

Duquesne Law Review

Volume 16
Number 4 *Criminal Law and Criminal
Procedure: Some Current Issues*

Article 16

1978

Federal Trade Commission - False Advertising - Corrective Advertising Remedy

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Recommended Citation

Marcel Weiner, *Federal Trade Commission - False Advertising - Corrective Advertising Remedy*, 16 Duq. L. Rev. 797 (1978).

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Recent Decisions

FEDERAL TRADE COMMISSION—FALSE ADVERTISING—CORRECTIVE ADVERTISING REMEDY—The United States Court of Appeals for the District of Columbia has held that the Federal Trade Commission's cease and desist power encompasses corrective advertising orders where past advertisements have played a substantial role in creating and reinforcing a false belief about the product and such belief would linger after the false advertising ceases.

Warner-Lambert Co. v. Federal Trade Commission, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978).

Listerine, a product of the defendant, Warner-Lambert Company, has been advertised since 1921 as an antiseptic mouthwash effective for the relief of colds and their symptoms. As of 1938, Listerine's label had included similar claims regarding colds and sore throats. In 1972, the Federal Trade Commission (Commission) issued a complaint¹ charging Warner-Lambert with violation of section 5(a)(1) of the Federal Trade Commission Act (Act) prohibiting "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"² by representing Listerine as effective in the prevention and cure of colds, their symptoms, and sore throats. Two years later, pursuant to the hearings held before an administrative law judge (ALJ),³ Warner-Lambert was found to

1. A similar complaint was issued in 1940 and following an evidentiary hearing, the Commission dismissed the complaint without prejudice for future reinstatement should future facts so warrant. *Lambert Pharmacal Company*, 38 F.T.C. 726 (1944). Other proceedings involving Listerine advertising occurred in 1932, 1951, 1958, and 1962. None resulted in any action against Listerine advertising.

Where the Commission has reason to believe that an unlawful act or practice has been or is being used, it is authorized to issue and serve upon the alleged offender a complaint stating the charges and affording the alleged offender the opportunity to appear and show cause why a cease and desist order should not be entered by the Commission. 15 U.S.C. § 45(b) (Supp. V 1975). Prior to issuing its formal complaint, the Commission will attempt to dispose of the case through its Informal Enforcement Procedure. *See Federal Trade Commission*, 16 C.F.R. §§ 2.21-.35 (1977). If an agreement is not reached, the Commission serves the party with a "proposed complaint." A respondent's agreement to a consent order at this stage is as binding as if the matter had been fully litigated. *See id.* § 2.32.

2. Federal Trade Commission Act, 15 U.S.C. § 41 (1970). The Act, as amended in 1975, broadened the Commission's power by declaring unlawful "[u]nfair methods of competition in or affecting commerce." *Id.* § 45(a)(1) (Supp. V 1975).

3. Where an agreement cannot be reached by the parties, both sides present evidence before an administrative law judge, who is himself a member of the Commission. *See Federal*

have misrepresented Listerine's effectiveness.⁴

In 1975, the Commission, in essentially affirming the ALJ's findings,⁵ ordered Warner-Lambert to cease and desist⁶ from making any further representations, directly or by implication, as to Listerine's effectiveness against colds, colds' symptoms, and sore throats, and to cease and desist from the dissemination of *any advertising* of Listerine unless such advertisements clearly and conspicuously disclosed that Listerine's prior advertisements had misrepresented its efficacy.⁷ The corrective advertising⁸ portion of the order was to continue until the company had expended approximately ten million dollars in advertising, the equivalent of Listerine's average annual advertising budget over the prior decade. Warner-Lambert

Trade Commission, 16 C.F.R. §§ 3.41-46 (1977). The ALJ's decision may be appealed by either party to the full Commission. See *id.* §§ 3.51-55.

4. Warner-Lambert Co., 86 F.T.C. 1398, 1484 (1975). The ALJ dismissed the allegations as to the falseness of the company's claim that recent tests showed children who gargle with Listerine twice a day have fewer and milder colds and miss fewer days of school due to colds than children who do not gargle twice a day.

5. The Commission held that the evidence introduced did not support the ALJ's conclusion as to customers' curative beliefs regarding Listerine.

6. If, after a hearing, "the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited . . . it . . . shall issue . . . an order requiring such [party] . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b) (Supp. V 1975).

7. Petitioner was ordered to cease and desist from disseminating any advertisement for Listerine, regardless of content, unless it clearly and conspicuously disclosed in each such advertisement that "[c]ontrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." 86 F.T.C. at 1513-14.

8. Corrective advertising, a newly fashioned remedy of the FTC, has as its purpose the correction or eradication of consumers' false beliefs regarding a product or service. The beliefs must be due to the advertiser's prior deceptive advertisements. As the advertisements would continue to have some effect even after the cessation of the advertisements, the advertiser is required to disseminate a message informing the public of the prior deception in all future advertisements for some predetermined time period regardless of the accuracy and truthfulness of the principle advertisement. The topic has given rise to much controversy and a proliferation of law review articles. See, e.g., Anderson & Winer, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEX. L. REV. 312 (1972); Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1976); Lemke, *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission*, 41 U. MICH. J.L. REF. 180 (1970); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349 (1973); Note, *False Advertising: The Expanding Presence of the FTC*, 25 BAYLOR L. REV. 650 (1973); Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496 (1972); Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477 (1971) [hereinafter cited as *Corrective Advertising*]; Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

petitioned the District of Columbia Court of Appeals for review,⁹ and, in a 2-1 decision, the court affirmed the Commission's order after deleting the confessional phrase.¹⁰

The court initially determined that the Commission's conclusions as to Listerine's ineffectiveness were supported by substantial evidence¹¹ and then proceeded to analyze the scope of the Commission's cease and desist power. Relying on the Supreme Court's ruling in *FTC v. Dean Foods*,¹² the majority noted that the Commission clearly had the power to shape remedies going beyond the literal meaning of a "cease and desist" order.¹³ Its analysis was then directed to the question of whether a corrective advertising order was outside the range of permissible remedies.¹⁴ The majority briefly examined the Act, including the 1975 amendments,¹⁵ and concluded that nothing in the legislative history of the Act removed corrective advertising from the Commission's class of permissible remedies.¹⁶

9. The court of appeals has the power to enter a decree affirming, modifying, or setting aside an order of the Commission. 15 U.S.C. § 45(c) (1970).

10. The court modified the order by deleting the phrase "[c]ontrary to prior advertising" from the corrective advertising portion of the order. *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 752 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978).

11. 562 F.2d at 753. 15 U.S.C. § 45(b) (Supp. V 1975) requires that the FTC make a report stating its findings as to the facts and provides for review in the appropriate court of appeals. "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." *Id.* § 45(c) (1970). The courts have held that the Commission may only draw inferences from findings of fact that are supported by "substantial evidence on the record considered as a whole." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The inferences drawn by "the Commission are accorded great deference in view of the Commission's position as the expert body in the area." *Jacob Siegel Co. v. FTC*, 326 U.S. 608 (1946).

12. 384 U.S. 597 (1966). In *Dean Foods*, the Supreme Court upheld the Commission's authority to seek a preliminary injunction against the defendant's proposed merger, repudiating the Court's holding in *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), that a Commission order requiring defendants to cease and desist from combining and cooperating in restraining competition could not include a divestiture order as the Commission had not "been delegated the authority of a court of equity." *Id.* at 623.

13. The Commission's discretion in choosing a remedy is well established. The Commission as the expert body may determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. *Jacob Siegel Co. v. FTC*, 326 U.S. 608, 612-13 (1946). It has been suggested that the Commission's choice of remedies be "treated as a finding of fact, subject to reversal only for lack of substantial evidentiary support." See *Corrective Advertising*, *supra* note 8, at 499. For a general discussion of the limitations of the Commission's powers, see note 69 and accompanying text *infra*.

14. 562 F.2d at 757.

15. Federal Trade Commission Improvement Act, 15 U.S.C. §§ 45, 57b (Supp. V 1975).

16. 562 F.2d at 757-58.

After summarily disposing of the first amendment issue¹⁷ by citing from the Supreme Court's dictum in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁸ that a state could regulate the form and content of deceptive advertisements, the majority embarked on an analysis of judicial precedent and determined that the remedy of corrective advertising had been "well established."¹⁹ Prior affirmative disclosure cases established the Commission's power to require an advertiser to disclose "unfavorable facts" where an advertisement without the disclosure was inherently misleading.²⁰ On point, the majority reasoned, were *Royal Baking Powder Co. v. FTC*²¹ and *Waltham Watch Co. v. FTC*,²² where the accumulated impact of past advertising necessi-

17. The first amendment issue is intertwined with the Supreme Court's recent decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which recognized advertising as a form of speech protected by the first amendment. Thus, the issues of chilling of first amendment rights and the constitutionality of compelling speech through a corrective advertising order were raised in the appeal.

18. 425 U.S. 748 (1976). In *Virginia State Bd. of Pharmacy*, the Court invalidated a state's ban on advertising of prescription drug prices.

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.

It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

Relying on the Court's dictum at footnote 24, that a state may "make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive," *id.* at 771-72 n.24 (emphasis added), the court in *Warner-Lambert* concluded that the first amendment does not present "an obstacle" to the Commission's power to issue a corrective advertising order.

Although a proper examination of the first amendment issue is beyond the scope of this paper, it is critical to note that the Court in *Virginia State Bd. of Pharmacy* was addressing itself to advertisements which were intrinsically deceptive, like those in the affirmative disclosure cases. See notes 43-51 and accompanying text *infra*.

In denying *Warner-Lambert's* petition for rehearing, the court reexamined the effect of *Virginia State Bd. of Pharmacy* on its ruling and concluded that it is "beyond doubt that the FTC order is a valid one." 562 F.2d at 771 (en banc). The court's reasoning was consistent with that expressed in the earlier opinion: future advertisements of Listerine, absent the required disclosure, would continue the public deception. In concluding that the corrective advertising order was the least restrictive means available to the Commission to correct the violation, the court seems to have ignored the remedy provided the Commission by the 1975 amendment, the "public notification respecting the rule violation on the unfair or deceptive act or practice." See notes 68-73 and accompanying text *infra*.

19. 562 F.2d at 757.

20. *Id.* at 759-61.

21. 281 F. 744 (2d Cir. 1922).

22. 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963).

tated that the respective advertisers disclose in future advertisements that the products they were currently advertising had either been substantially changed or were completely different products.²³ These cases, the majority concluded, indicated that the Commission had the power to order corrective advertising,²⁴ and that as applied here, corrective advertising bore a "reasonable relation" to the unlawful practices found to exist and was, thus, an appropriate remedy.²⁵

Judge Robb dissented insofar as the Commission's order included the remedy of corrective advertising.²⁶ The 1975 amendments to the Act,²⁷ in his opinion, indicated that Congress neither believed the

23. 562 F.2d at 761.

24. *Id.* at 762, 764. The majority noted its limited role in reviewing a Commission order. The judgment of the Commission, being that of an expert agency, is entitled to have its chosen remedy enforced, unless the court finds that it bears no reasonable relation to the unlawful practices found to exist. The court concluded that Warner-Lambert's own market surveys, as interpreted by the Commission's experts, "constitute[d] substantial evidence in support of the need for corrective advertising in this case." *Id.* at 763.

The market surveys contained data collected on an aided recall basis. A sample of consumers who were "exposed to a lot of Listerine advertising" were asked the following questions:

Thinking of the recent advertising you've seen or heard for each brand, which one of the following main ideas do you feel the brand has been advertising: *effective for colds and sore throats*, not too strong tasting, gives long lasting protection, recommended by dentists, leaves mouth feeling refreshed, effective for bad breath, leaves no unpleasant after-taste, *effective for killing germs*, pleasant flavor.

Warner-Lambert Co., 86 F.T.C. 1398, 1471 n.23 (1975) (emphasis added).

The Commission's experts' testimony as to the stability of consumers' beliefs, even during the spring and summer months when the "colds theme" was not being advertised, was the critical factor in the determination that corrective advertising was required to dissipate the residual effects of the false advertising.

25. 562 F.2d at 764.

26. *Id.*

27. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2201 (1975), 15 U.S.C. § 57b (Supp. V 1975). The relevant portions of the amendment state:

(a) (2) If any [party] . . . engages in any unfair or deceptive act or practice (within the meaning of section 45(a) of this title) *with respect to which the Commission has issued a final cease and desist order* . . . the Commission may commence a civil action against such [party] . . . in a United States district court or in any court of competent jurisdiction of a State. *If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.*

(b) The court . . . shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or to other [parties] . . . resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to . . . *public notification* respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that

Commission had, nor was intended to have, the power to order "public notification" by way of corrective advertising.²⁸ Judge Robb distinguished the cases relied upon by the majority because the affirmative disclosures in each were necessitated by the advertisements' failure to reveal the material facts necessary to clarify representations made in the advertisements. In the present case, however, the advertisements made pursuant to the cease and desist order would be truthful on their face. The disclaimer would be solely related to the uses advertised in the past and would, therefore, exceed the prevention of "illegal practices in the future" as contemplated by the Act. Thus, the dissent concluded that the corrective advertising order would improperly expand the Commission's statutory power.²⁹

The Federal Trade Commission Act³⁰ serves as the basis for the FTC's power to control the dissemination of false advertising. Although the legislative history of the original Act provided no evidence that Congress intended the Commission to control advertising,³¹ and although the Commission's authority to order the cessation of false advertising had been doubted immediately following

nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. §§ 57b(a)(2), 57b(b) (Supp. V 1975) (emphasis supplied by Judge Robb, 562 F.2d at 765).

28. 562 F.2d at 765.

29. *Id.* at 768. Judge Robb concluded by rejecting the proposition that the after-effects of advertising which have been discontinued pursuant to a cease and desist order can thus expand the Commission's statutory power to prevent future illegal practices. *Id.*

30. The Federal Trade Commission Act was enacted in 1914 as a result of general dissatisfaction with the Supreme Court's diminution of the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). The Supreme Court had adopted a rule of interpretation, popularly known as "the rule of reason," whereby only unreasonable restraints of trade would be proscribed by the Sherman Act. For an examination of the social and political pressures culminating with the congressional enactment of the Act, see G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 1-48 (1924) [hereinafter cited as HENDERSON]; Levy, *A Decade of the Federal Trade Commission* (pts. 1-4), 11 VA. L. REV. 21, 111, 196, 278 (1925); Montague, *Anti-Trust Laws and the Federal Trade Commission, 1914-1927*, 27 COLUM. L. REV. 650 (1927). During the same congressional session, the FTC's jurisdiction was greatly enlarged by the enactment of the Clayton Act which prohibited certain enumerated transactions, such as price discrimination, tying agreements, and interlocking directorates, and empowered the FTC to enforce compliance with the Act's provisions.

31. The Commission's jurisdiction in the field of misbranding and deceptive advertising has been referred to as "a more or less fortuitous by-product rather than the result of a clear legislative design." HENDERSON, *supra* note 30, at 339. *But see* Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 24-25 (1915).

the enactment of the original Act,³² the Supreme Court's ruling in *Winstead Hosiery Co. v. FTC*³³ and the Wheeler-Lea Amendment³⁴ of 1938 put such misgivings to a rest.

The Supreme Court in *Winstead Hosiery* held that the Commission had the authority to order the discontinuance of deceptive acts, including advertising, when such acts "constituted an unfair method of competition."³⁵ From the numerous decisions following *Winstead Hosiery*,³⁶ two distinct lines of cases can be discerned. The first involves the issuance of a cease and desist order in the vein of "go and sin no more." Orders to simply cease and desist from misrepresenting one's product or service have been issued where the advertiser misrepresented the composition or ingredients in his product,³⁷ its efficacy,³⁸ or its price,³⁹ and in numerous other situa-

32. See, e.g., *Winstead Hosiery Co. v. FTC*, 272 F. 957 (2d Cir. 1921), *rev'd*, 258 U.S. 483 (1922). The Second Circuit held: "Assuming that some consumers are misled because . . . some retailers deliberately deceive them . . . the result is in no way connected with unfair competition." *Id.* at 960-61. See also *L.B. Silver Co. v. FTC*, 289 F. 985, 992 (6th Cir. 1923) (Denison, J., dissenting).

33. 258 U.S. 483 (1922) (the manufacturer of knit underwear was ordered to discontinue the use of labels which falsely represented his product as 100% wool). In the first false advertising case to reach the courts, *Sears, Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919), the court upheld the Commission's authority to order the cessation of advertising where the advertisements falsely represented lower prices for sugars, teas, and coffees as being the by-products of quantity discounts offered the company, and that its commodities were purchased from selected brands abroad.

34. 15 U.S.C. § 45(a)(1) (1970) (amended 1975). In *FTC v. Raladam Co.*, 283 U.S. 643 (1931), the Supreme Court held that, absent some harm to competition, the Commission had no jurisdiction to issue cease and desist orders. The decision prompted Congress to enact the Wheeler-Lea Act of 1938. The Commission's jurisdiction over "unfair methods of competition in commerce" was enlarged so as to include the control of "unfair or deceptive acts or practices," thus extending the Act's protection against deception of the general public. To increase the Commission's effectiveness, Congress made the Commission's orders self-executing, with a civil penalty for the violation of a final order (15 U.S.C. § 45(g)(1) (1970)), provided for authority to seek injunctive relief pending the issuance of a complaint and until final disposition of the case (15 U.S.C. § 53 (1970)), and established a criminal sanction enforceable by the Attorney General upon information from the FTC (15 U.S.C. § 54(a) (1970)).

35. 258 U.S. at 494. The Court held that where "[t]he labels in question are literally false . . . [and] attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." *Id.* at 493.

36. See, e.g., *FTC v. Kay*, 35 F.2d 160 (7th Cir. 1929) (product falsely advertised and distributed as radium); *Fox Film Corp. v. FTC*, 296 F. 353 (2d Cir. 1924) (old motion pictures misrepresented as new films never before seen); *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922) (phosphate baking powder misrepresented as cream of tartar baking powder).

37. *Guarantee Veterinary Co. v. FTC*, 285 F. 853 (2d Cir. 1922) (salt blocks advertised as containing 16 medicinal ingredients).

38. *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968) (throat

tions such as misrepresenting the products' geographic origin,⁴⁰ the enterprise's business status,⁴¹ or the quality of the competing products.⁴²

The second line of cases involves cease and desist orders incorporating some form of affirmative disclosure in the future advertisements of the products.⁴³ The products had been presented as effective for specific maladies and the disclosures were required because the use of the products would be ineffective for the majority of consumers whose purchase decision would be based on the advertisements' general curative claims. The advertisements, without the required disclosures, were misleading on their face.⁴⁴ Thus, where

lozenges advertised as effective in relief of sore throats, including "strep throat").

39. *Regina Corp. v. FTC*, 322 F.2d 765 (3d Cir. 1963) (fictitious suggested retail price).

40. *Harsam Distribs., Inc. v. FTC*, 263 F.2d 396 (2d Cir. 1959) (domestic perfumes represented as French perfumes).

41. *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960) (salesmen represented as "trichologists").

42. *Carter Prods., Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963) (disparaging competing products by attributing inferiorities to them they did not possess).

43. Where, for example, an iron supplement product was advertised as helpful in the relief of tiredness, though the product was only effective if the consumer suffered from an iron deficiency, a cease and desist order was framed so that the advertiser could continue to advertise his product as helpful in the relief of tiredness *but* only for those individuals suffering from an iron deficiency. See *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

44. See, e.g., *Id.* (tiredness); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960) (bedwetting); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.) (baldness), *cert. denied*, 364 U.S. 827 (1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960) (baldness).

The earliest case upholding a cease and desist order which incorporated a form of affirmative disclosure was *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922). The court affirmed the Commission's order that the company cease from representing its new baking powder as the previous product it had manufactured, and that it delete the word "cream" from the product's name and incorporate the word "phosphate" so as to inform consumers of the product's new ingredient. The court agreed with the Commission's finding that petitioner, in the use of its labels and otherwise, was employing false and misleading advertising, which was calculated and designed to deceive the public, and which did deceive the public into buying a phosphate baking powder believing that it was the Dr. Price's Baking Powder which had been well known for 60 years as a cream of tartar powder, concealing and obscuring the fact that it was a radically different powder. *Id.* at 753.

In another early case, upon which many of the affirmative disclosure cases rely, *Haskelite Mfg. Corp. v. FTC*, 127 F.2d 765 (7th Cir. 1942), the court sustained the Commission's order requiring that the company clearly disclose on its synthetic buffet trays or upon the individual cartons that the trays, although indistinguishable from wood and advertised as wood, were really only covered with processed paper. The court reasoned that "[w]ithout some warning, the trays themselves are almost certain to deceive the buying public." *Id.* at 766. The court's primary concern was with the Commission's authority to proscribe an unlawful practice after it had ceased, viewing the disclosure as a guarantee against a recurrence of the past unlawful acts.

the product's advertisements are misleading or deceptive due to the advertisements' implied claims that the product will be beneficial for all individuals who suffer from a certain malady, such as baldness, bedwetting, or tiredness, a simple cease and desist order would preclude all advertising of the product unless the order was framed so as to preclude only the general curative claims.⁴⁵

In one of the first contemporary cases seeking an affirmative disclosure order, *Alberty v. FTC*,⁴⁶ the Commission was held to lack the authority to require the disclosure that the product would be effective in only rare instances.⁴⁷ Ten years later, in *Keele Hair & Scalp Specialists v. FTC*,⁴⁸ the Fifth Circuit Court of Appeals approved a cease and desist order compelling the advertiser to affirmatively disclose that its product would not cure male-pattern baldness, the prevalent form of baldness.⁴⁹ In *Keele* and its progeny, *J.B. Wil-*

Only one of the cases cited by the court involved an order requiring affirmative disclosure, *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). There, the Court affirmed the order, though modifying it by deleting the confessional portion of the order, on the basis of § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970), expressly authorizing affirmative action in addition to cease and desist orders. No such provision exists in the Federal Trade Commission Act. See Oettle, *The Power of the NLRB to Order Affirmative Action*, 5 HARV. LEGAL COMMENTARY 236 (1968).

45. The disclosures were designed to prevent similar future claims from being misleading. Because the future advertising of these products would have to refer to the products' purposes, the required disclosure would prevent the public from being misled into believing that the products would be effective regardless of the malady's cause. See Note, *Corrective Advertising*, *supra* note 8, at 489-90.

46. 182 F.2d 36 (D.C. Cir. 1950).

47. In deleting the portion of the order requiring the affirmative disclosures, the majority stated:

We are concerned with the scope of the power thus sought by the Commission

Such a requirement seems to us to have no relation to the prevention of falsity in advertising. It is a wholly different power.

. . . Both [the] purpose and terms [of the Act] are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority.

Id. at 39.

48. 275 F.2d 18 (5th Cir. 1960).

49. *Id.* at 23. In *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960), petitioners were engaged in the leasing of a device for the prevention of enuresis (bed-wetting). The Commission found that the device would not be effective in the majority of cases, those involving an organic defect or disease, and ordered petitioners to so disclose in their future advertisements. The court, in sustaining the Commission's order, read *Alberty* as only requiring a finding that the advertisements would be misleading in a material respect without the required disclosure. Referring to the *Alberty* court's footnoted reference to both sections five and twelve of the Act, the *Feil* court concluded that the holding was based on the narrower provisions of section twelve, 15 U.S.C. § 52 (1970), which prohibit the false advertising of foods, drugs, devices,

liams Co. v. FTC,⁵⁰ the courts sustained the Commission's orders on the basis of the Commission's findings that the advertisements would be misleading in a material respect unless accompanied by disclosures stating the improbability of success.⁵¹

Having gained approval of its affirmative disclosure orders, the FTC in *Campbell Soup Co.*⁵² asserted it had the authority to order corrective advertising, though declining to exercise it in that case.⁵³ The remedy was first employed when Continental Baking Company consented to a corrective advertising order involving its Profile Bread.⁵⁴ Although subsequent consent decrees have been negotiated and accepted by the Commission,⁵⁵ the *Warner-Lambert* court is the first to uphold the FTC's authority to require corrective advertising.

In its analysis of the judicial precedent, the court apparently distinguished two categories of affirmative disclosure cases. The

and cosmetics. This reading, however, is questionable as the case was not remanded for further findings. See *Corrective Advertising*, *supra* note 8, at 499.

50. 381 F.2d 884 (6th Cir. 1967).

51. *Id.* at 890.

52. 77 F.T.C. 664 (1970). Campbell Soup Co. had run television commercials showing its soup with a rich and thick consistency by placing marbles at the bottom of the soup bowl. A consumer protection group, Students Opposing Unfair Practices (SOUP), unsuccessfully attempted to intervene in the Campbell action by petitioning the Commission to withdraw its provisional acceptance of a consent decree whereby Campbell would be prohibited from using similar techniques in the future, and instead order corrective advertising.

Corrective advertising would require that a party, who has falsely advertised, expend a certain portion of their advertising space and time to dissipate the residual or lag effects of the past false advertising, regardless of the truthfulness and accuracy of the future advertising. It is similar in nature to the affirmative action orders of the NLRB, see note 44 *supra*, and the affirmative disclosure requirements of the Food and Drug Administration, both done pursuant to an explicit grant of such power. National Labor Relations Act, 21 U.S.C. § 160(c) (1970); Food & Drug Act, 21 U.S.C. § 321(n) (1970).

53. The Commission concluded: "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." 77 F.T.C. at 668. The Commission, however, concluded that corrective advertising was not warranted in the action.

Subsequent assertions of such authority came in the complaints against the Standard Oil Co. of California by implying that its gasoline additive "F-310" had a significant effect on the reduction of air pollution, Standard Oil Co. of Calif., [1970] 3 TRADE REG. REP. (CCH) ¶ 19,428, and against ITT Continental Baking Co. for implying that eating Profile Bread would lead to weight reduction, ITT Continental Baking Co., 79 F.T.C. 248 (1971).

54. ITT Continental Baking Co., 79 F.T.C. 248 (1971). Continental Baking Co. allegedly misrepresented the calories per slice of bread as lower than those of other breads and therefore as effective in weight reduction. The fewer calories per slice were due to the slices being thinner.

55. See, e.g., Pay Less Drug Stores Northwest, Inc., 82 F.T.C. 1473 (1973); Shangri-La Indus., 81 F.T.C. 596 (1972); Ocean Spray Cranberries, Inc., 80 F.T.C. 975 (1972).

first required the disclosure of some material facts without which the advertising would be misleading.⁵⁶ The second category of cases were identified as those requiring affirmative disclosure where "an advertisement, although not misleading if taken alone, becomes misleading considered in light of past advertisements."⁵⁷

In the two cases discussed by the majority from the second category, *Royal Baking Powder Co. v. FTC*⁵⁸ and *Waltham Watch Co. v. FTC*,⁵⁹ the Commission's affirmative disclosure orders were sustained by the courts. In *Royal*, the order required that the company cease from representing its new product, containing phosphates, as its prior product, which had contained the more expensive cream of tartar, and ordered the company to delete the word "cream" from the product's name and incorporate the word "phosphate" in its labels and future advertisements.⁶⁰

In *Waltham*, the original manufacturer of Waltham watches, after ceasing production, transferred its tradename, trademark, and goodwill to a successor corporation. The successor imported its watches but advertised them as a "product of the Waltham Watch Company since 1850." The Commission ordered the company to cease and desist from using the Waltham name as an aid in selling its product unless it disclosed in all future advertisements that the product was not manufactured by the original Waltham Company and that the product was imported.

The majority's reading of the above two cases focused on the reputation that the products had established.⁶¹ However, *Royal* and *Waltham* involved advertisements which falsely represented new products as the products proffered in the past. The public was intentionally deceived into buying product A where the advertised product was B. The plain and simple fact is that the advertisements of these products would be deceptive in the absence of a disclosure that, although the names were the same, the products were differ-

56. *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (tiredness); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960) (bedwetting); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.) (baldness), *cert. denied*, 364 U.S. 827 (1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960) (baldness).

57. 562 F.2d at 760.

58. 281 F. 744 (2d Cir. 1922).

59. 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963).

60. *See note 44 supra*.

61. 562 F.2d at 761.

ent.⁶² In *Warner-Lambert*, on the other hand, it was *only* the effect of the past advertising that the Commission wished to eradicate. Neither the product nor its ingredients had been altered. Thus, the facts in *Royal* and *Waltham* presented the court with an issue different from that in *Warner-Lambert*, and neither case can serve as authority for the Commission's power to issue the corrective advertising order it did.

The majority, however, seemed to proceed on the assumption that *Dean Foods*, an antitrust case, established the basis for the Commission's wide discretion in developing appropriate remedies for all cases. The Commission's orders in antitrust cases, however, are directed at activities which, because of their ongoing nature, are violative of the antitrust laws and are therefore unlawful.⁶³ Such is not

62. In its opinion, the majority rejected the dissent's contention that the labels and advertising were false and misleading on their face. The advertisements and labels, the majority stated, were "strictly truthful" and only became misleading when considered in light of the past advertisements. The majority's conclusion, however, runs contrary to the respective courts' opinions, that the basis of the actions was the deceptive nature of the advertisements and labels. *Id.* at 760 n.57.

In *Royal*, the court stated: "The Commission found that the advertising was false and misleading, in representing to the public that the price of said new phosphate baking powder had been reduced to about one-half its former cost, when in fact the price of said powder had been at all times the same." 281 F. at 749. The court went on to conclude that "the fact that the manufacturer is passing off one of this products for another . . . [is a] deception of the public." *Id.* at 753. See also note 44 *supra*.

In *Waltham*, the court's reasoning was similar. "The owner of a trademark or tradename may not use, nor permit the use of such trademark or tradename in a manner designed to deceive the public." 318 F.2d at 31.

63. To be sure, the Commission's view that the residual effects of false advertising represent a continuing injury to the public and to competition is unquestioned. The test established by the Commission and approved by the court states:

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

86 F.T.C. at 1499-1500 (emphasis added). However, as the test indicates, corrective advertising is aimed at the "ill effects of the [prior] advertisement" and not at the continuing activity, such as an illegal merger, which is in itself unlawful.

As stated in *Heater v. FTC*, 503 F.2d 321, 325 (9th Cir. 1974), "the Commission was not given the power to recast the consequence of conduct occurring prior to its entry of an order; Congress was unwilling to subject the operation of a business to the risk of subsequent Commission condemnation." In the accompanying footnote the court goes on: "We sympathize with the Commission's problem. Under the present design of the Act, those sufficiently

the case with these advertisements. The Commission's wide discretion to mold its cease and desist orders in antitrust actions⁶⁴ does not establish the Commission's authority to order corrective advertising where the activity involves a facially truthful and accurate advertisement.

Recognizing that the Commission was constrained to a "range of permissible remedies" under the Act, the majority analyzed the effect of the 1975 amendments to the Act⁶⁵ and concluded that the amendments "did not remove corrective advertising from the class of permissible remedies."⁶⁶ As the dissent pointed out, however, the issue was not whether the amendment or any other portion of the Act prohibited the use of corrective advertising as a remedy, but whether such remedy was within the Commission's arsenal of remedies under the Act.⁶⁷

In any FTC action, especially one concerned with the regulation of commercial speech, a key question must be whether the Commission has the power to require the particular remedy chosen. That the "Commission has a wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in [an] area of trade and commerce" is unquestioned.⁶⁸ That its discretion is not unbounded is illustrated in cases where the courts have refused to sustain or have modified Commission orders.⁶⁹ Because the Commission's orders are generally deemed to be prospective in nature,⁷⁰ the test that has emerged is whether the remedy selected bears a "reasonable relation to the unlawful practices found to exist."⁷¹

unscrupulous or reckless to engage in conduct clearly forbidden by the Act, may do so until a cease and desist order is entered, escaping with the fruits of the violation." *Id.* at 325 n. 16.

64. *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971) (divestiture order); *Charles Pfizer & Co., Inc. v. FTC*, 401 F.2d 574 (6th Cir. 1968) (compulsory licensing of a patent), *cert. denied*, 394 U.S. 920 (1969); *Luria Bros. & Co. v. FTC*, 389 F.2d 847 (3d Cir.) (order limiting purchases between parties), *cert. denied*, 393 U.S. 829 (1968).

65. *See note 27 supra.*

66. 562 F.2d at 758.

67. *Id.* at 766.

68. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). *Accord*, *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. National Lead Co.*, 352 U.S. 419 (1957).

69. *See FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948) (order may not be punitive); *Heater v. FTC*, 503 F.2d 321, 323-24 (9th Cir. 1974) (order requiring restitution of monies not within the Commission's power); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968) (unlawful practice had been discontinued); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 891 (6th Cir. 1967) (order too broad).

70. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

71. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). *Accord*, *FTC v. National Lead Co.*, 352 U.S. 419 (1957). An alternate interpretation of the *Siegel* holding is whether the remedy

In enacting the 1975 amendments, Congress recognized the limited scope of the Commission's cease and desist power⁷² and therefore provided it with additional remedies,⁷³ including "public notification" of unlawful practices where the Commission had issued a final cease and desist order and could show that the respondent had acted in bad faith. The majority differentiated public notification from corrective advertising by stating that public notification is a more general term with the remedy directed at past consumers.⁷⁴ Although it is true that public notification is a more general term, it is also a less onerous remedy in that only "notification" of the rule violation is required.⁷⁵ A corrective advertising campaign, on the other hand, has as its goal the dissipation of the lag effects⁷⁶ of

was truly necessary, "whether the Commission abused its discretion in concluding that no change short of . . . excision of the tradename would give adequate protection." 327 U.S. at 612. This narrower reading of *Siegel* would require that the Commission choose the least damaging or restrictive remedy in order to accomplish its objective.

72. Senator Moss, a co-sponsor of the 1975 amendment, indicated a similar belief.

The Federal Trade Commission's improvements specified in the bill will afford, in my opinion, long-term improvement in the fairness of the American marketplace. No longer will the Federal Trade Commission be confined to slapping the wrists of persons who engage in unfair or deceptive practices and telling them not to do it again. 120 CONG. REC. 49,612 (1974).

73. See note 27 *supra*.

74. The majority answered in the alternative that a subsequent congressional grant could not be veiwed as affirmative proof that the Commission did not have such power prior to the congressional enactment. Congress might have enacted the legislation to avoid adverse contentions and litigation. 562 F.2d at 758 n.39. See *FTC v. Dean Foods Co.*, 384 U.S. 597, 610 (1966); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 696 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *But see* note 72 *supra*.

75. See note 27 *supra*.

76. The lag effects of advertising refer to the effects that persist subsequent to the running of a commercial or advertisement. Although the duration of the effects of an advertisement vary with the type of product being advertised, the content of the advertisement, competitive advertisements, and numerous other factors, it is generally agreed in the current marketing literature that the direct effects of advertising become minimal after a period of one year. Much of the earlier research in advertising lag effects was performed with yearly data which resulted in advertising decay periods of up to five years and more. Clarke, *Econometric Measurement of the Duration of the Advertising Effect on Sales*, 13 J. MARKETING RESEARCH 347 (1976), found that the "average implied duration interval derived from annual data is more than 17 times as long as the average implied duration interval from monthly data." *Id.* at 350. For weekly data, the average implied duration interval was less than 1/2 that of the monthly data. He concludes that "the published econometric literature indicates that 90% of the cumulative effects of advertising on sales of mature, frequently purchased, low priced products occurs within 3-9 months of the advertising. The conclusion that advertising's effect on sales lasts for months rather than years is strongly supported." *Id.* at 355. See generally K. PALDA, *THE MEASUREMENT OF CUMULATIVE ADVERTISING EFFECTS* (1964); Appeal, *On Advertising Wearout*, 11 J. ADVERTISING RESEARCH 11 (1971); Burt & Dobell, *The Curve of Forget-*

advertising, connoting a reeducation of the consuming public, which, in the case of Listerine, would require the inclusion of the mandated corrective advertising copy in the next \$10 million of advertising. For a district court to issue an order compelling public notification, the Commission must show a bad faith violation of the Commission's cease and desist order. Yet, under the majority's reasoning, a cease and desist order incorporating the more onerous corrective advertising remedy requires no showing of bad faith. In addition, although corrective advertising is directed at "future consumers," the intent in issuing the order is clearly to eradicate the false beliefs held by present consumers. In other words, corrective advertising's aim is to redress the injury resulting from the product's past false advertising by eliminating that portion of consumer's beliefs or images due to the deceptive advertising. Thus, corrective advertising would, of necessity, relate solely to past advertising and would, therefore, exceed the Commission's mandate of preventing illegal practices in the future.⁷⁷ The Commission's prospective cease and desist powers cannot be expanded to include the power to order corrective advertising where the goal would necessarily be to dispel the residual effects of advertisements which have been discontinued pursuant to a cease and desist order.⁷⁸

Having determined that the Commission had the authority to order corrective advertising, the majority held that the standard adopted by the Commission for the imposition of corrective advertising was "entirely reasonable."⁷⁹ The FTC standard dictates two

ting for Advertising Material, 11 J. APPLIED PSYCHOLOGY 5 (1972); Craig, Sternthal & Leavitt, *Advertising Wearout: An Experimental Analysis*, 16 J. ADVERTISING RESEARCH 25 (1976); Dyer & Kuehl, *The "Corrective Advertising" Remedy of the FTC: An Experimental Evaluation*, 36 J. MARKETING 27 (1974); Greenberg & Suttoni, *Television Commercial Wearout*, 13 J. ADVERTISING RESEARCH 47 (1973); Griliches, *Distributed Lags: A Survey*, 35 ECONOMETRICS 1 (1967); Hunt, *Effects of Corrective Advertising*, 13 J. ADVERTISING RESEARCH 15 (1973); Simon, *The Effect of Advertising on Liquor Brand Sales*, 6 J. MARKETING RESEARCH (1969).

77. See *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). Although the court in *Heater* was concerned with the Commission's authority to order the restitution of monies secured through deceptive practices, the court's analysis of the scope of the Commission's "cease and desist" order is equally applicable to the *Warner-Lambert* case. In both cases, the Commission's concern was with the "lingering effects" of the unlawful act or practice and the "continuing injury" they entailed. Are consumers who have been defrauded of their life savings any less injured than consumers who are deceived into thinking that a slice of some bread has fewer calories than a slice of another? Are the lingering effects of the deceptive advertisements in the consumers' minds more onerous than the lingering effects on the consumers' depleted life savings?

78. 562 F.2d at 768.

79. *Id.* at 762.

factual inquiries: first, whether the advertisements played a substantial role in creating or reinforcing a false belief about the product; and, second, whether the belief would linger after the false advertising ceases.⁸⁰ If the answer to these two questions is yes, then corrective advertising is justified. By way of dictum, the majority proceeded to lay the foundation for shifting the burden of proof to defendant companies by stating that in some cases it would be appropriate "to presume the existence of the two factual predicates for corrective advertising."⁸¹

As desirable as the remedy of corrective advertising may be in certain circumstances, it is just as potent and dangerous. Under the guidelines proposed by the Commission and approved by the court, almost any advertising found to be misleading could be subject to a corrective advertising order. Such power in the hands of an agency which is prosecutor, judge, and jury must be scrutinized and granted only if appropriate guidelines are provided. The Commission has recently charged the makers of Anacin, Bufferin, Bayer, Cope, Excedrin, Excedrin PM, Midol, and Vanquish with false and misleading advertising and is seeking corrective advertising orders for each product. Since there are substantial questions concerning the Commission's authority to issue corrective advertising orders, those potential cases may provide further judicial analysis of the subject.

The Supreme Court has denied Warner-Lambert's appeal, presumably to give the various circuits an opportunity to provide additional input regarding the extent to which the Commission's power may be expanded. In the case of corrective advertising, the burden on the lower courts is increased as they must give due consideration to the newly recognized but as yet uncharted protection afforded to commercial speech. In approaching their task, the courts would do well to consider the Supreme Court's admonition in *FTC v. Raladam*: "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial function."⁸²

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80. See note 64 *supra*.

81. 562 F.2d at 762.

82. 283 U.S. 643, 649 (1931).