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## Advertising Regulation: The Contemporary FTC Approach

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# Advertising Regulation: The Contemporary FTC Approach

## **Cover Page Footnote**

B.A. Univ. of Iowa (1957); J.D. Univ. of Iowa College of Law (1960); Assistant Director for National Advertising, Bureau of Consumer Protection at the FTC. The Author wishes to acknowledge the invaluable assistance of Patrick E. Power in preparing this article. Mr. Power is a graduate of Amherst College and received a J.D. from New York Univ. School of Law (1970). He is presently a staff attorney in the Division of National Advertising. It must be emphasized that any thoughts expressed herein are solely those of the author and do not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner.

# ADVERTISING REGULATION: THE CONTEMPORARY FTC APPROACH

*Gerald J. Thain*\*†

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## I. Introduction

IN recent years the Federal Trade Commission has been far more rigorous and prominent in carrying out its statutory mandates than was the case in the past. I believe that any objective appraisal would lead to a conclusion that the Commission of the 1970's has been revitalized. While this revitalization has not been limited to any one area of the Commission's operation, perhaps the field which has drawn the most attention has been the regulation of advertising. The purpose of this article is to present an overview of current FTC activity in the field of advertising, from the author's perspective as a staff administrator of such activity.

Probably the most fundamental development which has occurred at the Commission in recent months has been the emergence of policies and programs reflecting a comprehensive programmatic approach to advertising regulation. The overriding intent behind these new policies and programs has been the substitution of rational planning for the seemingly random processes by which matters were too often selected for Commission attention in the past.<sup>1</sup> Accordingly, this article will be devoted to the illumination of the broad goals underlying the various programs and cases which have been generated recently, rather than to a detailed analysis of individual programs and cases. Hopefully, the broader discussion will provide a perspective which will aid understanding of particular matters.

The article is divided into two major parts. The first deals with the Commission's traditional activities of adjudication and rule-making and primarily discusses current expansion of theories of violation, standards of proof and remedies in advertising cases brought under section 5 of the Federal Trade Commission Act.<sup>2</sup> This part contains references to a number of pending cases, and should provide an indication of the variety

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1. The Commission's commitment to rational planning is evidenced by its creation of an Office of Policy Planning and Evaluation, which in the consumer protection area makes possible systematic selection of consumer problems most in need of Commission attention, and maximum enforcement within the Commission's limited budget.

2. 15 U.S.C. § 45 (1970). Section 5(a) (1) reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Cases involving primarily antitrust principles are brought under the statutory language proscribing "unfair methods of competition." The prohibition of "unfair or deceptive acts or practices" provides the basis for the bulk of the Commission's consumer protection activity, but practices falling within this language may also amount to unfair methods of competition.

of the types of advertising with which the Commission has become involved. The second part concerns alternatives to adjudication and rule-making, which have been designed to supplement traditional forms of regulation in situations in which use of the latter would be impracticable or inappropriate.

## II. Traditional Forms of Regulatory Activity

### A. Adjudication

Although the Commission has demonstrated a serious interest in innovative approaches to the protection of consumers from misleading advertising, the litigated case remains the most potent weapon in the Commission's arsenal. As in other areas of law, binding judgments and the threat of binding judgments probably promote more honesty in advertising than any other regulatory technique. Accordingly, heavy emphasis has been placed on developing the potential of litigation as an enforcement tool.

With respect to the assignment of priorities in the selection of cases to be brought under the Commission's adjudicative procedure, efforts are being made to utilize the Commission's limited resources in a manner that most effectively provides the greatest possible benefit to the consuming public. Whereas in the past, it often seemed that small companies whose unlawful activities posed relatively minor threats to the public interest were overly represented on the list of respondents in Commission cases, resources are now being allocated primarily to attacks on deceptions practiced by large-scale national advertisers whose unlawful activities have major consequences in terms of the public interest.

In addition, efforts are being made to develop more fully the Commission's section 5 powers with respect to advertising, both in the area of deceptive advertising and under the emerging "unfairness doctrine."<sup>3</sup> The following section discusses cases structured primarily within the "deception" framework and which add important new dimensions to the traditional deceptive advertising case.

#### 1. Deceptive Advertising

The broad, general prohibition of "unfair or deceptive acts or practices" in section 5<sup>4</sup> is the basic source of the Commission's authority

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3. The term "unfairness doctrine," as used in this article, will refer to the principle that the Commission has the power to attack business practices which have an unfair impact on consumers, regardless of whether the practice is deceptive to consumers or anti-competitive in the traditional antitrust sense. See notes 40-90 *infra* and accompanying text.

4. See note 2 *supra*.

concerning the regulation of advertising. The Act also contains a narrow provision, section 12,<sup>5</sup> which expressly prohibits the dissemination of "false advertisements" for foods, drug, cosmetics and devices.<sup>6</sup>

Until quite recently, the Commission's advertising cases were brought virtually exclusively under either the section 5 prohibition of "deceptive acts or practices," or the section 12 prohibition of "false advertisements," or both. Presently, despite the enormous potential for litigation under the "unfairness doctrine," cases attacking false or misleading advertising under sections 5 and 12 continue to play a crucial role in the Commission's overall enforcement program.

This type of case, for example, has been the vehicle for development of the highly controversial remedy of "corrective advertising." Since the corrective advertising remedy is involved in most of the cases which will be discussed in this section, some introductory information concerning this concept is presented below.

#### a. Corrective Advertising

Generally speaking, an advertiser subject to a Commission order containing a corrective advertising provision is required to disclose in its advertisements that the Federal Trade Commission has found that previous advertising for the product in question was deceptive in some respect, and to provide the truthful information necessary to correct the deception.<sup>7</sup>

The theory behind corrective advertising is that a deceptive advertisement has a "life of its own," and that the misleading impression lingers in the minds of the public and continues to influence purchasing decisions after the unlawful advertising itself has been discontinued. The consumer expects, in the normal course of events, to see the end of an advertising campaign. The simple fact that an advertising campaign no longer appears does not tell him that the claims were not well-founded. Providing information to enable the consumer to "rethink" his purchasing decision (which was based on the misleading information) is one of the primary functions of corrective advertising.

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5. Federal Trade Commission Act § 12, 15 U.S.C. § 52 (1970).

6. Subsection (b) of Section 12, 15 U.S.C. § 52(b) (1970), provides that the dissemination of a false advertisement within the purview of subsection (a) of Section 12, 15 U.S.C. § 52(a) (1970), shall be an unfair or deceptive act or practice within the meaning of § 5.

7. Compliance with FTC orders is insured by the Compliance Staff which monitors the advertiser's performance under the order in accordance with mechanics specified in the Commissioner's Rules; 16 CFR § 3.61 (1971).

In addition, corrective advertising may help to restore market shares to law-abiding competitors who, along with consumers, were victims of deceptive advertising. Presumably, the consumers' re-evaluation of the falsely advertised product, on the basis of the correct information, will result in a shifting of sales from the false advertiser to his competitors. The remedy is not intended to deprive a false advertiser of sales per se, but only of sales that were gained through unlawful advertising. The intent is to restore competitive conditions to where they would have been if no false advertising had occurred.

Corrective advertising is a sharp departure from the traditional Commission remedies of "cease-and-desist" and "affirmative disclosure." The cease-and-desist order, frequently called a mere admonition to "go forth and sin no more," is simply an order to discontinue advertising deceptively. The affirmative disclosure, which may provide some incidental correction of misimpressions caused by past deceptive advertising, is designed primarily to provide information without which the advertisement containing the disclosure would be deceptive.<sup>8</sup> Corrective advertising, on the other hand, corrects misimpressions caused by past advertising, even if current advertising for the product is completely truthful. Corrective advertising is thus designed to deprive false advertisers of the fruits of their unlawful conduct, by actually divesting them of the residual benefits of their past deception. While such attempts to restore competitive conditions to the *status quo ante* may seem novel as applied to false advertising matters, the same principle is the basis for the remedy of divestiture, which the Commission has used for several years to fashion relief in antitrust cases involving mergers or monopolies.<sup>9</sup>

As might be expected, the Commission's utilization of the corrective advertising remedy has stimulated vigorous criticism from the advertising

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8. Affirmative disclosure may be required: (1) where the total impression created by the advertisement is deceptive in light of claims or representations (deceptive half-truths), not literally false or deceptive in themselves, made by the advertiser; or (2) where no such claim or representation is made in the advertisement, but there is a "pure" failure to disclose a material fact. For a discussion of affirmative disclosure, see Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (1964) [hereinafter cited as Statement of Basis].

9. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *Ekco Products Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965).

industry and fairly extensive scholarly comment.<sup>10</sup> In addition, the remedy as yet remains untested in the courts. Most of the discussion of corrective advertising, however, has centered on the Commission's selection of cases in which to seek the remedy, and the methods of implementation in specific cases. In my view, no persuasive arguments have been raised against the concept of corrective advertising as such. Indeed, while the Commission itself, on the basis of factual considerations, has declined to impose corrective advertising in two cases,<sup>11</sup> its opinion in each case has asserted its authority to require corrective advertising in a proper case.<sup>12</sup>

As is the case with most novel legal concepts, time and experience in working with corrective advertising will be required to work out in detail the most satisfactory methods of administration of the remedy. Much knowledge has already been gained from litigation of cases in which this remedy was sought, and further testing of the concept in specific cases will undoubtedly remain the best method of developing the remedy. A discussion of some actual cases involving deceptive advertising follows.

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10. See Notes, "Corrective Advertising" Orders of the Federal Trade Commission, 85 Harv. L. Rev. 477 (1972); Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways, 70 Mich. L. Rev. 374 (1972); Corrective Advertising—The New Response To Consumer Deception, 72 Colum. L. Rev. 415 (1972); The Limits of FTC Power to Issue Consumer Protection Orders, 40 Geo. Wash. L. Rev. 496 (1972). See also Anderson and Winer, Corrective Advertising: The FTC's New Formula for Effective Relief, 50 Tex. L. Rev. 312 (1972).

11. Campbell Soup Co., [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 18,706, at 21,077 (FTC Mar. 24, 1969) (proposed complaint); *id.* ¶ 18,897, at 21,231 (FTC June 3, 1970) (Consent Order provisionally accepted); *id.* ¶ 19,261, at 21,421 (FTC May 25, 1970) (Consent Order finally accepted). Firestone Tire & Rubber Co., [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,011, at 21,267 (FTC June 29, 1970) (proposed complaint); 3 Trade Reg. Rep. ¶ 19,773, at 21,814 (FTC Aug. 17, 1971) (initial decision); *id.* ¶ 20,112, at 22,069 (FTC Sept. 22, 1972) (final order).

12. In the Campbell Soup opinion, the Commission stated: "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." [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,261, at 21,423 (FTC May 25, 1970). Similarly, the Firestone opinion states: "[W]e conclude that an order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon in fashioning effective remedial measures to bring about a termination of the acts or practices found to have been unfair or deceptive. If such relief is



## b. Nutritional Advertising

Few areas of advertising regulated by the Federal Trade Commission, have as significant an impact on the well-being of consumers as nutritional advertising. Recently, it has become clear that although the United States is the most affluent society which has existed, we are not a well-fed nation. The White House Conference on Food, Nutrition and Health brought into sharp focus this anomaly and pinpointed three problems relating to malnutrition existing in the United States today.<sup>13</sup> First and certainly most urgent is the poverty and deprivation afflicting a significant minority of our population. The second concerns population groups which have a sufficient income to achieve adequate nutrition but are not utilizing their income wisely in purchasing and consuming food products. The third problem, and perhaps the one most closely related to advertising, is the increasing occurrence of diseases in which the quality and quantity of the dietary intake are recognized factors.

In attempting to deal with these problems, the report of the White House Conference stated unequivocally that one basic right of individuals in our society is the right to proper food and proper nourishment.<sup>14</sup> But, in order to exercise that right effectively, every citizen must know enough about food and nutrition to choose for himself those foods which will supply his nutritional needs. Despite the great range and influence of our educational system and our communications media, many of our citizens, both rich and poor, educated and uneducated, lack this necessary knowledge. In fact, the White House Conference Report stated:

The gaps in our public knowledge about nutrition, *along with actual misinformation carried by some media*, are contributing seriously to the problem of hunger and malnutrition in the United States.<sup>15</sup>

With respect to the goal of educating consumers, not only has there been a failure to use the mass media for dissemination of positive educational nutrition information, but some commercial messages in food advertising which purport to be educational have in fact been counter-

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warranted to prevent continuing injury to the public, it is neither punitive nor retrospective." 3 Trade Reg. Rep. ¶ 20,112, at 22,085 (FTC Sept. 22, 1972) (final order).

13. White House Conference on Food, Nutrition and Health, Final Report (1969).

14. *Id.* at 179.

15. *Id.* (emphasis added).

educational. The White House Conference reported that "[n]o other area of the national health probably is as abused by deception and misinformation as nutrition."<sup>16</sup> What has happened is that the three basic rights of consumers, as delineated by the White House experts and various consumer groups, have been denied. Those rights are the right to know, the right to be heard, and the right to be protected from hidden exploitation.<sup>17</sup> In examining the need for consumer education and the restriction of counter-education the conference recommended that Congress be asked to increase the budget and authority of the Federal Trade Commission to deal with food advertising matters, and to grant the Commission power to impose stronger penalties than the cease-and-desist order, which the conference felt was "not a sufficient deterrent to deceptive promotional practices."<sup>18</sup>

The staff of the Commission's Division of National Advertising considers the Final Report of the White House Conference to be a mandate to assure the consumer that he will not be misled by illegal advertising when he spends his food dollars. Since the submission of the report the Commission has assigned high priority to the regulation of deceptive food and beverage advertising.

With respect to the advertising of basic "staple" foods, the Commission has recently attacked nutritional claims in advertisements for Wonder Bread.<sup>19</sup> The complaint in this case alleges generally that the ITT Continental Baking Company, Inc. and its advertising agency, Ted Bates & Company, Inc. falsely represented in advertisements that Wonder Bread is an outstanding source of nutrients, distinct from other enriched breads, and that Wonder Bread provides a child with all the nutrients that are essential to healthful growth and development. The complaint alleges that: (1) Wonder Bread in truth is a standardized enriched bread, (2) it contains the same amounts and kinds of nutrients as most other enriched breads, (3) all enriched breads are required by law to contain minimum levels of certain nutrients, and (4) Wonder Bread will not provide a child with all the nutrients that are essential to

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16. *Id.* at 190.

17. *Id.*

18. *Id.* at 191-92.

19. ITT Continental Baking Co., 3 Trade Reg. Rep. ¶ 19,539, at 21,613. (FTC Mar. 16, 1971) (proposed complaint); *id.* ¶ 19,779, at 21,817 (FTC Aug. 24, 1971) (complaint issued). The complaint also contains an "unfairness" allegation, which is discussed in the context of the "Unfairness Doctrine." See note 63 *infra* and accompanying text.

healthful growth and development. It should be noted that, contrary to the statements of some commentators, the Wonder Bread charges do not challenge as illegal any advertising for standardized products which fail to disclose that the product is standardized. The complaint does attack representations that a standardized product is something which it is not.

The *ITT* complaint also challenges nutritional claims for Hostess Snack Cakes, alleging that advertisements for such cakes represent that: (1) the cakes provide children with good nutrition, without also disclosing that they are composed primarily of sugar; and (2) the fortification of the cakes constitutes a major nutritional advance, when it is in fact the equivalent of using enriched flour to make the cakes, a process that has long been available.

The order that the Commission's staff is seeking in this case would prohibit a variety of false nutritional claims in advertisements for "any food product" advertised by the respondents.<sup>20</sup> In addition, the order contains a corrective advertising provision which would require that not less than twenty-five per cent of the advertising expenditures for Wonder Bread for one year be devoted to advertisements each of which consists exclusively of a clear and conspicuous disclosure that:

The Federal Trade Commission has found that Wonder Bread has been falsely advertised as more nutritious and better for the growth of children than other white enriched breads, and that Wonder Bread is nutritionally identical to other white enriched breads.<sup>21</sup>

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20. *ITT Continental Baking Co., Initial Proposed Findings of Fact, Conclusions of Law, and Order* submitted by counsel supporting the complaint at 185-88 (Oct. 18, 1972) [hereinafter cited as *Initial Proposed Findings*]. The main provision of the order would prohibit claims that any food product subject to a Standard of Food Identity promulgated by any department or agency of the federal government is in any way unique or superior as compared to any other food product subject to the same Standard, unless: (1) the claim of uniqueness or comparative superiority is true; (2) the specific manner in which the product is unique or superior is disclosed in detail; and (3) it is disclosed that the product is in all other relevant respects the same as any other product subject to the same Standard of Food Identity. Also proscribed would be representations that: (1) any food product is in any way necessary or essential for good health, development or nutrition, or helps build bodies twelve ways or any other number of ways; (2) any food product containing sugar as its primary ingredient is nutritious, unless the sugar content is disclosed; and (3) fortification of a product with vitamins and minerals constitutes a major nutritional advance.

21. *Initial Proposed Findings 188*. The order provides that: (1) the corrective advertisements must be given prior approval by authorized representatives of the FTC; (2) approved radio and TV advertisements must be disseminated in the same time periods and markets as the challenged advertisements; and (3)

The charges in the *ITT* complaint were dismissed in an Initial Decision by Administrative Law Judge Raymond J. Lynch on December 27, 1972.<sup>22</sup> In reaching his decision Judge Lynch found that, among other things: (1) Wonder Bread advertisements had no impact on consumers that was specific to the attribute of nutrition or was a function of the claims made; (2) exposure to Wonder Bread television advertising that promotes nutrition does not cause consumers to perceive Wonder Bread as more nutritious than other breads; and (3) none of the challenged advertising for Wonder Bread contained, either directly or by implication, any of the representations alleged in the complaint.

As to Hostess Snack Cake advertisements, Judge Lynch found that the claims made for this product were comparative in nature and stressed the difference between the new enriched product and comparable products that were not enriched. The Judge found that no advertisement included any express or implied representation that Hostess Snack Cakes contained all essential vitamins, and that, contrary to the allegation of the complaint, the enrichment of this product was not the nutritional equivalent of enriched flour, but in fact produced a considerably higher level of enrichment.

In addition, Judge Lynch ruled that the record failed to establish any basis upon which corrective advertising might properly be ordered. He found no reliable evidence that past nutrition advertising or any other assertedly false Wonder Bread advertising was presently contributing to sales or ever had any impact on sales. As to Hostess Snack Cakes, the Judge found that dissemination of the challenged advertising utilizing the "major nutritional advance" slogan was not sufficiently great to support corrective advertising.

This Initial Decision of the Administrative Law Judge is not a final decision of the Commission, and, under the Commission's procedures, may be appealed to the full Commission. The staff's appeal of the

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approved print advertisements must appear in the same print media as the challenged advertisements. It should be noted that the order requested by complaint counsel in the proposed findings differs in a number of respects from the order which was included in the complaint issued by the Commission. See 3 Trade Reg. Rep. ¶ 19,779, at 21,817 (FTC Aug. 24, 1971). These changes resulted from developments in the evidence presented at the hearing.

22. *ITT Continental Baking Co.*, 3 Trade Reg. Rep. ¶ 20,182, at 22,162 (FTC Dec. 27, 1972) (initial order to dismiss).

rulings of the Administrative Law Judge was argued before the Commission on April 18, 1973 and at this writing is pending decision.

Also attacked in the proposed complaint in the *ITT* case were weight reduction claims for Profile Bread. The proposed complaint alleged that Profile had been misrepresented to be lower in calories than ordinary bread and of special and significant value for use in weight control diets. The part of the case involving Profile Bread was settled on the basis of a consent order<sup>23</sup> which is significant in that it contains the first corrective advertising provision to appear in a final order issued by the Commission. This provision requires that for one year at least twenty-five per cent of the advertising budget for the product "for each media in each market be devoted to FTC-approved advertisements that Profile is not effective for weight reduction, contrary to possible interpretations of prior advertising."<sup>24</sup>

Another pending case involving nutritional advertising for a basic food product is *Amstar Corp.*<sup>25</sup> The major charges in the *Amstar* complaint are that the corporation and its advertising agencies, Lewis & Gilman, Inc., and Dailey & Associates have misrepresented in advertisements that Domino and Spreckels brands of sugar: (1) will give strength, energy and stamina to everyone; (2) will enable professional athletes to perform better; (3) are substantially different from all other refined sugars in composition and food value; (4) are as necessary a

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23. 3 Trade Reg. Rep. ¶ 19,681, at 21,727 (FTC July 2, 1971) (consent order provisionally accepted); id. ¶ 19,780, at 21,817 (FTC Aug. 17, 1971) (consent order finally accepted).

24. Id. ¶ 19,681, at 21,728. "Approved radio and television commercials must be run in the same time periods during the same seasons as other radio and TV ads for Profile, and approved print advertising must appear in the same print media as other Profile advertisements." Id. In one television commercial, which has already appeared, containing this disclosure an actress says: "I'd like to clear up any misunderstanding you may have . . . about Profile Bread from its advertising or even its name. Does Profile have fewer calories than other breads? No, Profile has about the same per ounce as other breads. To be exact, Profile has 7 fewer calories per slice. That's because it's sliced thinner. But eating Profile will not cause you to lose weight. A reduction of 7 calories is insignificant . . ." *Newsweek*, Sept. 27, 1971, at 98. The deletion of the requirement of a disclosure in the corrective advertisements to the effect that the FTC had alleged that prior advertising of Profile was deceptive resulted from settlement negotiations as to this part of the case.

25. 3 Trade Reg. Rep. ¶ 19,696, at 21,742 (FTC July 12, 1971) (proposed complaint); id. ¶ 20,004, at 22,004 (FTC May 8, 1972) (complaint issued).

factor in staying healthy as sleeping and exercising; and (5) have been selected as the "official sugar" of various athletic organizations because of their superior quality and nutritional value.

In addition to prohibiting such representations in advertisements for "any food product" advertised by the respondents, the order being sought by the Commission's staff would proscribe claims that any food product is in any way necessary or essential for proper or good health or to enable one to lead an active life. Finally, the *Amstar* order would require corrective advertising disclosures for one year stating that the advertised sugar "is not an especial or unique source of strength, energy and stamina."

In the beverage area, the Commission has accepted a consent order signed by Ocean Spray Cranberries, Inc. and its advertising agency, Ted Bates & Company, Inc. concerning the advertising of Ocean Spray Cranberry Juice Cocktail.<sup>26</sup> The advertising representations challenged by the Commission's complaint were the claims that Ocean Spray contains: (1) a greater variety and quantity of nutrients than orange or tomato juice, and from a nutritional standpoint, can be substituted for these juices at breakfast; (2) more "food energy" than orange juice; and (3) cranberry juice entirely. The order prohibits claims that "any beverage made by Ocean Spray or, in the case of Ted Bates, any beverage which is advertised as a product made with cranberries: (a) contains as many or a greater variety or quantity of nutrients than orange or tomato juice or any other beverage, unless this is true . . .<sup>27</sup> (b) has more 'food energy' than any other beverage unless clear disclosure is made that this term refers to calories; and (c) is a 'juice' unless it consists entirely of natural or reconstituted single strength fruit juice with no water added . . ."<sup>28</sup>

In addition, the order contains a corrective advertising provision

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26. Ocean Spray Cranberries, Inc., 3 Trade Reg. Rep. ¶ 19,477, at 21,555 (FTC Feb. 11, 1971) (proposed complaint); id. ¶ 19,604, at 21,648 (FTC Apr. 22, 1971) (complaint issued); id. ¶ 19,981, at 21,993 (FTC Mar. 2, 1972) (consent order provisionally accepted); id. ¶ 20,051, at 22,028 (FTC June 23, 1972) (consent order finally accepted).

27. "This does not prohibit representations which merely propose using any such product in place of other beverages without assigning any nutritional reason . . ." Id. ¶ 19,981, at 21,993 (FTC Mar. 2, 1972).

28. This does not prohibit: (1) the addition of any ingredient to sweeten, flavor, preserve, fortify or color such fruit juice; (2) descriptions such as "juice cocktail" or "juice drink" connoting a diluted or modified single strength juice; or (3) any name approved by any federal agency having appropriate jurisdiction. Id. ¶ 19,981, at 21,993 (FTC Mar. 2, 1972).

which requires, as to advertising for Ocean Spray Cranberry Juice Cocktail, that for a one-year period at least one out of every four advertisements of equal time or space for each medium in each market, or, in the alternative, not less than twenty-five per cent of the media expenditures (excluding production costs) for each medium in each market, be devoted to a prescribed corrective advertising message which discloses that representations in earlier advertising that Ocean Spray contained more "food energy" than orange juice were referring to calories and not to vitamins or minerals.<sup>29</sup>

In a second beverage case involving nutritional advertising, an Administrative Law Judge<sup>30</sup> of the Commission recently issued an initial decision dismissing the complaint against the Coca-Cola Co. and its advertising agency, the Marschalk Co., Inc.<sup>31</sup> Involved are claims concerning the nature, content and nutritive value of Hi-C fruit drinks. The primary misrepresentations alleged in the complaint are that Hi-C is: (1) the beverage that is "The Sensible Drink," nutritionally and economically, as a source of Vitamin C; (2) made with fresh fruit and has a high fruit content comparable to fresh fruits and fruit juices; (3) unqualifiedly good for children, and children can drink as much of it as they like without adverse health or nutritional implications; and (4) particularly high in Vitamin C content even as compared to other beverages widely known as high in Vitamin C content, specifically citrus fruit juices.

The proposed order in this case would have prohibited such representations, and would have compelled the company to devote twenty-five

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29. The required text of the message, which is incorporated into the order as an attachment, is as follows: "If you've wondered what some of our earlier advertising meant when we said Ocean Spray Cranberry Juice Cocktail has more food energy than orange juice or tomato juice, let us make it clear: we didn't mean vitamins and minerals. Food energy means calories. Nothing more. Food energy is important at breakfast since many of us may not get enough calories, or food energy, to get off to a good start. Ocean Spray Cranberry Juice Cocktail helps because it contains more food energy than most other breakfast drinks. And Ocean Spray Cranberry Juice Cocktail gives you and your family Vitamin C plus a great wake-up taste. It's . . . the other breakfast drink." *Id.*

30. The title of the officials who preside over administrative hearings of Commission cases has recently been changed from "Hearing Examiner" to "Administrative Law Judge."

31. The Coca-Cola Co., 3 Trade Reg. Rep. ¶ 19,351, at 21,484 (FTC Sept. 29, 1970) (proposed complaint); *id.* ¶ 19,603, at 21,648 (FTC Apr. 14, 1971) (complaint issued); *id.* ¶ 20,108, at 22,067 (FTC Sept. 15, 1972) (initial decision).

per cent of each advertisement for Hi-C for one year to a disclosure that the FTC had found that past advertisements for Hi-C were misleading in that they gave the false impression that the nutritive value of the drink was the equivalent of orange juice or other citrus juices.

The Administrative Law Judge, however, rejected the contention of complaint counsel that representations that Hi-C was "high in Vitamin C" were comparing the drink to orange juice. He found that the advertisements, which contained no express references to orange juice, represented simply that the Vitamin C content of Hi-C was high "in relation to the normal nutritional needs of human beings," and he determined that the record showed that this claim was true.

In addition, the Judge took the position that the consent order accepted by the Commission in the *Ocean Spray* case established that it is permissible to link references to the Vitamin C content of Ocean Spray with the slogan "The Other Breakfast Drink."<sup>32</sup> Thus, he noted, a slogan which specifically evokes a comparison to orange juice is permitted in juxtaposition to a Vitamin C claim, even though the Ocean Spray product contains less Vitamin C than orange juice, and one third less Vitamin C than Hi-C. Under these circumstances, the Judge determined it would be inconsistent to prohibit advertising representations that Hi-C is "high" in Vitamin C, where, as the Judge found, the advertisement "makes no reference to orange juice."

Finally, the Judge held that the slogan "The Sensible Drink" did not, as contended by complaint counsel, represent that Hi-C was the *sole* beverage that was sensible, nutritionally and economically, as a source of Vitamin C. Rather, Judge Jackson found the phrase would be understood by consumers to mean simply that Hi-C was a natural, good tasting product which carried a nutritional benefit—Vitamin C. In addition, the Judge concluded that Hi-C was in fact a "sensible" source of Vitamin C, since it was "high" in Vitamin C, and since it costs less to secure a child's recommended dietary allowance of the vitamin from Hi-C than from all but one form of citrus fruit juice. Complaint counsel in the Hi-C case have appealed this Initial Decision, on the basis that Judge Jackson's interpretations of the challenged advertising and the applicable law were erroneous and this matter is currently pending before the Commission.

It should be apparent from the above discussion that the *ITT*, *Amstar*, *Ocean Spray* and *Hi-C* cases all have far-reaching implications in the area of nutritional advertising. The questions of whether one brand of a

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32. See note 26 *supra*.



basic food product may be advertised as nutritionally superior to another brand belonging to the same standardized product group, and whether a product which is not composed entirely of natural ingredients and is nutritionally inferior to its natural counterpart may be nutritionally compared to the natural counterpart, involve very fundamental principles which apply to numerous products other than those which were the subjects of these cases. Hopefully, by bringing cases raising pervasive issues such as these, the Commission will have a constructive impact on nutritional advertising in the United States.

As a final comment on the regulation of nutritional advertising, it should be pointed out that steps are being taken to develop comprehensive Commission policy positions in nutritional matters. Such efforts are being implemented not only by the Commission's legal and planning staff, but also by a full-time nutritionist who has recently joined the staff of the Division of National Advertising. It seems clear to me that future needs of the public for an effective program of advertising regulation by the FTC will require the services of those trained in disciplines other than the law. While FTC will remain primarily a legal agency, it needs to give more consideration to economists, consumer behavior specialists, nutritionists, psychologists and professional planners if its future activity is to be properly channeled.

### c. Environmental Advertising

In response to increasing public concern over the deteriorating quality of the environment and a growing tendency among consumers to seek out products which do not harm the environment, a new type of advertising theme has emerged. Today, advertisers often stress the ecological or environmental benefits offered by their products rather than the direct, individual benefits they offer the consumer. Since false representations as to the environmental impact of products may induce consumer purchases just as effectively as more familiar forms of deception, the Commission has found it necessary to challenge certain environmental claims made by advertisers.

Two pending Commission cases involve allegedly false anti-pollution claims made in advertisements for gasoline. The complaint in *Standard Oil Co. of California*<sup>33</sup> charges that advertisements for Chevron gasoline falsely represent that the additive "F-310" has a significant effect in reducing exhaust emissions and air pollution. Similar allegations against

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33. 3 Trade Reg. Rep. ¶ 19,352, at 21,484 (FTC Sept. 29, 1970) (proposed complaint); id. ¶ 19,428, at 21,536 (FTC Dec. 29, 1970) (complaint issued).

advertising concerning the additive "CA-101" are made in the complaint in *Crown Central Petroleum Corp.*<sup>34</sup> The orders being sought in both cases would prohibit such anti-pollution claims, and, in addition, the *Standard Oil* order would require that twenty-five per cent of every gasoline advertisement disseminated by the company for one year be devoted to a corrective advertising disclosure that the Commission had found previous advertisements for Chevron gasolines deceptive, and that said products did not in fact reduce air pollution.

The Commission's staff is also exploring "corporate image" advertising containing representations regarding the advertiser's efforts to preserve the environment. Advertisements of this nature often do not involve affirmative product claims, but rather seek to create a favorable public image for the advertiser by stressing its position on questions of general public concern. Although such advertisements may not directly promote the sale of consumer products, they may, if deceptive, fall within the authority of the Federal Trade Commission, on the basis that they provide economic benefit to the advertisers.

#### d. Miscellaneous Cases

A number of deceptive advertising cases presently in various stages of litigation do not fit within any of the broad categories of advertising presently under scrutiny by the Commission, but are significant in that they involve well-known products which are heavily advertised in the national media.

In *Warner-Lambert Pharmaceutical Co.*,<sup>35</sup> for example, the Commission's complaint alleges that advertising for Listerine mouthwash falsely represents that this product can cure or prevent colds or lessen their severity. The proposed order seeks corrective advertising disclosures to the effect that previous Listerine advertising contained false representations as to the effectiveness of the product as a cure, preventative and treatment for colds and sore throats. The Listerine case is particularly appropriate for application of the corrective advertising remedy, because consumers have been exposed to the "colds" theme in Listerine advertising for decades, and because the product holds the largest share of the mouthwash market.

The case of *Sun Oil Co.*<sup>36</sup> involves allegedly false claims regarding

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34. 3 Trade Reg. Rep. ¶ 19,605, at 21,648 (FTC May 3, 1971) (proposed complaint); id. ¶ 19,781, at 21,785 (FTC July 14, 1971) (complaint issued).

35. 3 Trade Reg. Rep. ¶ 19,838, at 21,859 (FTC Nov. 3, 1971) (proposed complaint); id. ¶ 20,045, at 22,026 (FTC June 27, 1972) (complaint issued).

36. 3 Trade Reg. Rep. ¶ 19,856, at 21,871 (FTC Dec. 2, 1971) (proposed complaint); id. ¶ 20,033, at 22,020 (FTC June 2, 1972) (complaint issued).

the superiority and uniqueness of the octane quality of Sunoco blended gasolines. Challenged in the complaint are television commercials containing statements and demonstrations regarding two Sun "exclusives," "260 Action" and the "Custom Blending Pump." The commercials depict automobiles supposedly running on Sunoco gasoline performing such feats as pulling six railroad cars from a standing start, or pulling an empty U-Haul trailer up a ramp specially constructed over a bank of seats in the Los Angeles Coliseum.

The complaint alleges that the advertisements falsely represent that: (1) only when operated on the octane of Sunoco's "Custom Blended" gasolines will automobile engines operate at maximum power and performance; (2) the demonstrations are evidence that actually proves Sunoco gasolines blended with "Sunoco 260 Action" are unique or unusual in that they alone provide the power necessary to enable an automobile to perform the task depicted; (3) blending Sunoco's highest octane gasoline, "260," into Sunoco's lower octane gasolines conveys to resulting blends the benefits of "260 Action," and results in blends that provide more engine power than do competing gasolines having octane ratings comparable to those of Sunoco's blends. The complaint also charges that the advertisements convey the representation that Sunoco gasoline has unique qualities. In truth, the complaint states, octane is a measure of motor fuel anti-knock quality; and to the extent that octane relates to power and performance, any gasoline of sufficient octane will provide maximum power and performance. The proposed order in this case would require corrective advertising disclosures that, to the extent that automobile performance depends on octane levels, automobiles do not perform better with Sunoco than with other gasolines of equal octane.

In the case of *Sterling Drug, Inc.*,<sup>37</sup> the Commission has recently issued its complaint charging that Lysol Brand disinfectants have been deceptively advertised. The complaint primarily attacks the advertising theme that Lysol spray kills flu virus on household surfaces, alleging that Lysol advertisements falsely represent that use of Lysol will be of significant medical benefit in reducing the incidence and preventing the spread of colds, influenza and other upper respiratory diseases within the home. The complaint states that in fact: (1) germs and viruses on household surfaces do not play a significant role in the transmission of colds, influenza and other upper respiratory diseases; (2) the use of Lysol spray does not eliminate significant numbers of airborne germs and viruses,

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37. 3 Trade Reg. Rep. ¶ 19,925, at 21,937 (FTC Mar. 2, 1972) (proposed complaint); id. ¶ 20,109, at 22,068 (FTC Sept. 21, 1972) (complaint issued).

which are the known cause of most colds, influenza and other upper respiratory diseases; and (3) the use of Lysol is not of significant medical benefit in reducing the incidence or preventing the spread of colds, influenza and other respiratory diseases within the home. The order proposed by the Commission would require corrective advertising disclosures in accordance with the last of the foregoing three allegations in the complaint.

Finally, a complaint has been issued attacking advertising for Dry Ban spray anti-perspirants, alleging that certain television demonstrations concerning Dry Ban are misleading to consumers.<sup>38</sup> In these demonstrations, Dry Ban and a "leading anti-perspirant spray" are sprayed on the same surface. The other spray appears white and thick on the surface, while the Dry Ban appears clear and dry. The complaint states that the advertisements represent that these demonstrations are evidence which actually proves Dry Ban superior to competing anti-perspirant sprays because it is a dry spray that is not wet when applied to the body, and because it leaves no visible residue when applied to the body. In truth, the complaint alleges Dry Ban is not a dry spray, is wet when applied to the body, and, after application to the body, dries out leaving a visible residue. The proposed order does not contain a corrective advertising provision, but would prohibit the respondents from disseminating advertising which presents evidence, including tests, experiments or demonstrations, which does not actually prove the fact, product feature or product superiority it is represented to prove.

The Listerine, Sunoco, Lysol and Dry Ban cases demonstrate that the Commission has not become so involved in broad scale programs that it is forced to ignore significant instances of possible misrepresentation which happen to be unrelated to such programs. Deceptive demonstrations in television commercials for any type of product, for example, have been and most likely will continue to be of particular interest to the Commission, for this form of advertising can be especially persuasive to consumers.<sup>39</sup> In addition, questionable advertisements which are not reviewed as part of any established program may be brought to the attention of the legal staff by the Commission's monitoring section, which maintains continuing surveillance of advertising appearing on network television and in the major print media.

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38. Bristol-Myers Co., 3 Trade Reg. Rep. ¶ 19,765, at 21,808 (FTC Aug. 20, 1971) (proposed complaint); *id.* ¶ 20,106, at 22,066 (FTC Sept. 12, 1972) (complaint issued).

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

## 2. The "Unfairness Doctrine"

### a. History

In March of 1972 the Supreme Court held in *FTC v. Sperry & Hutchinson Co.*<sup>40</sup> that section 5(a)(1) of the FTC Act empowered the Commission to attack practices which may pose no threat to competition in the traditional antitrust sense, and may not deceive consumers, but which are objectionable primarily because they have an *unfair* impact on *consumers*. This holding may not appear particularly momentous in light of the express prohibition of unfair or deceptive acts or practices in section 5(a)(1).<sup>41</sup> However, examination of the history of the "unfairness doctrine" enunciated in the *S&H* case demonstrates the necessity for and significance of a decision conclusively establishing the Commission's broad power to protect consumers from unfair business practices.

Prior to passage of the Wheeler-Lea Amendments to the FTC Act,<sup>42</sup> which added the phrase "unfair or deceptive acts or practices" to section 5, the section had declared only "unfair methods of competition" to be unlawful. It is clear from the legislative history that the Congress did not intend the scope of the original language to be limited to any particular categories of practices.<sup>43</sup> Two of the early judicial interpretations of this language, however, attempted to impose the limitations that Congress had purposely excluded from the statute. In *FTC v. Gratz*,<sup>44</sup> the Court, while acknowledging that the "exact meaning" of the phrase "unfair methods of competition" was unclear, undertook to establish boundaries for the operation of the statute. It held that the only practices which could be deemed unfair methods of competition were those that were "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."<sup>45</sup>

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40. 405 U.S. 233 (1972).

41. See note 2 *supra*.

42. Act of Mar. 21, 1938 ch. 49, § 5, 52 Stat. 111, amending 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45 (1970)).

43. The view was expressed in both the Senate Report and the House Conference Report that it would be impossible to frame statutory definitions which would embrace all unfair practices, and that the determination of what practices were unfair should thus be left to the Commission. See S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18-19 (1914).

44. 253 U.S. 421 (1920).

45. *Id.* at 427. Accord, *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 475 (1923); *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 579-80 (1923).

While the *Gratz* court continued to tie the meaning of "unfair methods of competition" to pre-existing standards of illegality, it at least recognized that the concept included something more than anti-competitive activity of an antitrust nature. Similarly, other cases decided prior to the Wheeler-Lea Amendments held that deception of the public could amount to an unfair method of competition if such deception diverted business from competitors of the advertiser.<sup>46</sup>

However, prior to the Wheeler-Lea Amendments, the courts refused to find methods of competition unfair where no injury to present or potential competitors was involved. This position was most clearly expressed in *FTC v. Raladam Co.*,<sup>47</sup> in which the Court held that: "[t]he paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree. . . . Unfair trade methods are not *per se* unfair methods of *competition*."<sup>48</sup>

The landmark case which relaxed the restrictions imposed by *Gratz* and *Raladam* was *FTC v. R.F. Keppel & Bros.*<sup>49</sup> The Commission's cease-and-desist order in *Keppel* prohibited the practice of selling penny candy to children in "break and take" packs. This merchandising method induced children to purchase candy which was less desirable in quality and quantity than candy sold in the "straight goods" package, in the hope of getting bonus packs containing extra candy and prizes.<sup>50</sup>

The Court found that although children were too young to be cap-

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46. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

47. 283 U.S. 643 (1931).

48. *Id.* at 647-49. The Court stated further: "It is obvious that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. . . . If broader powers be desirable they must be conferred by Congress." *Id.* at 649.

49. 291 U.S. 304 (1934).

50. The Court gave as one example of "break and take" packaging an assortment of candy which "contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed." *Id.* at 307.

able of intelligent judgment regarding such transactions, the practice did not involve any fraud or deception, and that competing manufacturers could adopt the "break and take" device at any time and thus maintain their competitive position. However, the Court rejected the respondent's argument, based on these premises, that the practice was beyond the reach of the Commission. It held instead that the practice was of the sort which the common law and criminal statutes had long deemed contrary to public policy, because it tempted children to gamble and pressured competitors, who were under a powerful moral compulsion not to adopt the practice, to engage in the same reprehensible marketing technique.

Thus, the Court concluded:

[H]ere the competitive method is shown to exploit consumers, children, who are unable to protect themselves . . . . It would seem a gross perversion of the normal meaning of the word . . . to hold that the method is not "unfair."<sup>51</sup>

In reaching this result, the Court disposed of the argument, based on *Gratz and Raladam*, that an unfair method of competition under section 5 necessarily involved an antitrust violation or at least incipient injury to competitors. The Court stated that had it been the intent of Congress to limit the authority of the Federal Trade Commission to the prevention of competitive methods which were forbidden at common law or were incipient antitrust violations, such intention would have been expressly manifested in the Federal Trade Commission Act.<sup>52</sup>

In upholding the Commission's prohibition of this lottery method of selling to children, the *Keppel* case broadened the definition of "unfair methods of competition" in two respects. First, with respect to the *nature* of the challenged practice, *Keppel* established that practices involving no element of deception, fraud or oppression, but which nevertheless violated public policy in some respect, could be unfair. Second, as to the *impact* of the practice, *Keppel* established that a practice primarily unfair to consumers rather than to competitors could violate section 5.

The *Keppel* principle that a business practice could constitute a violation of section 5 primarily because of its impact on consumers rather than competitors was subsequently codified by the 1938 Wheeler-Lea Amendments to the Federal Trade Commission Act, which added the phrase "unfair or deceptive acts or practices" to the original section 5(a)(1) prohibition of "unfair methods of competition." The addition

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51. *Id.* at 313.

52. *Id.* at 310.

of this language was intended by Congress to make it clear that section 5 authorized the Commission to protect consumers as well as competitors.<sup>53</sup> Furthermore, the prohibition of "unfair" as well as "deceptive" acts or practices makes it clear that Congress realized that consumers could be injured by unfair practices, as well as by the deceptive practices which were attacked in cases prior to the amendments.

The case law which has evolved under section 5 since the Wheeler-Lea Act has given effect to this congressional intent to a substantial extent. Presently, in section 5 cases challenging deceptive acts or practices, including deceptive advertising, injury to consumers is usually the primary injury alleged.<sup>54</sup>

In addition, a considerable body of case law has developed in which various acts and practices have been forbidden primarily because of their unfairness to consumers, rather than to competitors.<sup>55</sup> Until very recently, however, cases in which unfairness to consumers was found usually involved actual business practices, other than advertising, which usually have been so blatantly inequitable or coercive as to evince actual intent to defraud consumers.<sup>56</sup> An exception to this rule has been the line of cases banning use of lottery methods of merchandising similar to that involved in *Keppel*.<sup>57</sup> Deception, antitrust violations and lot-

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53. The House Report on the amendment stated: "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937). See also S. Rep. No. 1705, 74th Cong., 2d Sess. 2-3 (1936). A further indication of the congressional intent to make the Federal Trade Commission Act more consumer-oriented by the addition of the Wheeler-Lea amendments is the fact that these amendments also added § 15, which declared the dissemination of false advertisements for foods, drugs, cosmetics and devices to be an unfair or deceptive act or practice under section 5.

54. With relation to "deceptive advertising," see notes 4-39 *supra* and accompanying text.

55. See, e.g., cases cited in Statement of Basis, *supra* note 8; Illinois Fraternal News, Inc., 66 F.T.C. 165 (1964); Trade Advertising Associates, 65 F.T.C. 650 (1964).

56. See, e.g., Illinois Fraternal News, Inc., 66 F.T.C. 165 (1964) and Trade Advertising Associates, 65 FTC 650 (1964), in which the Commission found to be an unfair practice the publishing of advertisements without having received orders therefor, and then seeking to exact payment for the unauthorized advertisements through means such as repeated "demand" letters and threats of legal action.

57. See, e.g., *Modernistic Candies, Inc. v. FTC*, 145 F.2d 454 (7th Cir. 1944);



teries aside, however, with respect to the nature of practices found to be unfair within the meaning of section 5, very little real development has occurred, since the Wheeler-Lea Amendments, beyond the *Gratz* formulation of practices "characterized by bad faith, fraud or oppression."<sup>58</sup>

Nothing inherent in the meaning of the term "unfair act or practice" limits its operation to the practices discussed above. Just as the term "deceptive acts or practices" has been construed to include *deceptive* advertising, so the term "unfair acts or practices" may include *unfair* advertising, as well as other types of unfair practices. Furthermore, the meaning of "unfair" is not limited to practices which border on fraud, oppression or gambling. Many advertising and other business practices which do not reach these extremes are nevertheless inequitable and exploitive in nature, and have seriously detrimental effects on consumers. Such practices should be actionable under section 5.

Section 5 is an intentionally flexible standard. No comprehensive definition of the term "unfair" is possible or desirable. In this section, Congress gave the Commission the power to determine, within broad limits, what new or different kinds of trade practices should be forbidden because they are unfair to the consuming public. Rather than limiting the Commission's authority to the prevention of business activity violating established standards of legality, it empowered the Commission to evaluate particular business practices in the contexts in which they are utilized.<sup>59</sup>

The Commission has already incorporated these principles into a number of complaints and proposed complaints issued prior to the decision of the Supreme Court in *S&H*. For example, proposed complaints issued against the six major advertisers of cigarettes in the United States, in addition to charging that the failure to disclose the health hazards of smoking in cigarette advertisements is deceptive, contained a separate

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J.C. Martin Corp., 66 FTC 1 (1964), *aff'd*, 346 F.2d 147 (3rd Cir. 1965), cert. denied, 382 U.S. 975 (1966); and Sun Distributing Co., 64 FTC 681 (1964).

58. See text accompanying note 45 *supra*.

59. As the Supreme Court stated in *Keppel*: "It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed." *FTC v. R. F. Keppel & Bros.*, 291 U.S. 304, 314 (1934).

allegation that the advertising of cigarettes without making clear and conspicuous disclosures in said advertisements that cigarette smoking is dangerous to health is "in itself" an unfair practice.<sup>60</sup> Similarly, in *Philip Morris, Inc.*,<sup>61</sup> which involved the distribution of sample razor blades through insertion in home-delivered newspapers, the gravamen of the Commission's complaint is the principle that this practice is unfair to consumers because of the safety hazard it creates. Thus, in matters involving advertising, and other promotional practices approaching advertising, which endanger the health or safety of consumers, the Commission has demonstrated a willingness to take a broad view of its powers under the unfairness doctrine. In addition, the principle that an advertiser should have prior substantiation for representations made in its advertisements<sup>62</sup> is based primarily on unfairness considerations.

This approach is also reflected in other recent cases not directly involving health or safety issues. The *ITT Continental Baking Company* complaint,<sup>63</sup> for example, contained an allegation that Wonder Bread advertisements are unfair to children in that they tend "to exploit childrens' aspirations for rapid and healthy growth by falsely portraying Wonder Bread as an extraordinary food for producing dramatic growth in them."<sup>64</sup>

Although the *S&H* case<sup>65</sup> did not involve a question of advertising, it must be considered an affirmation of the Commission's power to attack advertising which is unfair to consumers. At issue in this case was the

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60. *Brown & Williamson Tobacco Corp., The Lorillard Corp., Philip Morris, Inc., R.J. Reynolds Indus., Inc., American Brands, Inc., and Liggett & Myers, Inc.*, 3 Trade Reg. Rep. ¶ 19,687, at 21,729 (FTC July 1, 1971) (proposed complaints); *id.* ¶ 19,902, at 21,919 (FTC Jan. 31, 1972) (consent orders provisionally accepted); *id.* ¶ 19,965, at 21,986 (FTC Mar. 30, 1972) (consent orders finally accepted).

61. 3 Trade Reg. Rep. ¶ 19,548, at 21,620 (FTC Mar. 12, 1971) complaint issued); *id.* ¶ 20,153, at 22,141 (FTC Dec. 1, 1972) (consent order provisionally accepted).

62. This general principle was the foundation both for the Commission's complaint in the *Pfizer* case and for the Commission's Advertising Substantiation Program. See notes 102-17 *infra* and accompanying text.

63. See note 19 *supra*.

64. In his initial decision dismissing the *ITT Continental* complaint, the Administrative Law Judge ruled that only a small proportion of very young children were susceptible to exploitation by television commercials and that empirical data shows the incidence of childrens' efforts to influence bread purchases is relatively small. See notes 21-22 *supra* and accompanying text.

65. 405 U.S. 233 (1972).

legality of S&H's attempt to discourage "trafficking" in its trading stamps. Such trafficking is carried on primarily by professional trading stamp exchanges, which will sell books of S&H or other brands of stamps to consumers, or will trade one brand of stamps for another brand. These exchanges allow consumers, who acquire small numbers of a variety of different brands of stamps, to convert all of their stamps into one brand. This facilitates the accumulation by consumers of sufficient numbers of stamps of one brand to redeem them for desired items. Trafficking is also engaged in by retail merchants, who, rather than issuing stamps themselves, offer discounts on their own goods in return for S&H stamps.

Both these methods reduce the incentive for the consumer to return to the merchant who originally issued the S&H stamps to obtain more stamps, and in turn reduce the incentive for the merchant to buy and distribute the stamps. S&H attempted to pre-empt such trafficking by contractual provisions, reflected in a notice on the inside cover of every S&H stamp book. This notice, in essence, states that the consumer may not exchange or transfer S&H stamps or stamp books, and that the only right the consumer acquires in said stamps is to paste them in books and return them to S&H for redemption. In a number of lawsuits filed over a period of years against commercial exchanges and merchants, S&H won injunctions against unauthorized redemption or exchange of its stamps. It also sent numerous letters threatening legal action to other stamp exchanges and merchants, almost all of which agreed to discontinue the unauthorized practices.

The Commission found that this suppression of the operation of trading stamp exchanges and other "free and open" redemption of stamps violated section 5. The United States Court of Appeals for the Fifth Circuit, however, reversed the Commission, stating that the type of practice the Commission has the power to declare unfair must be either a per se violation of the antitrust policy, a violation of the letter of the Sherman, Clayton, or Robinson-Patman Acts, or a violation of the spirit of these Acts.<sup>66</sup> The court of appeals further held that S&H's conduct had not violated the letter or spirit of the antitrust laws, and vacated the Commission's order.

The Supreme Court, on the other hand, held that the court of appeals erred in its construction of section 5.<sup>67</sup> It held that a challenged practice

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66. *Sperry & Hutchinson Co. v. FTC*, 432 F.2d 146 (5th Cir. 1970), modified and remanded to FTC, 405 U.S. 233 (1972).

67. 405 U.S. at 245 (1972).

which has an anticompetitive impact but does not violate the letter or spirit of the antitrust laws may nevertheless be an unfair method of competition, and that a practice having an unfair impact on consumers may be an unfair act or practice in violation of section 5 without regard to competitive impact. In so holding, the Court stated that neither of the limiting interpretations of section 5 adopted in *Gratz* and *Raladam* survived to support the lower court's view, and that the *Keppel* case sets the standard by which the range of FTC jurisdiction is to be measured today.<sup>68</sup>

The Court delineated the Commission's power over unfair practices as follows:

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws.<sup>69</sup>

Because the question of whether the practices engaged in by S&H were actually unfair to consumers had not been decided by the Commission, the Court remanded the case to the Commission for determination of this issue.<sup>70</sup> Since it has not yet been decided whether these practices are unfair acts or practices prohibited by section 5, the actual facts of the *S&H* case provide little guidance as to the nature of the activities which would be unfair to consumers under the Court's view of section 5.

Nevertheless, the Court's comparing the Commission to a court of equity, and affirming the power of the Commission to consider "public values" beyond those reflected in the antitrust laws, are extremely important developments in the evolution of section 5. They indicate that the Commission has been following the proper course in its recent attacks on unfair advertising, and thus encourage continued pursuit of these attacks.

Because the Commission, to a significant extent, has already been ex-

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68. *Id.* at 242.

69. *Id.* at 244 (footnote omitted).

70. The Court stated that it had to look to the Commission's opinion, not the arguments of its counsel, for the underpinnings of the Commission's order. While the issue of unfairness to consumers had been raised by Commission counsel, the Commission's opinion was premised on the classic antitrust rationale of restraint of trade and injury to competition. Since the Court could not label the practice "unfair," but could only affirm or vacate the Commission's judgment to that effect, it had to remand the case to the Commission for determination under the proper construction of § 5 enunciated by the Court. *Id.* at 246.

exercising the power acknowledged by the Supreme Court in *S&H*, this opinion should not be regarded as a signal which will stimulate frenzied attacks on a multitude of advertising practices never before challenged. Furthermore, the opinion did advert to certain factors, previously designated by the Commission, which are relevant to the question of whether a particular practice is unfair. These factors are:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers . . . .<sup>71</sup>

In response to the argument of *S&H* that activity meeting the third of these criteria was not unfair unless it also met one of the first two, the Court indicated that the meaning of these criteria was that a method of selling violates section 5 if it is at least “exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others.”<sup>72</sup>

These standards against which the fairness of business practices is to be measured are necessarily general and broad in scope. Although their enunciation in a Supreme Court opinion is not likely to bring about radical changes in the Commission’s present enforcement policies, it does encourage further development of concepts of unfairness presently being utilized by the Commission.

One area to which further application of unfairness principles would seem highly appropriate is advertising addressed to children.<sup>73</sup> The primary flaw in most objectionable children’s advertising is its failure to compensate for the lack of maturity and experience of its audience. Any resulting deception of children usually is incidental to this fundamental unfairness. This theory could also be extended to cover advertising which attempts to exploit the disabilities of other “special audiences,” such as elderly, handicapped, or non-English speaking persons.

In addition, it is probable that the Commission will continue to use the unfairness doctrine to attack advertising claims which are not supported by substantiation sufficient to provide a “reasonable basis” for the claim. This “reasonable basis” principle, and its relationship to the unfairness doctrine are the subject of the following discussion.

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71. *Id.* at 244 n.5, citing Statement of Basis, *supra* note 8, at 8355.

72. 405 U.S. at 244 n.5.

73. See notes 91-97 *infra* and accompanying text.

b. The "Reasonable Basis" Standard

The principle that an advertiser should have, at the time he makes an advertising representation, substantiation sufficient to provide a "reasonable basis" for the representation, was set forth in the Commission's opinion in *Chas. Pfizer & Co.*<sup>74</sup> In this case, the respondent's advertising for "Un-Burn" sunburn treatment represented that the product anesthetized nerves and relieved sunburn pain. The respondent had not actually conducted any scientific tests of the efficacy of "Un-Burn," but had based its advertising representations on the fact that the active ingredients in the product had for many years been considered by doctors to be effective in the treatment of sunburn. The Commission's complaint alleged that Pfizer's advertisements were deceptive in that they carried the implied representation that the claims concerning the efficacy of "Un-Burn" had been substantiated by the respondent through adequate and well-controlled scientific studies or tests prior to the making of such claims. The complaint also charged that the making of the advertising representations, when such scientific studies or tests had not been conducted, was "in itself" an *unfair* practice.<sup>75</sup>

The hearing examiner dismissed the deception charge on the basis that the advertisement did not contain the implied representation alleged by the Commission. He also dismissed the unfairness charge, stating that it was reasonable, not unfair, for the respondent to rely on years of clinical experience indicating that "Un-Burn's" active ingredients were effective in the relief of sunburn pain.<sup>76</sup> He did state, however, that to advertise an untried remedy without adequate testing of any sort would constitute an unfair trade practice. On appeal, the Commission affirmed the decision of the hearing examiner dismissing the complaint.<sup>77</sup> With respect to the unfairness charge, the Commission held that the complaint had incorrectly formulated the legal standard to be applied to respondent's conduct. While the Commission accepted the general premise of the complaint that an advertiser should have substantiation for advertising

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74. [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,209, at 21,388 (FTC Apr. 16, 1970) (proposed complaint); 3 Trade Reg. Rep. ¶ 19,370, at 21,500 (FTC July 6, 1970) (complaint issued); *id.* ¶ 19,614, at 21,656 (FTC Apr. 16, 1971) (initial decision); *id.* ¶ 20,056, at 22,029 (FTC July 11, 1972) (final order).

75. [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,209, at 21,388 (FTC Apr. 16, 1970) (proposed complaint).

76. 3 Trade Reg. Rep. ¶ 19,614, at 21,656 (FTC Apr. 16, 1971) (initial decision).

77. 3 Trade Reg. Rep. ¶ 20,056, at 22,031 (FTC July 11, 1972) (final order).

representations, it rejected the argument of complaint counsel that the only possible valid foundation for Pfizer's advertising for "Un-Burn" was "adequate and well-controlled scientific studies or tests." The proper test, rather, was whether the respondent had a "reasonable basis" for its advertising representations. On this point, Chairman Kirkpatrick's opinion stated: "[T]he Commission concludes that the making of an affirmative product claim in advertising is unfair to consumers unless there is a reasonable basis for making that claim."<sup>78</sup>

The Chairman cited the *S&H* decision, which had been handed down subsequently to the issuance of the complaint in *Pfizer*, as a confirmation of the Commission's jurisdiction over unfair practices. He stated that an unfairness analysis takes into account many basic economic facts and considerations, and permits a broad focus in the examination of marketing practices. Describing unfairness as "potentially a dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy,"<sup>79</sup> he stated that standards of fairness to the consumer may change as products and marketing practices change in number, complexity, variety and function.<sup>80</sup>

In justification of the adoption of the reasonable basis concept as a standard of fairness, the chairman noted that:

[T]he individual consumer is at a distinct disadvantage compared to the producer or distributor of goods in reaching conclusions concerning the reliability of product claims. . . . [W]ith the development and proliferation of highly complex and technical products, there is often no practical way for consumers to ascertain the truthfulness of affirmative product claims prior to buying and using the product. . . .

Given the imbalance of knowledge and resources between a business enterprise and each of its customers, economically it is more rational, and imposes far less cost on society, to require a manufacturer to confirm his affirmative product claims rather than to impose a burden upon each individual consumer to test, investigate, or experiment for himself.<sup>81</sup>

The question of what constitutes a reasonable basis for a given advertising representation, the Chairman stated, is essentially a factual issue, and will be affected by the interplay of overlapping considerations such as: "(1) the type and specificity of the claim made—*e.g.*, safety, efficacy, dietary, health, medical; (2) the type of product—*e.g.*, food, drug, potentially hazardous consumer product, other consumer product; (3)

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78. Id. at 22,034 (footnote omitted).

79. Id. at 22,032.

80. Id.

81. Id. at 23,032-33.

the possible consequences of a false claim—*e.g.*, personal injury, property damage; (4) the degree of reliance by consumers on the claim; and (5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claim.”<sup>82</sup>

The opinion states further that the precise formulation of the “reasonable basis standard” is to be determined at this time on a case-by-case basis, and that the determination of reasonable basis depends both on facts known to the advertiser, and on those which a reasonably prudent advertiser should have discovered. In addition, the standard is determined by the circumstances at the time the claim was made. Facts obtained subsequent to the making of the claim are irrelevant to the question of “reasonable basis.”<sup>83</sup>

The Chairman also noted that the reasonable basis standard “focuses in large part on the adequacy of the underlying evidence, and is not solely a ‘reasonable man’ test . . . [It] evaluates both the reasonableness of an advertiser’s actions and the adequacy of the evidence upon which such actions were based.”<sup>84</sup>

In the *Pfizer* case, complaint counsel succeeded in proving that the respondent’s advertising claims were not supported by well-controlled and adequate scientific tests conducted prior to making the claims. However, since complaint counsel had not fully addressed the question of whether other evidence of efficacy possessed by Pfizer, such as medical literature and clinical experience, provided a reasonable basis for the advertising claims, the unfairness charge was dismissed. The Commission did not remand the case for a trial *de novo* even though respondent’s counsel had likewise failed to prove the *existence* of a reasonable basis for its claims. It determined, rather, that since the advertising in question had long been discontinued, further proceedings would not be in the public interest.<sup>85</sup>

The significance of the *Pfizer* case, then, like the *S&H* case, lies not in the decision on the facts of the individual case, but in the resolution of an important question of law concerning the scope of section 5 of the Federal Trade Commission Act. Although *Pfizer* was the first decided case based on the “reasonable basis standard,”<sup>86</sup> this theory was advanced

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82. *Id.* at 22,034.

83. *Id.*

84. *Id.*

85. *Id.* at 22,039.

86: A recent case applying the reasonable basis principle is *National Dynamics Corp.*, No. 8803 (F.T.C. Feb. 16, 1973). Another manifestation of the Commission’s commitment to the general principle of “prior substantiation of advertising claims” emanating from the *Pfizer* complaint, which occurred prior to the *Pfizer*



in some complaints and proposed complaints issued subsequent to the *Pfizer* complaint but prior to the *Pfizer* decision. For example, in three proposed complaints representing a broad-scale attack on analgesics advertising, the Commission alleged unfairness and deception in advertising for "Anacin," "Bayer Aspirin," "Bufferin," "Excedrin" and "Vanquish," as well as some less heavily promoted products.<sup>87</sup> Representations challenged in the complaints fall into five major categories: (1) claims of therapeutic superiority; (2) the promotion of analgesics for symptoms, such as tension, for which there exists no good evidence that they are appropriate; (3) misuse of scientific tests and studies concerning the efficacy of analgesic products; (4) misrepresentation of medical endorsements; and (5) failure to disclose the presence of the common ingredients aspirin and caffeine.

The first two categories lie at the heart of each complaint. With respect to claims of therapeutic superiority the complaints charge that there exists a "substantial question," recognized by scientific and medical experts, as to whether the variations in ingredients and dosage among the analgesic products are of any significance to the relative efficacy of the products as pain relievers. This substantial question derives primarily from two factors: first, scientific testing of pain and analgesic effect is not yet sufficiently precise to permit reasonably certain generalizations as to the superiority of any ingredient, combination of ingredients, or dosages; second, tests which have been conducted have often provided conflicting results. The complaints take the position that, in this climate of uncertainty, it is unfair and deceptive for advertisers of analgesic products to make unqualified claims of therapeutic superiority.

As to the promotion of the use of analgesics for symptoms such as tension, the complaints allege that such claims are unfair to consumers because there exists no "reasonable basis" from which to conclude that analgesics have any effect on such symptoms. The absence of a reasonable basis stems from the lack of any valid scientific evidence that consumption of aspirin or any other analgesic will relieve tension, anxiety or irritability, or will ease the ordinary stresses of daily life.

Additionally, the complaints focus on a common technique widely employed in nonprescription drug advertising, namely, the citation of scientific tests and studies to support specific advertising claims. While

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decision, was the announcement of the Commission's Advertising Substantiation Program. See notes 102-17 *infra* and accompanying text.

87. American Home Prods. Corp., Sterling Drug, Inc., and Bristol-Myers Co., 3 Trade Reg. Rep. ¶ 19,962, at 21,983 (FTC Apr. 19, 1972) (proposed complaints).

the tests themselves may have been well-controlled and carefully run, they are often used in advertising to over-simplify or distort the difficult scientific issues involved. Tests and studies cannot be evaluated in a vacuum; they can only be properly judged in light of scientific knowledge already accumulated, including the results of prior similar tests. When a single test is cited, especially when it is described as "exciting" or said to have been performed at a "leading hospital," it carries with it the aura of absolute scientific "proof." In any field, and especially in the analgesics area, the use of isolated test data to bolster an advertiser's claim is both misleading and unfair.

As with advertising references to test results, a claim that doctors recommend or prefer one product to all others purports to be "proof" of the product's superiority. While the complaints do not take the position that medical endorsements are in themselves unfair, the misuse of survey data to imply an endorsement, where none exists, is clearly misleading, and has been attacked.

The proposed orders in the analgesics cases seek the remedy of corrective advertising. This remedy is particularly appropriate in these cases, for the themes challenged in the proposed complaints have been repeated at heavy intensity for long periods of time.<sup>88</sup>

In another case involving the reasonable basis principle, the Commission's proposed complaint challenged weight-reduction claims for sugar made by two trade associations, composed of growers, refiners and processors of sugar.<sup>89</sup> The proposed complaint alleged generally that respondents' advertisements had unfairly represented that consumption of sugar and foods containing sugar before meals is an effective means of reducing human weight and maintaining reduced weight, when there existed no reasonable basis for these representations at the time they were made. The consent order in this case prohibits the dissemination of such unsubstantiated weight reduction claims for sugar, and misrepresentations of its nutritional value in weight-reduction dieting. The consent order also contains a corrective advertising provision, which prescribes the text of a corrective message which must be clearly and conspicuously stated in advertisements to appear in issues of seven major magazines.<sup>90</sup>

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88. See notes 7-12 *supra* and accompanying text.

89. Sugar Ass'n, Inc., 3 Trade Reg. Rep. ¶ 19,857, at 21,872 (FTC Dec. 2, 1971) (proposed complaint); *id.* ¶ 20,085, at 22,054 (FTC Aug. 18, 1972) (consent order provisionally accepted); *id.* ¶ 20,142, at 22,131 (FTC Nov. 1, 1972) (consent order finally accepted).

90. *Id.* ¶ 20,142, at 22,131. The required message reads as follows: "Do you recall the message we brought you in the past about sugar? How something with

As a vehicle for the exercise of the Commission's power to prevent trade practices which are unfair to consumers, the reasonable basis theory promises to develop into an extremely useful legal tool. Its most significant contribution to the Commission's enforcement program is that it renders susceptible to litigation advertising practices which previously were difficult to deal with by means of a standard false advertising complaint. In areas such as analgesics, for example, where scientific or technical knowledge is undeveloped or in conflict, it may be as difficult for the Commission's staff to utilize such knowledge to prove the falsity of an affirmative product claim as it is for the advertiser to prove the truth of the claim. However, it may be possible under such circumstances to prove that it was unreasonable for the advertiser, in making the claim, to rely on the information he did possess. In these cases, it is unrealistic to look to the proven truth or falsity of affirmative product claims as the standard against which advertising should be measured. It is equally undesirable, however, to give the advertiser free rein in such cases. He must be required to deal honestly with the consumer, and the most practicable method of assuring such honest dealing is to require simply that he act reasonably in light of all circumstances known to him or which he should have discovered before making the claim.

### 3. Advertising Addressed to Children

In almost every area of the law, the principle has long been established that children require special legal protection over and above that provided to adults. Early in the history of the Federal Trade Commission, this principle was incorporated into the law of unfair trade practices by the decision of the Supreme Court in the *Keppel* case.<sup>91</sup> The issue of the particular vulnerability of children to unlawful trade practices has also been involved in other Commission cases.<sup>92</sup>

In *Keppel*, the Supreme Court impliedly recognized that whether a practice is unfair or deceptive under section 5 depends primarily on its effect on the consumer group to which it is addressed. The test of legality is not keyed to the understanding of a "reasonable adult." It is settled

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sugar in it before meals could help you curb your appetite? We hope you didn't get the idea that our little diet tip was any magic formula for losing weight. Because there are no tricks, or shortcuts, the whole diet subject is very complicated. Research hasn't established that consuming sugar before meals will contribute to weight reduction or even keep you from gaining weight. Id.

91. See note 49 supra.

92. E.g., *Ideal Toy Corp.*, 64 F.T.C. 297, 310 (1964); *Wilson Chem. Co.*, 64 F.T.C. 168, 183 (1964).

law, rather, that section 5 was intended to protect "the most ignorant and unsuspecting purchaser."<sup>93</sup> Advertising addressed to children must be judged according to the way children understand its meaning and are affected by it. Consequently, a given advertising practice can be unfair or deceptive with respect to children even if it would not be unlawful if directed only to adults.

The principle that advertising addressed to children must be evaluated in light of the level of competence of its audience was expressly articulated for the first time in a group of consent orders accepted by the Commission concerning toy advertising. In *Mattel, Inc.*<sup>94</sup> and *Topper Corp.*,<sup>95</sup> the proposed complaints challenged advertising for the "Hot Wheels" and "Johnny Lightning" race cars, and the "Dancerina Doll." They alleged that the advertisements were unfair or deceptive in that, among other things: (1) special filming techniques were used to exaggerate or falsely represent the appearance and performance of the various toys, and to convey a sense of achievement or participation in the use of the toys which could not be achieved; and (2) endorsements by famous racing drivers were used for the "Johnny Lightning" and "Hot Wheels" toys, when the special competence of these drivers pertains only to actual auto racing and does not give them special qualifications to judge the worth, value or desirability to children of the respective toys.

In addition to alleging that the actual content of these television advertisements was unfair or deceptive, the proposed complaints alleged that the advertising was unfair in that: (1) it exploited children, who were unqualified by age or experience to anticipate or appreciate the possibility that the advertising representations might be exaggerated or untrue; and (2) it played upon the affection of parents for their children, by causing children to become "lobbyists" in the home for the advertised product.

The consent orders signed by the respondents, in addition to prohibiting the challenged practices, contain language to the effect that possible deception in the respondents' advertisements must be evaluated in light of the "level of knowledge, sophistication, maturity, and experience" of

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93. *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946) (citation omitted). *Accord, Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2nd Cir. 1944).

94. 3 Trade Reg. Rep. ¶ 19,398, at 21,519 (FTC Nov. 25, 1970) (proposed complaint); *id.* ¶ 19,735, at 21,786 (FTC July 26, 1971) (consent order provisionally accepted); *id.* ¶ 19,850, at 21,869 (FTC Nov. 1, 1971) (consent order finally accepted).

95. *Id.*

the age group or groups to which the advertisements are addressed.<sup>96</sup> Thus, these consent orders expressly adopt the principle, impliedly recognized in decisions dating back to *Keppel*, that children are a special class of consumers, and must be treated as such by businessmen.

Although all food and beverage advertising is potentially of significance to the development of children, children are exposed to advertisements for certain foods more than others. One of the food products most heavily advertised to children on Saturday and Sunday morning television is breakfast cereal. In the context of what is primarily an antitrust case, the Commission has issued a complaint against the Kellogg Company, General Mills, Inc., General Foods Corporation and the Quaker Oats Company alleging that advertisements for respondents' cereals addressed to children have the tendency and capacity to mislead children into the mistaken belief that respondents' cereals are different from other ready-to-eat cereals.<sup>97</sup> This practice, the complaint charges, facilitates artificial differentiation and brand proliferation, and has contributed to respondents' ability to obtain and maintain monopoly prices and to exclude competitors from the manufacture and sale of ready-to-eat cereal.

The complaint specifically challenges representations that: (1) respondents' cereals, without any other foods, enable children to perform certain physical activities depicted in the advertisements; and (2) consumption of respondents' cereals at breakfast will produce a loss of body weight without vigorous adherence to a reduced calorie diet, will result in maintenance of present body weight even if total caloric intake increases, or will result in loss or maintenance of body weight without adherence to regular physical exercise. The proposed order provides that if the Commission should conclude from the record developed in adjudication of the case that these advertising practices are anti-competitive, they may be prohibited. Thus, although this case is founded primarily on antitrust considerations, a decision upholding the complaint is likely to result in the elimination of certain objectionable practices in cereal advertising addressed to children.

One of the more intriguing aspects of the litigation concerning the

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96. 3 Trade Reg. Rep. ¶ 19,735, at 21,787.

97. Kellogg Co., 3 Trade Reg. Rep. ¶ 19,898, at 21,915 (FTC Jan. 24, 1972) (proposed complaint); *id.* (FTC Apr. 26, 1972) (complaint issued). Recently General Foods Corp. has brought suit to block further proceedings under this complaint. See *General Foods Corp. v. FTC*, Civil No. KI-73-CA9 (W. D. Mich., filed Jan. 2, 1973).

cereals case is the involvement of advertising questions in an antitrust matter. In essence, the cereal complaints charge that the companies cited therein restrained trade by, *inter alia*, engaging in a common course of conduct, which included massive "false" advertising. Whether members of a concentrated industry would violate the law by engaging in a restrictive common course of conduct which included massive "legal" advertising expenditures is a question which is not raised by the cereal complaints.

In considering various problems raised by advertising addressed to children, the Commission has come to appreciate the need to accumulate a body of general information in this area, which may be drawn upon in the analysis of specific matters. This realization was one of the motivating forces behind the organization of the Commission's Hearings on Modern Advertising Practices, held in the autumn of 1971. A number of experts from a variety of fields, including child psychology and child psychiatry, testified at these hearings. One of the primary purposes of the hearings was to gain insight into the way children respond to advertisements and are affected by them. Another purpose was to acquaint the Commission, through the testimony of members of the advertising industry, with technical aspects of the preparation and production of television commercials which may facilitate deception such as that involved in the *Mattel* and *Topper* cases. The Commission has gained much valuable information from these hearings, which will be of assistance in dealing with the highly complex area of children's advertising.

## **B. Rule-Making**

In addition to adjudication of individual cases, the Federal Trade Commission exercises its regulatory power in the form of rule-making. The preparation of the Commission's trade regulation rules is carried on primarily in the Division of Rules and Guides.

The basic purpose of a trade regulation rule proceeding is to determine whether a particular type of promotional technique amounts to an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act, and, if so, to announce to the industry involved, by promulgation of a trade regulation rule, the steps which must be taken to avoid violation of the Act. Once a trade regulation rule is promulgated, it must be enforced by the issuance of a complaint for violation of the rule. However, because the Commission has already determined that failure to adhere to the rule is a violation of section 5,

the only issues to be resolved during the hearing on the complaint are: (1) the existence of the rule; (2) its applicability to the advertising or practice in question; and (3) its violation. If these three elements are established, it is not necessary for the administrative law judge or the Commission to determine whether section 5 has been violated by the advertising in question. In theory, the existence of an applicable trade regulation rule should enable complaints to be handled swiftly and with greater uniformity of results. Additionally, the trade regulation rule proceeding should produce one other economy by laying down a carefully enunciated rule which is industry-wide in scope. In a field where dozens to hundreds of firms are competing with one another it is expected that a large majority of these firms will make a good faith effort to comply voluntarily with an administrative determination, particularly when it is made after the regulated industry has been given an opportunity to submit data, views and arguments during a public hearing held in connection with the rule-making proceeding.<sup>98</sup>

The Commission's authority to issue trade regulation rules has recently been called into question by the decision in *National Petroleum Refiners Association v. FTC*.<sup>99</sup> The case involved a trade regulation rule declaring that the failure to post octane ratings on gasoline pumps at service stations would be an unfair method of competition and a deceptive practice in violation of section 5. Stating that the issue was one of "first impression," the court held that the Federal Trade Commission Act did not grant the Commission the requisite authority to issue trade regulation rules.<sup>100</sup>

A lengthy analysis of the Commission's authority to issue trade regulation rules has been provided elsewhere<sup>101</sup> and would be extraneous to the purposes of this article. It is sufficient here to note that I am firmly convinced the Commission does have the power under the Federal Trade Commission Act to issue such rules and am confident that this power will be upheld on appeal of the *National Petroleum Refiners* case.

### III. Alternatives to Adjudication and Rule-Making

Part I of this article has discussed recent efforts of the Federal Trade Commission to attain effective enforcement of the Federal Trade Com-

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98. For a detailed discussion of the Commission's trade regulation rule proceeding, see Statement of Basis, *supra* note 8, at 8324.

99. 340 F. Supp. 1343 (D.D.C. 1972).

100. *Id.* at 1346.

101. See Statement of Basis, *supra* note 8, at 8324.

mission Act through the two traditional forms of regulatory activity—adjudication and rule-making. It should be apparent from the discussion in Part I that the Commission regards these traditional forms of regulation as vital to its consumer protection program.

Certain limitations, however, are inherent in these procedures. With respect to adjudication, for example, the Commission is unable to issue a complaint against every advertising deception of which it may become aware. Because the resources at the disposal of the Commission are limited, priorities must be assigned, and significant advertising abuses must often be neglected purely because of a lack of manpower. Also, litigation is a costly and time-consuming method of correcting advertising abuses, and by the time the litigation has been concluded, the damage often has already been done.

Most important, perhaps, is the fact that litigation and rule-making are appropriate only for attacking specific instances of deception or unfairness in advertising. Their primary purpose is to reduce the amount of misinformation being disseminated to consumers. Even the adjudicative remedies of affirmative disclosure and corrective advertising, which require the disclosure of truthful information, are designed primarily to eradicate representations which have been established to be false or unfair.

Realizing that litigation and rule making can be of only limited benefit in the quest to provide consumers with relevant product information, the Commission has recently initiated one program and supported another designed to make positive contributions to the amount of accurate information available to consumers. Part II of this article will be devoted to discussion of these programs.

#### **A. The Advertising Substantiation Program**

##### **1. Purpose**

In June of 1971, the Commission announced its issuance of a resolution which requires advertisers to submit to the Commission, upon demand, documentation to support claims regarding the safety, performance, efficacy, quality or comparative price of the product advertised.<sup>102</sup> The documentation required is that which the advertiser had in its possession prior to the time claims were made. The Commission's

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102. Resolution Requiring Submission of Special Reports Relating To Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation, issued July 9, 1971; amended July 7, 1971 [hereinafter cited as Substantiation Resolution].



authority to require such submissions is granted by section 6(b) of the Federal Trade Commission Act.<sup>103</sup> Furthermore section 6(f) of the Act authorizes the Commission to make materials submitted under section 6(b), except for privileged or confidential information, available to the public.

The policy considerations upon which public disclosure of these materials is made are the following:

- (1) Public disclosure can assist consumers in making a rational choice among competing claims which purport to be based on objective evidence and in evaluating the weight to be accorded to such claims.
- (2) The public's need for this information is not being met voluntarily by advertisers.
- (3) Public disclosure can enhance competition by encouraging competitors to challenge advertising claims which have no basis in fact.
- (4) The knowledge that documentation or the lack thereof will be made public will encourage advertisers to have on hand adequate substantiation before claims are made.
- (5) The Commission has limited resources for detecting claims which are not substantiated by adequate proof. By making documentation submitted in response to this resolution available to the public, the Commission can be alerted by consumers, businessmen, and public interest groups to possible violations of section 5 of the Federal Trade Commission Act.<sup>104</sup>

To date, Orders to File Special Reports under the substantiation program have been sent to advertisers of automobiles,<sup>105</sup> air condi-

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103. 15 U.S.C. § 46(b) (1970). Section 6 states in part that: "The commission shall also have power . . . (b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission . . . within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission." *Id.*

104. Substantiation Resolution, *supra* note 102 at 3-4.

105. General Motors, 3 Trade Reg. Rep. ¶ 19,698, at 21,743 (FTC July 13, 1971).

tioners,<sup>106</sup> electric shavers,<sup>107</sup> televisions,<sup>108</sup> dentifrices,<sup>109</sup> cough and cold remedies,<sup>110</sup> tires,<sup>111</sup> soaps and detergents,<sup>112</sup> hearing aids,<sup>113</sup> and pet foods.<sup>114</sup>

Some of the material submitted has already been made public,<sup>115</sup> and the balance of the material will be released after it has been reviewed by the Commission staff.

The substantiation program has been the subject of some criticism. It has been said that public response to the program has been insignificant, and that consumers are not using the information submitted. Another criticism has been that the material submitted is too technical to be of use to consumers in making purchasing decisions. With respect to the latter point, it is only logical to expect that much of the documentation for advertising claims for automobiles or televisions will be technical in nature. The Commission never expected consumers to be able to use the material in this form. However, the Commission itself does not have the resources to translate the information into a form which can be used by the average consumer. This function must be performed by outside consumer groups or other organizations which have the knowledge and resources necessary to accomplish such a task. Once such studies of the material are undertaken and information is disseminated in a form the average consumer can understand, it is likely that consumers will begin to make extensive use of the material.

Moreover, the Commission is determined to follow a new path in future substantiation orders. Instead of seeking documentation for each and every assertion, section 6(b) orders will be directed toward those three or four themes in the advertising material which are the major "selling themes" of the product's advertising. Particular focus will be given to claims common to the industry. In this fashion, the claims upon

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106. Whirlpool Corp., id. ¶ 19,771, at 21,812 (FTC Aug. 24, 1971); Admiral Corp., id. ¶ 19,828, at 21,839 (FTC Oct. 14, 1971).

107. North Am. Philips Corp., id. ¶ 19,772, at 21,813 (FTC Aug. 24, 1971).

108. Admiral Corp., id. ¶ 19,828, at 21,839 (FTC Oct. 14, 1971).

109. Beecham, Inc., id. ¶ 19,879, at 21,890 (FTC Dec. 22, 1971).

110. American Home Prods. Corp., id. ¶ 19,905, at 21,920 (FTC Jan. 31, 1972).

111. Goodyear Tire & Rubber Co., id. ¶ 20,009, at 22,007 (FTC May 24, 1972).

112. American Cyanamid Co., id. ¶ 20,040, at 22,024 (FTC June 28, 1972); American Brands, Inc., id. ¶ 20,103, at 22,065 (FTC Sept. 20, 1972).

113. Widex Hearing Aid Co., id. ¶ 20,059, at 22,040 (FTC July 26, 1972).

114. Allied Mills, Inc., id. ¶ 20,148, at 22,133 (FTC Nov. 24, 1972).

115. Material submitted to the Commission in response to § 6(b) orders is

which advertisers primarily rely will be those on which the 6(b) program is concentrated, and the efficiency of the program may be increased. Another change in future 6(b) orders will be the inclusion of a request to companies to submit, in addition to the technical documentation, a "running narrative summary" in layman's language of the substantiation which exists for the claims covered by the 6(b) orders.

## 2. Cases

Although the primary purpose of the Commission's advertising substantiation program is to make product information available to consumers, complaints may be issued where the substantiation submitted is patently inadequate to support the claims made. Such was the case with four proposed complaints recently issued by the Commission, three against manufacturers of air conditioners and one against an automobile manufacturer, attacking advertising representations which had been the subject of section 6(b) orders.

In *General Motors Corp.*,<sup>116</sup> the proposed complaint alleged that General Motors had no reasonable basis for the claims that: (1) the Chevrolet Vega is the best handling passenger car ever built in the United States; and (2) the Buick Opel has a chassis which never requires lubrication. The three proposed complaints against air conditioner manufacturers allege that the following claims are deceptive: (1) Fedders "reserve cooling power" is a unique feature of Fedders air conditioners; (2) Whirlpool's "Panic Button" is a unique feature of Whirlpool air conditioners; and (3) Rheem residential central air conditioning systems are "revolutionary" and are the most efficient central cooling systems available.<sup>117</sup>

These proposed complaints also allege that the respondents' advertisements were unfair in that the respondents had no reasonable basis for the following claims: (1) Fedders ACL air conditioners have a reserve cooling capacity that is substantially greater than that of competing systems; (2) Rheem residential central air conditioners are the quietest systems available; and (3) Whirlpool's initial cooling capability is substantially greater than that of competing air conditioners.

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available for examination in the Commission's Legal and Public Records Division (Room 130) in Washington and in the Commission's regional offices, and may be purchased from the National Technical Information Service, 5285 Port Royal Rd., Springfield, Va. 22151.

116. 3 Trade Reg. Rep. ¶ 20,120, at 22,102 (FTC Oct. 12, 1972) (proposed complaint).

117. Fedders Corp., Rheem Mfg. Co., and Whirlpool Corp., *id.*

Besides halting the challenged practices, the proposed orders in these four cases would require each firm to maintain, for three years after any future advertising claim is made, records detailing the documentation for such claim.

It is interesting to note that these cases in a sense represent the culmination of the Commission's efforts to combine innovative theories and programs into an integrated approach to advertising regulation. They arose out of the new substantiation program, which is based on the fundamental premise that an advertiser should possess substantiation for its advertising claims. In addition, they combined the "reasonable basis" principle of *Pfizer* with the "unfairness doctrine" of *S&H*, which yielded the theory that the failure to possess substantiation amounts to a lack of reasonable basis, which in turn is an unfair act or practice under section 5.

### B. Counter-Advertising

Another Federal Trade Commission action which furthers the principle that the consumer should have as much objective information as possible to enable him to make a rational purchasing decision is its recent *Statement in Support of Counter-Advertising*.<sup>118</sup> This statement was submitted to the Federal Communications Commission in response to the FCC's Notice of Inquiry concerning the "Fairness Doctrine,"<sup>119</sup> particularly in response to Part III of the Inquiry, entitled "Access to the Broadcast Media as a result of Carriage of Product Commercials."

The term "counter-advertising" refers to the right of access in certain defined circumstances of consumer groups and other qualified and interested persons to the broadcast media for the purpose of expressing views and positions on issues raised by commercial advertising. The FTC has recommended that the FCC establish rules creating "open availability" for paid advertising and paid counter-advertising.<sup>120</sup> The Commission has also recommended that free access be given, in prime time, for discussion of controversial issues raised by commercial messages in certain carefully defined circumstances.

The FTC statement to the FCC acknowledges that advertising plays an important and necessary role in the dissemination of information in a competitive, free-enterprise economy. However, advertising today is

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118. On file with FCC in connection with current inquiry into the "Fairness Doctrine."

119. *Id.*

120. *Id.*

largely a one-way street. Its usual technique is to provide only one aspect of any story. It is probably the only form of public discussion where there presently exists no public debate. The purpose of counter-advertising is to make such debate possible and to encourage the dissemination of legitimate and relevant information not presently being made available to consumers. The desired result would be that the consumer would be made aware of all of the significant implications raised by advertisements.

Clearly, counter-advertising, like the substantiation program, is pertinent to the effectiveness of an over-all program of advertising regulation. Both are necessary supplements to, not substitutes for, the traditional adjudicative approach which has been the Commission's main tool for the regulation of advertising in the past. They will serve to fill gaps where regulation by litigation or rule-making is inappropriate or unfeasible. For example, where advertising claims are based on controversial facts or opinions, litigation may fail to resolve the controversy. Counter-advertising would at least subject such claims to open discussion, so that consumers would not be given the impression that controversial opinions are established facts. Counter-advertising would also be an effective means of dealing with claims which the substantiation program cannot reach because they are not "objectively verifiable."

The Commission's statement to the FCC suggests four major categories of advertising which seem appropriate areas for counter-advertising:

- (1) Advertising which makes claims of product performance or characteristics that explicitly raise controversial issues of current public importance, *e.g.*, ads explicitly addressed to issues of ecology, nutrition and automobile safety.
- (2) Advertising which stresses broad, recurrent themes which affect a purchasing decision in a manner that implicitly raises controversial issues of current public importance, *e.g.*, food ads which may be viewed as encouraging poor nutritional habits, or detergent ads which may be viewed as contributing to water pollution.
- (3) Advertising claims that rely upon scientific premises currently subject to controversy within the scientific community, *e.g.*, advertisements promoting a drug as effective in curing or preventing various problems and ailments. The claims might be based on the opinions of some members of the scientific community whose opinions may be hotly contested by other experts.

(4) Advertising that is silent about negative aspects of the advertised product, *e.g.*, advertisements for small automobiles which emphasize such factors as low cost and economy, without informing the public of countervailing considerations, for example, that such cars are arguably less safe than larger cars.

Of course, in order for a counter-advertising program to be effective, the counter-messages must be responsible and must be designed by persons who are informed on the issues. The logical organizations to play such a role are the consumer and public interest groups which today abound in the United States.

It should be emphasized that the Commission's position on counter-advertising does not envision free time being given except in situations where there are no other means to pay for the time. Even more important is the fact that the Commission's position does *not* envision a Babel-like future for commercial television, in which there would be a counter-commercial for every commercial appearing on the air. Instead, there would only be counter-commercials for those commercials which raised truly controversial issues of public importance, and as to which there was little or no presentation of the opposite viewpoint on the airwaves, whether in commercials or other forms of broadcast expression. Such counter-commercials could, under the FTC proposal, even be bunched in one time slot of perhaps 5 to 15 minutes once a week. It is at least arguable that such a program would be one of the more interesting ones on television, possibly attracting a large and loyal audience of viewers.<sup>121</sup>

#### IV. Conclusion

Advertising, in the classic economic system of modified capitalism, under which this country operates, performs a very key function. That function is to provide meaningful information about products to consumers who then will be able to make rational choices from amongst competing products. To the extent that advertising performs this function, it is playing its proper role; to the extent it does not so perform, it is malfunctioning.

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121. It should also be noted that the Commission staff has stated its belief that counter-advertisers who engage in misrepresentation in counter-commercials would be subject to FTC regulation. Statement of Robert Pitofsky, Director, Bureau of Consumer Protection, 1972 American Advertising Federation Convention and Public Affairs Conference, panel discussion of Advertising and The Law at 27-30.

In the past, the law has been directed mainly toward advertising which communicates misinformation. Such advertising is subject to attack on an economic as well as legal base and will continue to be the target of much advertising regulation. The Federal Trade Commission, as the primary regulator of advertising, has taken some initial steps which it is hoped will lead to more effective regulation of misinformative advertising. Because the Commission's mandate is broad and its resources limited, the first requirement is that the Commission adopt a programmatic approach to advertising regulation, selecting for action those matters which are most significant in terms of impact on consumers and the economy. The next step is to develop more meaningful remedies; it must not only seek to stop misinformative advertising, but also attempt to correct the impact such advertising may have had on the marketplace. The Commission, as noted earlier in this article, has taken steps to become more selective in the choosing of cases, and to develop more meaningful remedies such as corrective advertising.

Dealing with advertising other than that which is simply misinformative, or attempting to furnish to consumers more relevant product information than that which is now available in advertising, has been more difficult. However, the Commission of the 1970's will, in my judgment, be compelled to focus increasingly on these problems. Some progress has been made in defining certain areas where information is so vital that it must be disclosed in advertising (such as the statement of the Surgeon General's findings of the health hazards of cigarette smoking being required in cigarette advertising). Beyond that, the Commission has, through the 6(b) advertising substantiation program discussed earlier, made available to consumers the data upon which advertisers purport to rely in asserting advertising claims.

It is *not* the intent of the Commission or its staff to take a position that every possibly relevant or useful piece of information about advertised products must be disclosed. It is clear that a program with that goal in mind would be counter-productive—it would furnish consumers with more than they would care to know. What is being considered is an effort to determine what information is so material and meaningful that it must be disclosed, and to establish what means can best be used to insure more disclosures of pertinent information to consumers—whether directly in advertising, or counter-advertising, through advertising substantiation demands or by other means. Development of more means of disseminating information to consumers will lead our system to an era in

which consumers may in fact exercise the sovereignty in the marketplace which the system in theory grants them.

In the field of advertising regulation much remains to be done, but the FTC has at least begun to undertake the task. The public interest demands that the challenges of the undertaking be met and mastered.