obsequious rivulets into visionary groves . . . This, sir, is . . . the art of puffing. . .

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

87. 53 F.T.C. 1137 (1957).

88. *Id.* at 1142, 1144.

89. 59 F.T.C. 1452 (1961).

90. *Id.* at 1469. See also I. L. PRESTON, *THE GREAT AMERICAN BLOW-UPS: PUFFERY IN ADVERTISING AND SELLING* (1975). But see *FTC v. Pfizer, Inc.*, 81 F.T.C. 23, 64-65 (1972).

C. *The Meaning of the Advertisement-Interpretive Authority of the Commission*

1. Evidence

Hard evidence is seldom employed to support or refute the interpretation of an advertisement upon which a charge of deception is based. Either it is not introduced at all or if it is introduced, in the form of a dictionary definition, consumer or expert testimony, or survey research, it is simply not very persuasive. Generally, the Commission develops conclusions based upon its own analysis of the advertisement,⁹¹ and the judiciary has been quite willing to uphold the Commission even when the only available evidence contradicts the Commission's position. One commentator stated:

The courts rationalize their frequent deference to the Commission's determination of meaning on the ground that meaning is a question of fact within the sole authority of the Commission. Although on rare occasions a court will reverse the Commission's determination of meaning if "arbitrary or clearly wrong" or not supported on the record as a whole by substantial evidence, more often the court will simply declare that the Commission must be affirmed unless completely "unsupported" in the record or that meaning is a question not to be reviewed because of "the Commission's special expertise and responsibility."⁹²

In the leading case of *Zenith Radio Corp. v. FTC*,⁹³ the Commission's unfettered discretion to determine the meaning of an advertisement was affirmed. The Commission found that an advertisement giving the number of tubes in a Zenith radio was deceptive since Zenith included in its count rectifier tubes. The Commission held that the public would assume that a reference to tubes would be those that detect, amplify, or receive radio signals. In answering Zenith's claim that consumer testimony regarding the meaning of the advertisement was required the court declared:

The Commission was not required to sample public opinion to determine

91. See, e.g., *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 963 (9th Cir. 1975), cert. denied, 423 U.S. 827 (1975); *FTC v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965). See generally Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 559, 563-67 (1969) [hereinafter cited as Gellhorn].

92. Millstein, *supra* note 9, at 470. Thus, the Commission has discretion to weigh the validity of conflicting evidence, and its decision will not be overturned so long as there is some evidence in the record in support of the Commission's conclusion. See *Bakers Franchise Corp. v. FTC*, 302 F.2d 258 (3d Cir. 1962).

93. 143 F.2d 29 (7th Cir. 1944). See also *Bantam Books, Inc. v. FTC*, 275 F.2d 680 (2d Cir. 1960), cert. denied, 364 U.S. 819 (1960).

what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint.⁹⁴

In *Savitch v. FTC*,⁹⁵ the Commission's judgment, unsupported by evidence, was similarly affirmed by the court which yielded to the Commission's special expertise and responsibility.

2. The Nonuse of Consumer Surveys

It is clear that the interpretation of an advertisement can be a source of a disagreement. A reasonable approach to this problem would be to develop a scientifically conducted test or survey which determines exactly what meaning consumers attach to an advertisement. A consumer laboratory test or field survey could determine what percentage of the respondents are misinterpreting the advertisement and even what impact the misinterpretation is having upon their purchasing behavior. Further, the analysis of the advertisement interpretation among various segments, such as the primary targets of the advertising, or segments which might be more susceptible to misinterpretation than others, could aid those making judgments about the nature and the extent of deception. However, despite this rationale, consumer tests and surveys are almost never employed in deceptive advertising cases, and in the few cases in which they are utilized they are rarely influential.⁹⁶ There are several reasons why such apparently useful procedures are not used.

a. The Authority of the Commission

The Commission has simply not been required by the judiciary to develop consumer survey evidence to support its position.⁹⁷ Therefore, with limited resources at its disposal, it has not had any incentive to develop this type of evidence. Further, the Commission only singles out a limited number of advertisements to prosecute. Presumably, most of the violations they do prosecute

94. 143 F.2d at 31.

95. 218 F.2d 817 (2d Cir. 1955). See also *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *Libbey-Owens-Ford Glass Co. v. FTC* 352 F.2d 415, 417 (6th Cir. 1965); *E. F. Drew & Co. v. FTC*, 235 F.2d 735, 740 (2d Cir. 1956), cert. denied, 352 U.S. 969 (1957), supporting the proposition that courts have deferred to the Commission's determination that a certain set of facts constitutes a deceptive practice.

96. See, e.g., *Korber Hats, Inc. v. FTC*, 311 F.2d 358 (1st Cir. 1962); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), cert. denied, 380 U.S. 917 (1962).

97. See note 94 *supra*, and accompanying text. See also Pitofsky, note 9 *supra*, at 678.

are relatively obvious and do not require testing.⁹⁸

b. Protecting the Ignorant and the Credulous

Advertiser's have been remarkably unsuccessful at developing survey evidence which has been helpful in refuting a Commission finding. In fact, because the courts have demanded that the ignorant, the unthinking, and the credulous be protected, survey evidence has been used against the advertiser. In *FTC v. Benrus Watch Co.*,⁹⁹ a survey showed that eighty-six percent of potential watch buyers would understand the meaning of a preticketing system. The Commission, relying on the fact that fourteen percent would be misled, used the evidence to prove deception.¹⁰⁰ Similarly, in *Rhodes Pharmacal Co. v. FTC*,¹⁰¹ a survey showed that ninety-one percent of the three hundred sampled consumers were not misled by an advertisement for Imdrin, a palliative for arthritis or rheumatism. Again, the Commission relied upon the survey as evidence that nine percent believed that the product would provide a treatment and cure for arthritis and rheumatism.¹⁰² Thus, under current circumstances, the advertiser, unless there was a belief that the survey would show zero deception, is naturally reluctant to invest money to generate this type of evidence.

c. The Limitations of a Survey

There are difficulties inherent in developing a survey. The population of the survey group must be adequately defined, a defensible sampling plan must be created, and objective standards to test questions for bias and validity must be established.¹⁰³ Even assuming such a survey is technically acceptable, an amount of

98. An average of fewer than five hundred investigations of deceptive practices were initiated in each year during the period of 1965-1969, with an average of fewer than seventy complaints issued each year. REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 19-20 (1969). Many of these investigations and complaints involved relatively insignificant advertising themes.

99. 64 F.T.C. 1018, 1032 (1964), *aff'd*, 352 U.S. 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966). See also notes 41-54 *supra*, and accompanying text.

100. 64 F.T.C. at 1045.

101. 49 F.T.C. 263 (1952), *aff'd*, 208 F.2d 382 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955).

102. 49 F.T.C. at 283.

103. See generally LUCK, WALES & TAYLOR, *MARKETING RESEARCH* 148 (4th ed. 1974) [hereinafter cited as LUCK, WALES & TAYLOR].

uncertainty will remain if only because of the fact that a sample is involved. The difficulties of determining the validity of specific surveys naturally causes apprehension among laymen. Such apprehensions are particularly understandable when one observes the quality of some of the surveys that have been introduced.

FTC v. Stephen Rug Mills,¹⁰⁴ was one of the rare cases in which the Commission did not attempt to use a consumer poll to support its position. A label on a rug in question contained the name "New Bedford" as well as a conspicuous indication that the rug was "Made in Belgium." The Commission chose an unspecified number of people "at random" from the New York telephone directory and sent them a questionnaire. A key question asked that if a hooked rug was named New Bedford, would they gain any impression of the country of origin? Of the thirty-eight responses, twenty-two answered the name indicated domestic manufacture.¹⁰⁵ The Commission indicated that this response was proof of deception and the "Made in Belgium" disclaimer was inadequate to remove the deception.¹⁰⁶ With surveys like this, it is little wonder that they have not been extensively relied upon.

d. Legal Inhibitors

There is a natural reluctance by the legal profession to agree to a single, impartial, court-commissioned consumer survey in part because the use of a survey research is somewhat inconsistent with the traditional adversary system of justice wherein each side submits arguments and evidence supporting its position. The judge or jury then weighs the two positions and arrives at a decision. Survey research, in contrast, is a direct approach to obtain an accurate picture of cognitions or attitudes. Ideally, the results should be unknown in advance and should be highly influential. To an attorney, however, agreeing to a carefully conceived and conducted survey is probably like calling a prestigious witness without knowing which side his testimony will support. Moreover, as one commentator pointed out: "[A] full exploration of these (perceptual) issues would complicate and delay enforcement proceedings."¹⁰⁷

3. Consumer Surveys—A Proposal

Professor Ernest Gellhorn has proposed that the Commission's procedures be modified to encourage or require reliance upon in-

104. 34 F.T.C. 958 (1942).

105. *Id.* at 966-67.

106. *Id.* at 969.

107. *See Pitofsky, supra* note 9, at 679.

dependent consumer surveys in determining deception.¹⁰⁸ The Commission's procedures involve a hearing under the auspices of an examiner. The outcome of the hearing may be reviewed by or appealed to the full Commission. After the full Commission has acted, the findings can be further appealed to the courts. The Rules now require a prehearing conference to exchange witness lists and documentary evidence.¹⁰⁹ The intent is to simplify and expedite the hearings themselves. Professor Gellhorn suggests that the Rules also "require that when the question of consumer understanding is at 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 Commission and respondent."¹¹⁰

Such an order would not accompany every situation in which false advertising is charged. In some cases, the circumstances may not warrant the cost of an expensive and time-consuming survey. A previous case, if similar, may be relied upon, or the deception may be obvious. The hearing examiner would have to use discretion in ordering surveys, restricting their use to cases in which "the dispute regarding consumer understanding is not frivolous and where its resolution would be aided by development of reliable survey evidence."¹¹¹

The examiner, under Professor Gellhorn's proposal, would have the power to guide those conducting the survey as to sample selection and questionnaire development. The examiner would, of course, consult with the parties involved during the survey design phase. Ideally, there would be agreement among all concerned that a survey design would permit a valid inference as to the interpretation an advertisement is precipitating among its audience. If agreement could not be reached, the survey may include sufficient scope so that each party, perhaps by analyzing a different subset of the survey, would be satisfied that the deception could be determined.

The potentially troublesome issue would be the selection of the sample population. The sample could focus on those to whom the

108. See generally Gellhorn, *supra* note 91. See also Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 U. KAN. L. REV. 625, 635-37 (1969).

109. See 16 C.F.R. §§ 3.41-46 (1978). See also note 26 *supra* and accompanying text.

110. See Gellhorn, *supra* note 91, at 568.

111. *Id.*

advertisement was directed, to whom it actually reached, or to those who had an opportunity to be exposed to it. It could also be restricted to those who were potential buyers or even to those who actually bought the product. Another reasonable sampling group would be those consumers who are the most likely to be deceived because of their education, experience, or motivation. One approach would be to obtain a large and broad sample so that analysis could be made for separate subgroups. The appropriate type of sample would depend upon how the survey was to be interpreted.

A crucial question relating to the viability of the Gellhorn proposal is the development of reasonable standards of deception. If the Commission should insist upon a zero deception standard, the use of surveys is probably doomed. Assuming a more realistic posture is forthcoming, what extent of misinterpretation would be the basis for a finding of deception? Clearly, it would be impossible to identify a standard that would hold for all cases. Just as zero percent is unrealistic, so too would be an arbitrarily fixed number. The extent of allowable misinterpretation will depend upon the situation. If health or safety is involved, a close to zero deception level might be appropriate at least among those whose health or safety is potentially involved. However, if economic harm is at issue, such as with a dance school advertisement which makes extravagant claims, a higher level of misinterpretation such as ten to fifteen percent, might be tolerated. By contrast, cases which are unlikely to cause even insignificant economic harm such as those involving the disclosure of a product's foreign origin or whether charcoal briquets are made with wood or corncob base should undoubtedly depend on the advertiser. If several segments of the public are involved, different percentage levels may be appropriate. However, the appropriate level for each situation will have to evolve through time as a series of specific decisions are obtained.

The above discussion has mentioned only consumer surveys. The implication is that a rather large probability sample would be involved with the use of extensive questionnaires. Market researchers select a test instrument to fit the problems—some decision contexts call for quick inexpensive copy tests, others for more elaborate field surveys, and still others require full-scale market tests.¹¹² Similarly, there is no reason in this context to restrict testing to a single standard technique of some fixed scope. Where there is disagreement as to whether five percent or seventy percent of those surveyed will misinterpret an advertise-

112. See LUCK, WALES & TAYLOR, *supra* note 103, at 94-126.

ment, a survey of twenty-five thousand people is not needed to determine which figure is closer to the truth. An estimate within a plus or minus 0.01 percent would simply not be needed, and a crude copy test would suffice. Professor Gellhorn's proposal actually becomes even more attractive when the wide range of available copy tests and surveys are considered.¹¹³

D. Remedies

The only formal procedure established by the Federal Trade Commission Act for enforcing its prohibition of "deceptive acts and practices"¹¹⁴ is to obtain a cease and desist order.¹¹⁵ In some cases involving food, drugs, devices, and cosmetics, the Commission does have the power to obtain injunctions to stop the use of the advertising in question until the case is decided on its merits.¹¹⁶ However in most cases, the Commission has relied upon the cease and desist order.

The cease and desist order has often been described as a command to "go and sin no more,"¹¹⁷ having little practical effect. Due to procedural delays, it is not uncommon for several years to elapse between the complaint and the issuance of the order.¹¹⁸ In

113. *Id.* Note that this proposal is *not* a suggestion that it be demonstrated that some consumer has in fact been deceived. Rather it is a suggestion that research be undertaken to demonstrate how typical consumers interpret an advertisement.

114. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (Supp. V 1975).

115. See note 26 *supra* and accompanying text.

116. See Federal Trade Commission Act § 13(a), 15 U.S.C. § 53(a) (Supp. III 1973). See also Pitofsky, *supra* note 9, at 692-93 n.28.

117. See Pitofsky, *supra* note 9, at 692.

118. See REPORT OF THE AMERICAN BAR ASSOCIATION TO STUDY THE FEDERAL TRADE COMMISSION 28-31 (statistics concerning administrative delays at the Commission), Note, 'Corrective Advertising' Orders of the Federal Trade Commission, 85 HARV. L. REV. 477, 483 (1971) (delays of three to five years between complaint and order are common).

While the Commission apparently cannot immediately obtain the efficiency necessary to adequately safeguard consumers from deceptive advertising, there are signs of improvement. Currently, cease and desist orders do not become final, and therefore effective until the appeals process is exhausted. See note 26 *supra* and accompanying text. However, the United States House of Representatives recently passed legislation amending the Federal Trade Commission Act to provide that a cease and desist order would become effective within sixty days, unless it was stayed by either the Commission or the appeals court. H.R. 3816, 95th Cong., 1st Sess. (1977). S. 1288 originally containing the Federal Trade Commission amendments was added to S. 1533, a measure authorizing funds for the Commission and requiring recodification of its rules.

The United States Senate then passed the House bill after substituting for it the language in S. 1533. However, since there existed differences between the bills

one extreme case, it took sixteen years for the Commission to get the word "Liver" out of "Carter's Little Liver Pills." During the delay the objectionable advertising can continue. The most significant remedial innovation has been corrective advertising, which directs an advertiser found guilty of disseminating a false and misleading claim to inform consumers, usually through the same advertising media originally used to disseminate the false claim, of the facts with respect to the claim.

The imposition of corrective advertising as a sanction by the Commission was first suggested in 1970 by a group of law students, who organized under the acronym SOUP¹¹⁹ (Students Opposing Unfair Trade Practices) to intervene in the *Campbell Soup Company* case.¹²⁰ The Commission, in denying the motion to intervene, made the following pronouncement:

We have no doubt as to the Commission's power to require such affirmative disclosures when such disclosures are reasonably related to the deception found and are required in order to dissipate the effects of that deception.¹²¹

Thus, the Commission adopted the concept of the corrective advertising and has used it not only in numerous proposed or final consent orders,¹²² but also in initial decisions¹²³ and in rare final

passed by the House and Senate concerning a number of provisions, the bills were submitted to a Conference Committee. Although the Conference report was accepted by the Senate, 124 CONG. REC. S. 2014 (Feb. 22, 1978), the report was rejected by the House and sent back to conference, 124 CONG. REC. H. 1570 (Feb. 28, 1978). While the precise form of the final law is yet undetermined, it is manifest that improvements are forthcoming.

119. See generally Cornfield, *New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1976) [hereinafter cited as Cornfield]; Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1 (1973); Note, *Corrective Advertising—The News Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972); Note, *Corrective Advertising Orders of the Federal Trade Commission: No, Virginia, Wonder Bread Doesn't Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971).

120. 77 F.T.C. 664 (1970).

121. *Id.* at 668.

122. A party who enters into a consent order agreement admits proposed Commission findings, waives the right to challenge the Commission order, and is legally bound to obey once the agreement is finally accepted by the Commission. See 16 C.F.R. §§ 2.31-.35 (1978). See generally Cornfield, *supra* note 119, at 696-97. See also Sears, Roebuck & Co., 3 TRADE REG. REP. (CCH) ¶ 21,210 (FTC 1977) (consent); Zayre Corp., 3 TRADE REG. REP. (CCH) ¶ 21,339 (FTC 1977) (consent); Idea Research & Dev., Inc. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 20,911, 21,197 (FTC 1976) (need for legal advice in dealing with patent promotion firm); Nagle, Spillman & Bergman, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,157 (FTC 1976) (ad agency order concerning use of salt substitute); Revlon, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,186 (FTC 1976) (health hazard resulting from use of hair straightener); Lustrasilk Corp. of America, Inc. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,041 (FTC 1975) (health hazard of hair conditioner); Miriam Mascheck, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,800 (FTC 1975) (wrinkle and blemish removal process); Beatrice Maggie Edwards, [1973-1976 Transfer Binder]

orders.¹²⁴ Litigation of the pertinent questions in the court has only just started.¹²⁵ The first corrective advertising order to be reviewed and upheld by a federal appellate court was discussed in *Warner-Lambert Co. v. FTC*.¹²⁶ Concluding that the Commission

TRADE REG. REP. (CCH) ¶ 20,685 (FTC 1974) (medical treatment for removing wrinkles and blemishes); Forever Young, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,649 (FTC 1974) (medical treatment, again, to remove facial wrinkles and blemishes); Boise Tire Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶20,347 (FTC 1973) (comparative advertising involving tires); Amstar, Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) 20,356 (FTC 1973) (nutritional claims for sugar); Biochem Research Foundation, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) 20,463 (FTC 1973) (health effects of flake salt as compared with commercially prepared salt); Coca-Cola Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 12,351, (FTC 1970), and 19,605 (FTC 1971) (consent); IIT Continental Baking Co. and Ted Bates & Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶19,681 (FTC 1971) (consent); Standard Oil Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶19,352 (FTC 1970) (consent).

123. Often initial decisions which incorporate corrective advertising provisions fall when reviewed by the Commission or are at least substantially modified. Theodore Stephen Co. 1973-1976 transfer Binder] TRADE REG. REP. (CCH) ¶¶ 20,282, 20,497, 20,693 (FTC 1974) (bait and switch carpet sales; Administrative Law Judge imposed corrective advertising "in order to stop respondents and deter others."); Wilbanks Carpet Specialists, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 20,381, 20,597, 20,739 (FTC 1974) (bait and switch carpet sales, initial order required corrective advertising of scarlet letter type which Commissioner Nye deleted because "the record in this case, however, does not support the requirements that respondents set forth any form of 'consumer warning'"); Tri-State Carpets, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 20,497, 20,666, 20,741, 20,742 (FTC 1974) (bait and switch carpet sales; Commission removed *sua sponte* the corrective advertising requirement since there was "insufficient evidence that a consumer warning is necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence.").

124. Peacock Buick, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 20,947, 21,083, 21,105 (FTC 1976) (misrepresentations concerning car sales); Encyclopedia, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,805, 21,119 (FTC 1976) (contests used as leads for salesmen); Warner-Lambert Co., [1973-1976 Transfer Binder] TRADE REG. REP. ¶ 21,066 (FTC 1975) (Listerine mouthwash).

125. See Warner-Lambert Co., *supra* note 124, where the respondent filed a petition for review in the U.S. District Court for the District of Columbia, Mis. Case, Docket No. 76-0080 (1976). A tangential standing issue was decided in Consolidated Fed'n of America v. FTC, 515 F.2d 367 (D.C. Cir. 1975). In that case, efforts by consumers to seek implementation of a corrective advertising order after the Commission had rejected its use failed since only those directly affected by a cease and desist order have standing to challenge the Commission's action in court.

126. 562 F.2d 749 (D.C. Cir. 1977), *supp. op. on petition for rehearing*, 562 F.2d 768 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1576 (1978) (it is interesting to note that between January 1, 1971 and May 1977 eighty Commission orders were issued which have so far resulted in the filing of thirteen petitions for *certiorari*. All thir-

could generally use remedies which went beyond the simple cease and desist order,¹²⁷ the court then examined whether corrective advertising in particular exceeded the limits of the Commission's power. Based on its interpretation of the 1975 amendments to the Federal Trade Commission Act and their legislative history,¹²⁸ the inapplicability of first amendment rights to reasonable regulation of false or misleading advertisements,¹²⁹ and the "well-established" nature of the corrective advertising concept,¹³⁰ the majority of the court found the Commission's action in ordering corrective advertising under the circumstances of this case warranted and within its power both legislatively and

teen petitions have been denied. H.R. REP. NO. 339, 95th Cong., 1st Sess., 28 n.41 (1977).

For approximately one hundred years, Warner-Lambert Co. had advertised Listerine, one of its products, as being effective and beneficial in fighting colds, cold symptoms and sore throats. The Commission issued a complaint against the company in 1972 charging that the company had misrepresented the effectiveness of Listerine. An Administrative Law Judge upheld the allegations of the complaint in his initial decision which was subsequently affirmed by the Commission and then appealed to the District of Columbia Circuit Court.

127. 562 F.2d at 757.

128. *Id.* at 757-58. The court agreed that Commission authority to impose penalties other than a cease and desist order (*e.g.*, civil penalties) was not granted in the original Act of 1914, 39 Stat. 717 (1914), or the Wheeler-Lea amendments in 1938, 52 Stat. 111 (1938). *Id.* at 757. While the court found that this fact did not prevent the use of the remedy, it devoted greater emphasis to amendments embodied in the Magnuson-Moss-Warranty-Federal Trade Commission Improvement Act, 88 Stat. 2183 (1975) (for an informative discussion of this Act *see* Comment, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391 (1977)). Specifically, a new consumer redress provisions was added to the Act, 15 U.S.C. § 57b (Supp. V 1975). This section empowered the Commission, following a final cease and desist order, to commence a civil action in federal district court. If the court found the violator had acted in bad faith it could grant relief including "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the . . . unfair or deceptive act . . ." 15 U.S.C. § 57b(b) (Supp. V 1975). (Emphasis added). Basing its decision in part on congressional intent, the court held that the grant to a court of the power of notification did not preclude Commission corrective orders. 562 F.2d at 757-58.

There is additional support for this holding with regard to intent. A report of the Senate Commerce Committee in referring to this provision stated: "[t]his section would not affect whatever power the Commission may have under Section 5 of the FTC Act to fashion relief in its initial cease and desist order, such as *corrective advertising* or any other remedy, which may be appropriate to terminate effectively unfair or deceptive acts or practices." S. REP. NO. 151, 93rd Cong., 1st Sess. 28 (1973). (Emphasis added.) *See generally* [1974] U.S. CODE CONG. & AD. NEWS 7702.

129. *See* note 188 *infra*, and accompanying text.

130. 562 F.2d at 759-61. The majority discussed the past use of orders analogous to corrective advertising requirements where the Commission had tried to remove residual effects of false advertising and concluded by uttering that: "[t]o allow consumers to continue to buy the product on the strength of the impression built up by prior advertising—an impression which is not known to be false—would be unfair and deceptive." *Id.* at 761.

constitutionally.¹³¹

Although the use of corrective advertising has been supported in one circuit, some uncertainty still exists. Nevertheless, other federal agencies have also begun to issue such orders.¹³²

Corrective advertising is premised conceptually on the notion that advertising has a residual effect.¹³³ It is contended that false, deceptive, or unfair claims made in prolonged advertising, are retained in the minds of the public for a considerable period of time,¹³⁴ even after the unlawful advertising has ceased.¹³⁵ There-

131. In fact, the court appears to have adopted the following standard used by the Commission in corrective advertising cases:

[I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is a clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisements. 562 F.2d at 762.

A question which was skirted was the permissible breadth of the Commission's proposed corrective advertising order. It was not decided whether an advertiser may be required to include words or phrases which not only bring attention to the fact that his advertisement is meant to be corrective, but also humiliate him. See 562 F.2d at 763 n.69. Note also that Judge Robb's dissent is strongly opposed to basic tenets of the majority opinion, *i.e.*, that corrective advertising is within the Commission's power. See also Haas, *Warner-Lambert Co. v. FTC: The Possibilities and Limitations on Corrective Advertising*, 13 NEW ENGLAND L. REV. 348 (1977) (after reviewing the holding in *Warner-Lambert*, and analyzing the concept of corrective advertising, the comment contended that questions remain as to the Commission's statutory authority to impose the remedy. It is also urged that the Commission may be severely restricted as to when orders may be imposed and the nature of the disclosures that can be made). For a recent update on the *Warner-Lambert* corrective advertising campaign see *Listerine Slips in Disclaimer*, ADVERTISING AGE, Sept. 11, 1978, at 2.

132. See *Upjohn to Run Warning Ads for Two Drugs*, ADVERTISING AGE, Feb. 3, 1975, at 59 (Food and Drug Administration consent order); *Trans-World Airlines, Inc.*, Enforcement Proceedings, CAB DOCK. NO. 28970 (initial Dec., Nov. 24, 1976) (premature fair cut ads).

133. The "residual effects" which emanate from advertising form the fundamental rationale behind the use of corrective advertising. See Thain, *Consumer Protection: Advertising—The FTC Response*, 27 BUS. L. REV. 891, 894, 897 *et seq.* (1972) (who calls it the "unfairness doctrine"); Note, *Corrective Advertising Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477, 494 (1971). It has been stated: "that advertisements seek to penetrate the memory of the consumer so that at some time they will trigger or increase the likelihood of a purchase by that consumer of the advertised products." *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 431 (1972) (Comm. Jones, dissenting).

134. See Note, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415, 416 (1972) Note, *Corrective Advertising Orders of the Federal Trade Commission: No, Virginia, Wonder Bread Doesn't Build Strong*

fore, goes the argument, corrective statements are needed for a period equal to the period of such residual effect.¹³⁶ It is further argued that violators prolong the period of deceptive advertising by taking advantage of all possible procedural delays before the Commission, so as to get the undeserved benefits from continuing their violations during these proceedings and, during the period in which the alleged residual effect is operative.¹³⁷

In most instances, the practice and procedure of the Commission regarding corrective advertising takes the form of consent orders.¹³⁸ Initial decisions by administrative law judges have mentioned the availability of corrective advertising as an appropriate sanction under certain circumstances.¹³⁹ However, final corrective advertising orders are unusual since most cases are settled through the issuance of consent orders.¹⁴⁰ It is obvious that the Commission is not presently overly anxious to order corrective advertising without the consent of the advertiser.

Usually, the orders require that twenty-five percent of the advertising dollar be devoted to correction of residual effects.¹⁴¹ The time span is customarily one year; but the Commission has begun to leave the time span open, requiring a minimum time of a year and continuation of the corrective advertising until certain stipulated results can be proved.¹⁴² Initially advertisers had the choice

Bodies Twelve Ways, 70 MICH. L. REV. 374, 380 (1971) [hereinafter cited as *Corrective Advertising*]; and many other authorities not herein cited.

Although advertisements may produce residual effects "there is today very little research and virtually no empirical studies which can establish or demonstrate the actual way in which information gleaned from an advertisement . . . operates to trigger in that consumer an intent to purchase the advertised product." *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 432 (1972) (Comm. Jones, dissenting). However, for interesting discussions concerning the impact of advertising on consumer behavior, see generally *supra* note 38, and authorities cited therein.

135. The Commission rarely considers abandoned advertising as moot. See *New Response*, *supra* note 134, at 419; *Corrective Advertising*, *supra* note 134, at 392.

136. There is, however, complete silence as to how to arrive at the appropriate duration. See *Corrective Advertising*, *supra* note 134, at 398.

137. See Jones, *To Tell the Truth, the Whole Truth . . .*, 26 FOOD DRUG L. J. 174, 184 (1971).

138. Only in *In the Matter of Warner-Lambert Co.*, *supra* note 124, was there an "initial decision" by an Administrative Law Judge imposing corrective advertising.

139. See *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 471 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

140. *Id.*

141. See, e.g., *Wasem's, Inc.*, 84 F.T.C. 209 (1974); *Amstar Corp.*, 83 F.T.C. 649 (1973); *Ocean Spray Cranberries, Inc.*, 80 F.T.C. 975 (1972); *ITT Continental Baking Co.*, 79 F.T.C. 248 (1971). Only two orders deviate: *Sugar Information, Inc.*, 81 F.T.C. 711 (1972), wherein a different road was taken and *Medi-Hair, Int'l*, 80 F.T.C. 627 (1972) where only fifteen percent was required.

142. See *RJR Foods, Inc.* [1973-1976 Transfer Binder] TRADE REG. REP. (CCH)¶ 20,334 (FTC 1973) (a provisional consent order fashioned by the court concerning the beverage "Hawaiian Punch").

of abandoning advertising for a year, rather than to advertise correctively.¹⁴³ There is now a tendency not to afford advertisers such a choice.¹⁴⁴ Some orders obligate the advertisers to state specifically that they have been found to have advertised deceptively.¹⁴⁵ The reasons behind this requirement are said to be that the public should be made aware of tendencies of an advertiser to violate the law.¹⁴⁶

It is manifest that the intent of corrective advertising is to counteract past deception. If consumer misunderstanding can be corrected, then the consumer presumably will be more likely to obtain greater utility from purchase decisions and the competitive balance will be restored.¹⁴⁷

IV. COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT

The power of the Commission to regulate advertising is not without limits.¹⁴⁸ Although it has not always been so held, advertising, despite its commercial nature, is nonetheless speech protected by the first amendment.¹⁴⁹ The doctrine that the protections of the first amendment do not apply to commercial advertising was abruptly decided in 1942, in *Valentine v. Crestensen*.¹⁵⁰ Citing no authority and discussing no public pol-

143. See cases cited in note 122 *supra*. See generally, Anderson & Winer, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEX. L. REV. 312, 330 (1972).

144. See *New Response*, *supra* note 134, at 431.

145. This practice is aptly referred to as a "scarlet letter" requirement. See Standard Oil Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,352 (FTC 1970); Coca-Cola Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,351 (FTC 1970), 19,063 (FTC 1971); Austern, *What is Unfair Advertising*, 26 FOOD DRUG COSM. L. J. 659, 662 (1971). But see Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496, 519-24 (1972), which suggests that the use of confessional disclosures are beyond the Commission's statutory authority.

146. See *Corrective Advertising*, *supra* note 134, at 374, 384-85.

147. For a recent Commission response to corrective advertising see generally Comment, *Corrective Advertising: Proposed Interpretive Rule of Policy Statement*, 4 TRADE REG. REP. (CCH) ¶ 39,046 (FTC 1977).

148. See *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (the court found that when considering government restrictions on speech "[t]he First Amendment requires . . . an examination of the Commission's action that is more searching than in other contexts." The court concluded that in making its review the appropriate premise is that prior restraints are suspect and that the least restrictive means must be employed).

149. See *Virginia State Bd. of Pharm. v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748 (1976).

150. 316 U.S. 52 (1942). Compare *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir.

icy,¹⁵¹ the Court upheld a municipal sanitation ordinance invoked to prohibit the distribution of a handbill with both a political and a commercial message. The Court held that states were free to regulate commercial advertising because it was not speech within the meaning of the first amendment.¹⁵²

A. *Erosion of the Chrestensen Doctrine*

For years, *Chrestensen* was followed unhesitatingly.¹⁵³ Gradually, though, several of the justices indicated doubt about or disagreement with the holding in *Chrestensen*. Justice Frankfurter, in a footnote to a concurring opinion,¹⁵⁴ expressed an apparent doubt as follows: "No useful purpose would be served by the challenged regulation as though it imposed no real restraint on speech or the press," referring, *inter alia*, to *Chrestensen*.¹⁵⁵ The Court intermittently returned to the *Chrestensen* doctrine,¹⁵⁶ but three justices other than Justice Frankfurter expressed criticism in more or less obvious ways. Justice Douglas gave vent to his

1941) (Commission may not constitutionally prohibit distribution of false and misleading pamphlets on aluminum cookware by person not materially interested in cooking utensil trade) *with Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693 (7th Cir. 1951) (distribution of stainless steel utensils may be prohibited from false and deceptive advertising disparaging aluminium cookware). *See also* *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Regina Corp. v. FTC*, 322 F.2d 765 (3d Cir. 1963).

151. Justice Douglas, concurring in *Cammarano v. United States* 358 U.S. 498 (1959) articulated that "*Valentine v. Chrestensen*, 316 U.S. 52, 56, held that business advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection." *Id.* at 513-14.

152. 316 U.S. at 54-55. The fact that advertising is a form of speech, a means of communicating ideas or information or opinions, and literally within the first amendment's protection of freedom of speech was totally ignored. For a quarter-century before *Chrestensen* and even longer thereafter, almost everyone accepted as gospel that the first amendment was irrelevant to the Commission's regulation of advertising. *See generally* Pitofsky, *supra* note 9, and Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

153. *Jamison v. Texas*, 318 U.S. 413, 417 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *cf.* *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950), *rehearing denied*, 339 U.S. 990 (1950); *cf.* Justice Reed's opinion for the Court in *Jones v. Opelika*, 316 U.S. 584 (1942), *rev'd upon rehearing*, 319 U.S. 103 (1943), where he said that "commercial advertising cannot escape control by the simple expedient of printing matter of public interest on the same sheet or handbill." *Id.* at 597.

154. *Dennis v. United States*, 341 U.S. 494 (1951), *rehearing denied*, 342 U.S. 842 (1951), *further rehearing denied*, 335 U.S. 936 (1958).

155. *Id.* at 529 n.7.

156. *Talley v. California*, 362 U.S. 60, 71 (1960) (Clark J. dissenting); *cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Ginzburg v. United States*, 383 U.S. 463 (1966) (the Court disclaimed any involvement of a commercial factor in its decision, *id.* at 474, yet it viewed the "publications against a background of commercial exploitation." *Id.* at 466).

feelings in several separate opinions,¹⁵⁷ and considerably later, became more vociferous in an unusual, reasoned dissent to a denial for a petition for a writ of certiorari, saying:

I am unpersuaded by the notion that because the petitioner's publications were commercial in nature they deserve less or no First Amendment protection. It is true that . . . *Chrestensen* . . . held that business advertisements and commercial matter fell outside sanctional expression, but as I suggested in *Cammarano* . . . that holding was ill-conceived and has not weathered subsequent scrutiny.¹⁵⁸

In doing so, he relied on the fact that the Court had meanwhile repeatedly ruled that profit enterprises are not deprived of full first amendment status just because they operate for commercial gain.¹⁵⁹

In 1967, Justice Harlan seemed to indicate some misgiving about *Chrestensen* when he enunciated, in his partly-concurring and partly-dissenting opinion in *Time, Inc., v. Hill*:¹⁶⁰ "[T]he question whether a state may apply more stringent limitations for the use of the personality in 'purely commercial advertising' is not before the court."¹⁶¹

More recently, Justice Brennan said in a footnote: "We also intimate no view on the extent of Constitutional protection, if any, for purely commercial communications made in the course of business."¹⁶² Then in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,¹⁶³ Chief Justice Burger indicated disagreement with *Chrestensen*.¹⁶⁴ Likewise, Justice Stewart

157. In *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting), and in *Cammarano v. United States*, 358 U.S. 498, 513-15 (1959) (Douglas J., concurring).

158. *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904-05 (1971) (Douglas J., dissenting).

159. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499 (1952); and *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

160. 285 U.S. 374 (1967).

161. *Id.* at 405.

162. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 n.12 (1971).

163. 413 U.S. 376 (1973) (holding that first amendment protection was available for "help-wanted" advertising separated into sex-designated columns since each advertising merely proposed a commercial transaction and since the underlying commercial transaction and since the underlying commercial activity—use of an applicant's sex as criteria of employment—was illegal). *Pittsburg Press Co.* has been widely discussed by commentators. See Note, *The Commercial Speech Doctrine: The First Amendment At A Discount*, 41 BROOKLYN L. REV. 60 (1974) (arguing that the *Pittsburg* case showed a moving away from the rigidity of the commercial speech doctrine); Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DE PAUL L. REV. 1258 (1974) (asserting *Chrestensen* should be overruled). See also notes 174-91 *infra*, and accompanying text.

164. The Chief Justice said in dissent that, "[T]he holding represents, for me, a

strengthened his dissent.¹⁶⁵ Justice Powell, basing his opinion for the majority in part on *Chrestensen*, did so obliquely, giving the impression that there is no deep conviction behind his feelings concerning *Chrestensen*.¹⁶⁶

Erosion of the *Chrestensen* doctrine continued in *Bigelow v. Virginia*,¹⁶⁷ where the Court struck down as unconstitutionally applied, a state statute which made it illegal to encourage, by way of publication, the procurement of an abortion. The *Bigelow* opinion is riddled with indications of a moderating view toward first amendment protection of commercial advertising. As the Court articulated:

The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations" . . . or because appellant was paid for printing it . . . or because appellant's motive or the motive of the advertiser may have involved financial gain . . . [T]he case (*Chrestensen*) obviously does not support any sweeping proposition that advertising is unprotected *per se*.¹⁶⁸

Although disavowing any intent to define the extent of protection which commercial advertising enjoys,¹⁶⁹ the Court nevertheless listed five types of advertisements that it would consider unworthy of first amendment protection.¹⁷⁰ Justice Rehnquist's dissent evidences concern that the majority opinion opens the

disturbing enlargement of the 'commercial speech' doctrine . . ." *Id.* at 393 (citations omitted). He went on to articulate that "[I]n any event, I believe the First Amendment freedom of press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials, or advertising, as it sees fit." *Id.* at 394-95.

165. 413 U.S. at 401 (Stewart, J. & Douglas, J., dissenting). "Whatever validity the *Chrestensen* case may still retain when limited to its own facts . . .," quoting Justice Douglas' statement in *Cammarano v. United States*, 358 U.S. 498, 514 (1959).

166. 413 U.S. at 384-86.

167. 421 U.S. 809 (1975) (The "Virginia Weekly" had published an advertisement pointing out the legality and availability of abortions in the state of New York. As manager of the paper, petitioner was tried and convicted pursuant to Virginia statute. The conviction was struck down as an unconstitutional application of the statute, and the Court concluded that the state of Virginia did not have a valid interest in regulating what its citizens heard and read about services in New York). *Id.* at 827-28.

168. *Id.* at 818. See also Comment, *The First Amendment and Commercial Advertising: Bigelow v. Commonwealth*, 60 VA. L. REV. 154 (1974).

169. *Id.* at 825. Since the Court denied that the state of Virginia had any valid interest in the conduct it sought to regulate (*see* text at note 167 *supra*), it was able to avoid a more difficult issue: While *Bigelow* makes it clear that speech will not be denied first amendment protection solely by reason of its commercial character, it did not confront the question of how the protection afforded advertising would be applied to activities which the States have a legitimate interest in regulating.

170. *Id.* at 828. Advertisements that: were deceptive or fraudulent; related to an illegal commodity or services; furthered criminal schemes; invaded the privacy of

door too wide¹⁷¹ and that commercial advertisers will use the opinion to abuse the public. With this opinion the pendulum finally swung toward protection of commercial advertisements, albeit in a limited fashion.¹⁷²

B. Virginia Pharmacy Board and Commercial Advertising

On May 24, 1976, the Court clarified and reiterated its position on these issues and finally discarded the so-called "commercial speech doctrine," first established in *Valentine v. Chrestensen*.¹⁷³ In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*,¹⁷⁴ the Court was confronted with a Virginia statute which made any pharmacist who advertised drug prices guilty of unprofessional conduct. Since the pharmacists were required to be licensed, a pharmacist who violated the statute by advertising ran the risk of paying a civil monetary penalty to the licensing authority or losing his license and, thereby, his livelihood. A consumer and two non-profit organizations challenged the constitutionality of the advertising proscription under the first amendment on the theory that users of drugs were entitled to receive price information through advertising and that pharmacists who desire to provide such information should not be prohibited from doing so.

Affirming the judgment of the district court in a seven-to-one decision, the Court struck down the statute.¹⁷⁵ After reviewing the gradual erosion of the commercial speech doctrine and acknowledging that *Bigelow*¹⁷⁶ had severely limited the doctrine in

other citizens; infringed somehow on the rights of others, or were messages thrust upon a captive audience.

171. *Id.* at 835.

172. *But see* Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 337-39 (S.D.N.Y. 1975), *aff'd sub nom.* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), which cites *Bigelow* for the exact opposite proposition in a case where a state statute which prohibited the display and advertisement of contraceptives was challenged as overbroad. The court reiterated that purely commercial speech was not protected by the first amendment, but then proceeded to declare the statute under consideration unconstitutional since it prohibited advertising of a mixed public interest—commercial nature.

173. See *supra* note 150, and accompanying text.

174. 425 U.S. 748 (1976).

175. 373 F. Supp. 683 (E.D. Va. 1974).

176. For a discussion of the *Bigelow* and *Virginia Pharmacy Board* cases, see Schneider, *Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64, 66-71 (1978); Comment, *First Amendment Protection for Commercial Advertising*:

the area of public interest advertisements, the majority enunciated that:

Here, in contrast (to *Bigelow*), the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political . . . The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.¹⁷⁷

The opinion went on to examine various rationales for continuing the doctrine. The fact that money is spent to prepare advertisements and to show them to the public and that the advertising is undertaken for a profit motive¹⁷⁸ does not justify denial of first amendment protection. The only possible justification would be the content of the advertisement. Yet speech which deals with a commercial subject or just reports a fact is protected:

Our question is whether speech which does "no more than propose a commercial transaction, . . . is so removed from an "exposition of ideas," . . . and from "truth, science, mortality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," . . . that it lacks all protection. Our answer is that it is not.¹⁷⁹

Similarly, there is no basis for denial to be found in the interests of the individual parties to an advertising transaction. The advertiser's economic interest in the commercial transaction which might result from an advertisement does not disqualify him from protection.¹⁸⁰ The individual consumer's interest "in the free flow of commercial information . . . may be as keen, if not keener, by far, then his interest in the day's most urgent political debate."¹⁸¹ Even society, in a macroeconomic sense, has an interest in the free flow of commercial information. It is in the public interest in a free enterprise system to see that resources are allocated properly. Informed decision-making in the commercial sector promotes that interest and also assists in determining where and how regulation of the free enterprise system is necessary.¹⁸²

The New Constitutional Doctrine, 44 U. CHI. L. REV., 205, 205-22 (1976). These Comments are indicative of the current trend among legal commentators to get away from looking only at the commercial content or speech and, instead, to scrutinize the public value of the speech for which first amendment protection is sought.

177. 425 U.S. 748, 760-61 (1976).

178. *Id.* at 761. None of the decisions following *Chrestensen* seem to have dwelled on the profit motive as a reason for excluding commercial advertising from the protection of the first amendment, although expressions like "purely commercial" have been used. See *Time, Inc. v. Hill*, 385 U.S. 374, 405 (1967).

179. 425 U.S. at 762.

180. *Id.*

181. *Id.* at 763.

182. *Id.* at 764. In essence, the state was taking away the consumer's ability to choose among economic decisions (where to shop, what prescription to request, and so on) by depriving him of the information needed to make these decisions intelligently. Such pre-emption of individual decision making was deemed by the Court to be objectionable in a free-market economy. But the Court did not use

Nor was the Court impressed by the state's arguments that: advertisements would allegedly endanger the "professionalism" of pharmacists by dragging them into detrimental commercial competition;¹⁸³ that more adulterated drugs might be sold by remiss pharmacists, thereby endangering the consumer's health;¹⁸⁴ that prices might not fall as the result of price competition, since the expense of advertising would be passed on to consumers in the form of higher prices;¹⁸⁵ and that perhaps the stable, desirable pharmacist-customer relationship would be lost.¹⁸⁶

The Court felt that these arguments were counterbalanced by the state's own rigid regulation of the conduct of pharmacists within its jurisdiction. Furthermore, the state's approach was simply too paternalistic. It was predicated upon maintaining the ignorance of its citizens. Consumers should be allowed to perceive and decide for themselves where their own best interests lie.¹⁸⁷

However, the Court did give a non-inclusive list of regulations to which advertisements may be subjected: restrictions on the time, place, and manner in which advertisements are run; prohibitions on advertisements advocating illegal transactions; and regulations applicable to false and misleading advertisements.¹⁸⁸

neo-classical, *laissez-faire* economic thinking to restrict the state's ability to regulate advertising, only to show that it could not accomplish these ends by suppression of first amendment freedoms.

183. *Id.* at 766.

184. *Id.* at 767.

185. *Id.* at 767-68.

186. *Id.* at 768-69.

187. *Id.* at 770.

188. *Id.* at 771. The first significant decision to address this issue was *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 758 (D.C. Cir. 1977), *supp. op. on pet. for rehearing*, 562 F.2d 768, 768-71 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1576 (1978). The court decided that corrective advertising was an appropriate and constitutional method of regulating false and misleading advertising. On rehearing, it expanded its discussion of this area, concluding that corrective advertisements did not regulate truthful speech, but rather limited speech aimed at deceiving the public. Although the danger of a chilling effect on protected speech through corrective advertising was acknowledged by the court, the possibility was discarded as "more theoretical than real." Greater concern was expressed that an advertiser's "right to advertise" might be impinged upon by such orders. However, the governmental interest in protecting citizens "against deception—with its attendant waste and misallocation by consumers to benefit of wrongdoers" coupled with a lingering doubt about the degree of first amendment protection which should be afforded commercial speech caused the court to reject petitioner's First amendment challenge to the commission's action in this case. *See also* *People v. Columbia Research Corp.*, 71 Cal. App. 3d 607, 614, 139 Cal. Rptr. 517, 521 (1977).

Additionally, the Court stated that it was not dealing with “the special problems of the electronic broadcast media”¹⁸⁹ in this decision or with the constitutionality of regulating advertisements by physicians or lawyers, professions which provide services to the consumer, as opposed to standardized products such as drugs.¹⁹⁰

However, the Court did suggest that, because of the “commonsense differences” between commercial speech and other varieties, even commercial speech subject to first amendment protections may nonetheless enjoy a “different protection” than that normally accorded under the first amendment.¹⁹¹

C. *The Aftermath of Virginia Pharmacy Board*

Further elucidation of the Court's position on these matters resulted from three cases decided in the term following *Virginia Pharmacy Board*. In the first, *Linmark Associates, Inc. v. Township of Willingboro*,¹⁹² a township had passed an ordinance forbidding the erection of “For Sale” and “Sold” signs on real estate

189. 425 U.S. at 773. The Court has observed a distinction between the press and the electronic broadcast media. See *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). The unique characteristics of the electronic media are its pervasiveness and its limited availability due to high cost. *Banzhaf v. FCC*, 405 F.2d 1082, 1099-1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1968).

190. 425 U.S. at 773 n.25.

191. *Id.* at 771-72 n.24. See also text of note 15 *supra*. The Justices were obviously concerned that their decision might be misconstrued as giving commercial speech the same degree of constitutional protection as, for instance, political or literary speech. The Court quickly aborted any foolish notion that it was repealing the Federal Trade Commission Act and other laws prohibiting false and deceptive advertising. At this point in the opinion, the Court injected footnote 24, which begins with an incontestable proposition:

“There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ . . . and other varieties . . . [A]ttributes such as these, the greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, *as are necessary to prevent its being deceptive*. . . They may also make inapplicable the prohibition against prior restraints.”

Id. at 771-72 n.24. (Emphasis added).

This footnote clearly should not be regarded as a comprehensive delineation of the scope of valid governmental regulation of advertising under the first amendment. But its importance is reflected in the evident care with which it was written. The Court plainly intended to define at least the general direction it would follow in future cases. Some basic points were made manifest. The constitutional principle that a prior restraint on speech “bears a heavy presumption against its constitutional validity” does not apply to a Commission's cease and desist order. Moreover, in contrast to political speech, commercial speech, if false or misleading, loses its first amendment protection.

192. 431 U.S. 85 (1977).

in order to slow down what it perceived as a flight of white home owners from a racially integrated neighborhood.¹⁹³ The Court struck down the ordinance on the basis that it interfered with the citizens right to receive information,¹⁹⁴ and that it was not a valid exercise of the township's police power since it dealt with restrictions on the content rather than the time, place, or manner of speech. The Court also ruled that the township's interest in restricting this type of speech did not outweigh its citizens right to receive information.¹⁹⁵ As Justice Marshall articulated:

If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and not on any interest in regulating the form . . . [T]he record here demonstrates that respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community.¹⁹⁶

The Court concluded with a *caveat* concerning the extent of protection to be extended to commercial speech.¹⁹⁷

In the second case, *Carey v. Population Service Internation-*

193. The Court specifically distinguished *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974), which upheld Gary, Indiana's prohibition of "For Sale" signs on a record wich showed that whites were fleeing en masse. "We express no view as to whether *Barrick Realty* can survive *Bigelow* and *Virginia Pharmacy*." 431 U.S. at 95 n.9.

194. The Court stated that:

"[P]ersons desiring to sell their homes are just as interested in communicating that fact as are sellers of other goods and services. Similarly, would-be-purchasers of realty are no less interested in receiving like information about available property than are purchasers of other commodities in receiving like information about those commodities. And the societal interest in 'the flow of commerical information,' is in no way lessened by the fact that the subject of commercial information here is realty rather than abortions or drugs."

Id. at 92.

195. *Id.* at 94.

196. *Id.*

197. The Court stated that:

"Beyond this, we reaffirm our statement in *Virginia Pharmacy Board* that the "commonsense differences between speech that does 'no more than propose a commercial transaction,' . . . and other varieties . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired" . . . Laws dealing with false or misleading signs, and laws requiring such signs to 'appear in such a form, or include such additional information' . . . as [is] necessary to prevent [their] being deceptive,' therefore, would raise very different constitutional questions."

Id. at 98.

Caveats of this nature seem to have become *de rigueur* for the Court and will probably remain so until the parameters of first amendment protection for commercial speech are more precisely and clearly defined.

al,¹⁹⁸ the Court invalidated a total ban on the advertising of contraceptives. Noting that the case at bench raised no question left open in *Virginia Pharmacy Board*, the Court found the ban lacking after applying the commercial speech balancing test.¹⁹⁹ Finally, in *Bates v. State Bar of Arizona*,²⁰⁰ the Court evaluated the advertising of price and availability of routine legal services. In *Bates*, two attorneys were disciplined by their state bar association under a rule prohibiting most forms of legal advertising after running advertisements for their “legal clinic” in a local newspaper. The Court held that the disciplinary rule infringed the appellants’ first amendments rights. Although rejecting a challenge to the state disciplinary rule as repugnant to the Sherman Antitrust Act, the Court held that price advertisements concerning routine legal services are neither unprofessional²⁰¹ nor inherently misleading²⁰² and that advertising is an essential adjunct to a free market economy which may serve to reduce the cost of legal services to the consumer.²⁰³ Nevertheless, the first amendment overbreadth doctrine was found to be inapplicable to all commercial advertising.²⁰⁴ As a result, the Court went on to examine the spe-

198. 431 U.S. 678 (1977).

199. In the *Township of Willingboro, Carey and Bates, infra*, the Court recognized, after applying a balancing test, that the public’s interest in receiving the information sought to be conveyed substantially outweighed the state’s interest in suppressing such communication.

200. 433 U.S. 350 (1977), *rehearing denied*, 434 U.S. 881 (1977).

201. 433 U.S. at 368-72.

202. *Id.* at 372-75.

203. *Id.* at 377-78.

204. *Id.* at 380-81. In most first amendment cases, if a rule or statute has been shown to restrict or to have a “chilling effect” on speech due to the breadth of its provisions, it will be declared unconstitutional even though it has not been applied with that result in order to ensure that otherwise protected speech will not be muted by the uncertain provisions of the rule or statute in question. The Court concluded that commercial speech is unlikely to be adversely affected by such uncertainty, since it “is linked to commercial well-being.”

It should be noted that an “overbreadth” challenge should not be confused with one on grounds of “vagueness,” though a challenger will often assert both grounds of invalidity. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). An unconstitutionally vague statute, like an overbroad one, creates “chilling effect” risks to protected speech. But a statute can be quite specific—*i.e.*, not “vague”—and yet be overbroad. The vagueness challenge rests ultimately on the procedural due process requirements of notice, though it is a challenge with special bite in the first amendment area.

Note the emphasis on the distinction between “overbreadth” and “vagueness” in *Zwicker v. Koota*, 389 U.S. 241 (1967), a challenge to a ban on the distribution of anonymous handbills. Justice Brennan noted that the attack was not on grounds of vagueness, “that is, that it is a statute ‘which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,’” *id.* at 249, but rather an attack “that the statute although lacking neither clarity nor precision, is void for ‘overbreadth,’ that is, that it offends the constitutional principle that ‘a government purpose to control or prevent activities constitutionally subject to state regulation

cifics of the legal advertisements in question, and, after determining they were not misleading,²⁰⁵ decided that they were entitled to first amendment protection.²⁰⁶

V. CONCLUSION

Given the breadth of the Commission's area of responsibility, judicial review in the past has played a surprisingly small role in defining the law of deception and demarcating the extent to which protection of consumers must give way to competing interests. Nevertheless, it seems clear that the definition of "deceptive advertising" is evolving rapidly, as are the programs and remedies that are intended to protect consumers. The advertising decision-maker needs to be informed of the constraints on his advertising programs and the sense of public opinion they reflect. On the other hand, it is also necessary to resist suggestions to make commercial advertisements that are safe, but say nothing. Such an approach will not only generate ineffective advertising campaigns, but is an inappropriate response to the pressures contributing to these changes.

Concerning the first amendment implications of *Virginia Pharmacy Board* and its progeny, it is manifest that they will have a pervasive effect on the advertiser. Not only will they invalidate by implication many state statutes which currently prohibit advertising in various "standardized product" fields, but they also reopen a panoply of questions which had previously been considered answered. Are corrective advertisements required by the Commission subject to challenge as prior restraints?²⁰⁷ Are injunctions

may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 250 (Citations omitted).

205. 433 U.S. at 381-82.

206. At the conclusion of its opinion, the Court listed, as it has done in all recent cases in this area, certain types of commercial speech for which regulation would or might be appropriate: advertisements concerning the quality of legal service, in-person solicitation by lawyers; reasonable restrictions on the time, place and manner of advertisements; and special problems concerning advertising on the electronic media. *Id.* at 709.

207. See generally Pitofsky, *supra* note 9; Schneider, *Prior Restraints and Restrictions On Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64 (1978). See also Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROB. 648 (1955) (The legal situation presented by a corrective advertising order appears to be very similar to one described by Professor Emerson as a type of prior restraint, that is, a situation where publication is conditioned upon a condition precedent. *Id.* at 656. It seems that such an order would violate the doctrine against prior restraint).

against advertisements of products and services subject to prior restraints?²⁰⁸ How will the various competing constitutional rights be balanced now that this new area of first amendment protection has been created?²⁰⁹ These are just some of the difficult questions to which answers will have to be developed judicially over time.²¹⁰

LARRY T. PLEISS.

208. See generally Note, *The FTC's Injunctive Authority Against False Advertising of Food and Drugs*, 75 MICH. L. REV. 745 (1977); Note, *FTC v. Simeon Management Corp.: The First Amendment and the Need for Preliminary Injunctions of Commercial Speech*, 1977 DUKE L. J. 489 (1977). See, e.g., *Beneficial Corp. v. F*, 542 F.2d 611 (3d Cir. 1976), cert. denied, 97 S. Ct. 1679 (1977), the Commission's remedy "can go no further in imposing a prior restraint on protected speech than is reasonably necessary to accomplish the remedial objective of preventing the violation." *Id.* at 619. Where the Commission's order prohibiting a loan company's use of the slogan "Instant Tax Refund" in advertising exceeded its remedial authority because the first amendment requires a "more searching" examination of its orders. (This decision has recently been criticized, not because of its recognition of the first amendment rights, but rather, because the Court trespassed upon the Commission's judgement in setting out what it believed to be adequate qualifying language. See Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705, 740 (1977).) See also, e.g. *Blout v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Monaghan, First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970). Outside the commercial context the use of injunctions or schemes requiring regulation, approval of speech would constitute a constitutionally impermissible prior restraint. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 687 (1931). It has been suggested that the rationale for excepting commercial speech from the prohibition against prior restraints is the exceptionally low value of commercial advertising. See *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 158-60 (1973). The resistance of this type of speech to the chilling effect of governmental regulation however, is an equally relevant factor.

209. Courts have begun to struggle with fine distinctions in these cases and seem to resolve their difficulties by using a balancing test. In *Pittsburg Press Co. v. Pennsylvania*, 276 A.2d 263 (Pa. 1977), the court differentiated between a speech restriction which was ancillary to a specific prohibition or restriction of an activity and direct regulation of that activity. Similarly, in *Harris v. Beneficial Fin. Co.* 338 So. 2d 196 (Fla. 1976), cert. denied, 97 S. Ct. 1591 (1977) (Statute prohibiting finance company from communicating with a debtor's employer prior to obtaining final judgment on the debt was found unconstitutional.) The Court looked at whether the speech in question pertained to constitutional interests. It then decided to balance the individuals interest against the state's interest in determining whether the public would be served by protecting the speech involved. See also *Schneider, Prior Restriants and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64, 74-83 (1978) (the comment develops a two-step process for analyzing commercial speech . . . that is, weighing the interests involved and measuring the product of that balancing process against the degree of abridgment exerted by the regulatory device brought to bear on commercial speech).

210. Now that it has been decided that commercial speech is covered by the first amendment, consideration of the limits of its application, the inevitable "balancing," can proceed in a sensible manner, a process in which the studies by economists of the effects of advertising may be expected to play a useful role. However, on a broader perspective, it is unlikely that either *Virginia Pharmacy*

Board or its progeny will appreciably circumscribe the Commission's regulation of advertising. See Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 672 (1977). But see Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705 (1977). It is dangerous to predict constitutional adjudication, especially where, as here, courts have just set sail on an uncharted sea. However, while there may be no immediate or dramatic changes, the law of advertising regulation will inevitably be affected by the introduction of the first amendment as a relevant and important factor.

