

Supplanting Government Regulation with Competitor Lawsuits: The Case of Controlling False Advertising

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INTRODUCTION

In this period of hundred billion dollar federal budget deficits, fiscal austerity and privatization have become critical concepts for the Bush Administration. This is particularly so because the President was elected on a campaign that promised to follow President Reagan's fiscal policies with the slogan "read my lips, no new taxes." In this economic and political climate, it is not surprising that the Federal Trade Commission's advertising program has been "downsized." It also is not surprising that private competitor advertising litigation has expanded, as if to fill the void.

The recent American Bar Association report on the Federal Trade Commission (FTC or Commission) noted that FTC resources for advertising enforcement were cut 42% from fiscal years 1978 to 1987, from 24% of the total consumer protection resources to 17.03%.¹ Some of these resources were redirected against fraud, including advertising fraud.² However, according to the report, there is still a perception that the FTC "has largely abandoned the regulation of advertising, especially national advertising."³

In contrast, commentators have noted the rise of private lawsuits, predominantly filed by competitors, challenging false advertising under

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1. Report of the ABA Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, *reprinted in* 58 *ANTITRUST L.J.* 43, 71 n.41 (1989) [hereinafter ABA Report].

2. *Id.* at 80, 151.

3. *Id.* at 70-71. See also Cohen, *FTC Memo Hits Ad Self-Regulation*, *ADVERTISING AGE*, Feb. 7, 1983, at 42 ("During a year when the ad industry self-regulation system identified nearly 60 instances where national advertisers were making claims that could not be substantiated, the Miller management at the FTC failed to act against a single case involving national ads that have run in major media since the present regime took office."); McGrew, *Advertising Issues Avoided by the FTC in Past Year*, *Legal Times*, Jan. 7, 1985, at 12.

the Lanham Act, which they note has been recently amended to make competitor litigation more likely.⁴ The Lanham Act generally has been limited to suits in which the plaintiff alleges business, rather than consumer injury.⁵ In the premier case denying consumer standing, *Colligan v. Activities Club of New York, Ltd.*,⁶ the court stated that "Congress' purpose in enacting § 43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interest of consumers generally."⁷ The court in *Ragold, Inc. v. Ferrero, U.S.A., Inc.*,⁸ was equally blunt: "[P]rivate litigation under the Lanham Act seeks primarily to regulate business competition, with any benefit to the consuming public incidental."⁹

However, this view has been strongly criticized as inconsistent with the plain meaning of the Act and its legislative history.¹⁰ Today, most courts recognize that there is a "strong public interest" in using the Lanham Act to prevent misleading advertising.¹¹ This public interest component is comparable to the FTC's statutory mandate.¹² The predominance of competitor plaintiffs in Lanham Act false advertising lawsuits and the availability of a comparable regulatory agency make false advertising a suitable subject for comparing government regulation with competitor lawsuits as a means of promoting public interest.

4. 15 U.S.C. § 1125(a), amended by Pub. L. No. 100-667, tit. I, § 132, 102 Stat. 3946 (1988). For commentary on the increasing numbers of lawsuits, see Buchanan & Goldman, *Us vs. Them: The Minefield of Comparative Advertising*, 67 HARV. BUS. REV. 38 (1989); Trachtenberg, *New Law Adds Risk to Comparative Ads*, Wall St. J., June 1, 1989, at B6.

5. The one exception when a consumer was allowed to sue under the Lanham Act is *Arnesesen v. Raymond Lee Org., Inc.*, 333 F. Supp. 116 (C.D. Cal. 1971).

6. 442 F.2d 686 (2d Cir.), cert. denied, 404 U.S. 1004 (1971). See also *Johnson & Johnson v. Carter-Wallace, Inc.*, 487 F. Supp. 740 (S.D.N.Y. 1979).

7. *Colligan*, 442 F.2d at 692.

8. 506 F. Supp. 117 (N.D. Ill. 1980).

9. *Id.* at 125 n.9. See also *American Home Prods. Corp. v. Johnson & Johnson*, 436 F. Supp. 785, 797 (S.D.N.Y. 1977) ("an action under the Lanham Act . . . is not the proper legal vehicle in which to vindicate the public's interest in health and safety"), *aff'd*, 577 F.2d 160 (2d Cir. 1978).

10. See, e.g., *Morris, Consumer Standing to Sue for False and Misleading Advertising Under Section 43(a) of the Lanham Trademark Act*, 17 MEM. ST. U.L. REV. 417, 430-32 (1987); *Thompson, Consumer Standing Under Section 43(a): More Legislative History, More Confusion*, 79 TRADEMARK REP. 341 (1989).

11. See, e.g., *American Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987). See also *Coca-Cola Co. v. Proctor & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987); *Stiffel v. Westwood Lighting*, 658 F. Supp. 1103, 1116 (D.N.J. 1987) ("Because the public as well as competitors are to be protected from false . . . advertising. . .").

12. 15 U.S.C. § 45(b) (1988) requires that the Commission action be in the public interest. See *FTC v. Klesner*, 280 U.S. 19 (1929). The Commission has "broad discretion" to make this determination. See *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir.), cert. denied, 314 U.S. 668 (1941).

Section I of this Article discusses the policy implications of public and private regulation. Section II describes the similarities and differences of proving false advertising, including remedial consequences, between the FTC Act and the Lanham Act. Section III examines cases brought under each statute in the past ten years, and Section IV presents four types of specific case comparisons. Finally, an overall evaluation is made.

I. POLICY CONSIDERATIONS

A. *Market Incentives for False Advertising*

Jordan and Rubin argue that the common law is economically efficient.¹³ They believe that the market provides few incentives for false advertising because consumers can verify most claims through product examination or use.¹⁴ Moreover, allowing competitors to sue one another for false advertising might discourage useful advertising and make entry more difficult. They argue that for these reasons, the common law efficiently limited a firm's legal recourse against a rival's advertising.¹⁵ Common-law courts were reluctant to allow businesses to sue for redress against a rival's advertising misrepresentations even when such misrepresentations took business away from the injured firm.¹⁶

If the rival misrepresentations concerned: (1) the identity of the manufacturer of its products (*i.e.*, "passing off" its products as those of the plaintiff); (2) the plaintiff's personality or character (defamation); or (3) the plaintiff's products (disparagement), the common law allowed suit.¹⁷ However, for disparagement, the courts typically would not grant an injunction, but would only award special damages, which had to be proven with considerable specificity.¹⁸ The plaintiff also had the burden of proving

13. Jordan & Rubin, *The Economics of False Advertising*, 8 J. LEGAL STUD. 527, 535-40 (1979).

14. *Id.*

15. *Id.*

16. *See, e.g.*, *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2nd Cir. 1925) ("The law does not allow him [the damaged competitor] to sue as a vicarious avenger of the defendant's customers," but does allow injunctive relief if diversion of trade can be proven.), *rev'd on other grounds*, 273 U.S. 132 (1927); *American Washboard v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900) (no relief). *See also* Schulman, *False Advertising: A Discussion of a Competitor's Rights and Remedies*, 15 LOY. U. CHI. L.J. 1, 4-8 (1983); Note, *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 905-07 (1964).

17. *See, e.g.*, K. PLEVAN & M. SIROKY, *ADVERTISING COMPLIANCE HANDBOOK* 363-92 (1988); Jordan & Rubin, *supra* note 13, at 536.

18. Note, *supra* note 16, at 893.

that the allegedly disparaging claims were false and malicious.¹⁹ Defamation was somewhat easier to prove because malice and proof of financial damage were not required and because the defendant had the burden of proving the truth of its statements. However, injunctions typically were not granted for defamation.²⁰ Moreover, the plaintiff had to prove that the challenged statements impugned the integrity or character of the business.²¹

“Passing off” cases were most likely to obtain injunctive relief. Damages were also available, if damages could be proven. Jordan and Rubin argue that the relative ease in proving “passing off” and defamation over disparagement was justified by the fact that consumers could evaluate the disparagement claims through product examination or use, but could not readily evaluate the truth of a claim about a firm’s identity or integrity (e.g., that its owners are devil worshipers).²²

Jordan and Rubin’s simple analysis supports their belief that limited common-law relief is sufficient and that neither FTC nor Lanham Act advertising regulation is needed for the protection of consumers.²³ There are a number of flaws in their argument. For purposes of this analysis, Jordan and Rubin’s implicit adoption of consumer injury as the appropriate criterion for judging the regulation of false advertising is adopted. As noted above, this criterion is consistent with both the FTC and the Lanham Act.²⁴

First, Jordan and Rubin’s argument is based upon their belief that most product attributes of interest to consumers can be readily judged by consumers either before or after purchase. However, growing use of mail and telemarketing techniques mean that consumers cannot examine goods before purchase and may be deceived into purchase even regarding search attributes (*i.e.*, attributes consumers can judge upon product examination) by “fly-by-night” operators.²⁵ Moreover, comparative advertising about search attributes is more difficult for consumers to verify if the consumer must visit several dealers to examine all of the goods compared. In either case, individual consumer injury may be too small to justify consumer lawsuits, particularly against a business located in a

19. *Id.*

20. *Id.*

21. *Id.* at 893-94.

22. Jordan & Rubin, *supra* note 13, at 536-37.

23. *Id.* at 541-42, 545-49, 551-53.

24. *See supra* notes 11-12 and accompanying text.

25. *See Reich, Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 39-40 (1979). *Cf. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 687 (1977) (deceptive price advertising might deceive consumers into making purchases, but consumers can often check the validity of such claims).

distant state.²⁶ However, the magnitude of aggregate consumer injury may be sufficiently large to justify a government or a competitor lawsuit.

Second, Jordan and Rubin ignore the role of product price and frequency of purchase in determining the amount of consumer injury. They assume that for experience attributes (*i.e.*, those that can only be evaluated after purchase), consumers may be deceived into a single purchase, but injury will be minimal. However, if the goods are infrequently purchased and evaluation takes a long time, businesses have stronger incentives to advertise falsely. Goods with these characteristics are frequently expensive; therefore, additional consumer protection may be cost justified. Of course, if the price of such goods is sufficiently high and consumers can prove that the advertising claims became part of the bargain and therefore constitute an express warranty, consumers may have the incentive to sue for breach of warranty.²⁷ This is particularly true when attorneys can form a large class of consumers as plaintiffs.²⁸

Third, with the exception of producer identity and integrity, Jordan and Rubin ignore credence attributes — attributes that consumers cannot readily verify. Advertising involving claims concerning credence characteristics have great potential for being false without additional regulation.

It is useful to divide credence attributes into two categories. Some attributes cannot be accurately evaluated through product use, but consumers may get some sense of such claims' truthfulness over time even without being able to perform a precise evaluation. Examples of such attributes include claims concerning joint inputs when all of the inputs contribute to performance, health claims for foods, and claims for drugs in which the placebo effect may cause consumers to believe the product works better than it does.

The second category of credence attributes are those that the consumer cannot evaluate through product use. These may be called faith attributes. Examples include manufacturer identity, geographic origin, certification as union made, exclusivity claims such that a product is patented, and many content claims (*e.g.*, that a food contains a specified amount of a nutrient). Advertising about faith or credence characteristics or about experience claims for expensive, durable products have the greatest potential for being false and provide the strongest justification for regulation beyond

26. Jordan & Rubin, *supra* note 13, at 545.

27. For a recent discussion of consumer suits for breach of express warranties based on advertising claims, see Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 OHIO ST. L.J. 671 (1986).

28. See Moewe, *Consumers, Class Actions and Costs: An Economic Perspective on Deceptive Advertising*, 18 U.C.L.A. L. REV. 592 (1971) (Supreme Court has held that injury of individual consumers cannot be aggregated to satisfy the \$10,000 diversity jurisdiction requirement).

the common law. Thus, there appears to be a need for additional control of false advertising beyond that provided by the common law. The next section examines FTC regulation and Lanham Act competitor lawsuit regulation to explore the similarities and differences from a public policy perspective.

B. Public versus Private Regulation

No one really knows what motivates regulatory agencies.²⁹ The theory of public interest regulation assumes that the FTC seeks to bring cases in which the estimated consumer injury is greater than the expected cost of the proceeding. Given an unlimited budget, the FTC would place all potential cases in order of net benefit and bring all of the cases in which the net benefit, as measured by future injury prevented, equals the expected cost of proceeding. With a limited budget, the FTC should choose those cases with the maximum net benefit. The FTC should look at past consumer injury when seeking refunds and future injury when seeking injunctive relief. The FTC may also include some deterrent benefit by attacking a particular industry or practice anticipating that others will "get the message" without the necessity of additional formal proceedings.

The expected costs of formal proceedings include the probability of settlement times the cost of proceeding until settlement summed for all possible settlements (including no settlement, an appeal to a court of appeals, and possibly an appeal to the United States Supreme Court). If the Commission challenges explicit claims that are readily established by examining the ads, its costs are lower than when it challenges implicit ads in which there likely will be conflicting evidence of consumer interpretation. Similarly, if the claims are challenged as being unsubstantiated, the FTC need only prove the inadequacy of the purported substantiation, rather than incurring the additional cost of proving that the claims are false. Lastly, the toughness of the desired order (refunds, disclosures, scope of products, and types of claims covered) will affect the willingness of the respondent to settle.

For Lanham Act competitor plaintiffs, the cost-benefit calculus is different. The plaintiff probably has lower costs than the FTC for monitoring product claims because of its familiarity with products in its industry. The plaintiff may even have lower costs of proving claims false

29. For a survey of articles discussing economic theories of regulation, see McCormick, *The Strategic Use of Regulation: A Review of the Literature*, in *THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS* 13, 17-24 (1986) (1984 F.T.C. Law and Economics Conference); Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* (R. Noll ed. 1985).

if it already has conducted tests or has low costs for doing so because of its in-house product expertise.

The plaintiff may also have lower benefits than the FTC because it looks at the injury to its own sales and profits, rather than total consumer injury. Competitor injury may differ from consumer injury as defined by the FTC. For example, the FTC may have little interest in protecting consumers from advertising that misleads them into trying a disposable product. If consumers are dissatisfied with a product, they can decide not to repurchase. Businesses, on the other hand, may litigate over such advertising for fear that consumers, once they try the new product, will not switch back because they prefer the new product (despite its misleading advertising) or simply because of inertia. For these reasons, plaintiffs are more likely to have a large market share. Also, they are likely not to sue extremely small, marginal companies, but will sue firms of a significant size, especially if these firms have the perceived ability to grow significantly. Plaintiffs may sue marginal firms if they wish to establish a reputation of deterring aggressive competition. In addition, a smaller "number two" firm in an industry may sue a larger firm if it perceives that most of the gains of suing will flow to it, rather than other, even smaller, competitors.³⁰ Such a lawsuit may be less expensive than attempting counter-advertising at a level sufficient to match the larger rival. The suit may also gain publicity at no additional cost.

Explicit comparative advertising is more likely to be challenged if the plaintiff believes such rival advertising could diminish its sales more than noncomparative advertising that merely extols the virtues of the rival product. One other benefit for the plaintiff to consider in bringing suit is the ability to discover its rival's strategy, to depose the rival's top executives to gain information, or simply to harass the rival into ceasing the advertising before a decision is reached by the court.

When evaluating the costs of the suit, the Lanham Act plaintiff will consider the probable speed of obtaining a preliminary injunction and the high costs and low probability of successfully proving damages. A large plaintiff may have more resources or greater sales over which to spread the costs of the suit than a smaller rival. The plaintiff should recognize that this increases the probability of a favorable settlement that would require the rival to develop new advertising.

Imposing differentially higher unit costs on rivals has generated much antitrust commentary.³¹ Such a suit can be anticompetitive and can be

30. See *MCI and AT&T to See Each Other in Court Again*, Washington Post, Oct. 11, 1989, at F1 (MCI suing AT&T under the Lanham Act for false advertising).

31. See Salop & Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983). For a more extensive treatment, see Krattenmaker & Salop, *Raising Rivals' Costs*, 96 YALE L.J. 209 (1986). For an opposing view see Brennan, *Understanding Raising Rivals' Costs*, 33 ANTITRUST BULL. 95 (1988).

challenged under the antitrust laws as "sham" litigation if it truly lacks a legitimate basis and the plaintiff has the requisite market power.³² Indeed, many commentators suggest that competitor lawsuits may be anticompetitive and may not promote the public interest.³³ In 1977, the Supreme Court recognized that competitors might sue under the antitrust laws to redress an injury to them that occurred because of increased, rather than decreased, competition.³⁴ The Court denied recovery to such plaintiffs unless they could show "antitrust injury" — injury that reflects "the anticompetitive effect . . . of the violation."³⁵

Fortunately, from a public policy perspective, there is little reason to believe that Lanham Act lawsuits can be used to actually monopolize an industry. The typical injunction remedy only prohibits specific claims, leaving the advertiser free to make slightly modified claims.³⁶ Unlike antitrust cases, multiple damage awards that might bankrupt a rival are rarely awarded.³⁷ Moreover, unlike the import relief laws, a Lanham Act injunction does not constitute a significant barrier to market entry.³⁸ Of course, the Lanham Act can be used to harass small rivals in order to signal them to reduce their competitive efforts (for example, to stop making explicit comparisons) or to face the expensive consequences of defending, and possibly losing, a lawsuit. Thus, there is some potential for anticompetitive misuse of private advertising litigation.

II. LEGAL COMPARISON

A. Federal Trade Commission

The FTC was established in 1914 as an independent regulatory agency empowered to create and enforce emerging antitrust policy. The FTC's

32. For an excellent exposition on this subject, see Hurwitz, *Abuse of Governmental Processes, The First Amendment, and the Boundaries of "Noerr,"* 74 GEO. L.J. 601 (1985). Hurwitz identifies three legal formulations of "sham" litigation as an antitrust claim: (1) a pattern of baseless claims; (2) claims that lack a reasonable basis in fact or law; and (3) litigation that is not cost-justified. For an example, see *Wilkinson to Gillette: En Garde*, Boston Herald, June 21, 1989, at 29 (Wilkinson filed a counterclaim in Gillette's Lanham Act suit alleging Gillette's advertising challenges were monopolistic).

33. See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347-64 (1978); C. KLEIN, *ECONOMICS OF SHAM LITIGATION: THEORY, CASES AND POLICY* (1989) (Bureau of Economics Staff Report to the Federal Trade Commission); Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 27 J.L. & ECON. 247 (1985).

34. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

35. *Id.* at 489.

36. See *infra* note 121 and accompanying text.

37. See, e.g., Baumol & Ordover, *supra* note 33, at 252-54.

38. See Calvani & Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, 16 J. REPRINTS ANTITRUST L. & ECON. 475 (1985); Waller, *Abusing the Trade Laws: An Antitrust Perspective*, 17 L. & POL. IN INT'L BUS. 487 (1985).

task was to condemn "unfair methods of competition."³⁹ From its beginning, it pursued false advertising cases.⁴⁰ However, after the Supreme Court held that the FTC must prove injury to competition in advertising cases, the FTC obtained authority to pursue unfair or deceptive acts and practices in 1983.⁴¹ Under this authority, the FTC regulates virtually all types of advertising.⁴² It now uses that authority to condemn advertising that is likely to harm consumers and no longer expressly considers harm to competitors.⁴³

FTC advertising cases follow a three step process. First, the Commission "interprets" the advertisements to determine what claims a reasonable consumer would find. Second, it decides whether those claims are deceptive or unsubstantiated. Third, it determines an appropriate remedy. Occasionally, the FTC also pursues advertising that it deems to be unfair.⁴⁴ Each of these steps will be addressed in turn.

39. Act of Sept. 26, 1914, ch. 311, § 45(a)(1), 38 Stat. 717, 719.

40. See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919).

41. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931). See also Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified at 15 U.S.C. § 45(a)(1) (1982)).

42. Other federal agencies may exercise jurisdiction over the advertising of certain products. For example, the Bureau of Alcohol, Tobacco, and Firearms regulates the advertising of alcoholic beverages as do several states under the twenty-first amendment. The Food and Drug Administration regulates the labeling of over-the-counter pharmaceuticals and the advertising and labeling of prescription drugs. In addition, the U.S. Postal Service can pursue companies for mail and wire fraud. See, e.g., *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984) (seller advertised low prices, but failed to deliver); *United States v. Andreadis*, 366 F.2d 423 (2nd Cir. 1966), cert. denied, 385 U.S. 1001 (1967) (claim of weight loss without dieting was untrue). Lastly, states are increasingly seeking to regulate advertising. All 50 states have "miniature" FTC acts and several have other advertising statutes. K. PLEVAN & M. SIROKY, *supra* note 17, at 343, 351. See also *People v. Western Airlines*, 155 Cal. App. 3d 597, 202 Cal. Rptr. 237 (1984) (California deceptive advertising statute applies to airlines); Beales, *What State Regulators Can Learn from Federal Experience in Regulating Advertising*, 10 J. PUB. POL. & MKTG. 101 (1991); Calvani, *Advertising Regulation: The States vs. The FTC*, 58 ANTITRUST L. J. 253 (1989); Richards, *FTC or NAAG, Consumers or Advertisers: Who Will Win the Territorial Battle?* 10 J. PUB. POL. & MKTG. 118 (1991); *Beef Trade Forced to Alter Ads*, N.Y. Times, March 2, 1985, at 48, col. 1 ("For the fifth time in less than two years . . . the New York State Attorney General has been responsible for significant changes in a national advertising campaign.").

43. In fact, the FTC has the discretion to refuse to pursue cases that competitors may bring to its attention. See, e.g., *Moog Indus. v. FTC*, 355 U.S. 411 (1958) (FTC discretion to set enforcement priorities); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873-74 (2d Cir. 1961) (deference to FTC expertise in deciding public significance of enforcement actions).

44. Under the FTC's unfairness jurisdiction and recent policy statement, prepared under the guidance of Michael Pertschuk, Chairman under President Carter, it would pursue advertising claims as unfair if they are likely to cause substantial consumer injury

1. *Interpreting the Ads.*—The FTC acts in advertising cases first by interpreting the ads to determine what claims are being made. It is authorized to use its own expertise to determine both the express and implied claims made in the advertisement.⁴⁵ It often uses evidence of consumer perceptions of the ads to make this determination.⁴⁶ The FTC next determines whether the claims are deceptive or unsubstantiated.

as determined by the conduct's net effects and consumers could not reasonably avoid such injury. Thus, in a situation in which the omission of product information might harm consumers, the FTC will require the disclosure of this information in advertising when the costs to the advertiser, and ultimately purchasers, of doing so, do not outweigh the benefits. Additionally, consumers must not readily be able to determine the missing information by a simple examination of the product. Of course in many cases, the omission of such information might also be deceptive. For a brief explanation of the FTC's recent deception, unfairness, and advertising substantiation policy statements, see Crawford, *Unfairness and Deception Policy at the FTC: Clarifying The Commission's Roles and Rules*, 54 ANTITRUST L.J. 305 (1985). The Commission's Unfairness Policy Statement is appended to its decision in *International Harvester*, 104 F.T.C. 949, 1072 (1984). See also Averitt, *The Meaning of "Unfair Acts or Practices" In Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981).

The only examples of advertising the FTC has challenged solely on unfairness grounds involve depictions of unsafe behavior that children viewing the advertisements might emulate. See, e.g., *Universal Body Bldg.*, 96 F.T.C. 783 (1980) (consent order prohibiting promotion of bodybuilding to children until safety study completed); *A.M.F., Inc.*, 95 F.T.C. 310 (1980) (consent order prohibiting bicycle advertisements showing unsafe riding); *Mego Int'l*, 92 F.T.C. 186 (1978) (consent order prohibiting depictions of young children using electrical appliances); *Uncle Ben's Inc.*, 89 F.T.C. 131 (1977) (consent order prohibiting depictions of unsupervised children near active gas stove); *General Foods Corp.*, 86 F.T.C. 831 (1975) (consent order prohibiting depiction of naturalist eating wild nuts and berries); *Philip Morris, Inc.*, 82 F.T.C. 16 (1973) (consent order prohibiting placement of sample of razor blades in newspapers where they might injure children).

Advertising that lacks a reasonable basis was once challenged as both deceptive and unfair. See, e.g., *Pfizer*, 81 F.T.C. 23 (1972). In 1984, however, the Commission stopped pleading unfairness in such cases. See *P. Leiner Nutritional Prods. Corp.*, 105 F.T.C. 291 (1985).

45. See, e.g., *FTC v. Colgate*, 380 U.S. 374, 391 (1965); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 886 (6th Cir. 1967); *Zenith v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944).

46. A study of 3,337 FTC cases from 1914 through 1973 found that only 206 involved any evidence of consumer perception. Most of those were consumer testimony with only 12 cases containing surveys of consumers' perceptions. Extrinsic evidence was used in only 6.8% of all cases from 1919-1954, but was used in 32.8% of the cases decided during 1955-1973. Brandt & Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception*, 41 J. MKTG. 54 (1977). From 1973 through 1984, extrinsic evidence was used in 10 of 23 litigated cases (43%). Preston, *Data-Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deceptiveness is Required*, 24 AM. BUS. L.J. 359, 361 (1986). From 1985 through 1989 only two of eight litigated cases (25%) examined extrinsic evidence of consumer perception. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1050 n.50 (1990) [hereinafter Preston, *Deceptiveness*] (Preston examined a ninth case, *Int'l Harvester*, 104 F.T.C. 949 (1984)). This last case is excluded here because it did not allege misleading advertising.

2. *Are the Ads Misleading?*—Under the FTC's recent Deception Policy Statement, an advertisement is considered to be deceptive if it contains a representation, practice, or omission likely to mislead consumers acting reasonably and if the representation, practice, or omission is material to consumer choice.⁴⁷ As applied, this Statement appears to make three changes in prior law.⁴⁸

First, prior law required only that the act or practice have the tendency or capacity to mislead consumers.⁴⁹ The Deception Policy Statement, however, requires the act or practice to be likely to mislead. This change requires the Commission to prove a probability of deception, not a mere possibility;⁵⁰ however, it does not require proof of actual deception.⁵¹

Second, the Deception Policy Statement adopts an objective standard, similar to that used in tort law, of a reasonable consumer.⁵² Past cases generally held that the Commission must find that a substantial number of people within the audience may be misled.⁵³ Occasional cases go further to indicate that "the ignorant, the unthinking and the credulous" are protected.⁵⁴ Other cases have limited this concept to reasonable interpretations of the advertising.⁵⁵

47. Deception Policy Statement, appended to *In re Cliffdale Associates*, 103 F.T.C. 110, 174-84 (1984) [hereinafter Deception Policy Statement]. Its use by the FTC was upheld by the Ninth Circuit in *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986).

48. After sending the Deception Policy Statement to Congress, it was criticized as being a change in the law. Chairman Dingell of the congressional committee that requested the analysis of the existing law of deception rejected the Statement as being a statement of what some thought the law should be. Chairman Miller defended it as not being a change in the existing law. However, as argued below, it is clear that it was a change. See Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849, 851-54 (1983); Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399, 402 (1988).

49. See *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919); *Cole-Conrad Co.*, 2 F.T.C. 188, 192-93 (1919); *Gordon-Van Tine Co.*, 1 F.T.C. 316, 323 (1919) ("do unfairly tend to, and do, deceive"); *E.P. Janes*, 1 F.T.C. 380, 385 (1919) ("tendency to mislead"); Bailey & Pertschuk, *supra* note 48, at 871.

50. J. RICHARDS, *DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT* 15 (1990).

51. See *In re Cliffdale Associates*, 103 F.T.C. 110, 165 (1984). *Accord* *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975).

52. RESTATEMENT (SECOND) OF TORTS §§ 282-83 (1965).

53. See, e.g., *Bristol-Myers Co. v. FTC*, 85 F.T.C. 688, 744 (1975); Bailey & Pertschuk, *supra* note 48, at 883-92; Karns, *supra* note 48, at 405.

54. See, e.g., *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1943).

55. See *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964) (Commission declined to interpret ad as it would be understood by an "insignificant and unrepresentative" group of consumers).

Under the former substantial numbers standard, the Commission never defined what is a substantial number. Bailey and Pertschuk suggest that twenty to twenty-five percent of the audience is substantial, but would allow a smaller percentage if the potential consumer injury is large.⁵⁶ Two decisions by circuit courts, affirming FTC opinions in which survey evidence was rejected, have expressed approval for numbers lower than the fifteen percent level.⁵⁷ In *Benrus Watch v. FTC*,⁵⁸ the court held that fourteen percent constitutes a "percentage that is entitled to protection."⁵⁹ In *Firestone Tire & Rubber Co. v. FTC*,⁶⁰ the court stated that it is "hard to overturn the deception findings of the Commission if the ad thus misled ten or fifteen percent of the buying public."⁶¹

The replacement of the substantial number standard with the reasonable consumer standard appears to make it harder to prove deception.⁶² The modern standard provides room for argument that despite any evidence of the deception of substantial numbers of consumers, those consumers were not behaving reasonably. The present standard appears more arbitrary than the substantial numbers standard and probably adds uncertainty to enforcement initiatives.

Although the Deception Policy Statement states that omissions are possibly deceptive, its application in conjunction with the Unfairness Policy Statement arguably has changed prior law.⁶³ In *In re International Harvester*,⁶⁴ the Commission majority created the so-called "pure omission" — silence on a subject in circumstances that do not give any particular meaning to the silence.⁶⁵ The "pure omission" can be pursued only under the unfairness doctrine.⁶⁶ In order for an omission to be deceptive, the majority stated that it must be in the context of a "half truth" or have occurred under other circumstances in which silence constitutes an implied misrepresentation.⁶⁷ The majority recognized the concept of reasonable fitness for intended use that requires products to be free of "gross" safety hazards, but did not apply it to the "fuel gysering" problem at issue

56. Bailey & Pertschuk, *supra* note 48, at 890-91.

57. See also Preston & Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 J. MARSHALL L. REV. 605, 610-13 (1986).

58. 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

59. *Id.* at 319-20.

60. 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

61. *Id.* at 249.

62. See Karns, *supra* note 48, at 407-13.

63. For a discussion of the Unfairness Policy Statement and the application of unfairness to advertising, see *supra* note 44.

64. 104 F.T.C. 949 (1984).

65. *Id.* at 1050-51, 1059.

66. *Id.*

67. *Id.* at 1057-58

because only twelve of 1.3 million tractors were known to have this problem.⁶⁸ In her dissent, Commissioner Bailey rejected the majority view that this omission was not deceptive. She maintained that manufacturers must point out nonobvious safety hazards or they are deceiving consumers into believing that the product is reasonably safe.⁶⁹

3. *Substantiation*.—The second prong of FTC advertising regulation includes a requirement that advertisers must have a “reasonable basis” for their advertising claims prior to making them.⁷⁰ In 1984, after a thorough review of the program, the FTC issued its Policy Statement Regarding Advertising Substantiation.⁷¹ Although Chairman Miller previously expressed reservations about the program,⁷² the Statement reaffirms this requirement and suggests only minor clarification.

The substantiation requirement appears simple, but deceptively so. Advertisers must have a “reasonable basis” for their express and implied advertising claims. Like the “reasonable person” standard in tort law, this standard is objective, not subjective, and is judged on a case-by-case basis.⁷³ According to the Substantiation Policy Statement, claims that promise a certain level of substantiation (e.g., “tests prove”), must be supported by that level of substantiation. Claims that imply a high level of substantiation to reasonable consumers must have the promised level of substantiation.⁷⁴ For example, comparative claims, specific performance

68. *Id.* at 1058-59, 1063. The Deception Policy Statement expressly recognizes the concept of reasonable fitness for intended use, but makes no mention of “gross” safety defects: “the practice of offering a product for sale creates an implied representation that it is fit for the purpose for which it is sold. Failure to disclose that the product is not fit constitutes a deceptive omission.” Deception Policy Statement, *supra* note 47, at 175 n.4.

69. *In re Int’l Harvester*. 104 F.T.C. 949, 1078 (1984) (Bailey, Comm’r, dissenting); Deception Statement, *supra* note 47, at 175 n.4.

70. *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). However, while announcing this new doctrine, the Commission did not find Pfizer liable, so there was no basis for an appeal. *Id.* See also *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *petition denied*, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff’d*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). For earlier precedents for substantiation, see Shafer, *Developing Rational Standards for an Advertising Substantiation Policy*, 55 U. CIN. L. REV. 1, 5-13 (1986).

71. See FTC Policy Statement Regarding Advertising Substantiation, appended to *In re Thompson Medical Co.*, 104 F.T.C. 648, 839-42 (1984) [hereinafter *Substantiation Policy Statement*].

72. See Karns, *supra* note 48, at 401, 406-07.

73. Although the *Pfizer* decision refers to the “reasonable and prudent businessman, acting in good faith,” it also states, “The standard depends on both those facts known to the advertiser, and those which a reasonable prudent advertiser should have discovered.” *Pfizer*, 81 F.T.C. at 64.

74. Substantiation Policy Statement, *supra* note 71, at 840.

claims, and claims with a scientific aura, imply that tests were performed to substantiate them. The Statement also lists six factors, commonly referred to as the *Pfizer* factors (although the *Pfizer* decision lists only five), that the FTC considers when determining what a reasonable level of substantiation should be in a specific case. These factors are: (1) type of claim; (2) type of product; (3) consequences of a false claim; (4) benefits of a truthful claim; (5) cost of developing substantiation; and (6) the amount experts feel is reasonable.⁷⁵

Finally, Commission law requires that the substantiation be developed prior to the dissemination of the advertising claims. However, for the first time, the Substantiation Statement suggests flexibility in this rule by listing four circumstances when the FTC will consider post-claim evidence of truthfulness: (1) when deciding whether it is in the public interest to proceed against an advertiser; (2) when evaluating the truth of a claim; (3) when determining the reasonableness of proffered prior substantiation; or (4) when considering the appropriate scope of a remedial order.⁷⁶

The other nuance in the Statement is the cessation of "industry-wide" rounds of publicized requests for substantiation from all members of a particular industry.⁷⁷ However, this nuance is of minor significance because the use of these rounds had been declining since 1975 and none were conducted after 1980.⁷⁸ At least one commentator has argued that these rounds were useful in establishing the FTC's presence in regulating national advertising.⁷⁹ Thus, unlike the controversial Deception Policy Statement that changed prior law, the Substantiation Statement confirmed prior law, but renounced the burden of industry-wide inquiries and added some flexibility to consider post-claim substantiation.

There is some evidence, however, that a "reasonable basis" for at least some Reagan-appointed commissioners was less stringent than for their predecessors. Prior to 1980, the normal substantiation requirement for advertising claims involving drugs and medical devices was two clinical studies.⁸⁰ Yet, in two cases involving electric shavers marketed to black men as a treatment for "razor bumps," the Commission voted to reconsider

75. *Id.* See also *In re Thompson Medical Co.*, 104 F.T.C. 648, 821 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 419 U.S. 1096 (1987).

76. Substantiation Policy Statement, *supra* note 71, at 840-41.

77. *Id.* at 647.

78. See Bureau of Consumer Protection, Advertising Substantiation Program: Analysis of Public Comments and Recommended Changes 14-15 (Mar. 1984).

79. See *Federal Trade Commission 75th Anniversary Symposium*, 58 ANTITRUST L. J. 797, 819 (1990) [hereinafter *FTC Anniversary Symposium*] (Statement of Mr. Rosch: "It gave notice that the cop was really on the beat.").

80. See K. PLEVAN & M. SIROKY, *supra* note 17, at 199-210.

the two clinical test requirements of the consent orders.⁸¹ Ultimately, the Commission decided not to change the orders.⁸²

More recently, in *Removatron International Corp.*,⁸³ a four member Commission could not agree whether to affirm the administrative law judge's order requiring two clinical studies to substantiate claims of permanent hair removal by a medical device.⁸⁴ They ultimately crafted an ambiguous order that simply required scientific evidence.⁸⁵ Thus, the standard, once clear, is now in question.

4. *Remedies.*—As this discussion of the reasonable basis for performance claims of medical products illustrates, the final step in FTC advertising cases is the imposition of a remedial order. The standard administrative remedy in an advertising case is a simple cease and desist order. Should a company violate the order, it will be subject to civil penalties.⁸⁶ A cease and desist order typically prohibits claims that are false or misleading, but it also prohibits other claims until the advertiser has a reasonable basis for them. As discussed above, the type of evidence that will constitute a reasonable basis is often specified in the order.⁸⁷ In addition, FTC cease and desist orders are noted for their "fencing-in" provisions. For example, in a recent case concerning Sears's false advertising for its Lady Kenmore dishwashers, the FTC order covered performance claims for all major appliances.⁸⁸

In some cases, the FTC has augmented its cease and desist orders with additional remedies. The FTC has ordered that future advertising

81. *North Am. Phillips Corp.*, 101 F.T.C. 359 (1983); *Sperry Corp.*, 98 F.T.C. 4 (1981).

82. *Sperry Corp.*, 104 F.T.C. 549 (1984).

83. No. 9200, slip op. (F.T.C. Nov. 4, 1988), *aff'd and injunction issued*, 884 F.2d 1489 (1st Cir. 1989). *See also* *Adria Labs., Inc.*, 103 F.T.C. 512, 526 (1984).

84. *Removatron*, No. 9200, slip op. at 26.

85. *Id.*

86. *See* 15 U.S.C. § 45(l),(m) (1988). *See also* *United States v. J.B. Williams Co.*, 354 F. Supp. 521 (S.D.N.Y. 1973), *modified*, 498 F.2d 414 (2d Cir. 1974) (affirming penalties against J.B. Williams of \$456,000, but modifying penalties against Parkson Advertising Agency of \$356,000).

87. *See supra* notes 81-85 and accompanying text.

88. *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392-94 (9th Cir. 1982). *See also* *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 706-08 (3d Cir. 1982) (order covered all over-the-counter drugs based on liability for Anacin advertising); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 371-72 (9th Cir. 1982) (order covering all consumer products based on microwave advertising); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (order covering any food, drug, cosmetic, or device based on advertising for diet aids); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 222-23 (2d Cir. 1976) (order covering all food products based on advertising for Wonder Bread).

disclose specified information to prevent future deception.⁸⁹ Often the disclosure is "triggered" by the making of certain advertising claims. Occasionally, the Commission has ordered corrective advertising disclosures to remedy the "lingering beliefs" in the minds of consumers created from past false advertising.⁹⁰

The FTC has also obtained consumer refunds. Two parts of the Federal Trade Commission Act authorize this relief. Section 19 of the Federal Trade Commission Act authorizes the Commission to seek consumer redress for "knowingly dishonest or fraudulent conduct" after completion of an administrative proceeding and the issuance of a cease and desist order.⁹¹ The Trans-Alaska Oil Pipeline Authorization Act of 1973 added section 13(b) to the FTC Act authorizing the Commission to obtain both preliminary and permanent injunctions in federal court.⁹² The FTC has used this authority to seek federal court injunctions to obtain refunds or an asset freeze so money will be available for refunds if the court believes they are warranted.

B. Lanham Act

A Lanham Act plaintiff must prove that the false statements either have deceived or have the capacity to deceive a substantial segment of the audience, that the deception is material to the purchasing decision, and that the plaintiff is injured or likely to be injured by the statement.⁹³ Like the FTC, the process begins with interpreting the ads.

1. *Interpreting the Advertisements.*—Many judges ease the plaintiff's burden by interpreting the meaning of the express claims within the

89. See Pitofsky, *supra* note 25, at 661-71.

90. See, e.g., Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Pitofsky, *supra* note 25, at 694-701.

91. 15 U.S.C. § 57b (1988).

92. Trans-Alaska Oil Pipeline Authorization Act, Pub. L. No. 93-153, § 408(f), 87 Stat. 592 (1973) (codified at 15 U.S.C. § 53(b)). For a discussion of cases under this section, see Cornell, *Federal Trade Commission Permanent Injunction Actions Against Unfair and Deceptive Practices: The Proper Case and the Proper Proof*, 61 ST. JOHN'S L. REV. 473 (1987); Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L. J. 141, 143-44 (1988).

93. *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974). Until its amendment in 1988, § 43(a) of the Lanham Act simply provided a private right of action to any person "who believes that he is or is likely to be damaged by the use of any . . . false description or representation" in connection with any goods or services in commerce. The Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 132, 102 Stat. 3946, expanded this language to cover "any . . . false or misleading description of fact or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities."

advertisement without requiring evidence of how consumers would interpret them.⁹⁴ This is particularly true in cases of willful false advertising. Recently, the Second and Ninth Circuits have decided that if the false advertising was willful, they will presume actual consumer deception.⁹⁵

Of course, other judges acknowledge their lack of expertise in this area and require evidence of consumer interpretation.⁹⁶ This lack of expertise argument is supported by occasional cases in which circuit courts interpret the express claims in advertising in ways diametrically opposed to the district court's interpretation.⁹⁷ Thus, the traditional rule for implied claims is to require evidence of consumer interpretation.⁹⁸

When fifteen percent of the audience interprets the advertising in a deceptive way, the courts become concerned.⁹⁹ Under the original

94. *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); *American Brands, Inc., v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1356 (S.D.N.Y. 1976).

95. See *PBX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 272 (2d Cir. 1987) (passing off); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986); *Harper House, Inc. v. Thomas Nelson, Inc.*, No. 85-4225 (C.D. Cal. 1987) (LEXIS, Genfed library, Dist file), *rev'd in part on other grounds*, 889 F.2d 197 (9th Cir. 1989) (the presumption of consumer deception based on willfulness was affirmed, but the presumption of damages equalling the amount of false advertising was reversed because the advertisements were not comparative). In a misappropriation of advertising case, the Sixth Circuit seems to have approved this standard. See *Can-Am Eng'g Co. v. Henderson Glass, Inc.*, 814 F.2d 253, 257 (6th Cir. 1987).

96. *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 172 n.27 (2d Cir. 1978); *Proctor & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y. 1984), *aff'd*, 747 F.2d 114 (2d Cir. 1984); *American Brands*, 413 F. Supp. at 1357.

97. *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 384-86 (2d Cir. 1986); *Information Fashion Council v. E. F. Timme & Son*, 501 F.2d 1048 (2d Cir. 1974). *Cf.* *Coca-Cola Co. v. Tropicana Prods. Inc.*, 690 F.2d 312 (2d Cir. 1982) (falsity on its face); *Bose Corp. v. Linear Design Labs., Inc.*, 467 F.2d 304 (2d Cir. 1972) (held three of four claims were mere "puffing").

98. *Coca-Cola Co.*, 690 F.2d at 317; *American Home Prods.*, 577 F.2d at 165; K. PLEVAN & M. SIROKY, *supra* note 17, at 5, 415-16. *But see* *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190 (S.D.N.Y. 1987); *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, 509 F. Supp. 1036 (S.D.N.Y. 1981) (defendant's advertising implied claims enjoined without consumer interpretation evidence).

99. *Coca-Cola Co. v. Tropicana Prods. Inc.*, 538 F. Supp. 1091, 1096 (S.D.N.Y.), *rev'd*, 690 F.2d 312, 317 (2d Cir. 1982) (trial court finding that 15% of consumers misled is too small for liability); K. PLEVAN & M. SIROKY, *supra* note 17, at 9. Before the adoption of the reasonable consumer test in its deception policy statement, the FTC also considered the number of consumers deceived by an advertisement. See *Bailey & Pertschuk*, *supra* note 48; *Karns*, *supra* note 48, at 417-20. For examples in early FTC cases, see *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 461-62 (1972) (1.4% not deceptive, 14% is deceptive), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973) (10-14% is deceptive); *Benrus Watch Co.*, 64 F.T.C. 1018, 1032 (1964) (14% is deceptive); *Rhodes Pharmacal Co.*, 49 F.T.C. 263 (1952) (9% is deceptive).

Lanham Act language, courts have held that literally true claims may be "false" under the Act if they are misleading.¹⁰⁰ However, the courts also recognize that advertising claims may not be deemed false if they are mere "puffing" — product praise too vague to be considered misleading.¹⁰¹

2. *Proving Falsity.*—Once the plaintiff proves how consumers interpret the advertisements, it must establish that the claims are false or misleading. Contrary to FTC law, most courts have held that a Lanham Act plaintiff cannot simply show a lack of substantiation by the defendant and win relief.¹⁰² Of course, in cases in which the advertising explicitly or implicitly promises that its claims are supported by proper evidence, the plaintiff may prove falsity by showing a lack of substantiation.¹⁰³ In addition, the plaintiff may use the defendant's own tests to show the falsity of particular advertising claims.¹⁰⁴ Thus, the plaintiff need not always conduct its own tests to prove falsity.

100. See, e.g., *Avis Rent A Car*, 782 F.2d at 383-86; *American Home Prods.*, 577 F. 2d at 165-67; *Fruit of the Loom, Inc. v. Sara Lee Corp.*, 674 F. Supp. 1020 (S.D.N.Y. 1987) (claim of 38% less shrinkage than rival, although literally true, might be misleading, but not actionable).

101. See, e.g., *Koontz v. Jaffarian*, 617 F. Supp. 1108, 1115 (E.D. Va. 1985), *aff'd*, 787 F.2d 906 (4th Cir. 1986); *Marcy v. Nissen Corp.*, 578 F. Supp. 485, 507 (N.D. Ind. 1982), *aff'd*, 725 F.2d 687 (7th Cir. 1983).

102. See, e.g., *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks Inc.*, 902 F.2d 222, 227-29 (3d Cir. 1990); *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253 (D. Del. 1980) (plaintiff must prove actual falsity, not merely lack of substantiation). *But see* *John Butler Co. v. Block Drug Co.*, 620 F. Supp. 771 (D.C. Ill. 1985) (case dismissed because claims had a "justifiable basis"); *Ciba-Geigy Corp. v. Thompson Medical Co.*, 672 F. Supp. 679 (S.D.N.Y. 1985) (packaging and advertising for defendant's 17 hour appetite suppressant and plaintiff's 15 hour product enjoined until clinical studies support duration claims). For a possible exception in the Third Circuit, see *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103 (D.N.J. 1987) (following *Johnson & Johnson*); *Johnson & Johnson v. Quality Pure Mfg.*, 484 F. Supp. 975, 983 (D.N.J. 1979) (injunction of defendant's claim made "without a good faith basis, grounded on substantial pre-existing proof, to support it."). At least one commentator has argued that there is a new trend toward allowing lack of substantiation to constitute a violation of the Lanham Act. See also *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985); Morrison, *The Emerging Burden of Proof Rule in Drug Advertising Cases*, 78 TRADEMARK REP. 551 (1988). Courts also do not hesitate to enforce settlements that require advertising substantiation to be reviewed by a third party.

103. See, e.g., *Proctor & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277-78 (2d Cir. 1981); *Gillette Co. v. Wilkinson Sword, Inc.*, No. 89-3586 (S.D.N.Y. July 6, 1989) (LEXIS, Genfed library, Dist file); *Upjohn Co. v. Riohom Corp.*, 641 F. Supp. 1209, 1223-24 (D. Del. 1986). *But see* *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 227-29 (3d Cir. 1990) "[t]he law does not presume that consumers assume that all OTC drug advertising claims are substantiated").

104. See, e.g., *American Home Prods. Corp. v. Johnson & Johnson*, 436 F. Supp.

The lack of a general reasonable basis requirement is an important difference between the FTC and the Lanham Act. The significance of this difference is illustrated by the FTC's case against Thompson Medical Company.¹⁰⁵ In that case, the Commission challenged representations that Aspercreme: (1) contained aspirin; (2) was proven by scientific studies to be more effective than orally-ingested aspirin for arthritis; and (3) was new. It challenged claims about Aspercreme's effectiveness and mode of performance as being unsubstantiated.¹⁰⁶ Had a competitor wanted to challenge this advertising, it would have had to perform tests to prove that Aspercreme was not effective. This would be expensive and difficult. Moreover, it currently appears impossible to disprove the claim that Aspercreme works at the site of pain by penetrating the skin. Although scientists have a theory that aspirin works in the brain, they have not been able to prove it. Because the active ingredient in Aspercreme is chemically related to aspirin, it also has not been proven how (or if) it works. Therefore, a Lanham Act plaintiff could not disprove the mode of performance claim, just like Thompson Medical could not substantiate this claim in the FTC proceeding.¹⁰⁷

A second important difference between the FTC and the Lanham Act is that the latter does not proscribe omissions of material facts.¹⁰⁸ However, the Act does reach advertisements that contain statements deemed misleading without disclosure of additional, omitted information.¹⁰⁹

785, 803 (S.D.N.Y. 1977), *aff'd*, 577 F.2d 160 (2d Cir. 1978) (efficacy claim proven deceptive because the weakness of the supporting evidence should have led to a weaker claim of efficacy).

105. *In re Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 419 U.S. 1096 (1987).

106. *Id.* at 786-87.

107. *See id.* at 755-760.

108. *See, e.g.*, *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974); *International Paint Co. v. Grow Group, Inc.*, 648 F. Supp. 729, 730 (S.D.N.Y. 1986); *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517, 532 (S.D.N.Y. 1980). *But see Bohsei Enter. Co. v. Porteous Fastener Co.*, 441 F. Supp. 162 (C.D. Cal. 1977) (holding that omission of foreign origin is material); *Universal City Studios v. Sony Corp. of Am.*, 429 F. Supp. 407 (C.D. Cal. 1977) (failure to disclose possible illegality of VCR use not actionable); *In re Certain Caulking Guns*, 223 U.S.P.Q. (BNA) 388 (Int'l Trade Comm'n 1984) (omission of country of origin is a tacit misrepresentation the goods are domestic). The United States Trademark Association recommended that § 43(a) be amended to prohibit omissions of material information, but that language was deleted from the Trademark Law Revision Act of 1988. *See C. MCKENNEY & G. LONG, FEDERAL UNFAIR COMPETITION: LANHAM ACT § 43 B-7* (1989).

109. *See, e.g.*, *Ragold, Inc. v. Ferrero, U.S.A., Inc.*, 506 F. Supp. 117, 124 (N.D. Ill. 1980); *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 n.11 (N.D. Ill. 1974).

Two limitations on applying the Lanham Act to false advertising have been eliminated by the Trademark Law Revision Act of 1988. The prior statute was interpreted by some courts to require that the false statement involve an inherent characteristic of the defendant's goods (e.g., the defendant's claims that their offer was an "exclusive TV offer" and made "for the first time on TV" are not claims concerning inherent characteristic of defendant's jewelry products).¹¹⁰ The Trademark Law Revision Act eliminates this requirement by explicitly covering misrepresentations about "commercial activities."¹¹¹

Second, a number of courts held that comparative advertising that only disparages a competitor, but does not falsely describe the defendant's product, is not actionable. These courts dissect comparative advertisements to determine whether what was said about the defendant's product is false.¹¹² Other courts either view the claim as a whole and hold that a false comparative claim is automatically a false claim about the defendant's product or simply enjoin disparaging claims.¹¹³ Fortunately, the Trademark Law Revision Act resolves this inconsistency by making actionable misrepresentations about the defendant's "or another person's goods, services, or commercial activities."¹¹⁴

3. *Remedies.*—The principal remedy in Lanham Act cases is an order enjoining the challenged advertising. Often cases are effectively

110. *Abernathy & Closther, Ltd. v. E & M Advertising, Inc.*, 553 F. Supp. 834, 837 (E.D.N.Y. 1982). *See also* *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 318 (2d Cir. 1982); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277 (2d Cir. 1981); *Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, Inc.*, 501 F.2d 1048, 1051-52 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). *But see* *Norwich Pharmacal Co. v. Hoffman LaRoche*, 180 F. Supp. 222 (D.N.J. 1960) (made in laboratories claim held actionable).

111. *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 132, 102 Stat. 3946.

112. *See, e.g.*, *Barr Labs., Inc. v. Abbott Labs.*, 867 F.2d 743 (2d Cir. 1989); *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299, 303 n.3 (2d Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); *SSP Agric. Equip., Inc. v. Orchard-Rite Ltd.*, 592 F.2d 1096, 1103 n.6 (9th Cir. 1979); *Fur Information*, 501 F.2d at 1048; *Bernard Food Ind., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *Oil Heat Inst. of Or. v. Northwest Nat'l Gas*, 708 F. Supp. 1118 (D. Or. 1988); *Borden, Inc. v. Kraft, Inc.*, 224 U.S.P.Q. (BNA) 811, 818 (N.D. Ill. 1984); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404 (E.D. Pa. 1983); *Ragold, Inc. v. Ferrero U.S.A., Inc.*, 506 F. Supp. 117, 124 (N.D. Ill. 1980).

113. *See, e.g.*, *J S & A Group, Inc. v. Cambridge Int'l, Inc.*, 209 U.S.P.Q. (BNA) 112 (N.D. Ill. 1980) (enjoining claim that Underwriters Labs found all air ionizers other than the defendant's to constitute a shock hazard).

114. *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 132, 102 Stat. 3946.

over after a preliminary injunction is issued. In order to obtain a preliminary injunction, the plaintiff must prove that: (1) the plaintiff will likely win the lawsuit because the advertising is false; (2) the defendant's advertising is likely to cause or have caused injury to the plaintiff; and (3) the plaintiff's injury without the injunction is likely to be greater than the defendant's injury with the injunction (balancing of the hardships).¹¹⁵ In contrast, when the FTC seeks a preliminary injunction, it need only prove a likelihood of ultimate success on the merits.¹¹⁶

Proving the likelihood of injury caused by the advertising in question can be relatively straightforward in injunction cases. It is presumed in cases involving explicit comparative advertisements.¹¹⁷ Otherwise, injury can be proven by establishing direct competition between the plaintiff's products and the defendant's advertised product.¹¹⁸

Although an injunction against advertising that, in most cases, is changed for business reasons may not seem like an effective remedy, it can be disruptive. Under the Lanham Act, a competitor's advertising may be enjoined within "months or even weeks" of its beginning.¹¹⁹ This compares favorably to some FTC advertising cases that have taken over a decade to resolve.¹²⁰ On the other hand, the typical Lanham Act injunction prohibits only specific claims, leaving the advertiser free to make slightly modified claims.¹²¹ Thus, Lanham Act suits may be faster than FTC actions, but are narrower in scope and more easily circumvented by advertising modifications.

Other injunction cases are disruptive because the court orders some sort of affirmative relief. Courts occasionally require the defendant

115. K. PLEVAN & M. SIROKY, *supra* note 17, at 23-28 (If the challenged conduct has ceased with no reasonable probability that it will be resumed, the court may refuse to issue an injunction.).

116. *See, e.g.,* FTC v. Pharmtech Research, Inc., 576 F. Supp. 294, 299 (D.D.C. 1983).

117. *See, e.g.,* McNeilab, Inc. v. American Home Prods. Corp., 848 F.2d 34, 38 (2d Cir. 1988) (false or misleading comparison to a specific competing product is presumed injurious).

118. *See, e.g.,* Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 189-91 (2d Cir. 1980).

119. Keller, *How Do You Spell Relief? Private Regulation of Advertising Under Section 43(a) of the Lanham Act*, 75 TRADEMARK REP. 227, 243-444 (1985).

120. *See* Pitofsky, *supra* note 25, at 692-93 n.128. Complaints against three marketers of over-the-counter analgesics were issued in 1973, but appeals of the final FTC orders did not occur until 1982 for one and 1984 for the other two. *See* Sterling Drug Co. v. FTC, 741 F.2d 1146, 1148 n.1 (9th Cir. 1984).

121. *See, e.g.,* McNeilab, Inc., 848 F.2d at 36 (within days of the first injunction, defendant launched a revised campaign).

to run corrective notices or to recall its previous advertising.¹²² In extreme cases, the courts have banned or recalled the product themselves.¹²³

Proving injury in cases in which damages are sought is more difficult. Most courts require proof of lost sales actually caused by the defendant's advertising.¹²⁴ This requirement has been a virtual bar to damage recovery for lost sales.¹²⁵ Moreover, presenting such proof may expose the plaintiff to broad discovery of its sales figures and planning documents.¹²⁶

III. DIFFERENCES BETWEEN FTC AND LANHAM ACT CASES

Two recent studies by this author examined 138 FTC advertising cases, including settlements, from July 1978 through June 1988 and 126 Lanham Act false advertising cases with reported decisions through mid-1989.¹²⁷ A comparison of the cases examined in these studies provides

122. For corrective notices, see *Avis Rent A Car Sys. v. Hertz Corp.*, 223 U.S.P.Q. 1255, 1256 (E.D.N.Y. 1984), *rev'd on other grounds*, 782 F.2d 381 (2d Cir. 1986); *John Wright, Inc. v. Casper Corp.*, 419 F. Supp. 292, 333 (E.D. Pa. 1976), *aff'd in pertinent part sub. nom. Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978); *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 16 (E.D. Pa. 1974). For advertising recalls, see *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241 (D. Del. 1980); *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1358 (S.D.N.Y. 1976).

123. *Playskool, Inc. v. Product Dev. Group, Inc.*, 699 F. Supp. 1056 (E.D.N.Y. 1988) (defendant's product could not safely interconnect with plaintiff's product as labeled and advertised); *Haan Craft Corp. v. Craft Masters, Inc.*, 683 F. Supp. 1234 (N.D. Ind. 1988) (injunction of further sale of sewing kits that infringed plaintiff's copyright and were falsely advertised); *Upjohn Co. v. Riahom Corp.*, 641 F. Supp. 1209 (D. Del. 1986) (baldness product claiming to have same ingredient as plaintiff's product recalled); *Ciba-Geigy Corp. v. Thompson Medical Co.*, 672 F. Supp. 679 (S.D.N.Y. 1985) (sale of 15 and 17 hour appetite suppressants enjoined until duration claims established). *See also American Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135, 143-46 (S.D.N.Y. 1987) (Reye's syndrome warning claim dismissed because FDA now requires warning, but claim to be reinstated if all pre-warning packages are not recalled).

124. *See, e.g., Coca-Cola Co. v. Tropicana Prod. Inc.*, 690 F.2d 312, 316 (2d Cir. 1982); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 191 (2d Cir. 1980); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 607-08 (3d Cir. 1978).

125. *See, e.g., Can-Am Eng'g Co. v. Henderson Glass, Inc.* 814 F.2d 253, 257-58 (6th Cir. 1987) (lower price rather than advertising misappropriation may have caused diminished sales); *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 607 (3d Cir. 1978) (award of \$462,500 in reasonable damages reversed because lost sales caused by low priced competition and plaintiff's slow deliveries); *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190, 1197-98 (S.D.N.Y. 1987); *American Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 592 (S.D.N.Y. 1987) ("It appears virtually impossible to prove, with any degree of reliability, the resulting damages each has sustained through lost sales, profits, and goodwill.").

126. Keller, *supra* note 119, at 244.

127. *See Petty, FTC Advertising Regulation: Survivor or Casualty of the Regan*

insight into the similarities and differences between these two types of advertising cases.

First, it is important to note that these two databases are not perfectly comparable. The FTC study includes cases that are settled, but the Lanham Act study includes only cases with reported decisions. Many of the Lanham Act cases appear to be settled after a reported preliminary decision, such as the denial of a motion to dismiss or the granting of a preliminary injunction; however, many more may have settled without a reported decision.

The best comparison may be between FTC cases that were at least partially litigated and Lanham Act cases with reported decisions. This will still underreport Lanham Act cases because many may have decisions that were not reported.¹²⁸ Table One presents the number of at least partially litigated cases with decisions in calendar years 1979-1987. During that time period, the FTC brought over five cases per year. Lanham Act plaintiffs brought almost nine reported cases annually.

TABLE ONE
Litigated cases by year

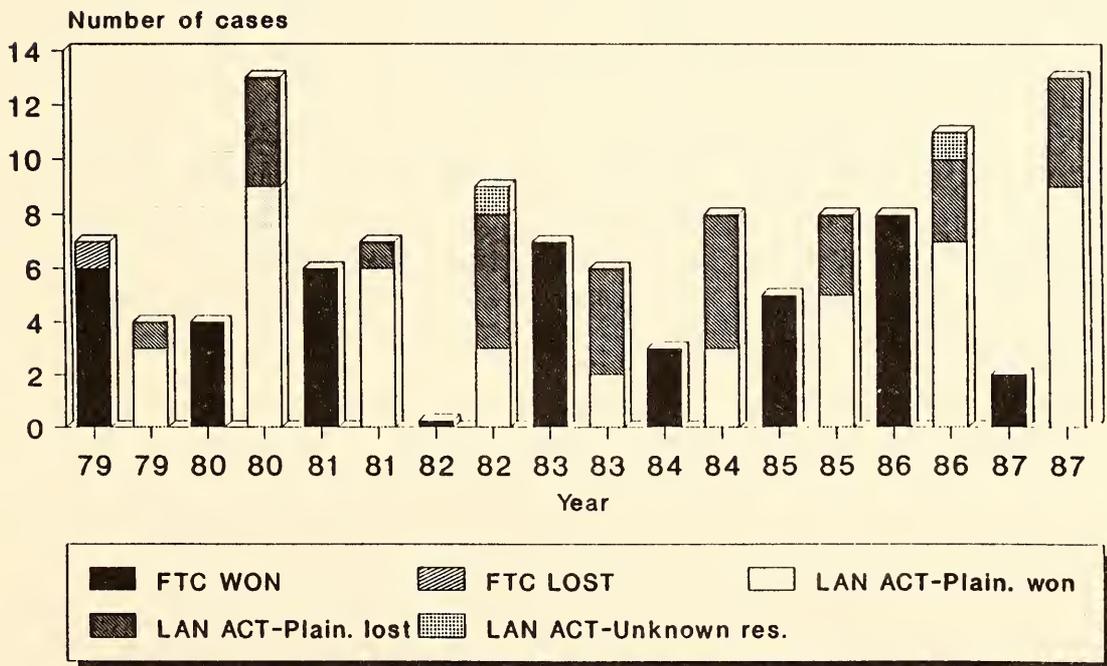


Table One also illustrates the general decline in FTC cases and the increase in Lanham Act cases. The decline in the number of FTC cases

Revolution? (to be published in Vol. 29, American Business Law Journal) [hereinafter Petty, *FTC Advertising*]; Petty, False Advertising Under the Lanham Act: Pro-Consumer Rule or Anti-Competitive Tool? (to be published in Vol. 20, University of Baltimore Law Review).

128. See *Unpublished but Influential*, A.B.A. J., 26 Jan. 1991, at 26.

is not surprising given the cut in resources for advertising enforcement cited earlier.¹²⁹ Some of the decrease may be a result of the Commission's new interest in pursuing hard core fraud.¹³⁰

Although the Lanham Act accounts for more cases, the FTC tallies a greater proportion of victories. Nearly sixty percent of FTC advertising cases are settled during the investigation stage before a formal complaint is issued. Moreover, of the fifty-six cases that went into litigation, nearly twenty-four settled before the litigation was concluded. Thus, the FTC wins nearly eighty percent of its advertising cases by settling them.

The Commission's success rate is nearly perfect for advertising cases. It has lost only one of the twelve cases appealed to circuit courts. In that case, *FTC v. Evans Products Co.*,¹³¹ the Ninth Circuit affirmed the district court denial of a preliminary injunction because the practices were not ongoing and because the FTC failed to establish that the claims were misleading.¹³² Despite the denial of preliminary relief, the case was favorably settled, with the FTC obtaining for a consumer a redress fund of \$1.9 million.¹³³

The only other advertising case loss suffered by the Commission during this time period was the dismissal of the complaint by the administrative law judge (ALJ) in *California Milk Producers Advisory Board of California*.¹³⁴ The Commission staff did not appeal this dismissal to the Commission, apparently agreeing with the ALJ that the claim "everyone needs milk" does not violate the Federal Trade Commission Act because less than one percent of the population is allergic to milk.¹³⁵

Thus, the Commission's success rate in advertising cases is reminiscent of Justice Stewart's celebrated dissenting opinion in *United States v. Von's Grocery*¹³⁶ that "[t]he sole consistency that I can find is that in litigation under section 7 [the Clayton Act section governing anticompetitive mergers], the Government always wins."¹³⁷ The Commission's

129. See ABA Report, *supra* note 1.

130. Much of the new antifraud efforts involve telemarketing and are outside the scope of this Article. To the extent that telemarketing is replacing advertising as a method of promotion, at least some of this shift appears warranted. Moreover, according to recent congressional testimony, the Commission has obtained \$23.5 million dollars in redress for consumers in telemarketing cases since 1983. More than 18 major telemarketing scams have been closed with court orders against 124 corporate and individual defendants. More than 6,650 victims have received checks ranging from \$50 to \$15,000. Testimony of William MacLeod before the House Subcommittee on Transportation, Tourism and Hazardous Materials (Dec. 3, 1987).

131. 775 F.2d 1084 (9th Cir. 1985).

132. *Id.* at 1089.

133. See 5 Trade Reg. Rep. (CCH) ¶ 22,480 (Oct. 22, 1987).

134. 94 F.T.C. 429 (1979).

135. *Id.* at 558.

136. 384 U.S. 270 (1966).

137. *Id.* at 301.

victorious record in advertising cases stands in stark contrast to its record in nonmerger antitrust cases during this period.¹³⁸

Perhaps some of the FTC's success is accounted for by its focus on fraud. Over ninety percent of the cases during 1978-1988 concern claims that were literally false or unsubstantiated. Only twelve cases focused on claims implied in the advertising.¹³⁹ Moreover, only one implied case was brought after 1984.¹⁴⁰

In contrast to the FTC's nearly perfect record of victories, Lanham Act plaintiffs won only about sixty-five percent of their cases. They obtained injunctive relief for some claims in fifty-two of the total 126 cases. Eleven of those involved relief beyond an injunction.¹⁴¹ In twenty-six cases, the last reported decision denied the defendant's motion to dismiss the case. These cases were likely settled by cessation of the challenged advertising. Therefore, they are included as plaintiff victories for a total of seventy-eight cases.

In twenty-nine cases, the final outcome was either dismissal of the advertising claims in the complaint or judgment for the defendant on those claims. Another fourteen cases denied the plaintiff injunctive relief. Because there are no later reported decisions for these fourteen cases, the defendant is considered the winner for a total of fifty-three defendant victories. The remaining four cases contain only reported decisions dealing with issues other than the advertising claims, such as motions for change of venue.

Lanham Act cases also were more likely to be appealed and reversed than FTC cases. Of the fifty-six litigated FTC cases, only twelve (or twenty-one percent) were appealed and only one was reversed. Forty-five of the 126 Lanham Act cases were appealed (thirty-six percent) and nineteen of the appealed cases were reversed (forty-two percent). The

138. See Hobbs, *Swings of the Pendulum —The FTC's First Seventy-Five Years*, 58 ANTITRUST L.J. 9, 12-14 (1989).

139. NEC Home Elec. Corp., 110 F.T.C. 501 (1988); *In re Thompson Medical Prods., Inc.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 419 U.S. 1096 (1987); Adria Labs., 103 F.T.C. 512 (1984); Estee Corp., 102 F.T.C. 1804 (1983); Christian Services Int'l Inc., 102 F.T.C. 1338 (1983); National Ass'n of Diving Schools, Inc., 100 F.T.C. 439 (1982); American Motors Corp., 100 F.T.C. 229 (1982); Kroger Co., 98 F.T.C. 639 (1981); Beneficial Corp., 94 F.T.C. 425 (1979); ITT Continental Baking Co., 94 F.T.C. 347 (1979); Ford Motor Co., 93 F.T.C. 873 (1979); Kaufman & Broad, Inc., 93 F.T.C. 235 (1979).

140. NEC Home Elec. Corp., 110 F.T.C. 501 (1988). For an analysis of types of implied claims, see Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. CIN. L. REV. 1243 (1989). The Reagan Commission's focus on literally false claims may be a factor in the reduction of the use of extrinsic evidence. See *supra* note 46 and accompanying text.

141. See *supra* notes 122-23 and *infra* notes 160-63 and accompanying text.

appellate courts appear to be more deferential to the FTC in advertising cases than to district courts.

The industries represented in these cases are summarized below:

TABLE TWO

<u>TYPE OF PRODUCT</u>	<u>FTC.</u>	<u>Lanham</u>
Advertising to businesses	-	23%
Household durable	45%	22%
Food & Supplements	10%	10%
Drugs	10%	13%
Household disposable	8%	18%
Service	14%	7%
Business opportunities/Investment	11%	-
Vocational school	5%	-
Other	-	4%
TOTAL	103%*	97%*

* Totals do not equal 100% due to rounding

Although some industries (*e.g.*, food and drugs) receive roughly comparable scrutiny under both laws, other industries receive disparate treatment. For example, advertising to businesses is readily pursued under the Lanham Act, but the FTC pursues investment and vocational school advertising. Lanham Act plaintiffs prefer disposable goods; the FTC favors more expensive durable goods.

A. Consumer Effects

1. *Likelihood of Consumer Injury.*—As noted in Section I above, false advertising should be challenged only if it is likely to mislead consumers and cause significant consumer injury. Therefore, to determine the likely consumer benefits, the cases should be examined to see how readily consumers can evaluate advertising claims for themselves and the amount of resulting injury if the claims are false.¹⁴² For example, deceptive pricing claims likely involve little consumer injury because even if the “sale” price is not really a reduced price, consumers can readily determine that it is the price they will pay before they purchase.¹⁴³

The FTC pursued only five deceptive pricing cases during the relevant time period (four percent). Two cases involved undisclosed charges when

142. The Deception Policy Statement advocates such an approach. See Deception Statement, *supra* note 47, at 181.

143. See Pitofsky, *supra* note 25, at 687-89.

the product was bought by mail or phone, and one involved a grocery store's attempt to perform a broad, arguably misleading, price comparison with its competitors.¹⁴⁴ The remaining two cases are of questionable value.¹⁴⁵

Comparably, under the Lanham Act, only five pricing cases were brought (four percent). Three of these cases involved price comparisons that consumers could check only by contacting different sellers, but the other two cases were of questionable value and were not successful. A real difference emerges when other types of search attribute claims are examined. As the following table shows, the FTC brought no cases involving non-price search attributes, but seven percent (or eight) of the Lanham Act cases fit this category:

TABLE THREE

Percent of Cases (FTC/Lanham Act)
Good By Advertised Attribute Type

Good /Attr.	Search	Experience	Credence	Faith	Total
Disp.	1/6	7/20	19/10	5/18	32/54
Dur.	3/4	26/14	33/5	4/16	66/39
Other ¹⁴⁶	0/1	1/0	0/1	0/5	1/7
Total	4/11	34/34	52/16	9/39	

A number of interesting differences surface in this analysis. First, only about ten percent of the FTC cases involve claims that could be verified before purchase (search attributes) or after purchase (experience attributes) for low-price products that are frequently purchased (disposables). Thus, the FTC appears to allow consumers to protect themselves in such cases.

In contrast, nearly one third of the Lanham Act cases fall into those two categories, suggesting that courts do not take into account the ability of the consumer to verify claims. Nothing in the Lanham Act or its related case law requires such consideration. In contrast, the FTC protects only consumers who act reasonably. Arguably, reasonable behavior includes verifying claims when it is easy to do so.

144. See *FTC v. World Travel Vacations, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,505 (N.D. Ill. 1988); *Kroger Co.*, 98 F.T.C. 639 (1981); *Market Development Corp.*, 95 F.T.C. 100 (1980).

145. *Home Centers, Inc.*, 94 F.T.C. 1362 (1979); *Nelson Bros. Furniture Corp.*, 92 F.T.C. 954 (1978).

146. Two FTC cases and seven Lanham Act cases involved low-priced, infrequently purchased goods. One Lanham Act case involved a high-priced, frequently purchased good.

Lanham Act plaintiffs and the FTC bring the same proportion of cases involving experience claims (thirty-four percent), but the type of goods varies. The FTC brings about three times as many experience claim cases for durable goods than for disposables. Lanham Act plaintiffs bring nearly one and one half times as many disposable goods experience claim cases as durable goods experience claim cases.

In fact, in all categories of advertising claims, the FTC strongly favors durable products (roughly two thirds of its cases), whereas the Lanham Act slightly favors disposable products (fifty-four percent of these cases). Competitors are more inclined to protect consumers from being misled into the trial of a frequently purchased product perhaps because of fear of brand loyalty or consumer inertia. On the other hand, the FTC appears to assume that misled consumers will only use a disposable product once.

Nearly ninety percent of FTC cases involved claims that are not readily verifiable or claims for relatively expensive durable items for which repeat purchases occur only after an extended period of time. In such situations, the market incentives for deterring misleading claims are weak, consumer injury is likely to be significant, and thus, the public interest is strong. In contrast, roughly seventy percent of the Lanham Act cases fall into this category of not-readily-verifiable claims or experience claims for durable products. However, plaintiffs only prevailed (obtained an injunction or survived a motion to dismiss) in two-thirds of these pro-consumer Lanham Act cases. Therefore, consumers have the potential to benefit from slightly less than half of the cases brought under the Lanham Act.¹⁴⁷ Because the FTC "wins" virtually all of its advertising cases, consumers appear well-served by ninety percent of FTC cases in these situations.

Two other points deserve mention. First, over half of the FTC cases involve credence claims, but only sixteen percent of the Lanham Act cases do. In contrast, nearly forty percent of the Lanham Act cases involve faith claims, compared to less than ten percent of the FTC cases. Because both types of claims are not readily verifiable by consumers, what accounts for this difference?

One possible explanation is that the FTC likely considers faith claims (product exclusivity, geographic origin, or newness) to be puffing or not material to consumers.¹⁴⁸ Lanham Act plaintiffs and courts may generally

147. Actually, consumers may benefit somewhat from a deterrent effect because defeated defendants may wish to avoid the expense of future challenges.

148. The FTC does, however, occasionally challenge such claims. It has challenged claims that a product contains a unique ingredient. *See, e.g., Bristol Myers Co. v. FTC* 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *American Home Prods. v. FTC*, 695 F.2d 681 (3d Cir. 1982). It has also challenged claims that a product was new. *See In re Cliffdale Assocs.*, 103 F.T.C. 110 (1984).

consider these claims to be more important. The courts seldom expressly consider materiality and appear willing to presume it.¹⁴⁹

Second, some of these advertising cases involve product safety issues. In contrast to product liability cases in which consumers benefit from post-injury compensation, these advertising cases benefit consumers by addressing safety concerns before they cause widespread injury. In the past ten years, the FTC has taken action based on a safety theory in twenty-one cases (or fifteen percent of the total). Ten of these cases involve unsafe products,¹⁵⁰ eight concern defective safety equipment,¹⁵¹ and three address unsafe behavior that is likely to be imitated.¹⁵²

The most common remedy, with the exception of a cease and desist order, is a required warning (nine cases)¹⁵³ or a requirement that the product defect be repaired (four cases).¹⁵⁴ Because physical injury to consumers is not explicitly considered in Lanham Act cases, there have been only two safety cases brought under the Act.¹⁵⁵

149. See Preston, *False or Deceptive Advertising Under The Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508, 551-52 (1989).

150. FTC v. Brown & Williams Tobacco Corp., 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part*, 778 F.2d 35 (D.C. Cir. 1985) (cigarettes); Sun Indus., 110 F.T.C. 511 (1988) (tanning booth); Silver Group, 110 F.T.C. 380 (1988) (tanning booth); American Motors Corp., 100 F.T.C. 229 (1982) (off-road vehicle); Farnum Co., 96 F.T.C. 826 (1980) (pesticide); Universal Bodybuilding, Inc., 96 F.T.C. 783 (1980) (weightlifting for children); Jordan Simmer, Inc., 95 F.T.C. 871 (1980) (birth control device); Kettle Moraine Elec. Corp., 95 F.T.C. 398 (1980) (insulation); Montgomery Ward, Inc., 95 F.T.C. 265 (1980) (heater); Bede Aircraft, Inc., 92 F.T.C. 449 (1978) (aircraft).

151. Puritan-Bennett, 110 F.T.C. 86 (1987) (fire escape hood); Reliance Wood, Inc., 109 F.T.C. 85 (1987) (fire-treated wood); Aquanautics, Corp., 109 F.T.C. 34 (1987) (marine survival suits); Figgie Int'l, Inc., 107 F.T.C. 313 (1986) (heat detector); Descent Control Corp., 105 F.T.C. 280 (1985) (descent system); Estee Corp., 102 F.T.C. 1804 (1984) (cookies for diabetics); Energy Devices, Inc., 102 F.T.C. 1713 (1983) (fire escape mask); BayleySuit, Inc., 102 F.T.C. 1285 (1983) (marine survival suit).

152. Mentolatum, Inc., 96 F.T.C. 757 (1980) (denture cushions used for prolonged period of time); *In re AMF, Inc.*, 95 F.T.C. 310 (1980) (children's bicycles ridden in unsafe manner); Mego Int'l Inc., 92 F.T.C. 186 (1978) (electric hair dryer used near water).

153. Sun Industries, 110 F.T.C. 511 (1988) (tanning booth); Silver Group, 110 F.T.C. 380 (1988) (tanning booth); Puritan-Bennett, 110 F.T.C. 86 (1987) (fire escape hood); Figgie Int'l, Inc., 107 F.T.C. 313 (1986) (heat detector); Descent Control Corp., 105 F.T.C. 280 (1985) (descent system); Energy Devices, Inc., 102 F.T.C. 1713 (1983) (fire escape mask); American Motors Corp., 100 F.T.C. 229 (1982) (off-road vehicle); Farnum Co., 96 F.T.C. 826 (1980) (pesticide); Jordan Simmer, Inc., 95 F.T.C. 871 (1980) (birth control device).

154. Aquanautics, Corp., 109 F.T.C. 34 (1987) (marine survival suit); BayleySuit, Inc., 102 F.T.C. 1285 (1983) (marine survival suit); Kettle Moraine Elec. Corp., 95 F.T.C. 398 (1980) (insulation); Montgomery Ward, Inc., 95 F.T.C. 265 (1980) (heater).

155. Playskool, Inc. v. Product Dev. Group, Inc., 699 F. Supp. 1056 (E.D.N.Y. 1988); Littlefuse, Inc. v. Parker-Hannifin Corp., 230 U.S.P.Q. (BNA) 654 (N.D. Ill. 1986).

2. *Remedies.*—Empirical studies suggest that consumers also benefit from the deterrent value of FTC remedies. FTC cases, in contrast to those brought under the Lanham Act, have a statistically significant effect on the stock market valuation of the challenged firm.¹⁵⁶

In recent cases, the deterrent value of FTC orders is further enhanced by efforts to obtain monetary penalties. When necessary, the FTC enforces its cease and desist orders in federal district court by seeking civil penalties.¹⁵⁷ The FTC now has the authority to seek federal court injunctions to obtain refunds or an asset freeze (so that money will be available for refunds if the court believes they are warranted) and has done so in almost twenty percent of the recent advertising cases.¹⁵⁸

In contrast, only five (or four percent) of the Lanham Act decisions awarded monetary compensation based on one of two theories.¹⁵⁹ Two courts awarded damages for intellectual property infringement, but disallowed additional recovery for false advertising for fear of double recovery. Thus, the infringement damages included damages for false advertising.¹⁶⁰

156. A. MATHIOS & M. PLUMMER, REGULATION OF ADVERTISING: CAPITAL MARKET EFFECTS 31 (1988) (Bureau of Economics Staff Report to the Federal Trade Commission) (finding an average diminution in value of five percent for firms pursued by the FTC). See also Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403 (1981) (only examined FTC cases).

157. 15 U.S.C. § 45(m) (1988).

158. See *FTC v. World Travel Vacations, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,505 (N.D. Ill. 1988) (asset freeze); *FTC v. American National Cellular, Inc.*, 810 F.2d 1511 (9th Cir. 1986) (asset freeze); *FTC v. Rare Coin Galleries of American, Inc.*, 114 F.R.D. 8 (D. Ma. 1986) (asset freeze); *FTC v. Sheldon Friedlich, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,221 (S.D.N.Y. 1985) (asset freeze); *FTC v. Evans Prods. Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 22,480 (1987) (\$1.9 million redress); *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282 (D. Minn. 1985) (refunds); *International Corp. Serv. One*, 106 F.T.C. 528 (1985) (refunds); *Weider Health & Fitness, Inc.*, 106 F.T.C. 584 (1985) (refunds); *Champion Home Builders Corp.*, 101 F.T.C. 316 (1983) (refunds); *Horizon Corp.*, 97 F.T.C. 464 (1981) (refunds); *Mid City Chevrolet, Inc.*, 95 F.T.C. 371 (1980) (refunds); *Art Instruction School Corp.*, 93 F.T.C. 32 (1979) (refunds); *National Sys. Corp.*, 93 F.T.C. 58 (1979) (refunds). See also *supra* notes 91-92.

159. Two false advertising cases that were primarily trademark infringement actions have also awarded the plaintiffs attorney's fees: *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738 (7th Cir. 1985) (\$20,000); *Clairol, Inc. v. Save-Way Indus., Inc.*, 211 U.S.P.Q. (BNA) 459 (S.D. Fla. 1980). In a more recent decision, the District of Columbia Circuit declared that attorney's fees are only available in exceptional cases involving willful or bad faith conduct. *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 903 F.2d 958 (D.C. Cir. 1990) (both sides were awarded attorneys fees for pursuing, but not defending, their false advertising claims).

160. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985) (\$13,250 profits for trademark infringement disgorged); *Universal Athletic Sales Co. v. American Gym Corp.*, 397 F. Supp. 1063 (W.D. Pa. 1975), *aff'd*, 546 F.2d 530 (3d Cir. 1976), *cert. denied sub nom.* 430 U.S. 984 (1977), *on remand*, 480 F. Supp. 408, 420 (W.D. Pa. 1979) (\$68,650 damages for patent infringement).

Occasionally courts have awarded damages based on the amount of advertising expenditures. Two courts have ordered reimbursement for the plaintiff's "curative" advertising campaign.¹⁶¹ In a third case, *U-Haul International, Inc. v. Jartran, Inc.*,¹⁶² the district court awarded damages for injury caused by Jartran's false comparison of its trucks with U-Haul's trucks based on U-Haul's curative advertising expenditures added to Jartran's advertising expenditures.¹⁶³ The court also justified the award because its amount was comparable to U-Haul's lost profits. The Ninth Circuit affirmed a doubling of the award to \$40 million because of the willful conduct of Jartran.¹⁶⁴

Recently, the *U-Haul* rationale has been criticized. In *Alpo Petfoods, Inc. v. Ralston Purina Co.*,¹⁶⁵ the district court awarded \$5.2 million in "damages" as the amount of the defendant's false advertising and doubled it for willfulness. The court then noted that the resulting amount of \$10.4 million was close to the plaintiff's share (based on its market share) of the defendant's profits (\$11 million) from the sale of the products falsely advertised. The court of appeals upheld the finding of liability, but reversed the monetary award.¹⁶⁶ The court relied on the traditional standard that the false advertiser's profits and multiple damages can only be awarded for intentional misconduct.¹⁶⁷ Absent such bad faith, the plaintiff must prove its own lost profits caused by the false advertising to recover single damages.¹⁶⁸

The FTC also benefits consumers more than Lanham Act cases by frequently ordering disclosure of information that might be useful to consumers. Thirty cases ordered the disclosure of specified information, and an additional nine cases ordered disclosures triggered by specified advertising claims. Two courts ordered respondents to provide public service information not directly tied to their product or its advertising. Despite controversy,¹⁶⁹ only three consent orders in the past ten years included corrective advertising, and one of these was later modified to

161. *Otis Clapp & Son*, 754 F.2d at 745; *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, 509 F. Supp. 1036 (S.D.N.Y. 1981).

162. 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd in part and rev'd in part*, 793 F.2d 1034 (9th Cir. 1986).

163. *Id.* at 1146.

164. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041-42 (9th Cir. 1986). The award for the costs of Jartran's advertising appears to be based on a disgorgement of profits theory.

165. 913 F.2d 958 (D.C. Cir. 1990).

166. *Id.* at 963-71.

167. *Id.* at 968.

168. *Id.* at 969-70.

169. See, e.g., Pitofsky, *supra* note 25, at 694-701.

remove the requirement.¹⁷⁰ Thus, in thirty-five percent of these cases, the Commission did not merely stop misleading information, but provided additional information to consumers. In contrast, Lanham Act cases seldom order information disclosure relief.¹⁷¹ One reason for this difference may be the fact that only affirmative misrepresentations are challengeable under the Lanham Act, not omissions.¹⁷² Omissions are often corrected by affirmative disclosures.

B. *Competitive Consequences*

In one sense, the FTC's case-by-case approach to advertising is inherently anticompetitive because firms under a broad order are disadvantaged vis-a-vis their competitors who are not under the order. This is true even if the unchallenged competitors are not violating the law. Although this may be somewhat troubling, it is the price paid for any regulatory scheme with prospective relief. This problem may be more troubling if the FTC pursues one firm (subjecting it to civil penalties for future advertising law violations) but not others in the same industry using the challenged practice.¹⁷³ If competition in the industry is robust, consumers are not harmed by the restriction of some competitors. On the other hand, if there are only a few firms in the industry, the potential for firms not under FTC order to extract monopoly rents from consumers is greater.¹⁷⁴ Although this problem may appear important, there is no empirical evidence that any FTC advertising orders actually caused this result.

Competitive questions also may be raised by the FTC's pursuit of small firms that appear to be engaged in hard core fraud. These firms may also be characterized as new entrants or marginal competitors. It seems disingenuous to attempt to gain the benefits of rigorous competition for consumers by misleading them into purchasing products that they otherwise would not have purchased. Therefore, there is little reason to believe that the FTC unduly restricts competition through its advertising regulation. In fact, through its antitrust program, the FTC actually encourages competition through advertising.¹⁷⁵

170. *Commodore Bus. Mach. Inc.*, 105 F.T.C. 230 (1985); *In re Heatcool, Inc.*, 101 F.T.C. 24 (1983); *In re AHC Pharmacal Co.*, 95 F.T.C. 528 (1980), *modified*, 101 F.T.C. 40 (1983).

171. *See supra* note 122 and accompanying text.

172. *See supra* note 109 and accompanying text.

173. *See* Schechter, *Letting the Right Hand Know What The Left Hand's Doing: The Clash of the FTC's False Advertising and Antitrust Policies*, 64 B.U.L. REV. 265 (1984).

174. *Id.* at 266-67.

175. For FTC action against advertising restrictions, see Trade Regulation Rule on

Because Lanham Act cases typically impose specific orders only prohibiting claims proven false, there is less concern that these orders will unduly restrict future competition. However, as noted in Section I, larger firms may have greater incentive to become Lanham Act plaintiffs than smaller firms. Large firms also have an incentive to use the Lanham Act to harass smaller firms to reduce the rigor of competition.¹⁷⁶ Although most Lanham Act advertising cases do not reveal the relative size of the parties, thirty-two (or twenty-five percent) of the decisions indicate that a new entrant or smaller rival was sued. However, like the FTC pursuit of hard core fraud, these cases are disproportionately successful. In twenty-four cases (or seventy-five percent), the plaintiff obtained an injunction and in another four (totaling eighty-eight percent), survived dismissal. Indeed, some of these suits clearly involve small, "outlaw" firms that are engaging in fraud or the infringement of patents or trademarks. The others appear to have little potential for significant consumer injury; therefore, most of these suits should be considered anticompetitive.

The number of suits against new entrants, small firms, and price discounters is only part of the story of the competitive effects of the Lanham Act. Five cases were brought by plaintiff trade associations (four percent).¹⁷⁷ In situations in which no individual firm has sufficient injury to justify a suit, a trade association can share costs and justify the suit based on injury to all of its members. The trade association thereby reduces "free-riding" by nonparticipating firms on the Lanham Act suit of an individual firm. It also allows plaintiff firms to lower their individual costs, while imposing significant costs on a single competitor. Such collective action may arguably constitute conspiracy to monopolize under section two of the Sherman Act.¹⁷⁸

Advertising of Ophthalmic Goods & Services, 16 C.F.R. § 456 (1989); Wyoming State Bd. of Chiropractic Examiners, 110 F.T.C. 145 (1988); Tarrant County Medical Soc'y, 110 F.T.C. 119 (1987); Independent Ins. Agent Ass'n of Mont., 108 F.T.C. 99 (1986); Independent Ins. Agents of Am., 108 F.T.C. 87 (1986); Rhode Island Bd. of Accountancy, 107 F.T.C. 293 (1986); American Dental Ass'n, 94 F.T.C. 403 (1979); American Medical Ass'n, 94 FTC 701 (1979), *aff'd*, FTC v. American Medical Ass'n, 638 F.2d 443 (2d Cir. 1980), *aff'd*, 445 U.S. 676 (1982). For a discussion of FTC encouragement of advertising, see Petty, *FTC Advertising*, *supra* note 127.

176. See *supra* notes 31-37 and accompanying text.

177. Camel Hair & Cashmere Inst. v. Association of Dry Goods Corp., 799 F.2d 6 (1st Cir. 1986); Oil Heat Inst. of Or. v. Northwest Natural Gas, 708 F. Supp. 1118 (D. Or. 1988); Fur Information & Fashion Council v. E. F. Timme & Sons, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973); Potato Chip Inst. v. General Mills, Inc., 333 F. Supp. 173 (D. Neb. 1971).

178. See, e.g., Crew, *Continuing Viability of Pursuing "Traditional" Cases and New Litigation Theories*, 58 ANTITRUST L. J. 289, 295-96 (1989).

Fourteen Lanham Act cases involved associative comparative claims (eleven percent).¹⁷⁹ Such claims do not assert superiority, only comparability. They are much more likely to be used by new or relatively unknown products for which superiority claims would be less credible to consumers. Scammon suggests that associative claims "free ride" on the target firm's reputation investment, but so do superiority claims.¹⁸⁰ The important issue for both types of claims is whether or not they mislead consumers. Associative claims may tend to identify situations in which a dominant firm is suing a small rival.

These potentially anticompetitive uses of the Lanham Act are occasionally tempered by understanding judges and by countervailing pro-competitive uses. In *Mennen Co. v. Gillette Co.*,¹⁸¹ the court found the suit to be a "competitive ploy," and awarded attorneys fees and costs to the defendant.¹⁸² Although this is the only case to make such an award to the plaintiff, other cases have recognized the potential for abuse. In *Gold Seal Co. v. SC Johnson & Son, Inc.*,¹⁸³ the first Lanham Act false advertising case, the court questioned why the advertising had gone unchallenged for seven years, and in denying an injunction and damages, stated that the Lanham Act should not be used to provide a "windfall to an overly eager competitor."¹⁸⁴ Similarly, in *Combe, Inc. v. Scholl, Inc.*,¹⁸⁵ the court denied a preliminary injunction, finding that the claims were not likely to be proven false, and that an injunction at that time would severely injure the defendant's business.¹⁸⁶ Lastly, in

179. *McNeilab Inc. v. American Home Prods. Corp.*, 848 F.2d 34 (2d Cir. 1988); *Saxony Prods. v. Guerlain*, 594 F.2d 230 (9th Cir. 1979); *Playskool, Inc. v. Prod. Dev. Group, Inc.*, 699 F. Supp. 1056 (E.D.N.Y. 1988); *Tyco v. Lego Corp.*, 5 U.S.P.Q. (BNA) 2d 1023 (D.N.J. 1987), *aff'd*, 853 F.2d 921 (3d Cir. 1988) (per curiam), *cert. denied*, 448 U.S. 955 (1988); *UpJohn Corp. v. Riahom Corp.*, 641 F. Supp. 1209 (D. Del. 1986); *Littlefuse, Inc. v. Parker Hannifin Corp.*, 230 U.S.P.Q. (BNA) 654 (N.D. Ill. 1986); *Cuisinarts, Inc. v. Robo-Coupe Int'l, Inc.*, 580 F. Supp. 634 (S.D.N.Y. 1984); *UpJohn Corp. v. American Home Prods. Corp.*, 598 F. Supp. 550 (S.D.N.Y. 1984); *Sherrel Perfumers, Inc. v. Revlon, Inc.*, 483 F. Supp. 188 (S.D.N.Y. 1980); *Johnson & Johnson, Inc. v. Quality Pure Mfg.*, 484 F. Supp. 975 (D.N.J. 1979); *Electric Corp. of Am. v. Honeywell Inc.*, 303 F. Supp. 1220 (D. Mass. 1969), *aff'd*, 487 F.2d 513 (1st Cir. 1973) (per curiam), *cert. denied*, 415 U.S. 960 (1974); *Smith v. Chanel, Inc.*, 151 U.S.P.Q. (BNA) 685 (N.D. Cal. 1966), *rev'd*, 402 F.2d 562 (9th Cir. 1968); *Societe Comptair de L'Indus. v. Alexanders Dept. Stores*, 190 F. Supp. 594 (S.D.N.Y. 1961).

180. Scammon, *Comparative Advertising: A Reexamination of the Issues*, 12 J. CONS. AFF. 381 (1978).

181. 565 F. Supp. 648 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984).

182. *Id.* at 657.

183. 129 F. Supp. 928, 940 (D.D.C. 1955), *aff'd*, 230 F.2d 832 (D.C. Cir.), *cert. denied*, 352 U.S. 829 (1956). *See also* *Johnson & Johnson, Inc. v. Carter-Wallace*, 631 F.2d 186 (2d Cir. 1980).

184. *Gold Seal Co.*, 129 F. Supp. at 940.

185. 453 F. Supp. 961 (S.D.N.Y. 1978).

186. *Id.* at 967.

Haagen-Dazs, Inc. v. Frusen Gladje, Ltd.,¹⁸⁷ the court refused to enjoin the defendant's implicit false statement of Scandinavian origin, because the plaintiff had "unclean hands" — it used the same marketing ploy.¹⁸⁸

In addition to the decisions that demonstrate some sensitivity to competitive concerns, eleven (or nine percent) of these cases have used the Lanham Act as an adjunct to an antitrust claim, presumably to enhance competition.¹⁸⁹ Seven of these occurred before 1979, but none were decided until 1987. The most recent four cases may mark a resurgence in advertising/antitrust cases.¹⁹⁰ In nine cases, small firms challenged the advertising of large firms without alleging antitrust violations.¹⁹¹ Thus, while there have been some anticompetitive uses of the Lanham Act, other cases have encouraged competition.

VI. CASE COMPARISONS

The following analysis highlights important differences between FTC cases and Lanham Act competitor lawsuits. Numerous specific comparisons also can be made, but in order to keep this analysis to a manageable size, only four will be discussed. The first two comparisons, concerning

187. 493 F. Supp. 73 (S.D.N.Y. 1980).

188. *Id.* at 75-76. *But see* Gillette Co. v. Wilkinson Sword Co., Civ. No. 89-3586 (LEXIS, Genfed library, Dist file) (S.D.N.Y. July 6, 1989) (enjoining implicit claim that a lubricated strip that was six times more slippery would give a better shave, without recognizing plaintiff's implicit claim that its lubricating strip improved shaving).

189. *See* SSP Agric. Equip. v. Orchard Rite, 592 F.2d 1096 (9th Cir. 1979); *In re* Uranium Antitrust Litig., 473 F. Supp. 393 (N.D. Ill. 1979); Chromium Ind. v. Mirror Polishing & Plating Co., 448 F. Supp. 544 (N.D. Ill. 1978); Fox Chem. Co. v. Amsoil, Inc., 445 F. Supp. 1355 (D. Minn. 1978); Alberto-Culver Co. v. Gillette Co., 408 F. Supp. 1160 (N.D. Ill. 1976); Smith-Victor Corp. v. Sylvania Elec. Prods. Inc., 242 F. Supp. 302 (N.D. Ill. 1965); Gerber Prods. Co. v. Beechnut Life Savers, Inc., 160 F. Supp. 916 (S.D.N.Y. 1958). The presumption that these Lanham Act antitrust cases are pro-competitive is subject to debate. *See supra* note 33 and accompanying text.

190. Barr Labs., Inc. v. Abbott Labs., 867 F.2d 743 (2d Cir. 1989); National Ass'n Pharmaceutical Mfg. v. Ayerst Labs., 850 F.2d 904 (2d Cir. 1988); Gillette Co. v. Wilkinson Sword, Inc., No. 89-3586 (S.D.N.Y. 1991) (LEXIS, Genfed library, Dist file) (counterclaim for false advertising and monopolization); Bloch v. SmithKline Beckman Corp., No. 82-510 (E.D. Pa. Nov. 1, 1988) (LEXIS, Genfed library, Dist file). For a discussion of advertising/antitrust cases, see Petty, *Predatory Promotion: A Theory of Antitrust Liability Whose Time Has Come?*, 27 AM. BUS. L. J. 215, 217 (1989) [hereinafter Petty, *Promotion*].

191. *See, e.g.*, Avis Rent A Car Sys., Inc. v. Hertz Corp., 782 F.2d 381 (2d Cir. 1986); Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1989); United States Healthcare, Inc. v. Blue Cross of Greater Phil., No. 86-6452 (E.D. Pa. 1988) (LEXIS, Genfed library, Dist file); Tambrands, Inc. v. Warner Lambert Co., 673 F. Supp. 1190 (S.D.N.Y. 1987); American Rockwool, Inc. v. Owens-Corning Fiberglass Corp., 640 F. Supp. 1411 (E.D.N.C. 1986) (alleging violation of state tort of destroying business); Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. (BNA) 811 (N.D. Ill. 1984); Marilyn Miglin Model Make-up, Inc. v. Jovan, Inc., 223 U.S.P.Q. (BNA) 634 (N.D. Ill. 1983); Glenn v. Advertising Publications Inc., 251 F. Supp. 889 (S.D.N.Y. 1966); Marshall v. Proctor & Gamble Co., 170 F. Supp. 828 (D. Md. 1959).

the *U-Haul* cases and comparative advertising, raise the anticompetitive issues in more detail. The second two comparisons, common negative product attributes and the *Kraft* cases, raise specific questions about the Lanham Act's ability to adequately protect consumers.

A. *U-Haul* Cases

*U-Haul International, Inc. v. Jartran, Inc.*¹⁹² was the first Lanham Act advertising case to award substantial damages. The damage award and other debts drove Jartran, the only national competitor to U-Haul in the one-way moving equipment rental business, into bankruptcy. U-Haul's actions in the bankruptcy proceeding resulted in an antitrust complaint, issued by the FTC, that was later settled.¹⁹³

In 1979, when Jartran entered the market, U-Haul supplied almost all consumer trailer rentals and sixty percent of consumer truck rentals. Jartran gained almost ten percent of the market in a few months, and U-Haul's revenues were \$49 million lower than it had expected for the post-entry three year period.¹⁹⁴ Jartran's success was attributed, at least in part, to its intentionally false advertising that showed its vehicles to be larger, more attractive, and lower priced than U-Haul's.¹⁹⁵ As has been noted, U-Haul sued under the Lanham Act and was awarded \$40 million.¹⁹⁶

Jartran subsequently entered bankruptcy, and the FTC accused U-Haul of deliberately using its creditor status to delay the reorganization and continued functioning of its rival. The case was settled by an order requiring U-Haul to notify the FTC, for a ten year period, before it participated in any bankruptcy proceedings of a rival and to provide a copy to the FTC of any lawsuit filed against a competitor.¹⁹⁷

In *U-Haul*, consumers were protected from deliberately false advertising, albeit on search attributes that they could have verified by visiting a Jartran and U-Haul dealer. The cost of this protection was the loss, for several years at least, of the only national competitor to U-Haul. The main problem appears not to be the injunction against the false claims, but the \$40 million damage award that contributed to Jartran's bankruptcy. The award was based on a doubling of the amount U-Haul spent in counter-advertising which was added to the amount

192. 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd in part and rev'd in part*, 793 F.2d 1034 (9th Cir. 1986).

193. *Amerco*, 109 F.T.C. 135 (1987).

194. *U-Haul*, 601 F. Supp. at 1145-48.

195. *Id.*

196. *See supra* notes 162-64 and accompanying text.

197. *Amerco*, 109 F.T.C. at 135.

Jartran spent on the false advertising.¹⁹⁸ There are several problems with this approach. First, the doubling of the award was inappropriate because of the competitive structure of the market. At most, the court should have awarded single damages as compensation, rather than attempting to further deter wrongdoing in a market with minimal competition.

Second, if compensation is to be given for the expense of counter-advertising, it should be given only for reasonable amounts of counter-advertising not, as in *U-Haul*, when the counter-advertising is more than double the amount of the false advertising.¹⁹⁹ This level of counter-advertising suggests predatory advertising against a new entrant, rather than a desire to merely undo the effects of false advertising.²⁰⁰

Third, there is no reason to believe that the sum of the amount of the plaintiff's counter-advertising and the amount of the defendant's false advertising is necessarily equal to the plaintiff's damages or lost profits.²⁰¹ U-Haul previously had only advertised in telephone directories, so that its media advertising was a specific response to Jartran's entry and advertising. Lanham Act plaintiffs who use counter-advertising may substitute it for some or all of their regular advertising; therefore, it is difficult to determine what amount is truly an incremental response to the false advertising (or to the entry itself in cases concerning new entrants). Moreover, the amount of the defendant's false advertising cannot be directly related to the plaintiff's injury unless the courts can determine the effectiveness of the advertising. To do so basically requires that the plaintiff prove lost sales caused by the false advertising, the traditional, but usually damages-barring, requirement.²⁰² It seems that consumers would have been better served by the traditional approach in this case.

B. Comparative Advertising

Recent estimates suggest that comparative advertising accounts for twenty-five to fifty percent of all advertising.²⁰³ The FTC in the early

198. *U-Haul Int'l, Inc. v. Jartran Inc.*, 793 F.2d 1034 (9th Cir. 1986).

199. See Best, *Monetary Damages for False Advertising*, 49 U. PITT. L. REV. 1 (1987); Waltzer, *Monetary Relief for False Advertising Claims Arising Under Section 43(a) of the Lanham Act*, 34 U.C.L.A. L. REV. 953 (1987).

200. See Petty, *Promotion*, *supra* note 190, at 220-23, 244-46.

201. See Heald, *Monetary Damages and Corrective Advertising: An Economic Analysis*, 55 U. CHI. L. REV. 629 (1988).

202. The *U-Haul* trial court attempted to calculate lost sales, but the Ninth Circuit did not consider this theory. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd in part and rev'd in part*, 793 F.2d at 1034 (9th Cir. 1986).

203. See, e.g., Freeman, *Comparative Cautions*, *MARKETING & MEDIA DEC.*, Sept. 1987, at 78 (over one third of advertising is comparative today); Levy, *Resurgence in*

1970's began encouraging explicit comparative ads, believing them to be more informative for consumers.²⁰⁴ Ultimately, the FTC issued a policy statement in 1979 supporting comparative advertising.²⁰⁵ There is an argument that because comparative advertising appears more informative, it may be more misleading because consumers use it as a substitute for making their own comparisons. Thus, although advertisers should not be able to deceive consumers by falsely advertising their own prices, for example, they may deceive consumers by falsely advertising prices of competitors in comparison to their own. Consumers may believe that because prices are readily verifiable, they need not check. Therefore, they will rely on the false advertisement.²⁰⁶

The same reasoning may apply to experience claims for disposable products. For example, in *Vidal Sassoon, Inc. v. Bristol-Myers Co.*,²⁰⁷ the Second Circuit affirmed an injunction against advertising that implied that 900 women participated in a comparative shampoo test and preferred Body on Tap to Sassoon and other products.²⁰⁸ In fact, only 200 subjects actually tried both shampoos.²⁰⁹ Perhaps consumers would rely on this test rather than buy several products to conduct their own head-to-head comparison.

Despite the increase in comparative advertising in the past ten years, the FTC has pursued only one case in which competing brands were named and another twenty-seven cases (or twenty percent of the total) in which unnamed comparisons were made (e.g., safer than aspirin).²¹⁰ Thus, the FTC first encouraged competition through comparative advertising and then left it largely unregulated, possibly because of its belief in probable consumer benefits.

Comparative Advertisements, DUN'S BUS. MONTH, Feb. 1987, at 57-58 (half of the advertisements aired by NBC in 1986 were comparative); Swayne & Stevenson, *Comparative Advertising in Horizontal Business Publications*, 16 IND. MARKETING & MGMT. 71, 73 (1989) (in 1985, 23.8% of advertising in these publications was comparative).

204. See Preston & Pridgen, *Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission*, 14 GA. L. REV. 635, 673-79 (1980).

205. See In Regard to Comparative Advertising, 16 C.F.R. § 14.15 (1979).

206. See *Thorn v. Reliance Van Co.*, 736 F.2d 929 (3d Cir. 1984) (false price advertising); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 681 F.2d 1159 (9th Cir. 1982) (false price comparisons). See also *Norton Tire Co., Inc. v. Tire Kingdom Co., Inc.*, 858 F.2d 1533 (11th Cir. 1988) (bait and switch price advertising not violative of Lanham Act); Scammon, *supra* note 180, at 384-87.

207. 661 F.2d 272 (2d Cir. 1981).

208. *Id.* at 278.

209. *Id.*

210. The one FTC case challenging an explicit comparison in advertising is *Blue Lustre*, 108 F.T.C. 41 (1986).

In contrast to FTC cases, comparative advertising is challenged under the Lanham Act more frequently than noncomparative advertising. Seventy-one of the 125 cases (or fifty-eight percent) challenged comparative advertisements. This trend has increased in recent years. Since 1980, forty-nine of the seventy-five cases (or sixty-five percent) involved comparative claims. Nearly half of these comparative advertising cases involved explicit differential comparisons and another twenty percent involved explicit associative claims. Thus, in forty-seven Lanham Act cases (or thirty-eight percent), explicit comparative claims were challenged. This figure dwarfs the one explicit comparative advertising case brought by the FTC in the past ten years. Like the FTC caseload, roughly twenty percent of the Lanham Act caseload concerns implicit or vague comparisons.

This difference in the challenge of explicit comparative advertising is not surprising given the fact that large firms that are the predominant targets of explicit comparisons may sue to protect the image of their own brand even when they otherwise would not have sued a rival for false advertising. Because the majority of comparative advertising lawsuits, like all Lanham Act lawsuits, involve disposable products, the question arises whether the legal battles over inducing consumer trial are worth the expenditure of judicial resources.

C. *Common Negative Attributes*

Arthur Best argues that competitors will not challenge false claims about each other's products if all the products share the same negative attribute.²¹¹ The example he cites involves competitor challenges under industry self-regulation, rather than the Lanham Act, of inaccuracies in a demonstration of an air cleaner's performance in a smoke-filled chamber.²¹² The FTC, on the other hand, challenged whether any of these products work effectively at all.²¹³ Similarly, Lanham Act cases have challenged taste test claims of cigarettes, but the FTC and Congress have addressed the health consequences of smoking.

Competitors simply lack any incentive to challenge advertising about common flaws, at least until a genuinely improved product is developed. If they were to challenge common flaws, a court may deny relief on the basis of the plaintiff's "unclean hands."²¹⁴ Thus, the Lanham Act cannot effectively police all false advertising.

211. Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 70 n.227 (1985) [hereinafter Best, *Study*].

212. *Id.*

213. *Id.*

214. See, e.g., *Haagen-Dazs, Inc. v. Frusen Gladje, Ltd.*, 493 F. Supp. 73 (S.D.N.Y. 1980).

D. *The Kraft Cases*

Perhaps it is surprising that given the hundred plus cases in each set of data, that there was virtually no overlap between FTC and Lanham Act advertising cases. The one exception to this statement are the suits challenging advertising for Kraft Singles cheese.²¹⁵ The earlier ads in Kraft's "five ounces of milk" campaign compared the amount of milk used to make Kraft Singles (five ounces) with that used to make imitation cheese products (sometimes indicated as two ounces). The ads also praised Kraft's taste.²¹⁶ These early ads were unsuccessfully challenged by Borden, a producer of imitation cheese products.

The court denied an injunction because, under its interpretation of the Lanham Act, Borden had to prove that Kraft made a false statement about Kraft's own product. Although Borden argued that some Kraft singles were made with only four and six tenths ounces of milk, the court found this difference to be immaterial to consumers.²¹⁷ The court also dismissed a state law claim of disparagement because Borden could not prove that the statements referred specifically to Borden.²¹⁸

In early 1985, the ads were modified to specifically refer to the benefits of calcium because consumers and other advertisers had a strong interest in calcium.²¹⁹ The FTC interpreted these newer ads as implicitly claiming that Kraft Singles had the same amount of calcium as five ounces of milk and had more calcium than imitation slices.²²⁰ The findings of the administrative law judge that these two claims, if made, were false and unsubstantiated, were not appealed. Because of processing, Kraft Singles contain only sixty to seventy percent of the calcium in five ounces of milk. Nondairy cheese products are fortified to a comparable calcium level.²²¹ The Commission further upheld the ALJ by finding that these claims were material to consumers despite Kraft's materiality survey that purported to show that consumers do not care

215. *Borden, Inc. v. Kraft, Inc.*, 224 U.S.P.Q. (BNA) 811 (N.D. Ill. 1984); *Kraft, Inc.*, 60 Antitrust & Trade Reg. Rep (BNA) 217 (F.T.C., Jan. 30, 1991). The only other possible exception was not considered on the merits by the court in the Lanham Act case. *See American Consumers, Inc. v. Kroger Co.*, 416 F. Supp. 1210 (E.D. Tenn. 1976) (case dismissed without discussion of the merits because Lanham Act only covers trademark infringement and similar sorts of cases); *Kroger Co.*, 98 F.T.C. 639 (1981) (Kroger found liable for misleading price comparisons).

216. *Borden*, 224 U.S.P.Q. (BNA) at 812-13.

217. *Id.* at 818-19.

218. *Id.* at 821.

219. *Kraft*, 60 Antitrust & Trade Reg. Rep. (BNA) at 219.

220. *Id.* at 221-26.

221. *Id.* at 220.

whether the singles contained 70% or 100% of the calcium in five ounces of milk.²²²

A number of factors account for the different results in these two cases. First and foremost, the advertising copy changed. Although Borden may have been concerned with taste claims, the FTC was not and chose not to challenge the advertisements. Moreover, taste is so subjective that it would be difficult for Borden to prove that Kraft does not taste better because no claims were made about a taste test (the results of which might have been exaggerated).

However, differences in expertise between the Lanham Act plaintiffs, the courts, and the FTC also account for the disparate results. The FTC pursued the implied claims about calcium using tests of consumer perceptions that established that consumers perceived that these claims were made. Borden foolishly pursued the largely truthful express claim about the amount of milk used to produce Kraft Singles. Moreover, Borden attempted to prove disparagement even though its surveys showed that, at best, only five percent of consumers thought that a specific comparison was made to Borden cheese. At a minimum, Borden should have talked to marketing experts such as the one who testified for the FTC and believed that the earlier ads also made implied claims about calcium content.²²³

V. EVALUATION

This Article has analyzed false advertising regulation by the FTC and by competitors using the Lanham Act. It has examined policy arguments, the legal requirements for proving false advertising, the cases themselves, and several examples of types of cases. It is clear that the Lanham Act has overtaken the FTC as the predominant means of regulating advertising, particularly for comparative claims and disposable products. Thus, regardless of public policy implications, the "privatization" of advertising regulation is occurring. Although a number of commentators have suggested that the FTC Act and Lanham Act are roughly equivalent,²²⁴ or even that the Lanham Act is superior,²²⁵ others omit any discussion of the Lanham Act.²²⁶ This Article suggests that there are significant policy implications in substituting private advertising regulation for public regulation and that these implications should be examined further.

222. *Id.* at 227-29.

223. *Id.* at 221-26.

224. See Preston, *Deceptiveness*, *supra* note 46, at 1050.

225. See Best, *Study*, *supra*, note 211.

226. See B. BAUDOT, *INTERNATIONAL ADVERTISING HANDBOOK* (1989).

Although many Lanham Act cases appear potentially to protect consumers, others appear potentially anticompetitive, involving large firms "harassing" a smaller firm's advertising to businesses that presumably are sufficiently sophisticated to protect themselves or concerning advertisements that seek to induce consumer trial of disposable products that consumers can inexpensively evaluate for themselves. These uses constitute a questionable use of scarce judicial resources. Judge Goettel noted in 1987 that "[o]ne of the phenomena of the last half of the twentieth century has been the extent to which economic battles have been waged in the courthouse rather than the marketplace."²²⁷ The following year, Judge Kaufman of the Second Circuit opined: "The ongoing competition between . . . rival pain reliever manufacturers has brought anything but relief to the federal courts. Instead, repeated and protracted litigation has created a substantial headache. The competitive battlefield has shifted from the shelves of supermarkets and drugstores to the courtroom."²²⁸

Moreover, if the benefits of a lawsuit do not accrue to a single competitor, a private advertising case is not likely to be brought. Government regulation is needed to pursue cases that competitors are not interested in and those that are too sophisticated for some plaintiffs or judges. Thus, it appears that competitor lawsuits can partially, but not fully, substitute for government regulation.²²⁹

The Federal Trade Commission's program of advertising regulation has been criticized in the past as ineffective and anticompetitive.²³⁰ This study shows that the FTC has protected consumers well. The FTC may show little interest in national advertising, but perhaps there is more deception in advertising by smaller firms. An intentionally false advertiser will seek to avoid network review of television ads by placing them locally.²³¹ Although the FTC's enforcement agenda may not please every-

227. *H.L. Hayden Co. v. Siemens Medical Sys.*, 672 F. Supp. 724, 727 (S.D.N.Y. 1987), *aff'd on other grounds*, 879 F.2d 1005 (2d Cir. 1989).

228. *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 35 (2d Cir. 1988). The district court judge was more restrained; he merely noted that "[s]mall nations have fought for their very survival with less resources and resourcefulness than these antagonists." *American Home Prods. Corp. v. Johnson & Johnson, Inc.*, 654 F. Supp. 568 (S.D.N.Y. 1987).

229. See *FTC Anniversary Symposium*, *supra* note 79, at 820-21 (remarks of Mr. MacLeod, then Director of the Bureau of Consumer Protection, that FTC advertising activities are supplanted by industry self-regulation).

230. For early criticisms, see E. COX, R. FELLMETH, & J. SCHULTZ, *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* (1969); R. POSNER, *REGULATION OF ADVERTISING BY THE FTC* (1973); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964).

231. Cf. *FTC, Texas Charge "Informercials" for Health Care Products Were De-*

one, it does benefit consumers. Second, there appears to be tangible benefits to the FTC's expertise in advertising regulation.²³² The FTC examines potential consumer injury and brings cases that otherwise would not be pursued by competitors such as those in which all competitors share the same product limitations. The FTC also has the discretion to refuse anticompetitive cases or cases with little potential for consumer injury. Lastly, although it lacks the Lanham Act plaintiff's product knowledge, the FTC has the sophistication to pursue cases like *Kraft* more effectively than inexperienced Lanham Act plaintiffs.

If consumer protection is to be accomplished primarily by competitor lawsuits, then four changes should be considered. First, either the Lanham Act or the courts' interpretation of the Act should be modified to require that the plaintiff prove not only the tendency of the ad to mislead consumers, but also the significance of the potential consumer injury from the deception. This change would allow courts to preemptively dismiss cases involving search or experience claims for disposable goods.

Second, the courts should exercise their discretion to limit the anticompetitive effects of competitor lawsuits by imposing costs on plaintiffs for bringing anticompetitive "sham" cases. Courts should also limit remedies imposed on defendants when warranted by the structure and level of competition in the industry to avoid another *U-Haul* situation, where protecting consumers from false advertising may not have been worth subjecting consumers to the whims of a virtual monopolist.

Third, the courts should be willing to entertain consumer plaintiffs under the Lanham Act.²³³ Consumer class action suits could pursue cases involving significant consumer injury, but minimal or dispersed competitor injury. Finally, why not privatize more completely by removing the courts from the process? Instead, competitors could challenge each other's advertising under industry self-regulation, as they already do, and not contribute to the backlog of the judicial system.

Many industry trade associations have advertising codes, as do media and media associations.²³⁴ The National Advertising Division (NAD) of the Council of Better Business Bureaus has actively investigated advertising complaints since 1971.²³⁵ It is funded by dues paid to the Council

ceptive; Charges Settled Under Consent Agreement Requiring \$1.5 Million in Consumer Redress (FTC Press Release April 17, 1990) ("informercials" are advertisements that appear to be television programs that are placed on non-network and cable stations).

232. LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1 (1971) (suggesting that the FTC lacks genuine expertise over the courts in antitrust cases particularly those concerning the Robinson-Patman Act).

233. See *supra* note 5 and accompanying text.

234. G. MIRACLE & T. NEVETT, VOLUNTARY REGULATION OF ADVERTISING 29-33 (1987).

235. *Id.* at 83.

of Better Business Bureaus by advertisers and advertising agencies.²³⁶ During 1983-85, forty-three percent of these complaints were made by competitors.²³⁷

If the NAD cannot resolve the complaint, the case can be appealed to the National Advertising Review Board. The Board is funded in the same manner as NAD, but has decided only forty-one cases that have been appealed to it out of the more than 2,000 investigated by NAD since 1971.²³⁸ In sixty-six percent of the cases, the Board upheld the NAD decision. In twenty percent of the cases, the Board reversed or modified the NAD decision, and fifteen percent of the cases were dismissed or withdrawn.²³⁹ Thus far, advertisers have always complied with a negative Board decision.²⁴⁰

NAD standards for reviewing advertising seem comparable to the FTC's standards. For example, in 1984, the NAD took formal action on 105 complaints.²⁴¹ Eighty percent of these complaints questioned the adequacy of substantiation and eighty-three percent challenged misleading statements or depictions.²⁴² In 1984, fifteen of these cases involved explicit comparisons with rival offerings and nearly forty involved implicit comparisons (e.g., "the only lawn fertilizer there is").²⁴³ Lastly, from 1973 through part of 1982, thirty percent of NAD cases dealt with companies in *Advertising Age's* 100 Leading National Advertisers.²⁴⁴ Thus, the NAD appears to be more willing than the FTC to deal with national advertisers and comparative advertising.²⁴⁵

The cost of complaining to NAD is comparable to complaining to the FTC and is lower than that of bringing a Lanham Act case. Like the Lanham Act courts, NAD acts quickly. It frequently resolves com-

236. *Id.* at 84.

237. *Id.* at 209.

238. *Id.* at 211, 216, 218.

239. *Id.* at 218.

240. *Id.* at 83-88. If the advertiser does not comply with the Board decision, procedures call for referring the complaint to the FTC. Best, *Study, supra* note 211, at 37-38 (noting that two advertisements had not been resolved by the NAD at the close of 1986).

241. G. MIRACLE & T. NEVETT, *supra* note 234, at 216.

242. *Id.* at 226.

243. Best, *Study, supra* note 211, at 21-22.

244. Armstrong & Ozanne, *An Evaluation of NAD/NARB Purpose and Performance*, 12 J. ADVERTISING 15, 17 (1983).

245. Until 1972, two major television networks and a number of national print publications banned comparative advertising. The FTC endorsed comparative advertising in a 1971 policy statement and persuaded the television networks to change their policies. See Note, *To Tell The Truth: Comparative Advertising and Lanham Act Section 43(a)*, 36 CATH. U.L. REV. 565, 565-66 (1987). See also *supra* notes 203-10 and accompanying text.

plaints within six months of receipt.²⁴⁶ NAD examines about one hundred complaints annually.²⁴⁷ Despite its lack of authority to issue binding orders, it obtains discontinuance or modification in about seventy-five percent of its cases with the remainder vindicating the challenged advertisement.²⁴⁸ Admittedly, the complete privatization of advertising regulation is neither feasible nor desirable. Although the NAD appears to play its role well, it cannot compel compliance. Furthermore, some will always be suspicious of an industry-sponsored system of regulation. For these reasons, the FTC is needed for at least a small role in advertising regulation. The Lanham Act, on the other hand, can provide faster relief from misleading advertising. These quick injunctions appear most often sought by competitors named in explicit comparisons. Although the business injury to the named rival may be significant in such cases, the injury to consumers is questionable. Therefore, little would be lost, from the consumer perspective, in abolishing advertising regulation under the Lanham Act, leaving this task for the NAD and FTC. The "privatization" of advertising regulation may be unstoppable, but it also can be improved to better serve the public and the taxpayers.

246. Sixty-four percent of all complaints in 1982 were resolved within six months. Best, *Study*, *supra* note 211, at 47.

247. *Id.* at 20.

248. It examined 107 complaints in 1986 and obtained discontinuance or modification in 75% of them. G. MIRACLE & T. NEVETT, *supra* note 234, at 216.

