THE AUTHORITY OF THE FEDERAL TRADE COMMISSION TO ORDER CORRECTIVE ADVERTISING

For years, Listerine Antiseptic, a mouthwash product, had been advertised as an effective ingredient in the prevention and cure of colds and sore throats.[1] In 1972, the Federal Trade Commission (FTC) challenged these representations by issuing a complaint[2] against Listerine's producer, the Warner-Lambert Co. (Warner-Lambert). The complaint alleged that, contrary to its advertisements,[3] Listerine does not cure or prevent colds or sore throats or cause them to be less severe than they otherwise would be.[4]

---

[1] Warner-Lambert Co. v. FTC, 562 F.2d 749, 752 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978). Warner-Lambert has marketed Listerine since 1879, always representing the product as an effective ingredient in the treatment of colds and sore throats. Starting in 1921, these claims were directly advertised to the consumer. *Id.*

[2] Warner-Lambert Co., 86 F.T.C. 1398-1404 (1975), [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ ¶ 19,838, 20,045 (complaint proposed November 3, 1971 and issued June 27, 1972). The Commission is empowered to issue a complaint whenever it has "reason to believe" that an unlawful practice is being employed and that an administrative proceeding would be "to the interest of the public." Federal Trade Commission Act, § 5, 15 U.S.C. § 45(b) (1970). This is the formal opening of an adjudicative proceeding before the Commission. *See* Procedures & Rules of Practice for the Federal Trade Commission, 16 C.F.R. § 3.11 (1977) [hereinafter cited as FTC Rules]. However, in the majority of cases, alleged offenders are given the opportunity to settle the case by negotiating with the Commission for a cease and desist order. Under this Consent Order Procedure, the respondent is bound by the agreed upon cease and desist order as if there had been a formal order entered after trial and review. Only when there is no agreement at this stage does the Commission issue its formal complaint. *See* FTC Rules, 16 C.F.R. § 2.31-.34 (1977).

[3] The cold and sore throat claims were made on labels, print advertisements and television commercials. Representative advertisements are as follows:

On packages or labels:

LISTERINE
Antiseptic
Kills Germs
By Millions
On Contact
For Bad Breath, Colds and
Resultant Sore Throats

****

For Colds and Resultant Sore Throats-Gargle with Listerine Antiseptic Full Strength at the First Sign of your Cold.

In print advertisements:

FIGHT BACK—The colds-catching season is here again! Nothing can cold-proof you***but Listerine Antiseptic gives you a chance to fight back!

****

Fight back with Listerine Antiseptic. Gargle twice a day—starting now—before you get a cold. You may find the colds you do get will be milder, less severe. That's why more people use Listerine during the colds-catching season than any other oral antiseptic. Why don't you?

86 F.T.C. at 1399-1400, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,838, at 21,859.

[4] *Id.* at 1400-01, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,838, at 21,859. The complaint also alleged that Warner-Lambert falsely represented that the latest tests prove that children who gargle with Listerine have fewer colds and miss fewer days of school because of colds than children who do not use Listerine. This allegation was dismissed by the FTC. 86 F.T.C. 1515 (1975). The complaint also alleged that the statement, "Kills Germs by Millions on Contact," gives the erroneous impression that such germ-killing ability is of medical significance in the treatment of colds and sore throats. *Id.* at 1401, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,838, at 21,859-60.

The complaint charged that these "false, misleading and deceptive" statements were in violation of section 5 of the Federal Trade Commission Act.[5] Extensive evidentiary hearings were held before an administrative law judge who sustained the allegations of the complaint.[6] Upon appeal[7] by Warner-Lambert to the FTC, this decision was affirmed.[8] Accepting the findings made below, the FTC ordered the company to cease and desist the challenged cold and sore throat representations.[9] The Commission further prohibited any future Listerine advertisement unless accompanied by a clear and conspicuous statement that:

> Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.[10]

The corrective statement was required until Warner-Lambert had spent a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.[11]

Warner-Lambert appealed[12] and in *Warner-Lambert Co. v. FTC,*[13] the United States Court of Appeals for the District of Columbia Circuit affirmed the order, with modification.[14] The court held first, that the FTC has the authority to issue a corrective advertising order in appropriate cases, even though such a remedy is not expressly mentioned in the Commission's authorizing statute,[15] and second, that the corrective advertising order as modified was appropriate in this case because it was reasonably related to the goal of dissipating the lingering effects of Warner-Lambert's prior false and deceptive advertisements.[16]

As a preliminary matter, the court observed that there was "substantial evidence on the record viewed as a whole"[17] to support the Commis-

---

[5] Section 5 of the Act provides that: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (Supp. V 1975).

[6] 86 F.T.C. 1398, 1405-86 (1975) (initial decision by Alvin L. Berman, Administrative Law Judge, November 25,1974). The evidentiary hearings are public hearings after which the administrative law judge makes findings of fact and proposes an initial order. *See* FTC Rules, 16 C.F.R. § 3.41-.51 (1977). The hearings in *Warner-Lambert* extended over four months. There were approximately 4,000 pages of documentary exhibits and forty-six witnesses. Warner-Lambert Co. v. FTC, 562 F.2d at 752.

[7] The decision of the administrative law judge may be appealed by either party to the full Commission within thirty days. *See* FTC Rules, 16 C.F.R. § 3.52-.55 (1977).

[8] 86 F.T.C. 1398, 1513-15 (1975).

[9] *Id.* at 1513-14.

[10] *Id.* at 1514.

[11] *Id.* at 1515. This is a sum of approximately $10 million. 562 F.2d at 752 n.1. The final order also included notice terms so that the corrective message would be readily apparent in both print and television advertisements. 86 F.T.C. at 1514. See note 236 *infra.*

[12] A respondent can obtain judicial review of a final cease and desist order in a United States Court of Appeals by filing a written petition within 60 days. 15 U.S.C. § 45(c) (1970).

[13] 526 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 98 S. Ct. 1575 (1978). Judge Wright filed the opinion for himself and Judge Bazelon. Judge Robb dissented. 562 F.2d at 752.

[14] *Id.* On review, the court of appeals can affirm, enforce, modify or set aside the final order of the FTC. 15 U.S.C. § 45(c) (1970). In *Warner-Lambert,* the court found that the preamble "Contrary to prior advertising" was not necessary to the effectiveness of the corrective message. See text at notes 235-48 *infra.*

[15] 562 F.2d at 756-57.

[16] *Id.* at 762.

[17] *Id.* at 753. When the court of appeals reviews an order, "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c) (1970). Such a statutory provision uniformly has been held to require that the agency's decision be

sion's finding that Listerine is not beneficial for colds or sore throats. In particular it accepted the Commission's findings of fact which were based upon the evidence produced at the hearings below.[18] The court further concluded that the Commission did not err in refusing to reopen the proceedings to consider a later Food and Drug Administration study of over-the-counter cold remedies, determining that the FDA study did not fundamentally contradict the Commission's findings.[19] More importantly, however, the court gave credence to the Commission's findings that Warner-Lambert's false and deceptive advertisements had engendered erroneous beliefs in the minds of consumers, namely, that Listerine will prevent or cure colds and sore throats.[20] Moreover, it appeared that these beliefs would remain even after Warner-Lambert had stopped the offensive Listerine advertisements[21] and would continue to be a significant factor in future consumer purchasing decisions.[22] Accordingly, the court accepted the Commission's view of the evidence that the "deceptive advertisements have created false beliefs which are likely to continue to exist and influence consumer decisions to purchase Listerine."[23]

Judge Wright's opinion for the majority next utilized a two-step process to support the holding that the Commission has the authority to require corrective advertising. First, the court construed precedent concerning the agency's remedial authority in the antitrust area to conclude that "the Commission has the power to shape remedies which go beyond the simple cease and desist order,"[24] the only remedy for which the Federal Trade Commission Act expressly provides.[25] Second, the court determined that corrective advertising is not outside the range of permissible affirmative remedies to which the Commission may look.[26] In support of this latter view, the majority observed that nothing in the legislative history of the FTC Act proscribed the use of corrective advertising.[27] Specifically, the court ruled that a 1975 amendment to the Act,[28] giving to the courts the

supported by substantial evidence on the record viewed as a whole. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951).

[18] 562 F.2d at 753-54.

[19] *Id.* at 754-56.

[20] *Id.* at 762-63. Based on expert testimony and consumer survey evidence, the Commission had found that a substantial number of consumers held erroneous beliefs concerning Listerine's ability to alleviate colds and sore throats and that these beliefs were created and maintained by Warner-Lambert's deceptive advertising. 86 F.T.C. at 1501-03, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,935-37.

[21] 562 F.2d at 762-63 & n.65. The Commission had concluded that a substantial portion of consumers would retain the erroneous beliefs about Listerine's cold and sore throat efficacy well into the 1980's. 86 F.T.C. at 1503-04, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,937.

[22] 562 F.2d at 762-63 & n.65. *See* 86 F.T.C. at 1504, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,937.

[23] 562 F.2d at 769 (supplemental opinion on petition for rehearing).

[24] 562 F.2d at 757.

[25] If, after reviewing the evidence at a hearing, the Commission determines that the respondent has engaged in an unfair or deceptive business practice, the Commission is empowered to issue "an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." FTC Act, § 5, 15 U.S.C. § 45(b) (1970).

[26] 562 F.2d at 757-62.

[27] *Id.* at 758.

[28] The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, tit. II, § 206, 15 U.S.C. § 57b (Supp. V 1975).

power to order "public notification" of a trade violation, did not indicate a congressional understanding that the agency itself lacked authority to order corrective advertising.[29] The court also decided that the Supreme Court's recent extension of first amendment protection to commercial speech did not bar the remedy since its imposition is an instance of legitimate governmental regulation of false or misleading advertising.[30] The court found judicial support for the corrective advertising remedy in prior cases applying the well established concept "that under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts."[31] Thus, as mentioned above, the court based the FTC's authority to require corrective advertising on two fundamental propositions: 1) in framing remedies, the Commission is not strictly limited by the literal language of the Federal Trade Commission Act and 2) the corrective advertising order is within the Commission's remedial authority encompassed by the Act.

Finally, the court ruled that the use of corrective advertising against Warner-Lambert was warranted and equitable.[32] It found "reasonable" the Commission's standard for the imposition of the remedy, which required the agency to prove both that the false advertisements played a substantial role in creating an erroneous consumer belief and that the belief did not dissipate after the advertisements were stopped.[33] Based on the record before it, the court held that the Commission met its burden of proof on these prerequisites.[34] It found persuasive the Commission's use of scientific consumer survey evidence and the testimony of experts and concluded that these constituted "substantial evidence in support of the need for corrective advertising in this case."[35] The court, however, disagreed with the Commission in one respect. Characterizing the FTC-ordered statement "contrary to prior advertising" as a "confessional preamble", the court noted that neither of the two purposes potentially served by the phrase—calling attention to the corrective message or humiliating the advertiser—were *necessary* for the Commission's goal.[36] The court accordingly deleted this phrase from the corrective message and affirmed the order as so modified.

While agreeing with the majority that Warner-Lambert should cease and desist its cold and sore throat claims, Judge Robb, in dissent, asserted that the imposition of a corrective message in future advertisements was beyond the scope of the FTC's authority.[37] Judge Robb viewed the agency's statutory power to enter cease and desist orders as prospective in nature and concluded that corrective advertising represents an unauthorized retrospective remedy requiring affirmative statements relating to *past* claims in

[29] 562 F.2d at 757-58.

[30] *Id.* at 758-59. After this decision, Warner-Lambert petitioned the court for a rehearing, relying primarily on the argument that the first amendment prohibited the imposition of corrective advertising. Although the court of appeals ultimately denied the petition, it wrote a supplemental opinion dealing with the constitutional issue in more detail than had been done in the earlier opinion. *Id.* at 768-71.

[31] *Id.* at 759. *See* cases cited at notes 173-96 *infra*.

[32] *Id.* at 762.

[33] *Id.*

[34] *Id.* at 762-63.

[35] *Id.* at 763.

[36] *Id.*

[37] *Id.* at 764.

now-truthful advertisements.[38] The dissent also inferred from the 1975 amendment to the FTC Act, which expressly grants a similar power to the courts, that Congress did not intend for the Commission itself to have this authority.[39] Finally, the dissent determined that neither the Commission's antitrust orders[40] nor its affirmative disclosure remedies,[41] both concededly valid, provide analogous support for corrective advertising. Judge Robb concluded that any expansion of the agency's power to remedy the "after-effects" of discontinued advertising must be made by Congress.[42]

Warner-Lambert is significant as the first judicial pronouncement on the validity of the FTC's newly emerging corrective advertising remedy. On several occasions, the Commission has asserted that it has the authority to impose corrective advertising,[43] but *Warner-Lambert* stands as the first acknowledgement of this authority by a federal court. The case is important not only for the majority's construction of relevant law but also for its recognition and treatment of the underlying policy considerations which form the basis for the Commission's very existence. In addition, the court's guidelines regarding the types of situations in which future Federal Trade Commission corrective advertising orders will be sustained have practical import for the future.

This note will initially examine the Federal Trade Commission's authority to issue affirmative orders in advertising. The historical basis for the Commission's jurisdiction in this area will be set forth and consideration will be given to the restrictions imposed upon the Commission's remedial

---

[38] *Id.* at 764-65, 768.

[39] *Id.* at 765-66.

[40] *Id.* at 766-67.

[41] *Id.* at 767-68.

[42] *Id.* at 768.

[43] The use of corrective advertising to dissipate the lingering effects of prior deception was first proposed in Campbell Soup Co., 77 F.T.C. 664 (1970). This § 5 proceeding concerned the respondent's practice of adding marbles to its soups before showing them in television commercials, a practice which had the effect of giving the soups a deceptively rich appearance. *Id.* at 665. A group of law students, known as Students Opposed to Unfair Practices (SOUP), sought to intervene in the action, contending that a cease and desist order was inadequate to protect the public and that the respondent should be required to disclose the deception in future advertisements. *Id.* at 669. The Commission believed that corrective advertising was not warranted in that case but declared: "We have no doubt as to the Commission's power to require such affirmative disclosures when such disclosures are reasonably related to the deception found and are required in order to dissipate the effects of that deception." *Id.* at 668, 670. SOUP again sought corrective advertising in Firestone Tire & Rubber Co., 81 F.T.C. 398, 426 (1972), *aff'd*, 481 F.2d 246, 251 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). Although the Commission again declined to impose the remedy, 81 F.T.C. at 473-74, it stated: "[A]n order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon . . . ." *Id.* at 471.

The Commission subsequently has utilized corrective advertising in various consent orders. *See, e.g.*, Lens Craft Research & Devel. Co., 84 F.T.C. 355, 362, 364 (1974); Wasem's Inc., 84 F.T.C. 209, 214-15 (1974); Amstar Corp., 83 F.T.C. 659, 673 (1973); Ocean Spray Cranberries, Inc., 80 F.T.C. 975, 982-83 (1971); ITT Continental Baking Co., 79 F.T.C. 248, 255 (1971). Most recently, as part of a settlement of a civil penalty action for violations of a 1976 Commission cease and desist order, STP Corporation has agreed to run $200,000 worth of advertisements containing the statement: "As a result of an investigation by the [FTC] into certain allegedly inaccurate past advertisements for STP's oil additive, STP Corporation has agreed to a $700,000 settlement." The remedy stems from the company's prior advertisements claiming that STP oil treatment reduced oil consumption in certain road tests. 3 TRADE REG. REP. (CCH) ¶ 21,390 (settlement announced February 9, 1978).

authority by the due process concept of fair warning. The affirmative remedy in the antitrust context will be examined as arguable support for a similar authority in the advertising area and the first part of the note will conclude that the Commission does have some affirmative remedial authority. The second part of the note will address the question whether corrective advertising falls within this class of affirmative remedies. The permissibility of corrective advertising will be considered in light of, first, the *Warner-Lambert* dissent's distinction between prospective and retrospective remedies, second, the effect of the 1975 amendment to the Federal Trade Commission Act and, finally, the first amendment. The third part of the note will focus on the relationship between the new remedy and prior cases allowing the Commission to order affirmative disclosure of unfavorable product characteristics. It will be submitted that corrective advertising is a logical extension of the affirmative disclosure power and additional factors which support such an extension will be presented. Finally, the fourth part of the note will attempt to discern, from the *Warner-Lambert* decision, guidelines regarding the circumstances under which corrective advertising may properly be imposed in future cases.

I. FTC POWER TO ISSUE AFFIRMATIVE ORDERS IN CASES OF UNFAIR OR DECEPTIVE ADVERTISING

The Federal Trade Commission was established in 1915 pursuant to the provisions of the Federal Trade Commission Act of 1914.[44] This legislation was designed not to deal with the regulation of advertising but rather to bolster enforcement of the antitrust laws.[45] In fact, it has been suggested that a different statutory scheme might have been pursued had Congress been specifically concerned with the problem of false and deceptive advertising.[46] Nevertheless, relying upon the broad language of section 5,[47] which authorizes the agency to prevent unfair or deceptive business practices, the Commission immediately began to exercise jurisdiction over advertising.[48]

---

[44] Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (1970).

[45] A prime motivation behind the FTC Act was the reaction to the judicial development of the "rule of reason." The Supreme Court had earlier declared that the Sherman Antitrust Act only proscribed "unreasonable" restraints of trade. Standard Oil Co. v. United States, 221 U.S. 1, 68 (1911). For discussion of the political and legislative history of the Federal Trade Commission Act, *see* G. HENDERSON, THE FEDERAL TRADE COMMISSION 1-48 (1924); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962); Baum & Baker, *Enforcement, Voluntary Compliance & The Federal Trade Commission*, 38 IND. L.J. 325-37 (1963); Rublie, *The Original Plan & Early History of the Federal Trade Commission*, 11 ACAD. POL. SCI. PROC. 6y6 (1926).

[46] HENDERSON, *supra* note 45, 339. Professor Henderson, in the first authoritative treatise on the Commission, concluded that the agency's jurisdiction over false advertising was a "fortuitous by-product" of its jurisdiction over antitrust matters. *Id.*

[47] "[U]nfair methods of competition in commerce are hereby declared unlawful." FTC Act of 1914, ch. 311, § 5, 38 Stat. 719 (current version at 15 U.S.C. § 45(a)(1) (Supp. V 1975).

[48] The Commission's justification for this move appeared in its second Annual Report:

> [T]he Commission has been of the opinion that at least those cases in which the method of competition restrains trade, substantially lessens competition, or tends to create a monopoly are subject to a proceeding under section 5 of the Federal Trade Commission Act. The Commission has gone further than this, however, and in some instances where these elements did not appear, as in certain cases of misbranding and falsely advertising the character of goods where the public was particularly liable to be misled, the Commission has taken jurisdiction.

This development met with judicial approval[49] so that by the early 1920's, FTC jurisdiction in the area was established. However, in 1931, the Supreme Court gave this authority a restrictive interpretation. In *FTC v. Raladam Co.*,[50] the Commission was held powerless to prohibit false and deceptive advertising unless it could show that there was a harmful effect upon the competitors of the advertiser, regardless of whether or not there was any harm to consumers exposed to the advertising.[51] Congress responded to this potential jurisdictional threat[52] by legislatively overruling *Raladam*.[53] The Wheeler-Lea Act of 1938 allowed the Commission to prevent not only "unfair methods of competition in commerce" but also "unfair or deceptive acts or practices in commerce."[54]

This amendment to section 5 gave the Commission the power to act to prevent trade practices which deceived the public, regardless of their effect upon competition. The expansion of the FTC's authority, represented by the passage of the Wheeler-Lea Act, indicated an approval of the Commission's and the courts' position that the agency could correct false and deceptive advertising through section 5. This legislative awareness of the Commission's advertising jurisdiction was further emphasized by the fact that the amendment expressly gave to the agency substantial control over the advertising of food, drugs, devices and cosmetics.[55] Thus, the Wheeler-Lea Act not only left indisputable the Commission's jurisdiction

---

[1916] FTC ANN. REP. 6. For a general discussion of the Commission's jurisdiction over advertising, *see* Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising*, 31 COLUM. L. REV. 527 (1931); Millstein, *The Federal Trade Commission & False Advertising*, 64 COLUM. L. REV. 439 (1964); Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

[49] *See* FTC v. Winsted Hosiery Co., 258 U.S. 483, 493-94 (1922); Sears, Roebuck & Co. v. FTC, 258 F. 307, 310-12 (7th Cir. 1919).

[50] 283 U.S. 643 (1931). In *Raladam*, the respondent manufactured an "obesity cure," which was advertised as the result of scientific research and as safe and effective. The Commission found that the preparation could not be used safely except under medical direction and advice, and consequently ordered the respondent to cease its representations unless accompanied by a statement to that effect. *Id.* at 644-46.

[51] *Id.* at 649, 654. *Accord*, FTC v. Royal Milling Co., 288 U.S. 212, 215-16 (1933).

[52] The *Raladam* case threatened to remove from the Commission's power those cases in which the violator's competitors were employing the same practice, or in which the violator had a monopoly in the field. Even though the Commission could usually show a harmful competitive effect, the limitation was serious because "considerable time and money had to be expended in many cases in order to do so . . . ." H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1937).

[53] Wheeler-Lea Act of 1938, § 3, 15 U.S.C. § 45(a)(1) (1970). The objective of the Act was described as follows:

> [O]ne of the things it will do is to relieve the Federal Trade Commission of the necessity of showing injury to a competitor. That is one of the practical purposes of the legislation. This will save unnecessary time and expense in showing that an act is injurious to a competitor. Indeed, the principle of the act is carried further to protect the consumer as well as the competitor. In practice the main feature will be to relieve the Commission of this burden, but we go further and afford a protection to the consumers of the country that they have not heretofore enjoyed.

83 CONG. REC. 391-92 (1938) (remarks of Rep. Lea). *See also* H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1937).

[54] Wheeler-Lea Act of 1938, § 3, 15 U.S.C. § 45(a)(1) (1970).

[55] *Id.*, § 4, 15 U.S.C. §§ 52-56 (1970).

over false advertising but also strengthened its role as protector of both the consumer and the competitor.[56]

A. *Affirmative Orders and the Problem of Fair Warning*

While the broad language of section 5 allowed the Commission to extend its jurisdiction to advertising, that language did not define the extent to which the agency would be able to regulate false and deceptive advertising. When establishing the scope of the Commission's remedial authority, Congress rejected the enumeration of proscribed acts and instead chose the general words "unfair" and "deceptive."[57] This was done "in order to prevent clever circumvention of a more precise definition, thereby insuring the ability of the Commission to define norms of acceptable business behavior."[58] Thus, it was left to the Commission to determine on a case-by-case basis the practices prohibited by the statute.

This decision, although providing a workable framework for the Commission's control of business activities, gave rise to due process concerns since the general language did not give specific notice to individual businesses that a certain course of conduct was in violation of the Act.[59] As one court stated, "a businessman would be unable to determine whether a particular practice was made unlawful until the Commission and courts gave the general language specific substance."[60] This problem could assume constitutional dimensions should a businessman be deprived of property for failure to comply with the statutory requirements. Thus, a company

---

[56] *See generally* Handler, *The Control of False Advertising under the Wheeler-Lea Act*, 6 LAW AND CONTEMP. PROB. 91 (1939); Legislative Note, 39 COLUM. L. REV. 259 (1939); Note, *The Consumer & Federal Regulation of Advertising*, 53 HARV. L. REV. 828 (1940).

[57] See note 5 *supra*.

[58] Heater v. FTC, 503 F.2d 321, 324 (9th Cir. 1974). This rationale first was expressed in the House Conference Report:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

H.R. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914), *quoted in* Heater v. FTC, 503 F.2d at 323 n.5. *See also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972).

[59] Heater v. FTC, 503 F.2d 321, 324 (9th Cir. 1974), *citing* 51 CONG. REC. 13,114-15 (1914) (remarks of Senator McCumber).

If, in addition to allowing the Commission to define what acts would be prohibited under § 5, Congress had provided that the Commission could impose civil or criminal penalties for violations, the statute might have been successfully challenged as violative of the due process clause of the fifth amendment. The Supreme Court has stated generally:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). *See also* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); International Harvester Co. v. Kentucky, 234 U.S. 216, 223-24 (1914); Collins v. Kentucky, 234 U.S. 634, 637-38 (1914).

[60] Heater v. FTC, 503 F.2d 321, 324 (9th Cir. 1974).

that engaged in a particular course of conduct, not obviously unfair or deceptive, in good faith reliance on past business practice, would be exposed to liability if the Commission subsequently determined that the practice violated the statute.

To avoid these potential due process problems, Congress in 1914 decided against the imposition of civil or criminal liability based on a Commission finding of a violation. Instead, it provided that "[i]f . . . the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [the FTC Act], it shall . . . issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."[61] The prospective nature of the cease and desist order allowed Congress to retain the broad proscriptive language by obviating the problem of an ex post facto identification of certain conduct as illegal.[62] In addition, this curb was considered necessary so that the Commission's remedial power would remain consistent with the agency's purpose, which was to develop principles, based on different factual contexts, that would serve as guidelines for the business world.[63] Permitting the Commission to attach consequences on the basis of past conduct that had not been identified as wrongful, through either criminal punishment or private relief, was thought inconsistent with the "quasi-legislative and educational function" contemplated by Congress.[64]

The remedial limitation inherent in section 5's language is best illustrated by the case of *Heater v. FTC*.[65] There, the respondent had engaged in numerous deceptions and misrepresentations in connection with the advertising and sale of franchises which authorized the franchisees to sell memberships in a credit card program.[66] The Commission had ordered the respondent not only to discontinue the unfair and deceptive business prac-

---

[61] FTC Act, § 5, 15 U.S.C. § 45(b) (1970). For a discussion of this accommodation and a comparison with the more stringent enforcement provisions of the Clayton Act, *see* Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 990-92 (D.C. Cir. 1973).

[62] In Heater v. FTC, the Ninth Circuit noted that:

> [T]o reconcile the Commission's broad power with the need for a specific notice to an individual who must conform his behavior to the terms of the [FTC] Act, Congress limited the consequences of violation of the Act to a cease and desist order. It withheld from the Commission the power to make a determination which would expose the businessman to liability for acts occurring before the Commission gave the general definition specific meaning in a factual context.

Heater, 503 F.2d 321, 324 (9th Cir. 1974). *See* FTC v. Gratz, 253 U.S. 421, 432 (Brandeis, J., dissenting).

It has been held that the general language of § 5 is not void for indefiniteness because the term "unfair methods of competition" is sufficiently certain so as to be generally understood. Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919). Although the language does not define what practices are to be prohibited by the statute, the court in *Sears* observed that the Commission's function is not to impose punishment but simply to prevent unfair trade practices, stating that the statute "is remedial and orders to desist are civil . . . ." *Id.*

[63] *See* 51 CONG. REC. 13,116 (1914) (remarks of Senator Newlands), *cited in* Heater v. FTC, 503 F.2d 321, 324 (9th Cir. 1974).

[64] Heater v. FTC, 503 F.2d 321, 324 (9th Cir. 1974).

[65] *Id.*

[66] Universal Credit Acceptance Corp., 82 F.T.C. 570, 642-44, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) § 20,240 at 22,240-41 (final order to cease and desist issued February 16, 1973).

tices but also to make restitution of money gained from those practices.[67] Upon review of the order, the United States Court of Appeals for the Ninth Circuit examined the relevant legislative history and concluded that the FTC was without statutory authority to order restitution.[68] The court reasoned that allowing the remedy would contradict the statutory scheme: "[I]t would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview."[69] The outcome of the *Heater* case accordingly demonstrates that the legislative solution to the due process problem limited the Commission's remedial power under section 5 to the prohibition of illegal practices for the future.

Although the Commission's remedial power was thus limited by the 1914 Act, the manner in which Congress defined the Commission's area of activity reveals that section 5 contains both a restriction on and an expansion of FTC authority. While limited to prohibiting violations in the future, the Commission is empowered to issue cease and desist orders to fill in the general language used by Congress.[70] The courts have recognized that in order to fulfill effectively its statutory mandate in applying section 5's general outline to particular fact situations, the Commission must have wide latitude in determining what action is to be taken.[71] In addition, the expertise gained by the Commission's specializing in this field has provided support for judicial deference to the agency's ability not only to identify viola-

---

[67] 503 F.2d. at 321.

[68] *Id.* at 324-25.

[69] *Id.* at 323.

[70] FTC v. Ruberoid Co., 343 U.S. 470, 484-87 (1952) (Jackson, J., dissenting). Justice Jackson stated that

> [Congress] must legislate in generalities and delegate the final detailed choices to some authority with considerable latitude to conform its orders to administrative as well as legislative policies.
>
> . . . .
>
> . . . The statute, in order to rule any individual case, requires an additional exercise of discretion and that last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

Id.

[71] Focusing on the Commission's power under § 5 to prohibit unfair or deceptive business practices, the Supreme Court has observed:

> It is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business.'
>
> This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations.

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384-85 (1965) (quoting FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953)).

tions[72] but also to prescribe appropriate remedies.[73] Because of these two factors—the Commission's skill gained through experience and the broad language of section 5—the courts, in reviewing Commission remedies, have followed the limited standard expressed by the Supreme Court in *Jacob Siegel Co. v. FTC*:[74]

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.[75]

The Commission's broad discretionary power to determine the appropriate remedy to correct a violation favors the view that it may go beyond a simple prohibitory order and may require the offender to take some affirmative action. Nevertheless, because of both the constitutional prohibition on the punishment of behavior not found to be illegal at the time of its occurrence and the fact that the only remedy authorized by the statute is the cease and desist order, the permissibility of such affirmative orders is not indisputable. Since Congress imposed limits on the FTC's remedial authority, the Commission's discretionary power to deal with unfair or deceptive business practices is not of itself sufficient to support an extension of that power to affirmative relief. Thus, the threshold question in *Warner-Lambert* concerned whether the FTC possesses the authority under section 5 to issue affirmative orders in general,[76] since corrective advertising is a type of affirmative remedy. The majority opinion resolved this issue in favor of affirmative remedies by reliance on the judicial treatment of the Commission's antitrust remedies.[77] Because the antitrust cases furnished significant support for the *Warner-Lambert* decision, a consideration of those cases is appropriate.

---

[72] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965). "[A]s an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *Id.*

[73] *E.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices."); Carter Products, Inc. v. FTC, 268 F.2d 461, 498, *cert. denied*, 361 U.S. 884 (1959) ("The Commission is the expert body to determine what remedy is necessary to eliminate the unfair and deceptive practices disclosed by the record, and it has wide latitude for judgment. Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting the means of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence.").

[74] 327 U.S. 608 (1946).

[75] *Id.* at 611-13. *Accord*, FTC v. Mandel Bros., Inc., 359 U.S. 385, 392 (1959) ("One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in."); FTC v. National Lead Co., 352 U.S. 419, 428 (1957) ("[T]he Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist.").

[76] 562 F.2d at 756.

[77] *Id.* at 756-57.

B. *Antitrust Orders Under Section 5*

The scope of the Commission's power under section 5 has been acknowledged as reaching many of the trade practices also prohibited by the Sherman Act.[78] However, the Supreme Court initially held the view that in proceeding against antitrust violators under section 5, the FTC could issue only negative cease and desist orders and could not require the violator to take affirmative action. In *FTC v. Eastman Kodak Co.*,[79] the Court struck down a divestiture order as beyond the Commission's statutory authority,[80] stating that the agency "has not been delegated the authority of a court of equity."[81] This early view, however, did not prevail.

In 1963, the Supreme Court held in *Pan American World Airways, Inc. v. United States*[82] that the Civil Aeronautics Board had primary jurisdiction over a suit brought against an airline charged with violations of the Sherman Act. The decision was based on the Court's interpretation of section 411 of the Federal Aviation Act,[83] a section patterned after section 5 of the FTC Act, which prohibited unfair or deceptive acts in air transportation and empowered the Board to issue cease and desist orders. The Court reasoned that this agency, like the FTC, must define the scope of the statute's general language on a case-by-case basis[84] and that the cease and desist power was broad enough to encompass the power to compel divestiture.[85] More importantly, the Court expressly contradicted the earlier *Eastman Kodak* line of reasoning, stating: "Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees . . . subject of course to judicial review. . . . [T]he power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority. . . ."[86]

In *FTC v. Dean Foods Co.*,[87] the Court extended to the FTC this power to impose remedies not expressly provided for by statute. There, the Commission had begun proceedings under section 5 of the FTC Act and section 7 of the Clayton Act[88] challenging the merger of two companies. It applied for a temporary restraining order and a preliminary injunction to

---

[78] *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683, 691-92 (1948), in which the Court stated that "soon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which were also outlawed by the Sherman Act, and . . . this Court has consistently approved that interpretation of the [FTC] Act." For the Commission's own view, see note 48 *supra*.

[79] 274 U.S. 619 (1927).

[80] *Id.* at 625.

[81] *Id.* at 623.

[82] 371 U.S. 296, 310 (1963).

[83] 49 U.S.C. § 1381 (1970).

[84] 371 U.S. at 307-08. The Court stated that "[W]e have said enough to indicate that the words 'unfair practices' and 'unfair methods of competition' are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly." *Id.*

[85] *Id.* at 312. The Court concluded that "where the problem lies within the purview of the Board, . . . Congress must have intended to give it authority that was ample to deal with the evil at hand." *Id.*

[86] *Id.* at 312 n.17.

[87] 384 U.S. 597 (1966).

[88] Section 7 of the Clayton Act prohibits the acquisition by one corporation of the stock of another where it tends to lessen competition or to create a monopoly. 15 U.S.C. § 18 (1970).

maintain the status quo until it determined the legality of the merger. In a 5-4 decision, the Supreme Court held that the appellate court had the power to issue a preliminary injunction[89] and that the FTC had the authority to request such relief.[90] In this latter holding, the Court concluded that Congress must have intended the Commission to exercise the power to take such affirmative action, asserting that "[s]uch ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities."[91] It further noted that the restrictive literal view of section 5, as expressed in *Eastman Kodak*, had been repudiated by the *Pan American* case.[92] Thus, under the *Dean Foods* reasoning, the Commission's antitrust authority encompasses the equitable relief necessary to deal adequately with monopolistic business practices.[93]

The *Warner-Lambert* majority viewed the judicial expansion of the FTC's antitrust remedial power under section 5 as leading to the conclusion that the Commission can go beyond the simple negative cease and desist order when dealing with any section 5 violation.[94] The dissent, on the other hand, reasoned that antitrust remedies could not be used to support a corrective advertising order framed in cease and desist language because the two areas were inherently different. The antitrust remedial powers, the dissent urged, must be viewed in the context of the statutory scheme giving the FTC extensive authority to enforce the antitrust provisions.[95] Such powers were to be distinguished from the sole authority of the Commission under section 5, the issuance of cease and desist orders; since the section does not provide for any type of affirmative remedy, the dissent concluded that the antitrust cases do not support its judicial enlargement.[96]

---

[89] The All Writs Act empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1970).

[90] 384 U.S. at 606-07.

[91] *Id.* at 607.

[92] *Id.* at 606 n.4.

[93] The *Dean Foods* reasoning has been followed by other courts. *See, e.g.*, L.G. Balfour Co. v. FTC, 442 F.2d 1, 23 (7th Cir. 1971) (FTC's power to order divestiture of monopolies, the court noting the Commission's broad discretion in choosing a remedial norm); Charles Pfizer & Co. v. FTC, 401 F.2d 574, 586 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) (FTC's power to order compulsory licensing of a patent on a reasonable royalty basis); Luria Bros. v. FTC, 389 F.2d 847, 861-63 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968) (FTC's power to limit the purchases of certain products between respondents).

[94] 562 F.2d at 757.

[95] The FTC, for example, has enforcement and administrative authority under the Sherman Act, §§ 1-8, 15 U.S.C. §§ 1-8; the Clayton Act (as amended by the Robinson-Patman Act), §§ 1-15, 26, 15 U.S.C. §§ 12-27; and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, §§ 101-04, 15 U.S.C. §§ 1311-14.

[96] 562 F.2d at 766-67. Judge Robb stated:

> Considered in the light of the specific and extensive statutory underpinning upon which the Court [in *Pan American*] based this decision it is a far cry from a holding that the power to order divestiture was derived only from the authority to issue cease and desist orders, as the majority opinion suggests. Certainly it does not follow from [*Pan American*] that the power of the Federal Trade Commission to order corrective advertising can be derived from its authority to issue cease and desist orders, standing alone.
>
> . . . I think [*Dean Foods*] does not support the majority's leap to the conclusion that the power to issue a cease and desist order, without more, authorizes the Commission to enter a corrective advertising order, nor does the decision justify a conclusion that the corrective order can be sustained under some general remedial power of the Commission.

Id.

Judge Robb's reasoning in the *Warner-Lambert* dissent is not persuasive since it relies on a perceived fundamental difference between the Commission's antitrust remedies and its false advertising remedies. The basis for this difference lies in his view that the "specific and extensive statutory underpinning" for antitrust remedial power supports a broader Commission jurisdiction in this area, as contrasted with its more limited role in the advertising field.[97] However, analysis of FTC jurisdiction reveals that Congress has indeed given the Commission the "statutory underpinning" necessary to support a broad view of its advertising authority. For example, the agency has extensive investigatory and discovery authority to implement its section 5 power[98] as well as the power to issue interpretive rules and regulations defining what it considers to be unfair or deceptive.[99] Moreover, the FTC was recently given the authority to bring civil actions to redress consumer and other injuries resulting from violations of its rules or final cease and desist orders.[100] Furthermore, the Commission's statutory authority to regulate false and deceptive advertising is not limited to the confines of section 5. As noted previously,[101] the Wheeler-Lea Act expressly brought certain classes of advertisements within the Commission's dominion.[102] In addition, other legislation has given the agency extensive enforcement and administrative authority over numerous forms of labeling and advertising in other areas.[103] Although Congress originally viewed antitrust authority as playing the more important role in the Commission's jurisdiction,[104] the agency's practices over the years under section 5, combined with the ad-

[97] *Id.*

[98] The Commission is authorized "[t]o gather and compile information concerning, and to investigate" the business activities of any company or individual engaged in commerce. FTC Act, § 6, 15 U.S.C. § 46(a) (Supp. V 1975). In addition, the Commission can require the filing of annual and special reports and written answers to specific questions. *Id.*, 15 U.S.C. § 46(b) (Supp. V 1975). The agency has other investigatory power as well. *Id.*, 15 U.S.C. § 46(c), (d), (e) & (h) (Supp. V 1975). In conducting its investigations, the Commission has extensive authority to receive documentary evidence, conduct depositions and examine witnesses. *Id.*, § 9, 15 U.S.C. § 49 (Supp. V 1975). Criminal penalties are mandated for any wilful obstruction of these powers. *Id.*, § 10, 15 U.S.C. § 50 (Supp. V 1975).

[99] *Id.*, § 6, 15 U.S.C. § 46(g) (Supp. V 1975). The FTC has the power to issue substantive as well as procedural regulations and the Commission's regulations are given great weight by the courts. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 694-98 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[100] The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, tit. II, § 206, 15 U.S.C. § 57b (Supp. V 1975) (adding a new § 19 to the FTC Act). See text at notes 128-31 *infra*.

[101] See text at note 55 *supra*.

[102] Through the Wheeler-Lea Act of 1938, Congress declared the dissemination of false advertisements of "food, drugs, devices or cosmetics" to be unfair or deceptive within the meaning of § 5. FTC Act, § 12, 15 U.S.C. § 52 (Supp. V 1975). In addition, it gave the FTC power to seek temporary restraining orders and preliminary injunctions against such advertisements in the district courts as well as establishing criminal penalties for health-endangering violations of the Act. *Id.*, §§ 13, 14, 15 U.S.C. §§ 53, 54 (Supp. V 1975).

[103] *See, e.g.*, 15 U.S.C. §§ 68-68j (1970) (the Wool Products Labeling Act); 15 U.S.C. §§ 69-69j (1970) (the Fur Products Labeling Act); 15 U.S.C. §§ 70-70k (1970) (the Textile Fiber Products Identification Act); 15 U.S.C. §§ 1191-1204 (1970) (the Flammable Fabrics Act); 15 U.S.C. §§ 1331-1340 (1970) (the Federal Cigarette Labeling and Advertising Act); 15 U.S.C. §§ 1451-1461 (1970) (the Fair Packaging and Labeling Act); 15 U.S.C. §§ 1601-1665 (1970) (the Truth in Lending Act); 15 U.S.C. §§ 1681-1681t (1970) (the Fair Credit Reporting Act).

[104] See text at notes 45-48 *supra*.

ditional jurisdictional legislation, reveal that the FTC has become the governmental agency primarily charged with the regulation of advertising. These factors indicate that the Commission's advertising jurisdiction has a "statutory underpinning" sufficient to support an affirmative remedial power.

Moreover, in the modern consumer protection trend, FTC control of deceptive advertising has played an increasingly important role in the governmental regulatory scheme.[105] In line with this role, the courts have given the Commission extensive authority to interpret the meaning and effect of advertisements.[106] This enlarged role and the "statutory underpinning" upon which it is based tend to refute the *Warner-Lambert* dissent's restrictive view of FTC remedial authority over deceptive advertising. Instead, they support the majority's conception of the Commission's power to remedy deceptive advertising as co-extensive with its acknowledged authority to issue affirmative orders to correct antitrust violations. Thus, despite the Commission's limited remedial powers dictated by the due process problem inherent in the statutory language, the Commission has been allowed to go beyond the literal language of section 5. Departure from the simple cease and desist order, when needed, seems appropriate for advertising violations, as well as for antitrust violations.

II. FTC POWER TO ORDER CORRECTIVE ADVERTISING

The concept that the Federal Trade Commission can require a violator to take some affirmative action in the future is a step beyond section 5's express authorization of cease and desist orders. However, acceptance of the *Warner-Lambert* majority's viewpoint that affirmative orders in both the antitrust and deceptive advertising contexts are within the ambit of section 5 does not automatically lead to the conclusion that corrective advertising orders are within the Commission's powers. As the *Warner-Lambert* court observed, the question remains whether corrective advertising is included in the class of affirmative remedies to which the Commission may look.[107] The boundaries of this class are defined in terms of three different subject matters: the prospective/retrospective distinction, the 1975 Federal Trade Commission Improvement Act, and the first amendment.

A. *The Prospective/Retrospective Distinction*

The dissent in *Warner-Lambert* expressed the view that mandatory corrective advertising was beyond the FTC's authority due to section 5's authorization of prospective remedies only.[108] According to Judge Robb,

---

[105] For a favorable view of Commission regulation of advertising, see Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977). Professor Pitofsky argues that governmental intervention, through the FTC, is required to protect consumers adequately in that it is the only viable means of ensuring that advertising will provide relevant and truthful market information. *Id.* at 663-75.

[106] See notes 71-72 *supra* and text at notes 214-18 *infra*. *See generally*, Pitofsky, *supra* note 105, at 675-79.

[107] 562 F.2d at 757.

[108] *Id.* at 764-65 (Robb, J., dissenting). Judge Robb reasoned that "the Commission's authority to enter cease and desist orders is prospective in nature . . . . I think [the Commission's broad discretionary authority] does not encompass the power to employ the retrospective remedy of corrective advertising . . . ." *Id.*

when the Commission finds an unfair or deceptive practice, the limit of its authority is to stop the conduct so as to protect the public in the future. In his view, once the practice is ended pursuant to a simple cease and desist order, any further requirement of a corrective message relates to the now-ended advertisements. Thus, since corrective advertising endeavors to abrogate the effects of this past conduct, it is retrospective in nature and exceeds the limits of the Commission's section 5 authority. In illustrating this viewpoint, the dissent stated that "when Warner-Lambert has ceased and desisted from advertising Listerine as a remedy for colds and sore throats there will be nothing to correct in the text of the Listerine advertisements. Any 'corrective statement' will relate solely to past advertising."[109] In addition, since the imposed statement in future truthful advertisements presumably would involve a detriment to the advertiser, the dissent regarded the imposition of such a statement as a form of punishment for the past deceptive advertisements. Under Judge Robb's view, the due process problem, resolved by Congress' original action, is resurrected since the remedy does not have a solely prospective effect and, in fact, imposes punishment for past deeds. Judge Robb found support for his concern[110] in the holdings of the Supreme Court which state that "the effect of the Commission's [cease and desist] order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress."[111] Because the prospective/retrospective distinction can be viewed as a significant obstacle to corrective advertising authority, further analysis of the distinction is required.

The Commission in *Warner-Lambert* justified corrective advertising on the ground that it does not relate solely to *past* conduct but rather serves to prevent *future* public deception in the form of lingering erroneous beliefs engendered by the past advertising.[112] Observing that the courts have traditionally given to the agency wide latitude in fashioning the proper relief to correct a violation, it reasoned that "the Commission has authority to order the relief necessary to adequately protect the public from the *effects* of a law violation."[113] The Commission thus had concluded that Warner-Lambert must engage in the affirmative remedy of corrective advertising since consumer beliefs that Listerine will prevent or cure colds and sore throats cannot be dispelled by a simple cease and desist order.[114] The cir-

[109] *Id.* at 768 (Robb, J., dissenting).

[110] *Id.* at 764-65.

[111] FTC v. Cement Inst., 333 U.S. 683, 706 (1948). *Accord,* FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."); L.F. Balfour Co. v. FTC, 442 F.2d 1, 24 (7th Cir. 1971) ("[T]he Commission's orders are to serve a remedial and not a punitive function."); Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) ("The purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer . . . ."), *quoted in* FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308, 1313 (D.C. Cir. 1968).

[112] See text at notes 20-23 *supra.*

[113] 86 F.T.C. 1398, 1499 (1975), [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,934 (emphasis added).

[114] Because of the significant continuing injury to both consumers and Listerine's competition, the Commission's opinion concluded that "an order merely requiring cessation of the deceptive advertising would not afford the public adequate protection. The lingering false beliefs must be dispelled, a task which requires corrective advertising." *Id.* at 1504, [1973-1976

cuit court accepted this reasoning, observing that consumers would be deceived if they continued to make purchases in reliance upon a reputation that was not deserved.[115] Judge Wright further stated:

> [C]urrent and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed—and purchased—as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly. It will induce people to continue to buy Listerine thinking it will cure colds.[116]

The *Warner-Lambert* court appears correct in regarding the residual effect of past deceptive advertising as a continuing wrong. Under this view of the lingering deception, corrective advertising can be seen as preventing a future illegal practice, and consequently, as a permissible affirmative remedy under section 5. The objective of a corrective advertising order is to deal with the phenomenon that prior deceptive advertisements have generated erroneous beliefs regarding the product in the minds of consumers, which beliefs will remain as an influence on purchasing decisions even after the advertisements have been stopped.[117] Thus, future "honest" advertisements, by failing to rebut this residual deception, merely continue the violation and are deceptive themselves. Even though truthful, the later advertisements serve to reinforce or strengthen the misleading latent images of the product created by the past false advertisements.[118] Moreover, because of the lingering beliefs, the violator continues to enjoy sales and to reap profits based, at least in part, on the prior deception. Failure to correct the residual deception in future advertisements preserves this unfair competitive advantage.

Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,937. The Commission's argument before the *Warner-Lambert* court was summarized as follows:

> The Commission's position . . . is that the affirmative disclosure that Listerine will not prevent colds or lessen their severity is absolutely necessary to give effect to the prospective cease and desist order; a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims.

562 F.2d at 756.

[115] 562 F.2d at 761 n.58.

[116] *Id.* at 769 (supplemental opinion on petition for rehearing) (footnote omitted).

[117] *See* Note, *Illusion or Deception: The Use of "Props" and "Mock-Ups" in Television Advertising*, 72 YALE L.J. 145, 156 n.46 (1962).

[118] The Commission's ability to deal with future truthful advertisements hinges upon whether the advertisements actually do encourage the retention of erroneous beliefs. If residual deception can be shown, corrective advertising becomes appropriate. The Commission has always had the power to prohibit truthful advertisements if, due to the particular circumstances of the case, the effect upon consumers is one of deception. *See, e.g.*, P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950) (prohibiting the selective reporting of test information due to its deceptive effect); *see also* Koch v. FTC, 206 F.2d 311 (6th Cir. 1953) ("[T]he mere fact that words and sentences may be literally and technically true does not prevent their being framed so as to mislead or deceive.").

Viewed in this manner, corrective advertising has both prospective and retrospective qualities; it focuses upon past acts of deception but only to prevent future wrong. This highlights the fact that a rigid prospective/retrospective distinction is unrealistic since every Commission order necessarily looks to the future as well as to the past:

> Every Commission order is "retrospective," in the sense that it looks to and is based upon the causes and results of the acts found to violate the statute, and at the same time it is "prospective" in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future.[119]

The fact that a corrective advertising order is based upon past acts of deception should not prove fatal, however, since it is not the retrospective nature of a certain order that offends section 5 but rather its tendency to impose civil or criminal liability.[120] This concept was expressly recognized in *Heater v. FTC*,[121] in which the Ninth Circuit held that the Commission lacked statutory authority to order restitution of money gained from a deceptive business practice.[122] In that case, however, the court distinguished corrective advertising which seeks not to attach consequences to prior acts through the adjudication of private rights or otherwise, but rather to protect the public from future deception.[123] Corrective advertising is designed to halt a future illegal practice—the sale of a product based on an erroneous impression residing in the public mind. On the other hand, the restitution order struck down by the *Heater* court was designed to mitigate the injury already suffered through the imposition of civil liability.

Following this reasoning, the decree in *Warner-Lambert* can be deemed "retrospective" insofar as it focuses on the prior deceptive claims. Yet its function is to provide the public with relevant, truthful information for the future, not to impose any liability for past wrongful conduct. It should not be viewed as conflicting with section 5 because it seeks to halt the continuing influence of past Listerine advertisements over future consumer pur-

---

[119] Curtis Publishing Co., 78 F.T.C. 1472, 1514 (1971), *quoted in* Heater v. FTC, 503 F.2d 321, 325 n.13 (9th Cir. 1974).

[120] See text at note 111 *supra*.

[121] 503 F.2d 321 (9th Cir. 1974).

[122] See text at notes 65-69 *supra*.

[123] 503 F.2d at 324-25 n.13. The *Heater* court stated that:

> Our holding denies retroactive impact to a Commission decision, at least insofar as private rights and liabilities are involved. . . .
>
> We recognize that divestiture and corrective advertising orders support the Commission's position that it has power, in order to remedy the continuing effects of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal. Moreover, we recognize that there is no economic difference in the impact of those orders and a restitution order—in each case the offender loses the benefits of money expended in reliance on the legality of conduct later found illegal. Nevertheless, the two cases must be treated differently because Congress, out of reasonable fair notice considerations, chose to leave the cure of private injuries caused by violations of the Act to whatever common law remedies existed.

Id. The Court in *Warner-Lambert* found this reasoning persuasive, stating that "restitution is not corrective advertising. Ordering refunds to *past* consumers is very different from ordering affirmative disclosure to correct misconceptions which *future* consumers may hold." 562 F.2d at 757 n.33 (emphasis in original).

chasing decisions. Concededly, the effect of a corrective message, in terms of deleterious economic consequences for an advertiser, may be the same as if restitution had been ordered. Yet, this alone should not defeat the order's validity under section 5 because even traditional cease and desist orders have an adverse economic impact. Moreover, the protection of the public interest through corrective advertising should not be subordinated to the advertiser's interest in the profits derived from deceptive advertising. Thus, even though based on past deception, the corrective advertising remedy is essentially "prospective" in nature and should be upheld on that basis.

Further support for this view of corrective advertising as designed to prevent future illegal activity is furnished by an analogy to the divestiture remedy. Although the Sherman Act does not expressly provide for divestiture, it has been authorized by the courts on the rationale that it is necessary to protect the public interest.[124] The mere prohibition of future illegal conduct allows the violator to continue to reap new gains from past wrongs. The affirmative remedy of divestiture is required to prevent the realization of future benefits from a current competitive advantage which was secured by past wrongful activity.[125] Moreover, it has a deterrent effect since the cessation of profits accruing from the illegal practice as well as the additional costs incurred in effecting the divestiture tend to negate the economic benefits derived from the practice. Hence, the wrongdoer will no longer find it profitable to engage in such conduct. The same rationale supports corrective advertising since its objectives are similar to those of divestiture. Like divestiture, corrective advertising is an attempt to prevent the violator from realizing the future benefit of his illegal gains—in the case of the deceptive advertising, the increased profits and greater share of the market that result from consumer reliance on the false claims. In addition, the future costs and other consequences accompanying the imposed corrective message tend to remove the economic incentive to engage in deceptive advertising. As noted previously,[126] the courts have seen fit to allow the Commission broad equitable powers to remedy antitrust violations. The Commission should have a comparable power when the unfair trade practice takes the form of deceptive advertising.[127]

B. *The 1975 FTC Improvement Act*

In 1975, Congress amended the Federal Trade Commission Act so that, under some circumstances, the Commission can bring civil actions to

---

[124] *See* United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316, 326-27 (1961).

[125] In affirming the divestiture of illegally acquired theatres, the Supreme Court in Shine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948), stated:

> In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors.

Id. at 128.

[126] See text at notes 78-106 *supra.*

[127] *See generally* Note, *Corrective Advertising & the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways,* 70 MICH. L. REV. 374, 391-95 (1971).

redress injury to consumers resulting from a violation of section 5.[128] Under the statute, the courts may provide necessary relief, including "public notification" of the unfair or deceptive practice,[129] but only if the deceptive practice violates a Commission rule or final cease and desist order, and if the court is satisfied that a reasonable person would have known the practice to be dishonest or fraudulent.[130] These prerequisites are needed to maintain consistency with Congress' intent that a businessman be put on notice before he can be held liable for his commercial practices.[131]

In his *Warner-Lambert* dissent, Judge Robb concluded that because Congress had granted to the court the power to order public notification, including corrective advertising, Congress must have understood that the FTC itself could not order public notification:[132] "If the Commission already had that power to order public notification by way of corrective advertising, why was the amendment necessary?"[133] Judge Robb also found support for his view that the FTC had no power to order corrective advertising in the 1975 amendment's requirement of a showing of bad faith before a court could order public notification. Focusing on the majority's conclusion that the FTC could order the analogous remedy of corrective advertising even if there were no showing of bad faith, Judge Robb found it "strange that the Congress would require a court to find bad faith, while authorizing the Commission to act in the absence of bad faith."[134]

In response to this opinion, the majority noted that public notification and corrective advertising are not synonymous.[135] It asserted that while corrective advertising can be classified as a form of public notification,[136] the latter seems a broader remedy. The majority further observed that public notification is to be used expressly "to redress injury"[137] to past consumers. Corrective advertising, on the other hand, is aimed at future consumers.[138]

The distinction made by the majority between public notification and corrective advertising appears accurate although it is not as precise as the *Warner-Lambert* opinion suggests. As noted previously,[139] a corrective advertising order, like a traditional cease and desist remedy, looks to the prior deceptive advertisements. In this limited way, it can be said to redress injury. However, its primary purpose is to prevent *future* deception in the form of lingering erroneous beliefs. It is intended to promote the informa-

[128] The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, tit. II, § 206, 15 U.S.C. § 57b (Supp. V 1975).

[129] *Id.*, 15 U.S.C. § 57b(b) (Supp. V 1975).

[130] *Id.*, 15 U.S.C. § 57b(a) (Supp. V 1975).

[131] See text at notes 57-64 *supra*.

[132] 562 F.2d at 765-66 (Robb, J., dissenting).

[133] *Id.* at 765.

[134] *Id.*

[135] *Id.* at 757.

[136] Other forms of public notification noted by the court included "requiring the defendant to run special advertisements reporting the FTC finding, advertisements advising consumers of the availability of a refund, or the posting of notices in the defendant's place of business." *Id.* at 757 n.36. In addition to his view that public notification includes corrective advertising, Judge Robb felt that these examples of public notification were "simple variations of corrective advertisements." *Id.* at 765-66 (Robb, J., dissenting).

[137] FTC Act, § 19, 15 U.S.C. § 57b(b) (Supp. V 1975).

[138] 562 F.2d at 757.

[139] See text at note 119 *supra*.

tive function of advertising, *i.e.*, to stop lingering beliefs erroneously held by consumers through the provision of truthful information, not to relieve *past* injury. Similarly, public notification, although intended "to redress injury," is not exclusively retrospective, since it will necessarily be viewed by prospective consumers as well as by those who have already been deceived. Yet, the primary purpose of the judicial remedy of public notification is to mitigate the injury of past consumers, not to preclude the *future* effects of residual deception. Because of the different functions served by the two remedies, it is important to note that Congress provided for public notification along with such other remedies as the "rescission or reformation of contracts, the refund of money or return of property, and the payment of damages."[140] The fact that public notification is most likely to be used in conjunction with these other remedies, which are clearly retrospective in nature, supports the idea that its primary function is to hold the wrongdoer liable for his past injury rather than to prevent a future violation. The additional requirement that the violator know the practice to be dishonest or fraudulent is therefore necessary since the statute contemplates a remedial function similar to the order struck down in *Heater v. FTC*.[141] The narrower corrective advertising order would not be subject to such a requirement because it does not focus primarily on past conduct.

Although somewhat imprecise, the distinction between the two remedies gives weight to the *Warner-Lambert* majority's conclusion that Congress did not intend the 1975 amendment to affect the Commission's existing authority.[142] There is evidence that Congress recognized that the amendment, giving remedial authority to a court, must be considered as separate from and additional to the provisions for the Commission's own authority. The statute contains the proviso that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law."[143] In addition, the Conference Committee in its report to Congress stated that the statute "is not intended to modify or limit any existing power the Commission may have to itself issue orders designed to remedying [sic] violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way."[144] As the dissent observed,[145] these statements do not answer the question regarding the extent of the FTC's existing authority. Nevertheless, that existing authority has always encompassed the power to prohibit public deception for the future.[146] Corrective advertising falls within this authority since the future advertisements, though literally truthful, will be deceptive themselves without an accompanying corrective message. The additional power to correct past violations given to the courts by the statute in order to bolster the

[140] FTC Act, § 19, 15 U.S.C. § 57b(b) (Supp. V 1975).

[141] 503 F.2d 321 (9th Cir. 1974). See text at notes 65-69 *supra*.

[142] 562 F.2d at 757-58.

[143] FTC Act, § 19, 15 U.S.C. § 57b(e) (Supp. V 1975), *quoted in Warner-Lambert*, 562 F.2d at 757-58.

[144] CONF. REP. No. 1408, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7774.

[145] 562 F.2d at 766 (Robb, J., dissenting).

[146] See text at notes 61-64 *supra*.

Commission's consumer protection role[147] should not lead to an inference narrowly limiting the Commission's own authority in the area.[148] The fact that Congress has created the authority for the courts to find liability for wrongful conduct should not preclude a court from construing section 5 as authorizing corrective advertising ordered by the FTC, an affirmative remedy imposed to prevent future deception.

C. *The First Amendment*

Even if corrective advertising is statutorily legal, the imposition of such an order raises constitutional questions since advertising is a form of speech. In its recent landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[149] the Supreme Court held that purely commercial speech, such as price and product advertising, is not "wholly outside the protection of the First Amendment."[150] In striking down a statutory ban on the advertising of prescription drug prices, the Court noted the individual consumer's strong interest in commercial information.[151] It also identified a general interest that society may have in "the free flow of commercial information," reasoning that advertising promotes intelligent and informed decision making and a rational allocation of resources.[152] However, the Court noted that there were "commonsense dif-

[147] The amendment's official title lists one of its purposes as being "to amend the Federal Trade Commission Act in order to improve its consumer protection activities . . . ." The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, tit. II, § 206, 88 Stat. 2183 (1975). For a discussion of how the amendment attempts to effectuate this purpose, see [1974] U.S. CODE CONG. & AD. NEWS 7702-75.

[148] Such an inference is not justified for Congress may have chosen to grant the public notification power to the courts for reasons other than an absence of similar power in the FTC. The *Warner-Lambert* court refuted the dissent's reasoning that the 1975 amendment promotes the inference that the Commission lacks corrective advertising power by citing FTC v. Dean Foods Co., 384 U.S. 597, 610 (1966) (Court will not construe an agency's request for authorizing legislation as affirmative proof of no authority) and National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 696 (1973), *cert. denied*, 415 U.S. 951 (1974) (subsequent grant of congressional authority does not prove agency's prior lack of authority). 562 F.2d at 758 n.39.

[149] 425 U.S. 748 (1976).

[150] *Id.* at 761-62. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388-91 (1973) (upholding a municipal ordinance prohibiting a newspaper from using discriminatory sex-designated classifications in its employment want advertisements and implying that first amendment protection might otherwise be extended to commercial speech); Bigelow v. Virginia, 421 U.S. 809, 818-25, 829 (1975) (holding that commercial advertising enjoys a degree of first amendment protection and reversing a conviction under a state statute which prohibited any advertisements for abortion clinics); Bates v. State Bar of Arizona, 433 U.S. 350, 363-83 (1977) (holding that the blanket suppression of all advertising by attorneys is an unconstitutional infringement of the first amendment). *See generally* Redish, *The First Amendment in the Marketplace: Commercial Speech & The Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DE-PAUL L. REV. 1258 (1974); Comment, *The Right To Receive & The Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L. J. 775 (1975); 18 B.C. IND. & COM. L. REV. 276 (1977); 61 CORNELL L. REV. 640 (1976).

[151] 425 U.S. at 763. The Supreme Court noted that "as to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.*

[152] *Id.* at 765. The Court reasoned that

> advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be

ferences" between commercial speech and other forms of protected speech.[153] The Court found illustrative of these differences both the fact that because advertising is linked to commercial profits, it is less likely to be discouraged by governmental regulation and the fact that the advertiser can more easily verify the accuracy of the factual assertions made about its product.[154] In his concurring opinion, Justice Stewart further elaborated the distinction by observing that "[i]deological expression . . . is integrally related to the exposition of thought" whereas commercial advertising "is confined to the promotion of specified goods or services."[155] First amendment protection is accorded the latter because of the "information of potential interest and value conveyed . . . rather than because of any direct contribution to the interchange of ideas."[156] Thus, although the Court declared that advertising was within first amendment protection, the ability to verify commercial speech as well as its capacity to withstand governmental regulation called for a "different" degree of protection.[157]

This view of commercial speech as having a less significant first amendment value than other, traditionally protected, types of speech permits regulation of advertising in order to achieve legitimate governmental ends. The *Virginia State Board* Court concluded that in order to prevent false and deceptive advertising, it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[158] Thus, while bringing commercial speech within the protection of the first amendment, the Court viewed the protection as not absolute, recognizing the need for the state to be able to deal effectively with the problem of false and deceptive advertising. The Court's language, however, does not necessarily indicate that corrective advertising is constitutionally permissible. Read narrowly, the Court's conclusion authorizes a requirement of disclosure only where the advertisement itself would be deceptive in the absence of such disclosure. Corrective advertising is designed not to prevent deception that otherwise might result from the literal language of current advertising, but rather to mitigate the impact of past deceptive claims. Nonetheless, it would appear that corrective advertising does fall within the range of constitutionally permitted regulations of speech. As noted previously,[159] an advertisement may be deceptive despite its literal accuracy by reason of its reinforcement of prior deceptive claims. Applying this rationale, the court in *Warner-Lambert* determined that corrective advertising is not forbidden by the first amendment:[160] "The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future ad-

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

Id.

[153] *Id.* at 771 n.24.

[154] *Id.*

[155] *Id.* at 779-80 (Stewart, J., concurring).

[156] *Id.* at 780 (Stewart, J., concurring) (citation omitted).

[157] *Id.* at 771 n.24.

[158] *Id.*

[159] See text at notes 112-27 *supra*.

[160] 562 F.2d at 758-59.

vertisements, would render those advertisements themselves part of a continuing deception of the public."[161] The constitutional guarantee of free speech does not mandate a narrower view of the range of deceptive advertising properly subject to governmental regulation. In *Virginia State Board,* the Supreme Court observed that there is no constitutional obstacle to the regulation of "deceptive or misleading" advertising even though it is not "wholly false," stating that "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."[162] Under this reasoning, corrective advertising is constitutionally warranted to prohibit the misleading effects which would flow from future truthful advertisements.

The *Warner-Lambert* court also determined that corrective advertising would not have a chilling effect on the future truthful speech, relying on the Supreme Court's recognition that "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."[163] The circuit court further noted that any chill that did occur—either through the forced abandonment of the future advertising campaign or through the imposed disclaimers in future advertising—is justified by the fact that the measures are necessary to serve the consumer's interest in truthful information.[164] The court conceded that corrective advertising may place a burden on the constitutionally protected right to advertise truthfully since the remedy precludes future advertisements unless accompanied by the corrective message.[165] However, it observed that the Commission has a significant interest in protecting against public deception by eliminating the misleading effects of advertising.[166] The *Warner-Lambert* court found that this interest would not be served by a simple cease and desist order since such a remedy would take no effective action against residual deception.[167] Thus, the court concluded that the burden imposed on future advertising is justified because corrective advertising "is the least restrictive means of achieving a substantial and important governmental objective . . . ."[168]

The *Warner-Lambert* court's conclusion that corrective advertising does not impose an unconstitutional burden on the right to advertise appears correct in light of the analysis employed by the Supreme Court in *Virginia*

---

[161] *Id.* at 769 (supplemental opinion on petition for rehearing).

[162] 425 U.S. at 771-72. *See also* Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest."); Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint.").

[163] 562 F.2d at 770 (supplemental opinion on petition for rehearing), *quoting Virginia State Board,* 425 U.S. at 771-72 n.24.

[164] *Id.* The *Warner-Lambert* majority observed that a cease and desist order cannot serve the consumers' interest in truthful information because, by the time a cease and desist order is issued, the public has already been deceived and the advertising campaign has probably achieved its goal and given way to a new campaign. *Id.*

[165] *Id.* Since Listerine's advertisements, without the corrective message, are considered deceptive themselves, the corrective advertising order in this case imposes no burden on truthful speech. However, the *Warner-Lambert* court found the corrective advertising order would be warranted "[e]ven if . . . the current and future advertising of Listerine is considered constitutionally protected speech . . . ." *Id.*

[166] *Id.* at 771.

[167] *Id.*

[168] *Id.* at 770-71.

State Board. There, the Court found that the government's interest in regulating the advertising of prescription drugs had some legitimacy[169] but that the total ban on advertising did not directly promote that interest.[170] Thus, while the Court recognized the validity of governmental regulation of advertising for legitimate ends, it required the means chosen to be narrowly tailored to serve those ends. The means chosen by the FTC in *Warner-Lambert* are narrowly tailored to further the interest in eradicating public deception. Warner-Lambert is not prohibited completely from advertising Listerine in the future but rather must include a message in its advertisements sufficient to dispel latent erroneous impressions. Furthermore, as the *Warner-Lambert* majority noted,[171] the amount of correction required by the Commission was not set arbitrarily but rather was determined by reference to Warner-Lambert's prior investment in deceptive advertising. Thus, unlike the total prohibition on advertising found in *Viriginia State Board,* the Commission's order in *Warner-Lambert* attempts to achieve a legitimate governmental interest—the eradication of lingering deception in the public mind—while still allowing the respondent to exercise fully his constitutional right to advertise.

It is submitted that the *Warner-Lambert* court's determination that corrective advertising is within the permissible range of affirmative remedies to which the Commission may look when dealing with section 5 violations is correct. A sensible approach to this determination, an approach implicitly employed by the court, is to reject a rigid adherence to the strict prospective/retrospective distinction in favor of a more searching review of the function of the remedy itself. Although it may be deemed retrospective in some aspects, corrective advertising does not violate section 5 because its primary objective is to prevent future public deception engendered by past false advertising. This function also distinguishes it from the "public notification" remedy given to the courts by the 1975 FTC Improvement Act and supports the *Warner-Lambert* court's conclusion that Congress did not intend the Act to restrict the Commission's own remedial power. Finally, corrective advertising is constitutionally sound due to the Supreme Court's recognition that the state has a legitimate interest in the regulation of commercial speech in order to prevent deception so long as such corrective advertising is narrowly tailored to meet those ends.

III. AFFIRMATIVE DISCLOSURE AS PRECEDENT FOR CORRECTIVE ADVERTISING

The court in *Warner-Lambert* found further support for the validity of the corrective advertising remedy in prior cases upholding similar remedies. The majority opinion cited prior cases which held that the Commission has the power under certain circumstances to compel affirmative dis-

[169] 425 U.S. at 766-69. The Court recognized the validity of the State's interest in maintaining a high degree of professionalism among licensed pharmacists. *Id.*

[170] *Id.* at 769-70. The Court asserted that the total ban on advertising was not narrowly tailored to achieve the governmental interest. It observed that the real justifications for the ban rested on the assumed reactions that people would have to drug price advertising and concluded that the advertising ban has no direct effect at all on professional standards. *Id.*

[171] 562 F.2d at 771.

closure of unfavorable product characteristics through its cease and desist orders. It thus viewed corrective advertising as a variation upon a familiar theme.[172] The *Warner-Lambert* court's conclusion that the affirmative disclosure cases supply exactly pertinent precedent appears inaccurate, however, since corrective advertising differs in important regards from the affirmative orders previously upheld. Although not entirely on point, however, those cases do provide some support for the validity of the corrective advertising remedy.

A. *Prior Uses of Affirmative Disclosure*

The Commission has ordered affirmative disclosure primarily in situations where an advertisement has the capacity to deceive potential purchasers due to its failure to reveal facts material to the representations made in the advertisement. For example, where a product was advertised as a cure for baldness, the Commission was allowed to order the manufacturer to cease the advertisements unless accompanied by a statement that baldness is most often caused by heredity, age and endocrine balance, for which the product is not effective.[173] A like result was reached in *Feil v. FTC*[174] where the respondent had falsely advertised its product as effective for all cases of bedwetting.[175] After noting that the FTC's power under section 5 is extensive, the Ninth Circuit upheld the Commission's order prohibiting the advertisements unless clearly and conspicuously limited to cases of bedwetting not caused by organic defects or diseases.[176] A similar example is *J.B. Williams Co. v. FTC*,[177] in which the makers of Geritol had advertised that product as an effective cure for tired and run-down feelings. In reality, Geritol was effective only when those symptoms were due to iron deficiency anemia, an infrequent cause. Upon review, the Sixth Circuit sustained the Commission's order that respondent disclose in future advertisements that Geritol will only relieve iron deficiency anemia and that the vast majority of cases of lassitude are not attributable to this deficiency.[178]

While such cases clearly support the FTC's authority to compel affirmative disclosure, an earlier case, *Alberty v. FTC*,[179] appeared to hold that the Commission lacked this power. In this case, as in the later *J.B. Williams* case, the Commission had ordered the maker of Geritol to limit its advertisements to cases of lassitude caused by iron deficiency anemia and to state affirmatively that it is not effective for the more frequent cases not caused

---

[172] *Id.* at 759.

[173] Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 953-55 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 20-23 (5th Cir. 1960). In both cases, the courts concluded that failure to make such statements in light of the advertised claims would be misleading to the public.

[174] 285 F.2d 879 (9th Cir. 1960).

[175] *Id.* at 885-96.

[176] *Id.* at 896-902. The court found that the advertisements deliberately conveyed the idea that the device was effective in all cases when, in reality, it was only effective in some. Therefore, the court concluded that affirmative disclosure was needed to counteract the misleading effect of the prior false advertisements. *Id.*

[177] 381 F.2d 884 (6th Cir. 1967).

[178] *Id.* at 890-91. In reaching its conclusion, the court asserted that requiring a manufacturer to state what its product will or will not do is desirable because it allows consumers to make an intelligent choice. *Id.* at 890.

[179] 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950).

by iron deficiency anemia.[180] The United States Court of Appeals for the District of Columbia upheld the former requirement but struck down the latter affirmative disclosure requirement. The court was clearly worried that judicial recognition of the Commission's affirmative disclosure power would undermine private freedom in commercial marketing and Judge Prettyman's broad language for the majority indicated a belief that the Commission could not order such a remedy.[181] However, the case was actually decided on the narrower grounds of section 12 of the FTC Act, which expressly prohibits the dissemination of certain false advertisements as an unfair or deceptive act or practice within the meaning of section 5.[182] More specifically, the court relied on section 15, which defines "false advertisement" for the purposes of section 12 (but not for section 5) as one that is "misleading in a material respect."[183] In determining whether the advertisement is materially misleading, the statute dictates that the Commission may look at

> the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.[184]

The court in *Alberty* thus held that before compelling affirmative disclosure, the Commission had to find that the failure to disclose was materially misleading as so defined. Because there were no such supportive findings before the court, it found the affirmative disclosure requirement unwarranted.[185]

In a vigorous dissent, Judge Bazelon argued that the court should defer to the Commission's discretion as to the necessity of the remedy[186] and that the affirmative disclosure power served to promote the "informative function" of advertising, a purpose encouraged by the FTC Act.[187] Later courts have preferred Judge Bazelon's reasoning and have confined *Alberty* to the narrow holding that the Commission must make supportive

---

[180] *Id.* at 37.

[181] *Id.* at 39. Judge Prettyman reasoned that:

> Such power seems to us to be no less than the power to control the marketing of all such products, because, if particular advertisers, selected by the Commission, can be required not only to state accurately the limited benefits of their products but also to call attention to what the products will not do, the effect on marketing is clear enough. Such a requirement seems to us to have no relation to the prevention of falsity in advertising. It is a wholly different power.
>
> . . . [W]e think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter.

Id.

[182] FTC Act, § 12, 15 U.S.C. § 52(a), (b) (1970).

[183] *Id.*, § 15, 15 U.S.C. § 55 (1970).

[184] *Id.*

[185] 182 F.2d at 39.

[186] *Id.* at 41-42 (Bazelon, J., dissenting).

[187] *Id.* at 45 (Bazelon, J., dissenting).

findings before compelling affirmative disclosure.[188] *Alberty's* broad language has never been followed and has been expressly repudiated by at least one court.[189] In discussing the Commission's affirmative disclosure power, the *Warner-Lambert* court noted this trend with approval.[190] Thus, although *Alberty* has never been overruled, later courts have established that the Commission does have the power to order affirmative disclosure under certain circumstances.

The affirmative disclosure remedy has been employed in a variety of situations: to respond to a consumer preference—even if illogical—known to be a material factor in purchasing decisions;[191] to warn consumers of the dangerous propensities of a product,[192] and to inform consumers of their legal rights and obligations relating to a particular transaction.[193] Such uses of affirmative disclosure have been consistent with the nature of that remedy—a conditional order prohibiting the respondent from continuing its misleading advertising unless coupled with the required disclosure. These functions, moreover, highlight an important distinction between the FTC's traditional power to order affirmative disclosure and its newly-established power to order corrective advertising. Affirmative disclosure serves to correct deception flowing from misrepresentations expressly made in the advertisements. Corrective advertising, on the other hand, serves to

---

[188] *See* Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 23 (5th Cir. 1960) ("There is nothing in the *Alberty* case that prevents enforcement of a cease and desist order requiring affirmative disclosure. The *Alberty* case simply held that the Commission must make certain findings before compelling affirmative disclosure."); Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 955 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960) ("In [*Alberty*] there were no findings as here that failure to make any affirmative statement in itself was misleading."). In J.B. Williams Co. v. FTC, 381 F.2d 884, 890-91 (6th Cir. 1971), the court used this rationale to uphold the affirmative disclosure requirement struck down in *Alberty*.

[189] Feil v. FTC, 285 F.2d 879, 900-01 (9th Cir. 1960).

[190] 562 F.2d at 759 n.52.

[191] In L. Heller & Son, Inc. v. FTC, 191 F.2d 954 (7th Cir. 1951), the respondent sold imported imitation pearls without revealing the fact of foreign origin. Relying on evidence which showed that the public preferred American-made products over imports, the Commission ruled this practice deceptive under section 5. The court sustained the Commission's order that the respondent cease and desist selling the pearls without marks to disclose their foreign origin. *Id.* at 955-56. Similarly, in Kerran v. FTC, 265 F.2d 246 (10th Cir.), *cert. denied*, 361 U.S. 818 (1959), the respondent sold re-refined oil in the same containers as those used to sell oil refined from virgin crude. The Commission found this a deceptive practice under section 5 even though the two types of oil were the same quality and the respondent enjoyed no market advantage due to the packaging. The court affirmed the order to cease and desist selling the re-refined oil without a clear and conspicuous statement as to its origin on the container. The court determined that the Commission could take action in response to consumer preference, even if it was "predicated at least in part upon ill-founded sentiment, belief or caprice." *Id.* at 248.

[192] In Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942), the court sustained the Commission's order requiring the respondent to cease and desist from advertising that its product, which contained dangerous drugs, was harmless or from failing to reveal the harmful effects that might occur as a consequence of usage. *Id.* at 166, 170.

[193] In Portwood v. FTC, 418 F.2d 419 (10th Cir. 1969), the court affirmed a Commission order requiring a mail-order stamp business to include in its communications with customers a statement regarding the legal rights of recipients of unsolicited merchandise received through the mail. *Id.* at 423. Also, in All-State Indus., Inc. v. FTC, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970), the court sustained a Commission order requiring home-improvement companies to reveal that instruments of indebtedness could be assigned to a finance company against whom the purchaser's claims or defenses would not be available. *Id.* at 425-26.

prevent residual deception flowing from past misrepresentations, which deception is encouraged and continued by future truthful advertisements. Because corrective advertising thus mandates a disclosure even where the future advertisements are not themselves misleading, it can be argued that affirmative disclosure does not support corrective advertising.

B. *A New Category?*

Despite the fact that there are differences between affirmative disclosures and corrective advertising, the court in *Warner-Lambert* nevertheless viewed corrective advertising as a form of affirmative disclosure. After discussing the prior cases upholding affirmative disclosure orders, the court identified another category where the remedy has been allowed: "Affirmative disclosure has also been required when an advertisement, *although not misleading if taken alone,* becomes misleading considered in light of past advertisements."[194] By accepting this premise the court could conclude that affirmative disclosure serves as precedent for corrective advertising. To support its proposition, the majority opinion relied primarily on two cases: *Royal Baking Powder Co. v. FTC*[195] and *Waltham Watch Co. v. FTC.*[196]

In *Royal Baking,* the respondent had sold for 60 years a cream of tartar baking powder and had extensively advertised that it was superior to the cheaper phosphate baking powders.[197] However, after the company itself switched to phosphate, it continued to use labels and advertisements substantially similar to those previously used. This helped to conceal or to obscure the fact that the product changed.[198] The FTC found this unfair and deceptive in that consumers were deliberately misled into buying a now-inferior product based upon the strength of a reputation that was no longer true.[199] Agreeing with the Commission, the Second Circuit affirmed an order requiring the respondent to change its labelling and advertising format, to substitute the word "phosphate" for the word "cream" in its labels and advertisements and to cease representing that the new product was the same as had been sold for years.[200]

In *Waltham Watch,* the respondent company was organized as a spin-off of the original, famous 100 year-old Massachusetts clock company. The respondent licensed another company to use the original name in connection with the sale of clocks imported from Europe.[201] Similar to those advertisements in *Royal Baking,* the advertisements in *Waltham Watch* stressed the history of quality of the original company and misrepresented that the clocks were manufactured by that company.[202] The Seventh Circuit upheld the FTC's order that the respondent cease and desist from permitting the use of the name "Waltham" unless accompanied by a statement that the clocks were not manufactured by the original Massachusetts company.[203]

---

[194] 562 F.2d at 760 (emphasis added).
[195] 281 F. 744 (2d Cir. 1922).
[196] 318 F.2d 28 (7th Cir.), *cert. denied,* 375 U.S. 944 (1963).
[197] 281 F. at 747.
[198] 281 F. at 747-49.
[199] *Id.* at 749-50.
[200] *Id.* at 750, 753.
[201] 318 F.2d at 29-30.
[202] *Id.* at 30-31.
[203] *Id.* at 31-32.

In *Warner-Lambert,* the majority concluded that the affirmative disclosure remedies authorized in *Royal Baking* and *Waltham Watch* were the same as the corrective advertising order now sought by the Commission:

> Like *Royal* and *Waltham,* Listerine has built up over a period of many years a widespread reputation. When it was ascertained that that reputation no longer applied to the product, it was necessary to take action to correct it. Here, as in *Royal* and *Waltham,* it is the accumulated impact of *past* advertising that necessitates disclosure in *future* advertising. To allow consumers to continue to buy the product on the strength of the impression built up by prior advertising—an impression which is not known to be false—would be unfair and deceptive.[204]

The court's determination that the remedies affirmed in *Royal Baking* and *Waltham Watch* were comparable to the corrective advertising order at issue in *Warner-Lambert* rested on its assertion that the Royal and Waltham advertisements were truthful, but became deceptive in the context of the past advertising.[205] In the same manner, the court reasoned that the Listerine advertisements will be truthful after a cease and desist order but became deceptive in the context of the prior cold and sore throat claims.

While this view has some force, the cases can be distinguished. The advertisements in *Royal Baking* and *Waltham Watch* cannot be considered "truthful" unless the concept is stretched. In both cases, the advertisements before the court were found to demonstrate a substantial and willing concealment of the fact that the product had changed. In *Royal,* the respondent retained the *same* advertisements and labels, the *same* trademark, and stressed its history of quality. In *Waltham Watch* the respondent repeatedly emphasized its name and the quality and dependability of that name, deliberately conveying the impression that the imported clocks were manufactured by the famous American company. As recognized by the *Warner-Lambert* dissent:

> In those cases advertisements falsely represented that the products offered for sale were the same as the products, well-known to the public, which had been offered in the past. The Commission's orders simply required these false representations to be corrected in future advertisements using the same or similar format or copy.[206]

In contrast, after compliance with a simple cease and desist order, the future Listerine advertisements will be "truthful" since there will no longer be any cold and sore throat claims. Because the remedies authorized in *Royal Baking* and *Waltham Watch* can be distinguished from the corrective adver-

---

[204] 562 F.2d at 761.

[205] *Id.* at 760 n.57. The *Warner-Lambert* court noted that in *Royal* and *Waltham,* the advertisements were once true, but were no longer so due to a change in the product. In *Warner-Lambert,* the product has remained the same but it is now known that the advertisements were never true. The court found that nevertheless, the result is the same: "like Royal baking powder or Waltham watches, Listerine continues to enjoy a reputation it does not deserve, and consumers would therefore be deceived if they were to make purchases in reliance upon that reputation." *Id.* at 761 n.58.

[206] *Id.* at 768 (Robb, J., dissenting).

tising order in *Warner-Lambert,* the court's assertion that corrective advertising is another category of affirmative disclosure is open to question.

Corrective advertising should be viewed as an innovative technique rather than as another form of affirmative disclosure. This fact, however, does not put it beyond the scope of the FTC's power. Affirmative disclosure forbids an advertiser from making future representations which are deceptive unless he discloses information which negates the deception. Corrective advertising, on the other hand, requires a disclosure even if the future advertisements make no reference to the prior claims, because it is designed to dissipate the lingering effects of past deception. However, this distinction between affirmative disclosure and corrective advertising should not be given controlling weight. If in fact the future honest advertisements build on the latent impressions left in the consumer's mind by the prior advertisements, then the Commission should have the authority to counteract the effect of these "implied" representations. Whether public deception flows from misrepresentations made in the advertisements themselves or from the lingering effects of past misrepresentations should not alter the nature of the Commission's remedial power. Thus, although the affirmative disclosure cases do not squarely support the order imposed in *Warner-Lambert,* corrective advertising can be viewed as the logical extension of these precedents.

C. *The Need for Corrective Advertising*

The idea that corrective advertising is valid as a logical extension of the Commission's affirmative disclosure power can be supported for a number of reasons. Affirmative disclosure has been judicially sanctioned when necessary to deal effectively with the form of deception found by the Commission. The same reasoning supports the necessity of corrective advertising since a Commission order which requires the respondent merely to cease making the false claims is ineffective due to the failure to rebut the effects of the prior advertisements. Viewed in this light, the corrective advertising order is essential to the Commission's ability to carry out its statutory mandate. The wide latitude given by the courts to the Commission to fashion remedies[207] is further support for the agency's authority to combat residual deception. If traditional cease and desist orders are ineffective to accomplish this task, then corrective advertising becomes appropriate. "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled, it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."[208]

Similarly, the fact that future advertisements will be truthful should not be an obstacle to the imposition of corrective advertising, for the Commission cannot presume that the new advertisements alone will dissipate the lingering beliefs. While a few sophisticated consumers might recognize the significance of altered advertising, the general public would re-

[207] A considerable degree of discretion is given to the Commission not only to define what is unfair or deceptive but also to determine the proper remedy that will put a stop to such practices. See text at notes 71-75 *supra.*

[208] FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952), *quoted in Warner-Lambert,* 562 F.2d at 759-60.

member and continue to believe the prior claims. And it is this latter body that the Commission is intended to protect.[209] Thus, the Commission cannot be bound by literal truth if a false impression is conveyed to the general public because of the past representations:

> If the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise its judgment. Advertisements are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers.[210]

The need for corrective advertising is highlighted by the delay attendant upon FTC proceedings.[211] It is a common occurrence that years pass from the time a deceptive advertisement is used until the time the Commission discovers it, begins proceedings, issues a cease and desist order and has that order judicially sustained.[212] Significantly, the court in *Warner-Lambert* noted that the nature of this problem further emphasized the ineffectiveness of the traditional cease and desist order:

> While we do not know and do not decide whether [Warner-Lambert] made its false cold claims in good faith or bad, we do observe that for an advertiser who knowingly advertises falsely a simple cease and desist order provides no real deterrent. He has nothing to lose but attorneys' fees. He gets to use the deceptive advertisements until he is caught—more precisely, until Commission proceedings, which usually drag on for years, are completed against him. By the time the order has become final, the particular campaign has probably been squeezed dry, if not already dis-

---

[209] *See* Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676, 677 (2d Cir. 1944). *See also* Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

[210] Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942), *quoting* Newton Tea & Spice Co. v. United States, 288 F. 475, 479 (6th Cir. 1923).

[211] For a discussion of this problem, *see* Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477, 482-88 (1971).

[212] *See* H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702,7714.

> Some cases have taken years from the filing of the original complaint to a cease and desist order becoming final. In this regard the report of a special commission of the American Bar Association established to study the FTC stated: 'Problems of delay have vexed the FTC ever since it was established, and some of the most notorious examples of protracted administrative proceedings have occurred in that agency. One consequence of such delay was illustrated recently in Columbia Broadcasting System, Inc. v. FTC, in which a Court of Appeals, reviewing in 1969 an FTC cease and desist order entered in 1967 under Section 5, found that evidence of injury to competition has been based on a 1959 investigation. The Court concluded that market conditions had changed so substantially in the intervening years that the FTC's findings were no longer reliable, and it remanded the case for the taking of additional evidence on the question of injury.'

Id. (*quoting* REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, September 15, 1969).

In Carter Products, Inc. v. FTC, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959), it took the Commission sixteen years to require the respondent to cease and desist from making misleading advertising claims with regard to its laxative pills. A more typical example is *Warner-Lambert* itself, which officially began in 1971.

> carded. In the meantime the seller has increased his market share and reaped handsome profits. The order to cease making the false claims takes none of this away from him. In short, '[a] cease and desist order which commands the respondent only to "go, and sin no more" simply allows every violator a free bite at the apple.'[213]

Corrective advertising is an effective remedy for this problem. The incentive for a business to engage in misleading advertising would likely be reduced since the profits attributable to the campaign would be offset by the costs of compliance with the order. In addition, the advertiser's credibility would be called into question by the imposed honesty of a corrective statement.

The *Warner-Lambert* court found precedent for corrective advertising by positing it as another category of the Commission's power to order affirmative disclosure. As demonstrated, this conclusion is questionable and corrective advertising should more properly be viewed as a logical extension of affirmative disclosure. Corrective advertising serves the same purpose in cases of residual deception that affirmative disclosure serves in cases of express deception. The point is further supported by the fact that the innovative remedy of corrective advertising is needed to deal with the unique problem of lingering deception since mere cessation of the false advertisements is not adequate. Therefore, although the court's holding in *Warner-Lambert* stretches the Commission's discretionary authority, it is submitted that this approach is necessary if the Commission is to carry out effectively it statutory powers.

IV. THE GUIDELINES FOR FUTURE USE OF CORRECTIVE ADVERTISING

Judicial recognition of the Commission's authority to order corrective advertising does not decide the question whether it is a proper remedy in every case in which a traditional cease and desist order would issue and residual deception is demonstrated. While the proper application of the corrective advertising remedy will be decided by future litigation, *Warner-Lambert* has provided some guidelines as to when the remedy will be imposed. In its discussion of the Listerine order, the court focused on the circumstances under which corrective advertising may be appropriate. In addition, its treatment of the order suggests future limits that may be placed on the content and other terms of the corrective message itself.

A. *Appropriate Circumstances for the Imposition of Corrective Advertising*

Consistent with the Commission's specialization and expertise in the field, courts have traditionally recognized its authority to determine the meaning of an advertisement and whether or not that meaning has the tendency or capacity to deceive the public.[214] The Commission's determinations in this respect have been deemed findings of fact which would be up-

[213] 562 F.2d at 761-62 n.60 (quoting Note, *supra* note 211, at 482-83).

[214] *See, e.g.*, Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944).

held unless the court found them to be arbitrary or clearly wrong.[215] Moreover, the finding of a *tendency* to deceive is sufficient to support a cease and desist order, and the Commission is not required to prove an actual deceptive effect.[216] In addition, the Commission is allowed to infer that the presumed deception will be a material factor in the consumer purchasing decision.[217] Finally, the courts have used a lax standard in reviewing FTC remedies, characterized by the view that the Commission's order need have only a "reasonable relation" to the violation sought to be remedied.[218]

However, this note has suggested that corrective advertising should properly be viewed as something more than a simple cease and desist order. By requiring the respondent to insert a prescribed and presumably detrimental corrective message, the Commission's remedy raises concern regarding first amendment protection of commercial speech.[219] Although the *Warner-Lambert* court held corrective advertising not unconstitutional,[220] it recognized that the question "triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than *necessary* to serve the interest involved."[221] The constitutional problem involved in the imposition of a corrective message is thus important since it dictates a departure from the "reasonable relation" standard employed to review an ordinary cease and desist order. Indeed, the very nature of corrective advertising supports such a departure. The foundation of the remedy is that the lingering deception is so effective that it influences consumer behavior even after the false representations have been stopped. Thus, before imposing corrective advertising, the Commission should be required to go beyond proving that an advertisement has the tendency to deceive and should have to show that there has been substantial actual deception which will continue to influence the consuming public's purchasing decisions.

In formulating its own guidelines as to when corrective advertising is to be imposed, the Commission has acknowledged that a more stringent burden of proof is appropriate:

> [I]f a deceptive advertisement has played a *substantial role* in creating or reinforcing in the public's mind a false and material belief *which lives on after the false advertisement ceases,* there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely re-

---

[215] Carter Products, Inc. v. FTC, 268 F.2d 461, 496 (9th Cir.), *cert. denied,* 361 U.S. 884 (1959).

[216] Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944). This standard is applicable even where the Commission requires the advertiser to engage in affirmative disclosure. Portwood v. FTC, 418 F.2d 419, 421-22 (10th Cir. 1969); Feil v. FTC, 285 F.2d 879, 883-84 (9th Cir. 1960).

[217] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965).

[218] The leading case enunciating this standard of deference to the Commission's broad discretion and expertise is Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946). See text at notes 74-75 *supra*. This standard has been applied unanimously by later courts. *See, e.g.,* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965); FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).

[219] See text at notes 149-71 *supra*.

[220] 562 F.2d at 758-59, 768-72.

[221] *Id.* at 758 (emphasis added).

> quiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisements.[222]

In approving this standard, the *Warner-Lambert* court noted that the standard requires the Commission to prove that the false advertisements played a substantial role in causing an erroneous consumer belief and that the belief did not dissipate after the advertisements were stopped.[223]

Based on the record before it, the *Warner-Lambert* court held that the Commission met its burden of proof on these prerequisites.[224] In its opinion below, the agency had analyzed the voluminous evidence produced at the administrative proceedings to conclude that Listerine's prior deceptive advertisements had engendered false beliefs which would live on after the advertisements were stopped. On review, the court found persuasive the Commission's use of scientific consumer survey evidence and the testimony of experts. Indeed, the survey evidence, known as the "Product Q" reports, was Warner-Lambert's own consumer surveys designed to show the effectiveness of its advertising.[225] The court concluded that this evidence constituted "substantial evidence in support of the need for corrective advertising in this case."[226]

The adoption of the corrective advertising remedy in the *Warner-Lambert* case does not necessarily herald widespread imposition of this remedy. The circumstances of the Listerine advertising campaign were peculiarly suited to the assembling of evidence sufficient to justify the requirement of corrective advertising in that case. The campaign was a nationwide project continued for a sustained period of time. It encompassed all major forms of media and was unique in that no other mouthwash product claimed effectiveness in the treatment of colds and sore throats. Thus, it was easier for the Commission to prove its case than in other less widely known or publicized advertising campaigns.[227] It may be extremely difficult for the Commission to show that a lingering false belief originated from a particular advertisement for a certain product in cases where other advertisements for comparable products make the same or similar claims. Moreover, the Commission may not have the resources to investigate,

---

[222] Warner-Lambert Co., 86 F.T.C. 1398, 1499-1500 (1975), [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,934-35 (emphasis added).

[223] 562 F.2d at 762.

[224] *Id.* at 762-63.

[225] *Id.* at 762 n.65. The "Product Q" reports showed that about 70% of those surveyed recalled the cold and sore throat claims as a major part of Listerine's advertising; the figure fell to only 64% after the claims were stopped for a period of six months. In addition, 60% of those surveyed actually believed that Listerine was effective in fighting colds and sore throats. The testimony of the survey experts corroborated these results. *Id.*

[226] *Id.* at 762-63.

[227] Noting the unique nature of the Listerine advertising campaign and the substantial evidence supporting the Commission's claims, Professor Pitofsky has stated that "[c]omparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases. If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*." Pitofsky, *supra* note 105, at 697-98.

gather evidence and prove its case whenever there is a need for corrective advertising.[228] In short, the burden of proof required of the Commission by the stricter standard—proof that a corrective advertising order is necessary to eradicate deception rather than that it is only "reasonably related" to such purpose—may limit the future application of the corrective advertising remedy to advertising campaigns similar to the one employed by *Warner-Lambert*. Nevertheless, because of the first amendment considerations and the extraordinary nature of the remedy, the Commission should be required to meet the stricter standard before it can order corrective advertising.

In *Warner-Lambert*, there is language intimating that it may be proper in some situations to relax this standard in favor of an approach that requires the advertiser to prove that corrective advertising is *not* needed.[229] Observing that the very purpose of expensive advertising investments is to produce a lasting effect on consumer purchasing habits, the court stated that "it might be appropriate in some cases to presume the existence of the two factual predicates [that the advertisements have promoted a false belief and that this belief will linger on] for corrective advertising."[230] Although the court did not state under what circumstances use of the presumption would be appropriate, its language suggests that such use would occur in cases involving massive advertising campaigns, similar to the Listerine campaign.

The effect of the presumption would be to shift the burden of proof in much the same manner as is done in reviewing traditional cease and desist orders. Applying such a presumption, a corrective advertising order could be imposed after the Commission made an initial showing that the advertisements in question had the capacity or tendency to deceive unless the respondent rebutted the presumption by demonstrating that there was no actual deception. Likewise, once the tendency to deceive or actual deception was established, the lingering nature of the deception would be presumed unless the respondent introduced evidence disproving the residual effects. Rebutting the presumption could very well prove an extremely difficult task for it would require the respondent to show that its advertising was not really effective. The respondent would be required, in effect, to show that consumers did not believe the advertisements or, if they did, that the advertisements had no lasting effects upon them. In such a case, the burden on the advertiser to demonstrate the absence of any deceptive effect would be at least as great as the burden to show actual deception which is presently imposed on the Commission by the stricter standard. The use of such a presumption by future courts would mean that corrective advertising orders would probably be given the same deference by the courts that has been traditionally given to simple cease and desist orders.

---

[228] The "Product Q" reports, upon which the Commission and the court primarily relied, cost Warner-Lambert over $100,000. 86 F.T.C. 1398, 1501, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066, at 20,935. The Commission is not likely to be able to meet the expense concomitant with years of proceedings for every case in which a corrective advertising order may be effective. It stands to reason that only "major" campaigns would be afforded such treatment.

[229] 562 F.2d at 762.

[230] *Id.*

The *Warner-Lambert* court, however, found it unnecessary to use the presumption in affirming the Commission's order because of the presence of the survey evidence and expert testimony.[231] Thus, while mentioning it as a possibility, the court based its decision on the more stringent "necessary" standard. Whether or not the presumption is employed, the corrective advertising remedy seems more appropriate to remedy deceptions occurring in the larger, "major" advertising campaigns.[232] The expenditure and exposure associated with these campaigns would increase the difficulty of negating their effects. Correspondingly, in less intensive or less publicized campaigns, the respondent would seem to be in a better position to prevail against the Commission. In such cases, there is a greater likelihood that the advertising did not achieve its intended effect. This may be due to a number of factors, such as the infrequency of exposure to the consumer and the smaller number of consumers actually reached by the advertisements. In addition, the applicability of corrective advertising would depend upon the length of time that the false or deceptive claims were advertised. The longer the advertising was disseminated, the greater the likelihood that it had a substantial lasting effect. While these factors indicate that corrective advertising will be employed in cases involving major advertising campaigns similar to the Listerine campaign, it is possible that misleading campaigns made for a short period of time or addressed to a smaller number of consumers could demonstrate the requisite degree of residual deception to render corrective advertising appropriate. In such cases, whether a court uses the stricter standard actually followed by the court in *Warner-Lambert* or a laxer standard based upon a presumption could be an important determinant in a decision on the efficacy of a particular corrective advertising order. Nevertheless, the Commission should be held to the stricter standard, which requires it to show that the order is necessary to correct whatever residual deception is found to exist.

B. *Terms and Content of the Corrective Advertising Order*

Although it employed a "necessary" standard for determining the appropriateness of the corrective advertising order, the *Warner-Lambert* court stated that the limited "reasonable relation" standard was applicable when reviewing the terms of the order such as the amount of money required to be spent on the corrective campaign. Nevertheless, while the court applied the "reasonable relation" standard to its review of the terms, it applied the stricter "necessary" standard to its review of the content of the message itself. With regard to the terms of the order, the Commission had required the message for the next $10 million worth of Listerine advertising, a figure equivalent to the average annual Listerine advertising budget for the period April, 1962 to March, 1972.[233] The duration requirement was tied to the expenditures so that Warner-Lambert could not evade the order simply by not advertising for a period of time. The court found this to be "reasonably related to the violation [the Commission] found."[234]

---

[231] *Id.* at 762-63.

[232] Given the limited resources of the Commission, it may wish, as a matter of policy, to impose the remedy only in those cases where the advertising campaigns have been widespread.

[233] See text at note 11 *supra*.

[234] 562 F.2d at 763-64.

On the other hand, the court viewed the content of the message proposed by the Commission—"Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity"—in a different light. Since the goal of the order was to have the corrective message reach the public in a meaningful way so that residual deception could be eradicated, it would appear that this message was "reasonably related" to that goal. However, the court declared: "[W]e believe the preamble 'contrary to prior advertising' is not necessary."[235] The court determined that the function of the preamble in calling attention to the corrective message was not persuasive evidence in favor of its retention because that purpose was served by other terms in the order.[236] While this finding may be accurate, it is not consistent with the "reasonable relation" standard since the mere fact that two portions of the order serve the same purpose does not necessitate the elimination of one. Thus, it would appear that the "necessary" standard in fact guided the court's review of the content of the corrective message itself.

The reason for the approach taken in *Warner-Lambert* lies in a combination of factors. Besides the first amendment considerations,[237] the court was influenced by the fact that the "confessional preamble" would have the tendency "to humiliate the advertiser."[238] Intentional humiliation may be outside the Commission's authority under section 5 since the FTC does not have the power to punish a wrongdoer.[239] Nevertheless, it is not clear whether a judicially-imposed "Scarlet letter" should be labelled punitive. In general, administrative orders requiring confessional disclosures have been given varying treatment by the courts. The orders of the National Labor Relations Board serve as useful illustrations of this treatment.

Like the FTC, the NLRB is empowered to prevent certain unfair practices through cease and desist orders.[240] In addition, it can order certain affirmative action, such as reinstatement of employees, to effectuate

---

[235] *Id.* at 763 (emphasis added).

[236] *Id.* The court noted that

> in printed advertisements [the corrective message] must be displayed in type size at least as large as that in which the principal portion of the text of the advertisement appears and it must be separated from the text so that it can be easily noticed. In television commercials the disclosure must be presented simultaneously in both audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, may occur.
>
> These specifications are well calculated to assure that the disclosure will reach the public.

Id. In support of its conclusion, the court cited United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978, 984 (D.C. Cir. 1977), and Beneficial Corp. v. FTC, 542 F.2d 611, 618-19 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), as requiring that an "order should not be more intrusive than necessary to achieve fulfillment of the governmental interest." 562 F.2d at 763 n.68.

[237] First amendment considerations would appear to be a stronger force with respect to a confessional preamble than with a corrective message in general. By expressly calling attention to the past deception, the former places a greater burden on the constitutionally protected right to advertise. Similarly, it can be argued that the use of such a preamble is not the least restrictive means of achieving the government's purpose of providing truthful information to consumers since other terms in a corrective advertising order serve the same function.

[238] 562 F.2d at 763.

[239] See text at notes 61-64 & 111 *supra*.

[240] 29 U.S.C. § 160(c) (1970).

the statutory policies.[241] Recognizing the NLRB's expertise in the labor field, the courts have given it broad discretion in formulating remedies,[242] but, like the FTC, it does not have the power to punish past wrongs.[243] In the past, the Board has attempted to impose a form of corrective remedy where it has found the employer guilty of unfair labor practices. As part of the cease and desist order, it has required the employer to read the terms of the order aloud to the employees at a meeting called for that purpose. Provisions of this kind have been viewed as forms of punishment beyond the Board's statutory authority and have been struck down as unnecessarily embarrassing and humiliating to management.[244] Some courts, on the other hand, have modified the orders to give the company the option of having the notice read by NLRB representatives, rather than by its own officials. In this manner, the element of humiliation is mitigated somewhat and the order has been held not to be penal in nature.[245] At the same time, however, the remedy has been limited to undoing the effect of egregious unfair labor practices.[246]

The FTC's corrective advertising remedy is analogous to the NLRB's remedy in that it requires the respondent to disclose publicly his previous violation. Because of the punitive implications, orders for such disclosure should be subjected to closer judicial scrutiny to avoid unnecessary humiliation. Thus, the *Warner-Lambert* court applied a test focusing upon whether the proposed corrective message was reasonably *necessary* to achieve the goal of the FTC's order—effective communication of the truth and elimination of residual deception. The application of this test in *Warner-Lambert* indicates that a preamble having the tendency to humiliate will be treated much like the NLRB's disclosure requirements, and will be either struck down as punitive or affirmed with modification to remove the element of humiliation. The *Warner-Lambert* court expressly declined to comment on whether intended humiliation always would constitute unauthorized punishment but hinted that intended humiliation "might be called for in an egregious case of deliberate deception."[247] The court determined that this was not such a case since "the record compiled could support a finding of good faith."[248] Thus, it appears that this type of message, like the NLRB's

---

[241] *Id.*

[242] *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 610-15 (1969); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215-16 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348-49 (1953); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943); Southern S.S. Co. v. NLRB, 316 U.S. 31, 46 (1942); International Ass'n of Machinists v. NLRB, 311 U.S. 72, 82 (1940).

[243] *See, e.g.*, NLRB v. Strong, 393 U.S. 357, 359 (1969); Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 655 (1961); NLRB v. Gullett Gin Co., 340 U.S. 361, 362 (1951); NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 250 (1939).

[244] *See* NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 869 (5th Cir. 1966). The same result was reached in International Union of Electrical Workers v. NLRB, 383 F.2d 230 (D.C. Cir. 1967), the court stating: "The ignominy of a forced public reading and a 'confession of sins' by any employer, any employee, or any union representative makes such a remedy incompatible with the democratic principles of the dignity of man." *Id.* at 234.

[245] *See, e.g.*, J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304-05 (2d Cir. 1967); Textile Workers Union v. NLRB, 388 F.2d 896, 903-05 (2d Cir. 1967); J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972). *Cf.* NLRB v. Bush Hog, Inc., 405 F.2d 755, 758-59 (5th Cir. 1968).

[246] *See* Lipman Motors, Inc. v. NLRB, 451 F.2d 823, 829 (2d Cir. 1971).

[247] 562 F.2d at 763.

[248] *Id.*

disclosure requirement, will be used only when needed to restore the balance after an extreme violation.

Although the *Warner-Lambert* court paid lipservice to the "reasonable relation" standard used by courts to review traditional cease and desist orders, it actually applied the more stringent "necessary" standard because of the first amendment considerations inherent in the imposed message. This approach is justified because the fundamental rationale for corrective advertising is the retention by the public of erroneous beliefs after the deceptive advertising has ceased. It is logical to require the Commission to show this substantial actual deception before imposing the remedy. The court also applied the same standard when reviewing the content of the message itself and its treatment of the "confessional preamble" indicates that the content of future messages will hinge on factual circumstances. Future imposition of the remedy will be decided on a case-by-case basis, but its use would seem to be limited to "major" advertising campaigns, similar to the one employed by Warner-Lambert.

CONCLUSION

In holding that the Federal Trade Commission has the authority to order mandatory corrective advertising, the United States Court of Appeals for the District of Columbia has looked beyond the literal language of section 5 of the Federal Trade Commission Act. Because of the due process problem inherent in that section's language, the Commission has been limited to prohibiting for the future those business practices that it finds unfair or deceptive. However, the Commission has in the past been allowed to require the wrongdoer to take some affirmative action to correct antitrust violations and it seems logical to extend this power to advertising violations. Corrective advertising is a permissible affirmative remedy under section 5 since it serves to prevent future deception in the form of lingering erroneous beliefs in the public mind engendered by past false advertising. Since the remedy requires disclosure in literally truthful advertisements, it should not be viewed as a category of the Commission's power to order affirmative disclosure but rather as a logical extension of that power. Such extension is made necessary by the fact that traditional cease and desist orders cannot deal adequately with the problem of residual deception. Although corrective advertising will be subjected to a closer judicial scrutiny than that given simple cease and desist orders in the past, the *Warner-Lambert* case establishes corrective advertising as an important new weapon for both the Federal Trade Commission and the consumer.

MICHAEL J. PELGRO