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PROBLEMS OF PROOF IN FALSE COMPARATIVE PRODUCT ADVERTISING: HOW GULLIBLE IS THE CONSUMER?

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I. Introduction

Since the days of opportunistic salesmen hawking potions of dubious medicinal value from the backs of covered wagons, advertising has been considered inherently suspicious. In economic circles, it has been argued that most advertising serves to create markets for unessential goods, and thus disrupts the proper functioning of the market place.[1] The assumption that consumers are easily manipulated—and that advertisers must therefore be policed—has been prevalent for several decades.

In recent years, however, the Supreme Court has discounted the notion of consumer gullibility,[2] and the Federal Trade Commission (FTC) has reduced its policing of the advertising industry in several ways.[3] Many now believe that consumers are capable of discerning when a product does not live up to its claims, and that excessive intervention in advertising may have both First Amendment and economic implications not heretofore recognized. As a result of this more permissive attitude towards advertisers, there has been increasing comparative product advertising, and a concomitant increase in false advertising litigation.[4]

Note the following related article: Jerome G. Lee, Comparative Advertising, Commercial Disparagement and False Advertising, 71 TMR 620 (1981), and those articles cited therein.

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1. J. Galbraith, The Affluent Society 152-60 (1958); R.S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale LJ 1165 (June 1948). For a study of the literature of the last two decades suggesting the relevance of economic principles to the analysis of the law and public policy, see R. Posner, Economic Analysis of Law (2d ed 1977).

2. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 US 748, 770 (1976): "There is, of course, an alternative to this highly paternalistic approach [of prohibiting advertising of prices by pharmacies]. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."

3. 16 CFR §14.15 (1980); Wall Street Journal, at 6, col 2 (October 27, 1981); Wall Street Journal, at 16, col 2 (October 1, 1981). See also infra notes 11-13, 17, 20-35 and accompanying text.

4. Robert G. Sugarman, Recent Developments in Advertising Litigation, Advertising and the Law 23 (1981); Jeffrey S. Edelstein, Superiority Claim Guidelines for Advertising Agencies and Advertisers, 49 ABA Antitrust LJ 809 (June 1980). The term "false advertising" has been defined by Congress to include false, deceptive or misleading claims. 15 USC §55(a) (1976).

II. The Development of Comparative Advertising

A. A Brief History

In earlier days, the most important function of trademarks was to serve as the consumer's identification of the producer; consequently, comparatively fewer trademarks were registered for specific products than is the case today. As advertising increased, product characteristics were stressed more and more, and trademarks for many separate products were registered to protect the newly-created "product image."[5] As a general rule, when performance characteristics are emphasized, trademark value is enhanced, and the value of competing product marks tends to lessen. As product characteristics become more important, competition between similar products tends to increase.

Much advertising today attempts to emphasize the product by focusing on the characteristics of the advertiser's product alone. In the last two decades, however, there has been a significant increase in advertisements that compare—explicitly or implicitly—advertisers' products with competing products. At first, competitors were not named—for example, a competing detergent was referred to as "Brand X" or "the leading brand."[6] At that time, there was a general feeling in the advertising industry that naming one's competitor would only give him free publicity, and might even evoke sympathy for him.[7] This view was revised after Avis rental cars launched its tremendously successful WE TRY HARDER campaign in the mid-1960s. Although Hertz was not actually mentioned, the target was clear in the references to "Number One."[8]

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5. See Gilbert H. Weil, Protectibility of Trademark Values Against False Comparative Advertising, 44 Calif L Rev 527 (July, 1956).

6. See 2 R. Callmann, The Law of Unfair Competition, Trademarks and Monopolies §41.2 (3d ed 1967); Suzanne B. Conlon, Comparative Advertising: Whatever Happened to "Brand X"?, 57 Chi Bar Rec 118 (1975), 67 TMR 407 (1977); Stewart E. Sterk, The Law of Comparative Advertising: How Much Worse Is "Better" Than "Great," 67 TMR 368 (1977).

7. See Lawrence D. Gaughan, Advertisements Which Identify "Brand X": A Trialogue on the Law and Policy, 35 Ford L Rev 445, 446, 57 TMR 309 (1967). In addition, one well-known treatise continued to advocate against comparative advertising: "[A]s a general rule, the comparison of one's product with a competitor's should not be sanctioned, whether the comparison is deceptive or not." Callmann, supra note 6 at §41.2; but see Prestonettes, Inc. v. Coty, 264 US 359 (1924) ("When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. This is not taboo." Id at 368).

8. Sterk, supra note 6 at 368 fn 2. Another example of a successful comparative advertising campaign that did not actually name the competitor was the "Big Blue" vs. "Pink Pad" campaign in the soap pad industry. It was clear to most consumers that SOS brand was referring to BRILLO brand soap pads in this campaign. Id at 369-70.

In 1971, the National Broadcasting Company (NBC) announced that it would televise comparative advertisements that identify competitors by name. NBC had first sought FTC approval, which was granted on a trial basis.[9] Soon thereafter, the FTC requested that the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS) adopt similar policies,[10] which they did. The prevailing wisdom since then has been that restrictions against comparative advertisements may prevent consumers from receiving information which is relevant and useful and which may "assist[] them in making rational purchase decisions." [11]

In the last decade numerous comparative advertising campaigns that actually name the competitor have enjoyed dramatic success.[12] Comparative advertising is now a widely accepted marketing device.[13] The potential for rapid and substantial commercial damage in a comparative advertisement, however, has made that form of false advertising even more attractive, as is evidenced by the recent increase in such ltigation.[14]

B. The FTC Requirement of Substantiation

The Federal Trade Commission is charged with policing truth in advertising. Section 5 of the Federal Trade Commission Act (FTCA) makes illegal "unfair or deceptive acts in or affecting commerce," and gives the FTC the power to issue cease and desist

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9. Federal Trade Commission News, No 1-0320 (March 20, 1972).

10. Ibid.

11. 16 CFR §14.15(c) (1981). It may also help new products to enter the market place. A comparative advertisement allows a newcomer to "piggyback" on an established product by favorably comparing his product with his competitor's. Two economists recently have encouraged this practice precisely for this reason. Ellen R. Jordan and Paul H. Rubin, An Economic Analysis of the Law of False Advertising, 8 The J of Legal Studies 527, 532 (June 1979). See also Yale Brozen, Entry Barriers: Advertising and Product Differentiation, in Industrial Concentration: The New Learning (H. Goldschmidt, H. Mann and J. Weston, eds 1974).

12. See, eg, Nets To Study Norelco Data in Shaver Hassle, Advertising Age, at 8 (January 22, 1973); Doulton Credits 6% Share Gain to Ad Comparing its China with Lenox Line, Advertising Age, at 4-6 (February 5, 1973); Morner, It Pays to Knock Your Competitor, Fortune, at 104 (February 13, 1978).

13. Bill Abrams, Comparative Ads Are Getting More Popular, Harder Hitting, Wall Street Journal, at 25, col 1 (March 11, 1982). In 1978, ABC reported fourteen percent of their advertisements were comparative. By 1981, that figure had increased to twenty-three percent. Ibid. For an article critical of comparative advertisements, see Albert Robin and Howard B. Barnaby, Jr., Comparative Advertising: A Skeptical View, 67 TMR 358 (1977). But see, Stephen Nye, In Defense of Truthful Comparative Advertising, 67 TMR 353 (1977).

In 1976, a leading ad agency, Ogilvy & Mather, completed a study which concluded that comparative advertising was ineffective. For and Against Comparative Advertising, Advertising Age, at 25 (July 5, 1976). In late 1980 Ogilvy & Mather reversed its opinion. Abrams, supra note 13.

14. Abrams, ibid.

orders[15] or to order corrective advertising.[16] For many years the courts have allowed the FTC to define "deceptive" broadly.[17] The FTC need prove only the capacity or tendency to deceive an average or ordinary person.[18] This definition allows the FTC to police the industry without bearing the burden of proving that consumers were actually deceived.[19]

In the 1960s, the FTC was faced with the problem that by the time administrative procedures were completed, and appealed, the damage to consumers had already been done. Primarily for this reason the FTC announced in Pfizer, Inc.[20] that it would require prior substantiation of certain advertising claims.

The Pfizer case involved claims that the topical anesthetic UNBURN would anesthetize nerve endings in sunburned skin to "stop sunburn pain fast." Under its authority to regulate "unfair" commercial practices,[21] the Commission ruled that it was unfair to make an affirmative product claim—even if it were true—without having a reasonable basis for making it, prior to its dissemination to the public.[22] The Commission, articulating its

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15. 15 USC §45(a)(1) (1976). The FTC may also look to Section 12 of the FTCA for authority to police false advertising. 15 USC §52 (1976).

16. See, eg, Warner-Lambert Co. v. FTC, 562 F2d 749 (CA DC 1977) (upholding FTC order requiring Listerine ads to disclose that Listerine does not cure colds, as the company had previously advertised). See generally Note, Warner-Lambert Co. v. FTC: Corrective Advertising Gives Listerine a Taste of Its Own Medicine, 73 NW U L Rev 957 (December 1978); Note, Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways, 70 Mich L Rev 374, 399 (December 1971). For the results of a recent study by the FTC of the effect of Listerine corrective ads, see Antitrust & Trade Regulation Report, at A-23 (October 29, 1981).

17. See, eg, FTC v. Colgate-Palmolive Co., 380 US 374 (1965); Giant Food Inc. v. FTC, 322 F2d 977 (CA DC 1963); Zenith Radio Corp. v. FTC, 143 F2d 29 (CA 7 1944). The FTC's authority to regulate "deceptive" advertising should not be confused with its controversial authority to regulate "unfair" advertising. It is under the latter authority that the Commission has proposed rules for the restriction of children's television advertising. See generally G. Thain, Suffer the Hucksters to Come Unto the Little Children? Possible Restrictions of Television Advertising To Children Under Section 5 of the Federal Trade Commission Act, 56 BU L Rev 651 (July 1976); Comment, Big Brother's War on Television Advertising: How Extensive Is the Regulatory Authority of the Federal Trade Commission?, 33 SW LJ 683 (June 1979). The FTC has recently abandoned the proposed rules restricting children's advertising, Wall Street Journal, at 16, col 2 (October 1, 1981).

18. See Gelb v. FTC, 144 F2d 580 (CA 2 1944) (court affirmed the Commission's finding that hair dye advertisements for "permanent" dye were deceptive because a consumer might not realize the dye would only last until the dyed hair grew out). See generally Ernest Gellhorn, Proof of Consumer Deception Before the Federal Trade Commission, 17 U Kan L Rev 559, 563-67 (1969).

19. In suits between private parties plaintiffs must prove actual deception, unless the defendant's advertising is false on its face. See infra part III.

20. FTC v. Pfizer Inc., 81 FTC 23 (1972). As early as 1960, the FTC had been giving notice to the industry that it encouraged greater self-regulation. See D.J. Baum, Self Regulation and Antitrust: Suppression of Deceptive Advertising by the Publishing Media, 12 Syracuse L Rev 289 (Spring, 1961) (quoting from a statement made by Earl W. Kintner, who was Chairman of the FTC at the time).

21. See supra note 17.

22. Supra note 20 at 64.

reasonable basis standard, said it would consider the facts that a "reasonable prudent advertiser should have discovered" before making the claim.[23] When a medicinal efficacy claim is made, the standard of prior "adequate and well-controlled scientific tests" will be applied.[24] When the claim relates to safety, "competent scientific tests" will be required in advance.[25] Substantially the same standard has been applied to product performance claims that cannot readily be verified by the consumer.[26]

It is not clear what substantiation requirements may be when the claim is more subjective, and thus more easily and inexpensively verifiable by the consumer.[27] Many advertising claims are susceptible to some kind of objective determination of falsity; if a claim is totally subjective, however, it is usually simple puffing, and is not actionable at all.[28] If it has an element of objectivity, the advertiser should make every reasonable effort to substantiate that element of the advertisement in advance of dissemination.[29] Advertisements that claim superiority over a competing product through consumer preference tests must have a "reasonable basis" for such objective claims of a subjective element.[30]

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23. Ibid.
24. Id at 65.
25. Firestone Tire & Rubber Co. v. FTC, 81 FTC 398, 475 (1972), affd 481 F2d 246 (CA 6 1973), cert denied 414 US 1112 (1973) (claims of shorter stopping distances).
26. See, eg, National Dynamics v. FTC, 82 FTC 488, 569 (1973), affd 492 F2d 1333 (CA 2 1974) (claim that battery additive will lengthen the active life of an automotive battery). For an update on this case, see Antitrust & Trade Regulation Report, at 473 (March 4, 1982).
27. Claims that an antiperspirant is "dryer," or that a certain laundry detergent gets your wash "whiter and brighter" are examples of subjective claims. Comparative claims that name a competitor are, by definition, objective claims that require detailed substantiation.
28. Testimonial or endorsement advertisements are a good example of puffing. These are advertisements in which a "typical" consumer will make statements as to the product's efficacy based on experience, or a famous person will lend his or her name, photograph, signature, or picture to the endorsement of a certain product. For a discussion of the FTC's recent update of its 1975 guidelines on these two forms of advertising, see Use of Testimonials and Endorsements in Advertising, 49 ABA Antitrust LJ 823 (June 1980).

Other examples of puffing abound in such "image" advertising as COME TO MARLBORO COUNTRY, THIS BUD'S FOR YOU and COKE IS THE REAL THING.

29. See Philip J. Crihfield, FTC Claim Substantiation Requirements, 49 ABA Antitrust LJ 829, 830 (June 1980).
30. In the Matter of Litton Industries, Inc., et al.. CCH Trade Reg Rep ¶21,784 at 22,015 (FTC 1/5/81). The Commission defined a "reasonable basis" for the claim as that which is based on "competent and reliable surveys, tests, or other evidence which substantiates the representation. . . ." Ibid. This is essentially the same test that is being applied in the private sector. See infra Part III, A. 2.

The three major networks and the National Association of Broadcasters have adopted substantiation requirements similar to those of the FTC. See Alfred R. Schneider, The American Broadcasting Company's Standards and Practices for Commercial Clearance: An Overview, 49 ABA Antitrust LJ 805 (June 1980); Edelstein, supra note 4; Excerpts from the Television Code, National Association of Broadcasters, Twenty-First Edition, January 1980, 49 ABA Antitrust LJ 811 (June 1980). This would seem to reduce the

Despite the fact that these substantiation requirements have been upheld in the courts, over the last decade the FTC has gradually reduced the number of cease and desist orders it has sought, for several reasons. First, the cost of bringing such suits has risen; as advertising has become more competitive there have been more possible suits to bring, and they have become complex. Second, since 1971 the National Advertising Division (NAD) of the Better Business Bureau has been policing the industry with increasing effectiveness. Third, since FTC authority should be exercised only when the public interest is at stake, and since there is now greater confidence in consumer acumen, the FTC's authority needs to be exercised less often.

FTC Chairman James Miller has indicated that the FTC's claim substantiation requirements may be reduced in the near future. He has expressed "strong reservations" about the ad substantiation requirement, noting that "consumers are not as gullible as many people think [they are]."[31] Chairman Miller has also stated that Section 5 of the FTCA, regulating unfair and deceptive trade practices, "is too broad" and "probably needs to be circumscribed in some way."[32]

Recently, Congress has moved to decrease the authority of the FTC in the false advertising arena. The House Energy and Commerce Committee has approved a bill[33] that allows the FTC to act only if an advertisement "causes consumers substantial injury that is not reasonably avoidable and is not outweighed by the benefits."[34] The Senate has recently approved an even more restrictive bill.[35]

The effects of reduced FTC involvement and authority seem to be two-fold: first, the number of false and misleading advertising claims is likely to increase; second, and consequently, pres-

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need for much FTC policing of the industry. Because the networks have to consider their need for revenue derived from advertisements, however, their definition of deceptive may, in practice, be less strict than the FTC's; in any event, they face a balancing, if not conflict, of interests. Nevertheless, the networks do refuse a substantial number of advertisements each year. ABC, for example, reviews about fifty thousand commercials per year; about five percent of which are rejected outright, and approximately twenty five to thirty percent are accepted only after modification. A much higher percentage of advertisements for children is rejected outright. Schneider, id at 807.

31. Antitrust & Trade Regulation Report, at A-4 (October 29, 1981). Chairman Miller cited the high costs of substantiation—all of which are passed on to the consumer—as another reason for reducing the FTC requirements. Ibid.

32. Antitrust & Trade Regulation Report, at 239 (January 28, 1982). See supra note 17.

33. HR 6995. See Volume 37, Number 36, USTA Bulletin, October 19, 1982.

34. Cong Q 2072 (August 21, 1982).

35. S 2499. See Volume 37, Number 36, USTA Bulletin, October 19, 1982.

sures on federal courts to litigate such matters between competitors may also increase. Because comparative advertising can cause quick and devastating damage to the competitor, it is essential for the courts to develop coherent legal standards with which to balance competing claims. In these cases, delays and appeals can be tantamount to no relief.

III. Substantiation Requirements and the Burden of Proof in Private False Comparative Advertising

Since the damage that can be inflicted on a competitor can be so swift,[36] plaintiffs in false advertising cases are likely to seek preliminary injunctive relief. The burden of proving the falsity or misrepresentation of defendant's advertising is on the plaintiff.[37] To obtain a preliminary injunction, plaintiff usually must demonstrate: (1) a likelihood of success on the merits—i.e. that defendant's advertisement is false or misleading; (2) that it has suffered, and is likely to continue to suffer, irreparable injury to its market share or the good will of the product; and (3) that the balance of equities tips decidedly in favor of granting preliminary relief.[38]

A. Likelihood of Success on the Merits

1. The Express/Implied Distinction

The legal standard currently being applied in private false advertising litigation derives from Section 43(a) of the Lanham Act,[39] and was established in American Brands, Inc. v. R. J. Reynolds Tobacco Co.[40] American Brands involved Reynolds' advertising that claimed that its NOW cigarette had the lowest tar content of all cigarettes available at that time, while in fact, American's CARLTON 70 had a lower tar content. Reynolds counterclaimed, stating that American falsely advertised its CARLTON 2 as the

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36. See infra notes 56 and 76 and accompanying text.

37. See supra text accompanying note 19.

38. Jackson Dairy Inc. v. J.P. Hood & Sons, 596 F2d 70, 72 (CA 2 1979); American Home Products Corp. v. Abbott Laboratories, 522 F Supp 1035, 1047 (SDNY 1981).

39. Section 43(a) reads in pertinent part: "Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation." 15 USC §1125(a).

40. 413 F Supp 1352 (SDNY 1976). The American Brands standard was most recently applied in American Home Products Corp. v. Abbott Laboratories, supra note 38 at 1039-40.

"fastest growing of the top 25" cigarette brands.[41] The court granted American a permanent injunction and dismissed Reynolds' counterclaim, announcing the two prong test that would control future false advertising cases. First, if the advertising statement is an express claim that is actually false, "relief can be granted on the court's own findings without reference to the reaction of the buyer or consumer of the product." [42] Second, if the advertising is claimed to have a tendency to "mislead, confuse, or deceive," [43]—that is, if it is impliedly false—then there must be evidence of deception of the public before an injunction will issue. In American Brands only the false express claim was enjoined; as to various implied claims of both parties, "[t]he fatal defect in both the American and Reynolds cases is that in neither instance has any evidence of substance been submitted which establishes the 'determinative' reaction of the consumer to the respective advertisement." [44]

This distinction between express and implied claims has been followed in most cases; but recently, one court attempted to define a third category—advertising not overall false or misleading despite its containing expressly untrue claims. In Coca-Cola Co. v. Tropicana Products, Inc.,[45] the District Court felt that claims in an advertisement that were expressly false would not mislead when the advertisement was considered as a whole. The Coca-Cola case involved advertising showing Bruce Jenner squeezing oranges into a TROPICANA carton while saying the product was "pure pasteurized juice as it comes from the orange." [46] In fact, TROPICANA orange juice often is made from frozen juice that is up to a year old, and, of course, juice does not come from an orange in a pasteurized state. Judge Carter denied the motion for preliminary injunction because "[s]uch a false representation violates the Lanham Act . . . only if it is not vitiated by the rest of the commercial . . ." [47] Because he found no consumer evidence of the effect of the whole commercial, the false claim was not enjoined. On appeal,[48] this theory failed to survive; the Second Circuit Court of Appeals made clear that it is only when all the individual

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41. Id at 1356.
42. Ibid. This is because it is presumed that expressly false claims mislead consumers. McNeilab, Inc. v. American Home Products Corp., 501 F Supp 517, 543, 207 USPQ 573 (SDNY 1980).
43. Id at 1357.
44. Ibid.
45. 538 F Supp 1091, 214 USPQ 927 (SDNY 1982).
46. Id at 1093, 214 USPQ at 929.
47. Id at 1095, 214 USPQ at 930.
48. Coca-Cola Co. v. Tropicana Products, Inc., 690 F2d 312 (CA 2 1982).

claims in an advertisement are true that the commercial will be considered as a whole to determine if there is any implied false claim.[49]

The propriety of testing consumer reaction to a small portion of a truthful advertisement was addressed in McNeilab, Inc. v. American Home Products Corp.[50] That case involved an implied comparison between Maximum Strength ANACIN and Extra-Strength TYLENOL. The advertisement claimed that Maximum Strength ANACIN was more potent than various other unnamed analgesics because it contained one thousand mg. of pain relief medicine while the others contained less. A bar graph depicted comparative dosage levels. A consumer survey was submitted in which subjects were asked to view the bar graph alone—separate from the rest of the advertisement. Nearly forty percent believed that the middle bar represented Extra-Strength TYLENOL.[51] At trial defendant produced a marketing expert who testified that it was improper to direct consumers' attention to the bar chart rather than the whole commercial.[52] Judge Lasker denied there was anything improper in such a test: "[I]nsofar as the bar chart was a key visual element of the commercial, especially with respect to the comparative claims made, we doubt that such a feature causes the study to be an unreliable guide to consumer reactions to the whole commercial."[53]

2. *The Use of Consumer Surveys*

(a) Testing for the Message Conveyed

In the first case to enjoin an impliedly false claim, evidence of consumer reaction was submitted. In American Home Products Corp. v. Johnson & Johnson,[54] the Second Circuit Court of Appeals affirmed the District Court's opinion,[55] which had enjoined a false comparative advertising claim. The case involved a massive advertising venture by American Home Products that portrayed its product, ANACIN, as one that could reduce inflammation, and named its primary competitor, TYLENOL,[56] as not being able to

49. Id at 317.
50. Supra note 42.
51. Id at 526, 207 USPQ 573.
52. Id at 527, 207 USPQ 573.
53. Id at 528, 207 USPQ at 583.
54. 577 F2d 160, 198 USPQ 132 (CA 2 1978).
55. 436 F Supp 785, 196 USPQ 484 (SDNY 1977).
56. In the summer of 1976, TYLENOL replaced ANACIN as the number one over-the-counter internal analgesic. 577 F2d at 162, 198 USPQ 132.

reduce inflammation. When McNeil Laboratories (McNeilab), a subsidiary of Johnson & Johnson and the manufacturer of TYLENOL, wrote letters to the networks and magazines protesting that the comparative advertisements were misleading and demanding that they be withdrawn, American Home Products filed suit. McNeilab counterclaimed under the Lanham Act, on the grounds that the ANACIN advertisements made false claims of overall superiority over TYLENOL.[57]

The appellate court first agreed that the advertisements were deliberately ambiguous. After the finding of "rather obvious ambiguity" [58]—and thus that the advertisement involved an implied claim—the lower court was correct in examining consumer data to determine what messages were conveyed by the ambiguous advertising.[59] The court affirmed one consumer test that showed the ANACIN television commercial to two hundred fifty persons and asked them questions about it. This type of test is called a "forced exposure" study. From the results of the study, the court found that the advertisement conveyed a general message of superiority over TYLENOL and the message that ANACIN was an effective anti-inflammatory agent[60] to a significant number of consumers.[61] The scientific experts for both parties and the medical literature indicated that the active in-

57. The print advertisement reads in part:

> Anacin can reduce inflammation that comes with most pain. Tylenol cannot.
>
> With any of these pains, your body knows the difference between the pain reliever in Adult-Strength Anacin and other pain relievers like Tylenol. Anacin can reduce the inflammation that often comes with these pains.
>
> Tylenol cannot. Even Extra-Strength Tylenol cannot. And Anacin relieves pain fast as it reduces inflammation.
>
> Get fast relief. Take Adult-Strength Anacin. Millions take Anacin with no stomach upset. Anacin.

Id at 163 fn 4, 198 USPQ at 135. The pains referred to in the print advertisement are depicted on a diagram of a human body and include sinusitis, tooth extraction, neuritis, tendonitis, backache, muscle strain, and sprains. Ibid.

58. Id at 166, 198 USPQ 132. One commentator has interpreted this as a requirement that a threshold finding of intentional ambiguity must be made and criticizes this as placing a "severe burden" on future litigants "in an area that is not particularly susceptible to such a finding." Note, The Lanham Trade-Mark Act Offers Relief for Implied Advertising Claims: American Home Products v. Johnson & Johnson, 11 Conn L Rev 692, 705 (Summer, 1979). In fact, this is the only case that mentions intent as a threshold requirement. Most cases imply intent from the ambiguity itself. See, eg, U-Haul International, Inc. v. Jartran, Inc., 522 F Supp 1238, 1254, 212 USPQ 49 (D Ariz 1981).

59. The court stated that, unlike the FTC, the courts do not have the expertise to evaluate on their own what messages are being conveyed to consumers in various advertisements. Id at 166, 198 USPQ 132.

60. Supra note 55 at 793, 196 USPQ 484.

61. The District Court defined the burden of proof as a "preponderance of the evidence" standard—plaintiff must show that a "substantial segment of consumers perceived the allegedly false advertising claims" before an injunction will be granted. Id at 796-97, 196 USPQ 484.

gredients in ANACIN and TYLENOL were equally effective for general pain relief.[62] The court, however, found that the anti-inflammatory claim could not be adequately substantiated by American Home Products or refuted by McNeilab. On these findings, the District Court enjoined American Home Products from further dissemination of the ANACIN advertising because it was false on the implied superiority claim, and misleading on the anti-inflammatory claim.

The court also considered another consumer survey of the "day after recall" type. This survey was conducted through brief random telephone interviews of television viewers who admitted to remembering the advertisement which had been aired in their area on the previous day.[63] The court did not give this study much weight because factually inaccurate descriptions by numerous interviewees indicated that the viewers had paid little attention to the advertisements, and thus the results did not accurately reflect the message conveyed.

> [W]e think that the format of the ASI presentation was likely to cause the audience to attend to the programs and ads more closely and thus more accurately reflect what the average consumer who heard and saw the ad took the message(s) to be, although it probably less accurately reflects the real impact that seeing an Anacin ad will have on the viewer.[64]

This was followed in Johnson & Johnson v. Carter-Wallace, Inc.,[65] in which the court again chose between a forced exposure and day after recall test. Johnson & Johnson sought preliminarily to enjoin advertisements for NAIR with baby oil, alleging that they implied falsely that inclusion of baby oil in a hair removing product would make legs as soft and smooth as would rubbing baby oil onto a recently shaved leg.[66] The court found inconclusive a day after recall study of consumer's perception

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62. Id at 801, 196 USPQ 484.

63. This test was first designed and administered by Burke Marketing Research, Inc.; when a commercial has been analyzed by this method, it is said to have been "Burked."

64. Supra note 55 at 794, 196 USPQ at 491.

65. 487 F Supp 740, 205 USPQ 827 (SDNY 1981).

66. An example of the several advertisements Johnson & Johnson sought to enjoin is found in this audio from one of them: "Who's got Baby Oil? Nair's got Baby Oil. If you're a baby goil, Nair with Baby Oil. Nair with Baby Oil. It takes off the hair . . . so your legs feel baby-smooth. And Nair's baby-soft scent . . . smells terrific, baby. Who's got Baby Oil? Nair's got Baby Oil. Soft-smelling Nair with Baby Oil. Nair, for baby-smooth legs." Johnson & Johnson v. Carter-Wallace, Inc., 631 F2d 186, 188 fn 2, 208 USPQ 169, 171 (CA 2 1980).

of the NAIR advertisement, but found a forced exposure study to be even less probative because of its form; it decided that Johnson & Johnson had failed to prove that consumers had received the alleged message. After appeal and remand, the court heard further testimony of two experts that day after recall tests should be used primarily to show the memorability of an advertisement, not to show the claims made therein.[67] The court reversed its earlier opinion, and, as the American Home Products v. Johnson & Johnson court had done, gave the forced exposure survey greater weight in determining the message conveyed by the advertisement.[68]

(b) Consumer Preference Tests

Judicial preference for the forced exposure test to show the message conveyed recently was solidified in Vidal Sassoon, Inc. v. Bristol-Myers Co.[69] In one of the challenged advertisements, Christina Ferrare was shown holding a bottle of Bristol's product and claiming "[I]n shampoo tests with over nine hundred women like me, Body on Tap got higher ratings than Prell for body. Higher than Flex for conditioning. Higher than Sassoon for strong, healthy looking hair."[70] In fact, the tests involved groups of approximately two hundred women, each of whom tested only one shampoo and rated it on a qualitative scale. Instead of showing that nine hundred women preferred BODY ON TAP to SASSOON for strong, healthy hair, the test actually showed that the opinions of the group that tested only one, compared to those of the different group that had tested the others, revealed a statistically insignificant one percent preference for BODY ON TAP for "strong, healthy looking hair."

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67. Supra note 65 at 747-48, 205 USPQ 827. In fact, that was the purpose of conducting the test. It is routine for advertising agencies to commission a Burke test of an advertisement soon after it is aired to test (and report to the client) the effectiveness of the advertisement.

68. Id at 748, 205 USPQ 827. Another case to rely upon a forced exposure study to prove the message conveyed was Philip Morris, Inc. v. Loew's Theatres, Inc., 511 F Supp 855 (SDNY 1980). A Lorillard survey showed thirty six percent preferred the taste of TRIUMPH over MERIT cigarettes, twenty four percent considered them even, and forty percent preferred the taste of MERIT. Defendant's claim that TRIUMPH was a "National Taste Test Winner" and TRIUMPH BEATS MERIT! was false on its face. The survey, showing substantial consumer perception of TRIUMPH taste superiority, was relied upon to enjoin the literally true claim: "an amazing 60% said 3 mg Triumph tastes as good or better than 8 mg Merit" (by the same methodology, sixty four percent voted for MERIT).

69. 661 F2d 272, 213 USPQ 24 (CA 2 1981).

70. Id at 274, 213 USPQ at 25. As Ms. Ferrare referred to each of the shampoos, a picture of the competing product was shown on the screen.

Also, one third of the so-called "women" who participated in the test were only thirteen to eighteen years old.

To prove that these misleading claims were conveyed to the consumer by the advertisement, Sassoon submitted a forced exposure study. Ninety-five percent of those surveyed said that the advertisement represented that each of the "nine hundred women" had tried two or more brands.[71] Sixty-two percent of the participants thought the tests showed that BODY ON TAP was competitively superior.[72] On the finding of the claim made, and the falsity of that claim, the court issued a preliminary injunction.

The Sassoon case is one of the two significant cases involving claims based on surveys of consumer preference. Because the advertisements were so misleading, the court did not analyze the tests in depth; however, it implied that even if the results had not been portrayed in a misleading manner it would have struck down the test because of dubious methodology. Rating one unknown product on a qualitative scale, as in the BODY ON TAP test, is known as "blind monadic testing." Of this, the Court said: "The propriety of blind monadic testing for the purpose of comparative advertising claims is in some doubt."[73] The usual purpose of such a test is to determine consumer reaction to a new product, without reference to another product.

The second significant case involving consumer preference tests[74] is American Home Products Corp. v. Abbott Laboratories,[75] which involved a claim of superiority in the hemorrhoid remedy market. TRONOLANE, a new product of defendant, was advertised as preferred by consumers "more than 2 to 1" over PREPARATION H.[76] At the outset, plaintiff conceded that it was

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71. Id at 276, 213 USPQ 24. In a footnote, the court referred to the deposition of Alfred Lowman of the Department of Broadcasting Standards & Practices of ABC. Mr. Lowman testified that ABC had rejected this advertisement precisely because of the deceptive nature of this claim. The other networks did not complain, however, and ABC later cleared the commercial. See supra note 30.

72. Ibid.

73. Id at 276-77, 213 USPQ at 26.

74. Two companion cases, Philip Morris Inc. v. Loew's Theatres, Inc., supra note 68 and R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc., 511 F Supp 867, 210 USPQ 291 (SDNY 1980), also involved consumer preference surveys. These cases, however, only discussed the methodology tangentially to the finding of deceptive use of the data the study produced.

75. Supra note 38.

76. This case illustrates how effective this kind of advertising can be. Before the TRONOLANE advertisements, PREPARATION H had an overall share of the hemorrhoid remedy market of approximately two-thirds, and a grocery store market share of more than ninety percent. Id at 1038. By the time the case reached the preliminary injunction hearing, just a month after the first advertisement, PREPARATION H reported a loss of approximately six percent of its market share—a loss of about six million dollars in annual sales. Id at 1039.

unable to show that this claim was false or misleading. The Court remarked: "Because of AHP's . . . concession, the challenge to Abbott's consumer test claim need not be resolved here. It nevertheless seems appropriate to note that both parties appear to agree on the legal standard that should apply to [such a] challenge."[77] The question in such a case, the court recognized, is whether the test itself may be false or misleading because of its methodology. With subjective preference claims, the court should analyze carefully the design of the test; in some cases, perhaps "no valid test may be practicable."[78]

The court was careful to state that in cases involving consumer preference tests, defendant only has the burden to prove the test methodology sufficient to withstand a challenge that the advertising is false or misleading. The burden then shifts to the plaintiff to challenge the methodology of the test. "To prevail on the merits, plaintiff must develop specific criticisms of the way the test was carried out."[79] The court suggested that plaintiffs might conduct a more reliable test to show the misleading nature of defendant's comparative preference claim.[80]

B. Proof of Irreparable Injury

Although one of the traditional requirements for a preliminary injunction is proof of irreparable injury, in false advertising cases a somewhat lesser standard applies. In Johnson & Johnson v. Carter Wallace, Inc.[81] the Second Circuit Court of Appeals held that Section 43(a) merely requires proof "providing a reasonable basis for the belief that the plaintiff is likely to be damaged as a result of the false advertising"[82] before an injunction will issue. This does not provide a windfall for plaintiffs because they would only get something to which they are already entitled: a market free of false advertising.[83]

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77. Ibid.
78. Ibid. Although the court did not support this statement it probably was correct under the facts of the case. If Abbott's testers had been able to give another product to the consumer in addition to TRONOLANE—and mask them both—the consumer would not have had the bias for the test product because he would not have known which was which. Such a test methodology is known as a double blind test, and was not practicable in this case because PREPARATION H was known to—and easily recognizable by—the test subjects, all of whom were hemorrhoid sufferers.
79. Ibid.
80. Ibid.
81. Supra note 66.
82. Id at 190, 208 USPQ at 172.
83. Id at 192, 208 USPQ 169.

In Quaker State Oil Refining Corp. v. Burmah-Castrol, Inc.,[84] a case involving comparative superiority claims between competing motor oils, irreparable injury was presumed from the facts that the two products were competitors, and that one competitor made a false superiority claim about its product.[85] The Court also quoted Judge Sweet from the Philip Morris case:[86] "[T]here is convincing evidence that consumers are being deceived . . . and the [plaintiff's] reputation . . . among consumers will thereby suffer injury. . . ." [87]

Defendants may argue that despite express falsity in their advertising their own evidence establishes that many consumers are not misled by the false claim; that if consumers are not actually misled by the falsity, then there is no injury. Such a contention was expressly rejected by Judge Sofaer in American Home Products v. Abbott Laboratories.[88] The Abbott advertisements contained the assertion that TRONOLANE "Stops Pain Immediately." Looking to consumer definitions of each word taken separately, the Court found that a substantial number of consumers understood the claim to mean that TRONOLANE "ends all perceived pain immediately or quickly." [89] The Court enjoined this false claim despite the fact that many other consumers thought the claim meant "relieves pain immediately," and as far as the claim was trying to mean "immediate cessation of all pain," said they would not believe it.[90]

When plaintiff chooses to sue for damages at trial, it should bear the burden of proving a causal connection between loss of sales and the advertisement in question. In antitrust law it is well-established that the mere fact that an injury occurred after some anticompetitive behavior took place is not enough to show causation.[91] Instead, the plaintiff must show a nexus between the alleged violation and the injuries suffered.[92] Several courts have already suggested that day after recall or "Burke" studies are more proba-

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84. 504 F Supp 178 (SDNY 1980).
85. Id at 182.
86. See supra note 68.
87. Supra note 84 at 182, quoting Philip Morris, Inc. v. Loew's Theatres, Inc., supra note 68 at 858.
88. See supra notes 75-80 and accompanying text.
89. Supra note 38 at 1042-45.
90. Id at 1045. In the Coca-Cola case, supra notes 45 and 48, the District Court denied the injunction for lack of proof of injury to Coca-Cola, but was reversed.
91. See, eg, Salerno v. Amer. League of Professional Baseball Clubs, 429 F2d 1003, 1004 (CA 2 1970), cert denied sub nom Salerno v. Kuhn, 400 US 1001 (1971); Vandervelde v. Put & Call Brokers & Dealers Assn., 344 F Supp 118, 144 (SDNY 1972).
92. Ibid.

tive than other test methodologies on the question of damages.[93] This is so because the recollection of a television viewer the day after seeing an advertisement at home is more likely accurately to represent the general viewing public than, for example, a forced exposure test with retention questions immediately following a viewing of the challenged advertising.

C. Equities Tip Decidedly in Favor of Plaintiff

The third requirement for a preliminary injunction—equities favor plaintiff—usually is deduced from balancing the hardships on both sides. In practice, the balance seems to tip in plaintiff's favor whenever there is irreparable injury because in cases that involve large companies with substantial market shares it is rare that the balance of hardships will tip decidedly in favor of either party—particularly in the short time it takes to bring on a preliminary injunction hearing.

In American Home Products v. Abbott Laboratories, Judge Sofaer balanced the hardships in terms of the range of possible remedies. He examined the prices of advertising at issue and fashioned a remedy that minimized the harm to the defendant.

> In this particular context, the balance of hardships will tilt one way or the other according to the remedy chosen. Some remedies would work a grave hardship to the defendant; others would cause only minimal inconvenience. By contrast, persistent hardships are being suffered by the plaintiff; indeed, this is a clear case of possible irreparable injury. Consequently, it is appropriate to impose on defendant . . . those remedies that cause so little hardship as to leave the scales tipped decidedly in plaintiff's favor.[94]

This theory was implemented by enjoining defendant's "Stops Pain Immediately" claim, but advertising that was already being printed and shipped was not included in the injunction.[95] Judge

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93. See, eg, Johnson & Johnson v. Carter-Wallace, Inc., supra note 65. In fact, damages are very rarely sought. The only case in which false advertising damages have been recovered appears to be Alberto Culver Co. v. Gillette Co., 408 F Supp 1160, 194 USPQ 84 (ND Ill 1976), and there they were part of a settlement. See also Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 651 F2d 1365, 67 TMR 453, 195 USPQ 417 (CA 10 1977); H. A. Friend & Co., Inc. v. Friend & Co., 276 F Supp 707, 156 USPQ 306 (CD Calif 1967), affd 416 F2d 526, 163 USPQ 159 (CA 9 1969).

94. Supra note 38 at 1046.

95. A stricter injunction was issued in American Brands, Inc. v. R. J. Reynolds Tobacco Co., supra note 40, when the Court ordered Reynolds to paint over "all existing billboards or other comparable uses of out of home advertising" and to "use every effort by the employment of its sales force to withdraw from use any point of purchase material which includes the [offending] words." Id at 1360.

Sofaer also based this result on his recognition of the equitable consideration of the timeliness of plaintiff's claim. Apparently, American Home Products had known of Abbott's TRONOLANE claims as early as April 1981.[96] Plaintiff should have protested defendant's claims earlier than it did—before defendant had made its full advertising investment.[97] This dicta suggests that equitable considerations may be accorded more weight in the future. Besides timeliness, courts may consider the clean hands doctrine to determine where the equities fall.

A preliminary injunction is an equitable remedy which need not be granted to parties who lack clean hands.[98] In Häagen-Dazs, Inc. v. Frusen Glädje Ltd.,[99] plaintiffs sought to enjoin defendants from leading the public to believe that FRUSEN GLADJE ice cream is made in Sweden when, in fact, it is made in the United States. However, plaintiff was guilty of the same deceptive trade practice of which it accused defendant. "In short, since plaintiff's hands are similarly unclean, they may not secure equitable relief simply because defendant's hands may be a shade or two less clean."[100] Although not part of the holding, this should serve to warn potential plaintiffs guilty of the same deceptive practice for which they are suing defendant.

IV. Conclusion

The law of false advertising has evolved considerably in the past decade. The old assumption that consumers believe everything that is advertised is dead. With FTC encouragement, comparative advertising has burgeoned, forcing courts to analyze consumer surveys to evaluate claims of false advertising. Comparative advertising is good, insofar as it opens the market for quick entry and provides valuable consumer information.[101] Comparative advertising may be the form of advertising most likely to be true, since the substantiation required is so high and the danger of litigation is increased when the competition is named. Comparative advertisements, however, often require consumer test

96. Supra note 38 at 1046.
97. Ibid.
98. Clairol, Inc. v. Gillette Co., 270 F Supp 371, 154 USPQ 466 (EDNY 1967), citing 4 R. Callmann, Unfair Competition and Trademarks 1745 (2d ed 1950).
99. 493 F Supp 73, 210 USPQ 204 (SDNY 1980).
100. Id at 76, 210 USPQ at 206-07.
101. It is bad when it is misleading or false—worse than a non-comparative false advertisement—because of its greater apparent credibility. Though consumers are less gullible than they once were, there is still a prevalent belief that advertisers cannot make untrue claims, particularly about a competitor's product.

evidence for their substantiation; the courts have not had an easy time adjusting to this new requirement.

American Home Products v. Johnson & Johnson was the first case to consider survey evidence in depth. After that case, plaintiff's attorneys challenging a false advertisement face two tasks. First, they must prove what message is conveyed by the advertisement. Second, they must prove that the message either is false on its face or implies a false message. When plaintiff alleges that advertising misleads a substantial number of consumers, consumer survey evidence is essential to prove what message was conveyed. In advertisements involving claims of consumer preference, consumer testing—either the advertiser's inadequate testing or the challenger's testing—must be a part of the determination of falsity as well.

Because injury can be so swift and devastating, the courts must handle these cases swiftly and expertly. Creative, hardship balancing remedies, such as those fashioned in Abbott, should be encouraged. Advertisers considering a dubious or tenuous claim had best be prepared to structure their substantiation to stand up to scrutiny. Even if the FTC withdraws its prior substantiation requirements, advertisers may lose their case at the preliminary injunction level if they are not properly prepared. In the future, it appears that courts will examine consumer tests with greater care and expertise; the cases thus far have laid the groundwork.