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First Amendment Restrictions on the FTC's

Robert D. Eckinger

RECENT DEVELOPMENT

First Amendment Restrictions on the FTC's Regulation of Advertising

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I. INTRODUCTION

Advertising provides consumers with product information that is useful in making choices between competing goods. In theory this information helps to facilitate the rational allocation of resources necessary in a free enterprise economy. For markets to operate effectively, consumers must have accurate information about the prod-

ucts offered for sale.[1] Thus a major concern of the Federal Trade Commission (FTC) has been the regulation of false or misleading advertising.[2]

Section 5 of the Federal Trade Commission Act directs the FTC to prevent any "unfair or deceptive acts or practices in or affecting commerce."[3] In interpreting this broad legislative mandate, the courts generally have deferred to the FTC's findings of fact and selection of remedies.[4] By granting first amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[5] however, the Supreme Court has raised questions about the scope of the Commission's authority to regulate advertising. Although the Court indicated that the first amendment does not prevent the regulation of false or misleading advertising,[6] the elevation of advertising to protected speech status nonetheless creates uncertainty as to the extent of permissible regulation and the degree of judicial review. Whether specific practices employed by the FTC are found to be unconstitutional will depend largely upon subsequent interpretation of *Virginia Pharmacy*. Indeed, three recent circuit court opinions have cited *Virginia Pharmacy* to support conclusions that the FTC's regulation of advertising should be closely scrutinized in order to prevent unnecessary interference with constitutionally protected speech.[7]

The purpose of this Recent Development is to analyze these circuit court decisions in light of *Virginia Pharmacy*. In providing first amendment protection to commercial speech, the Court in *Virginia Pharmacy* suggested a "degree of protection" approach, which would allow the FTC to undertake more rigorous regulation of false or misleading advertising than would be permitted in noncommercial cases. This Recent Development proposes that the Commission's regulative efforts should receive a deferential level of scrutiny from reviewing courts and should be upheld when reasona-

1. *See generally* Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

2. *See generally* Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORDHAM URB. L.J. 349 (1973).

3. 15 U.S.C. § 45(a)(1) (1976).

4. *See* notes 49-58 *infra* and accompanying text.

5. 425 U.S. 748 (1976).

6. *Id.* at 771-72, 771 n.24.

7. National Comm'n on Egg Nutrition v. FTC, [1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 61,751 (7th Cir. Nov. 29, 1977); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976); *see* notes 111-43 *infra* and accompanying text.

bly related to correcting the deception of consumers. Based on this proposed standard of judicial review, the circuit courts have misinterpreted *Virginia Pharmacy* by assuming that the first amendment requires the courts to substitute their judgment for that of the FTC.

II. Regulation of Advertising by the FTC

A. *The FTC's Statutory Power to Regulate Advertising*

Congress first authorized federal regulation of advertising in 1914 by enacting the Federal Trade Commission Act.[8] The Commission's initial regulation of deceptive advertising[9] was subsequently restricted, however, by the Supreme Court's ruling that the FTC could only regulate false advertising that adversely affected competition.[10] Congress responded with the Wheeler-Lea Act in 1938,[11] providing the FTC with power over "unfair or deceptive acts or practices" whenever deception of the public was involved, regardless of the effect on competition.[12] Although numerous critics have questioned the effectiveness of the FTC,[13] Congress has continued to expand the Commission's powers.[14]

Sections 5 and 12 of the Federal Trade Commission Act provide the FTC with its major regulatory powers over advertising. Section 12 states that "[i]t shall be unlawful . . . to disseminate, or cause to be disseminated, any false advertisement . . . for the purpose of inducing . . . the purchase of food, drugs, devices or cosmetics."[15] This section, which has been narrowly applied to the specific advertising of food, drugs, devices, and cosmetics, contains special en-

8. Act of Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717 (codified at 15 U.S.C. §§ 41-77 (1976)). The Federal Trade Commission Act did not give the Commission specific power to regulate advertising but rather authorized it to prevent unfair and deceptive trade practices.

9. Three of the five complaints issued by the FTC in its first year of operation were directed at false advertising. *See* Millstein, *supra* note 2, at 451.

10. FTC v. Raladam Co., 283 U.S. 643 (1931).

11. Act of Mar. 21, 1938, ch. 49, § 4, 52 Stat. 111 (codified at 15 U.S.C. §§ 45, 52-55 (1976)).

12. 15 U.S.C. § 45(a)(1) (1976).

13. E. Cox, R. Fellmeth, & J. Schultz, "The Nader Report" on the Federal Trade Commission (1969) [hereinafter cited as Cox]; R. Posner, Regulation of Advertising by the FTC (1973); E. Rockefeller, Desk Book of FTC Practice and Procedure 6 (2d ed. 1976).

14. The FTC's specific regulatory powers have been expanded through statutes such as the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461 (1976). For a comprehensive list of these statutes see Rockefeller, *supra* note 13, at 28-29, 28-29 nn.4-17. Amendments to the Federal Trade Commission Act also have expanded the Commission's jurisdiction, rule-making, and enforcement powers. 15 U.S.C. § 45(a)(1) (1976), *amending* 15 U.S.C. § 45 (1970) (jurisdiction changed from "in commerce" to "in or affecting commerce"); 15 U.S.C. § 53 (1976), *amending* 15 U.S.C. § 53 (1970) (authority to seek injunctions); 15 U.S.C. § 57b (1976) (authority to bring civil actions on behalf of consumers).

15. 15 U.S.C. § 52(a) (1976).

forcement provisions for regulating the false advertising of these goods. Section 5's broader statutory powers prevent any "unfair or deceptive acts or practices in or affecting commerce."[16] Neither the statute nor its legislative history, however, specifically defines "unfair or deceptive."[17]

The FTC has used this expansive legislative mandate to investigate various kinds of advertising;[18] a partial listing includes advertising that is false,[19] misleading,[20] ambiguous,[21] deceptive,[22] unsubstantiated,[23] or directed toward vulnerable groups.[24] In 1972 the Supreme Court further broadened the Commission's powers by ruling in *FTC v. Sperry & Hutchinson Co.*[25] that the FTC could attack practices that neither deceive consumers nor threaten competition, but are objectionable because of their unfair impact on consumers.[26] Thus the Commission's authority to regulate particular advertising practices has gone largely unquestioned.[27] Controversy has arisen

16. 15 U.S.C. § 45(a)(1) (1976).

17. The legislative history of the Federal Trade Commission Act suggests that Congress intended to provide the FTC with broad regulatory powers. Senator Thomas, in commenting on § 5, stated that:

> [U[nfair competition, like fraud, is a creature of protean shapes. It assumes one attitude to-day and another to-morrow. As with fraud, so will it be with unfair competition. In fraud there is a constant race between the rogue and the chancellor. In unfair competition there is going to be a constant race between the corporation and the commission
> . . . .

51 CONG. REC. 11,598 (1914).

18. For a detailed recent account of advertising regulations, see Pitofsky, *supra* note 2.

19. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (finding that Listerine mouthwash was not beneficial for colds and sore throats); *see* notes 123-33 *infra* and accompanying text.

20. Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir.), *cert. denied*, 364 U.S. 819 (1960) (failure to inform consumers that books were abridged or retitled); Zenith Radio Corp. v. FTC, 143 F.2d 29 (7th Cir. 1944) (misleading claims that radios could receive broadcasts from Europe).

21. Murray Space Shoe Corp. v. FTC, 304 F.2d 270 (2d Cir. 1962) (ambiguous claims about the therapeutic qualities of certain shoes).

22. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965) (use of plexiglass to which sand had been applied in an advertisement claiming that shaving cream could shave "tough, dry, sandpaper" in a single stroke); Campbell Soup Co., 77 F.T.C. 664 (1970) (placing marbles in soup to give it a deceptively richer appearance).

23. Pfizer, Inc., 81 F.T.C. 23 (1972) (failure to substantiate claim that suntan lotion contained a special ingredient that anesthetized nerves in sunburned skin).

24. FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934) (selling penny candy to children by inducing them with possible prizes); Mattel, Inc., 79 F.T.C. 667 (1971) (using special filming techniques to exaggerate the appearance and performance of "Hot Wheels" racing cars).

25. 405 U.S. 233 (1972).

26. To date, the FTC has not made extensive use of the "unfairness doctrine." *See* Pitofsky, *supra* note 2, at 684.

27. For a discussion of judicial deference to the Commission's finding that a certain

instead over the types of remedies that the Commission may apply to false or misleading advertising.

B. *Remedies Applicable to False or Misleading Advertising*

Upon determining that a party might be engaged in an unfair or deceptive advertising or sales practice, the FTC may seek an order "requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice."[28] Although a cease and desist order normally requires a formal adjudication of charges between the parties, approximately seventy-five percent of the actions are settled informally by consent orders that have the binding effect of a fully litigated disposition.[29] An agreement reached in this manner may take the form of an oral promise or a written assurance of voluntary compliance.[30] Consent orders allow the defendant to assist in shaping the remedy and to escape adverse publicity, and also permit the FTC to avoid the cost of prolonged litigation while implementing its orders more quickly.

If an informal agreement is not reached, the FTC may file a complaint against the respondent to obtain a formal cease and desist order.[31] A hearing is held by an administrative law judge who must file an initial decision within ninety days of the receipt of all evidence. This decision is appealable to the full Commission by either party and the Commission's ruling may be appealed to a United States court of appeals.[32] Thus a cease and desist order often will not take effect until several years after the violation first occurs.[33] This delay, coupled with a sanction that does not become effective until after a final decision is rendered, has been said to give each violator "a free bite at the apple,"[34] since the advertiser can

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activity constitutes an unfair or deceptive act, see Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705, 708-11 (1977).

28. 15 U.S.C. § 45(b)(1976). *See generally* Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496 (1972).

29. F. KENT, LEGAL AND BUSINESS PROBLEMS OF THE ADVERTISING INDUSTRY 158 (1975).

30. 16 C.F.R. § 2.21 (1977).

31. 15 U.S.C. § 45(b) (1976).

32. 16 C.F.R. §§ 3.51-3.55 (1977). Upon final adjudication, a party violating a cease and desist order is subject to a civil penalty of up to $10,000 for every violation, with each day of continuing failure to obey an order counting as a separate offense. 15 U.S.C. § 45(1) (1976).

33. *See* COX, *supra* note 13, at 72. The most extreme example of this delay was a case in which 149 hearings were held over the course of 16 years before the FTC finally compelled Carter Products, Inc., to remove the references to "liver" in the name "Carter's Little Liver Pills." Carter Products, Inc. v. FTC, 268 F.2d 461, 465 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

34. Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477, 483 (1971).

acquire a delay profit by continuing to violate the Act until the cease and desist order becomes final.

Because of the inadequacies of cease and desist orders, the FTC recently has been granted additional powers by Congress and has developed alternative remedies to regulate false and misleading advertising. In 1973 the FTC was granted authority under section 13(b) of the Federal Trade Commission Act to seek preliminary injunctions from the district courts.[35] The FTC previously could seek injunctive relief in section 12 cases,[36] but rarely used this power because of the narrow scope of its application and the considerable confusion over the standard of proof required by the courts.[37] Under section 13(b), the FTC may be granted a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . ."[38] This stringent standard of proof suggests, however, that the FTC may continue to have difficulty in limiting an advertiser's "free bite at the apple" through the use of injunctive relief.[39]

In conjunction with cease and desist orders, the FTC also has required some advertisers guilty of unfair or deceptive acts to disclose publicly certain information about their products. These affirmative disclosure orders are not required because the advertisement's statements are false, but because it fails to state facts necessary for the consumer to make an intelligent selection. Upon receipt of an affirmative disclosure order, the advertiser must either comply with the order or cease advertising. An illustration of the use of affirmative disclosure is provided by *J.B. Williams Co. v. FTC*,[40] in which the makers of Geritol were required to disclose that their product was of no benefit to most people suffering from a general "run-down feeling."[41] In order to sustain an affirmative disclosure

35. 15 U.S.C. § 53(b) (1976). Halverson, *The Federal Trade Commission's Injunctive Powers Under the Alaskan Pipeline Amendments: An Analysis*, 69 NW. U.L. REV. 872 (1975).

36. 15 U.S.C. § 53(a) (1976); Note, *The FTC's Injunctive Authority Against False Advertising of Food and Drugs*, 75 MICH. L. REV. 745 (1977).

37. FTC v. Sterling Drug, Inc., 317 F.2d 669, 673-74 (2d Cir. 1963); FTC v. National Health Aids, Inc., 108 F. Supp. 340, 346 (D. Md. 1953). *But see* FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 489 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); FTC v. Rhodes Pharmacal Co., 191 F.2d 744, 747-48 (7th Cir. 1951).

38. 15 U.S.C. § 53(b) (1976).

39. *See* FTC v. National Comm'n on Egg Nutrition, 517 F.2d at 488-89; FTC v. Simeon Management Corp., 391 F. Supp. 697 (N.D. Cal. 1975).

40. 381 F.2d 884 (6th Cir. 1967).

41. Future Geritol advertisements were required to disclose that "in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of

order the FTC must demonstrate that a failure to disclose is misleading because the actual performance or quality of the product does not comport with the claims made in the advertisement.[42]

A recent remedy developed by the FTC that is similar to affirmative disclosure is the use of corrective advertising.[43] Affirmative disclosure traditionally has been required only when the failure to reveal specific facts in current advertisements might mislead future consumers. Corrective advertising, on the other hand, requires certain disclosures based on the nature of past representations, regardless of whether the false or misleading advertisement is continued.[44] Corrective advertising is promoted as a solution to the delay-profit problem since compliance with the corrective advertising order should offset profits arising from the continuation of deceptive advertising during the FTC proceedings.[45] More importantly, these orders are viewed as a solution to the residual-effect problem of deceptive advertising whereby consumers who remember the advertising claim continue to be influenced by it after the advertising campaign is over.[46] Critics of corrective advertising have challenged these orders as retrospective and punitive in nature and thus beyond the statutory powers of the FTC.[47] Prior to 1977, however, the courts had not had the opportunity to address these criticisms because the only corrective advertising orders issued by the FTC were either proposed orders or were included as part of consent orders.[48]

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one or more of the vitamins contained in the preparation [Geritol] or by iron deficiency or iron deficiency anemia;" and "for such persons the preparation will be of no benefit." *Id.* at 890.

42. *Id.* (quoting Alberty v. FTC, 182 F.2d 36, 39 (D.C. Cir. 1950)). *See also* Ward Laboratories, Inc. v. FTC, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960) (manufacturer of purported baldness cure was required either to disclose that 95% of all cases of baldness are not curable or to stop advertising its product as a cure for baldness).

43. *See generally* Cornfield, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1976); Pitofsky, *supra* note 2, at 692-701; Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1 (1973).

44. For example, in a case involving the misleading advertisement of sugar, the order in Amstar Corp., 83 F.T.C. 659, 673 (1973), required the following disclosure:

> Do you recall some of our past messages saying that Domino sugar gives you strength, energy, and stamina? Actually, Domino is not a special or unique source of strength, energy or stamina. No sugar is, because what you need is a balanced diet and plenty of rest and exercise.

45. In Ocean Spray Cranherries, Inc., 80 F.T.C. 975 (1972), which involved a consent order incorporating a corrective message, the agreement provided that 25% of the advertising hudget for one year must be devoted to informing the public of past deception.

46. *See* Cornfield, *supra* note 43, at 707.

47. *Id.* at 708-13.

48. *Id.* at 707-08; Thain, *supra* note 43, at 2-17. *But see* notes 123-33 *infra* and accompanying text.

C. *Judicial Review of FTC Remedies*

The courts generally have afforded the FTC the same broad discretion in the shaping of remedies that it is allowed in determining whether a particular practice violates the Act.[49] In *Jacob Siegel Co. v. FTC*[50] the Supreme Court overturned a court of appeals decision that had modified an FTC order requiring the defendant company to cease using a trade name the FTC had found to be deceptive. In remanding the case for further findings, the Court stressed the great deference accorded the Commission's selection of remedies:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here . . . judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy . . . . Congress has entrusted it [the Commission] with the administration of the Act and has left the courts with only limited powers of review. 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.[51]

The "reasonable relation" test stated in *Jacob Siegel* has been applied repeatedly in subsequent cases reviewing the legality of a remedy selected by the FTC.[52] The Supreme Court also has established that a remedial order is not limited to the specific violations that have occurred, but rather the FTC may take any steps necessary to prevent circumvention of its orders.[53]

Additional language in the *Jacob Siegel*[54] case, along with the earlier *FTC v. Royal Milling Co.*[55] decision, have been interpreted, however, as creating a stringent "least drastic means" standard for reviewing FTC remedies. Although both cases suggested that a remedy requiring the destruction of valuable business assets would not

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49. *See* notes 18-26 *supra* and accompanying text.

50. 327 U.S. 608 (1946).

51. *Id.* at 611-13 (emphasis added).

52. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965); FTC v. National Lead Co., 352 U.S. 419, 428-29 (1957); FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); Portwood v. FTC, 418 F.2d 419, 424 (10th Cir. 1969); Waltham Watch Co. v. FTC, 318 F.2d 28, 32 (7th Cir. 1963).

53. *See* FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952), in which the Court noted that the FTC "cannot be required to confine its road block to the narrow lane that 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." *See also* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965); FTC v. National Lead Co., 352 U.S. 419, 429 (1957).

54. 327 U.S. at 612.

55. 288 U.S. 212, 217 (1933).

be upheld if less drastic means would accomplish the same result,[56] the application of this test has been limited to the regulation of long-established trade names.[57] Absent these conditions, federal courts have sustained FTC orders prohibiting false or misleading advertising without a showing that the remedy employed was the least restrictive cure for the deception.[58] Thus the overriding trend indicates judicial deference to the Commission's expertise in selecting the proper remedy in areas under its supervision. The current validity of this deferential approach, however, has been placed in issue by the recent extension of first amendment protections to commercial speech.

III. First Amendment Protection of Commercial Speech

A. *The Commercial Speech Doctrine*

(1) *Valentine v. Chrestensen*

The first Supreme Court decision to address directly the question whether commercial speech receives first amendment protection[59] was *Valentine v. Chrestensen,*[60] in which the Court upheld an antilitter ordinance that had been invoked to prohibit circulation of handbills advertising free admission to a submarine. In a brief opinion, devoid of analysis or citation to precedent, the Court concluded that although the first amendment would forbid the banning of all communication by handbill, it imposed no such restraint on the governmental regulation of purely commercial advertising.[61] In holding that commercial advertising was unprotected by the first

56. 327 U.S. at 612; 288 U.S. at 217.

57. In *Joseph Siegel* the respondent had used the trade name for 13 years and in *Royal Milling* for over 30 years. *See* Reich, *supra* note 27, at 713. *See also* Beneficial Corp. v. FTC, 542 F.2d 611, 619-20 (3d Cir. 1976).

58. *See* Reich, *supra* note 27, at 713.

59. For an account of earlier mail censorship cases, see 5 Hofstra L. Rev. 655, 655-58 (1977).

Additional background sources on commercial speech and the first amendment include: Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 Iowa L. Rev. 1 (1976); Meiklejohn, *Commercial Speech and the First Amendment,* 13 Cal. W.L. Rev. 430 (1977); Redish, *The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression,* 39 Geo. Wash. L. Rev. 429 (1971); Rotunda, *The Commercial Speech Doctrine in the Supreme Court,* 1976 U. Ill. L.F. 1080; Note, *Yes, FTC, There is a Virginia: The Impact of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *on the Federal Trade Commission's Regulation of Misleading Advertising,* 57 B.U.L. Rev. 833 (1977); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. Chi. L. Rev. 205 (1976).

60. 316 U.S. 52 (1942).

61. *Id.* at 54.

amendment,[62] the Court in *Valentine* employed a "two-level" theory of the first amendment, which classifies speech as either fully protected or wholly unprotected.[63]

Having established the commercial speech doctrine in *Valentine,* the Court avoided applying it in subsequent cases. In *Breard v. Alexandria,*[64] the only major case to follow the *Valentine* rationale, the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. Since *Breard,* however, the Court has either ignored the doctrine[65] or has restricted the scope of its application. In *New York Times Co. v. Sullivan,*[66] for example, a public appeal by the NAACP for funds to combat the effects of alleged racial discrimination by Alabama police was held protected by the first amendment notwithstanding the fact that it took the form of a commercial advertisement. The Supreme Court distinguished *Valentine* as involving purely commercial advertisement, unlike the *New York Times* advertisement, which contained political information of public interest.[67] Thus the Court moved away from the strict nonprotection approach to commercial speech and began to examine the actual content of advertisements. The Court failed to address, however, the *Valentine* holding that purely commercial advertising is wholly unprotected by the first amendment.

(2) Erosion of the Commercial Speech Doctrine

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights,*[68] a divided Court[69] upheld a local ordinance prohibiting

62. The traditional view of the first amendment status of commercial advertising was later noted by Chief Judge Bazelon in Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969):

> Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression.

63. *See* Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20, 30-33 (1975).

64. 341 U.S. 622 (1951).

65. One notable comment about the *Valentine* decision was made by Justice Douglas in Cammarano v. United States, 358 U.S. 498, 513-14 (1958) (Douglas, J., concurring), in which he stated: "The ruling was casual, almost off hand. And it has not survived reflection."

66. 376 U.S. 254 (1964).

67. *Id.* at 266.

68. 413 U.S. 376 (1973).

69. Justice Powell's majority opinion was joined by Justices Brennan, White, Marshall, and Rehnquist; Chief Justice Burger and Justices Douglas, Stewart, and Blackmun each filed dissents.

newspapers from publishing separate columns of male and female want ads. The Court initially held that the regulated want ads, as proposals of possible employment, were classic examples of commercial speech,[70] which the Court defined as speech that does no more than propose a commercial transaction.[71] Having determined that the want ads constituted commercial speech, the Court then focused on the constitutionality of their regulation. Rather than applying the commercial speech doctrine, the Court upheld the ordinance on the ground that the restrictions it imposed were aimed at the advertisement's discriminatory hiring proposals, which were themselves illegal.[72] The Court indicated, however, that the advertisements would have received some degree of first amendment protection if the commercial proposal had been legal.[73] Despite the lack of clarity of this dictum, it strongly suggested that commercial speech might be afforded some constitutional protection. The dissenting opinions of Justices Douglas and Stewart went even further in urging that *Valentine* be expressly overruled because it denied first amendment protection for commercial speech.[74]

The attack upon the commercial speech doctrine continued in *Bigelow v. Virginia*,[75] in which the Court struck down on first amendment grounds a Virginia statute under which a local newspaper had been convicted of publishing an advertisement for an abortion referral agency.[76] In an opinion by Justice Blackmun, the Court stated for the first time that constitutional protections were not entirely inapplicable to paid commercial speech.[77] In recognizing the value of commercial information, the Court stressed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[78] The Court

70. 413 U.S. at 385.

71. *Id.*

72. *Id.* at 388. Justice Powell compared the advertising of sex-associated jobs with the illegal advertisement of narcotics or prostitution.

73. The Court noted that: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidential to a valid limitation on economic activity." *Id.* at 389.

74. *Id.* at 399, 401 (Douglas, J., & Stewart, J., dissenting).

75. 421 U.S. 809 (1975).

76. The advertisement stated that abortions were legal in New York (they were then illegal in Virginia) and that there was no residency requirement. It then set forth the conditions under which the referral agency would provide information and counseling for a fee. *Id.* at 812.

77. *Id.* at 818.

78. *Id.* at 826.

also questioned the validity of *Valentine,* intimating that it authorized only the "reasonable regulation" of the manner in which advertisements could be distributed.[79]

The Court in *Bigelow* declined, however, to establish the proposition that commercial speech is fully protected by the first amendment. Instead the Court stated that "commercial advertising enjoys a degree of protection,"[80] and that courts must balance first amendment concerns against the governmental interests asserted in support of the regulation.[81] Thus, while the decision provided some first amendment protection for commercial speech, it also recognized the states' legitimate interest in regulating advertising.[82] In adopting a balancing approach, however, the Court failed to define clearly the extent to which the first amendment allows the regulation of advertising.[83]

B. *The* Virginia Pharmacy *Decision*

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[84] individual consumers and consumer interest groups challenged the constitutionality of a Virginia statute prohibiting licensed pharmacists from engaging in price advertising for prescription drugs. Writing for the majority, Justice Blackmun concluded that advertisers have a first amendment right to speak the truth in commercial advertising, and that the public has a corresponding right to receive this information.[85] In reviewing the history of the commercial speech doctrine, the Court once again distinguished *Valentine,* characterizing it as a simplistic approach that was rarely applied.[86] The Court then stressed the strong consumer interest in the free flow of commercial information, stating that

79. *Id.* at 819-20. The Court stressed that *Valentine* does not support the "proposition that advertising is unprotected per se."

80. *Id.* at 821.

81. *Id.* at 826. The Court further noted that: "The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation." *Id.*

82. In balancing these interests, the Court likened the advertisements before it to those in the *New York Times* decision, indicating that the Virginia statute interfered with the flow of information that was of vital public interest as opposed to merely commercial transactions. *Id.* at 821-22. Moreover, the Court did not feel that the statute was relevant to the state's legitimate interest in maintaining the quality of medical care provided within its borders. *Id.* at 827.

83. *Id.* at 825.

84. 425 U.S. 748 (1976).

85. *Id.* at 756-57.

86. *Id.* at 758-59.

informed decision making is as essential to the free market economy as it is to the political process.[87] In light of this reasoning, the Court ruled that speech that does no more than propose a commercial transaction is not wholly outside the protection of the first amendment.[88] Because it found the advertising in question directly protected by the first amendment, the Court rejected any balancing against governmental interest as had occurred in *Bigelow*.[89] The Court noted, however, that the regulation of some forms of commercial speech is permissible. Thus regulation of time, place and manner of advertising, false and misleading advertising, advertising of illegal acts, and advertising in the broadcast media might all be constitutionally permissible.[90]

The impact of *Virginia Pharmacy* on the regulation of advertising is significant for several reasons. In ruling that commercial speech that merely proposes a commercial transaction is protected by the first amendment, the Court disregarded the suggestions of earlier cases[91] that only commercial speech containing material of public interest or editorial concern should receive constitutional protection.[92] Thus advertisements presenting a purely commercial proposal are now protected by the first amendment. The *Virginia Pharmacy* decision indicated, however, that the FTC's regulation of false or misleading advertising is not prohibited by the granting of first amendment protection to commercial speech.[93] Since deceptive advertising is of questionable informational value, its regulation is consistent with the Court's interest in aiding consumers by promoting the free flow of truthful information. Moreover, because inaccurate advertising has only marginal first amendment value, the gov-

87. *Id.* at 763-64.

88. *Id.* at 761-62.

89. The Court cursorily stated: "[T]he choice among these alternative approaches is not ours to make or the Virginia Assembly's. It is precisely the kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

90. *Id.* at 770-73. The Court noted that this list of the types of advertising that are subject to regulation is not exclusive.

91. *See* note 67 *supra* and accompanying text; note 82 *supra*.

92. 425 U.S. at 760-61.

93. *See* note 90 *supra* and accompanying text. In listing the types of commercial speech regulations that are permissible, the Court stated:

> Untruthful speech, commercial or otherwise, has never been protected for its own sake . . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

425 U.S. at 771-72.

ernment may not be required in all cases to demonstrate a legitimate interest sufficient to justify its regulation.[94] Even the most fraudulent advertisement, however, may contain some truthful information and thus the regulation of false or misleading advertising must not be allowed to mute completely the presentation of constitutionally protected speech.

In discussing the extent of regulation allowed by the first amendment, the Court in *Virginia Pharmacy* indicated that false or misleading speech might permissibly be regulated with greater rigor than would similar false statements of fact in a noncommercial setting.[95] The Court justified this "different degree of protection" approach[96] on two grounds.[97] First, the greater objectivity of commercial speech makes advertising claims more readily verifiable than news reporting or political commentary.[98] Perhaps more importantly, the Court suggested that because advertisers are greatly motivated by the desire for commercial profit, stricter regulation of false advertising creates a less severe chilling effect than does the regulation of noncommercial speech.[99] Thus the greater objectivity and hardiness of commercial speech reduce the need to tolerate inaccuracy. In attempting to separate and prohibit the false and

94. In National Comm'n on Egg Nutrition, 88 F.T.C. 84, 198 (1976), the FTC interpreted the *Virginia Pharmacy* decision by stating:

> [W]e doubt that the *Bigelow* case compels the application of a balancing of interests test in each particular case before any regulation whatsoever may be applied to misleading commercial speech. That balance has already been struck on a categorical basis, a fact recognized by the Supreme Court in *Virginia Board of Pharmacy* if not in *Bigelow* itself.

95. In describing this permissible regulation, the Court noted:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common-sense differences between speech that does "no more than propose a commercial transaction," . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

425 U.S. at 771 n.24.

96. *See* note 90 *supra* and accompanying text. Professor Meiklejohn acknowledges the "degree of protection" approach but argues that all commercial speech, including false or misleading advertising, should receive full first amendment protection. *See* Meiklejohn, *supra* note 59, at 443-50. *See also* Note, 57 B.U.L. REV., *supra* note 59, at 841-42, in which the author recognizes this different level of constitutional protection, but argues that it is inconsistent with the Court's broad application of first amendment rights.

97. Generally, false or misleading statements in noncommercial, political speech are given a stringent degree of first amendment protection because of the considerable difficulty in determining whether the statement is in fact untruthful and because of the danger of stifling free debate. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-41 (1974).

98. 425 U.S. at 771 n.24.

99. *Id.*

misleading elements in commercial speech from those that are accurate and thus protected, governmental entities may therefore proceed more aggressively and with less exacting precision than would be required of regulative schemes affecting noncommercial speech.

Although this rationale suggests that a less exacting degree of judicial scrutiny is appropriate in reviewing governmental regulation of deceptive advertising, the Court failed to elaborate on the precise standard of review that is required.[100] In suggesting that deceptive commercial speech might be more rigorously regulated than similar noncommercial speech, the Court noted that it might be appropriate to require that an advertisement appear in a particular form or include additional information and warnings "as are necessary to prevent its being deceptive."[101] While this statement clearly authorizes the use of remedial advertising, it may be interpreted as requiring that such remedial measures be "necessary." The lack of additional language in the opinion supporting or defining this vague term, however, raises serious doubt that the Court intended it to be used as a standard of constitutional review.[102]

C. *Recent Supreme Court Decisions*

In two recent decisions the Supreme Court has followed *Virginia Pharmacy* in extending first amendment protection to commercial speech, but has not directly confronted the issue of the degree to which false or misleading advertising may be regulated.[103]

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100. The Court also failed to provide an explicit definition of commercial speech. For a discussion of the various ways courts and commentators have approached this problem, see Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

101. 425 U.S. at 771 n.24. In support of this statement, the Court cited Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), and United States v. 95 Barrels of Vinegar, 265 U.S. 438 (1924).

102. For a further discussion suggesting that the Court did not create a "necessary" standard of review, see notes 149-51 *infra* and accompanying text.

103. In another recent decision, a plurality of the Court purported to follow the *Virginia Pharmacy* "degree of protection" approach by suggesting that the first amendment afforded a lesser degree of protection to sexually explicit material than to other forms of protected expression. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). It is important to note, however, that the degree of protection approach employed by the plurality was expressly rejected by five members of the Court. 427 U.S. at 73 n.1, 84-88. More important for the purposes of this Recent Development, the "degree of protection" theory advocated in *Mini Theatres* is entirely different from that suggested in *Virginia Pharmacy*. In *Virginia Pharmacy* the Court initially determined that because of the need for accurate consumer information in the market place, commercial speech was afforded protection by the first amendment. Having made that determination, the Court then suggested that commercial speech, because of its greater objectivity and comparatively hardy nature, requires less protective safeguarding than expression in noncommercial areas. 425 U.S. at 771 n.24. Although

In *Linmark Associates, Inc. v. Township of Willingboro,*[104] the Court unanimously held that an ordinance prohibiting the posting of "For Sale" signs on residential property in order to prevent the flight of white residents from the township violated the first amendment. Finding no constitutional distinctions between advertisements designed to sell realty and those for prescription drugs, the Court relied on *Virginia Pharmacy* in holding that this restriction on the free flow of truthful information constituted a first amendment violation.[105] The Court suggested, however, that different constitutional questions would have been raised had the challenged law regulated false or misleading signs. This difference would stem from the lesser degree of protection required to insure the unimpaired flow of accurate information in the commercial setting.[106]

In the recent case of *Bates v. State Bar of Arizona,*[107] the Supreme Court again extended protection to commercial speech in holding that a blanket suppression of attorney advertising violated the first amendment.[108] The Court limited its ruling, however, find-

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the Court will allow more rigorous regulation, the ultimate effect on protected commercial speech, because of its hardy nature, will be no more chilling than the deterrent effect that less rigorous regulation has on noncommercial speech.

The approach adopted in *Mini Theatres* is dramatically different. In *Mini Theatres* the plurality apparently concludes that because there is a "less vital interest" represented by the exhibition of sexually explicit materials than by the dissemination of ideas with "social and political significance," state and local governments may place greater restrictions on the former. 427 U.S. at 61. This analysis suggests that the first amendment itself affords less protection to certain types of expression considered to be, presumably by majority consensus, of social and political insignificance. In essence, the plurality reasons that since the constitution affords a lesser degree of protection, the Court will allow greater governmental restriction. Because the plurality found sexual expression to be of lower social value, it concluded that less constitutional protection was in fact afforded and that greater regulation was permissible.

Unlike *Virginia Pharmacy,* the greater regulation permitted in *Mini Theatres* will produce a more severe chilling effect on protected expression than the Court would allow in areas considered more socially or politically valuable. As the dissenting opinion forcefully notes, the plurality's approach allows "selective interference with protected speech whose content is thought to produce distasteful effects" and permits the right of free expression to be "defined and circumscribed by popular opinion." *Id.* at 85, 86. Such an approach does indeed ride "roughshod over cardinal principals of First Amendment law." *Id.* at 86.

104. 431 U.S. 85 (1977).

105. *Id.* at 96-97. The respondents attempted to distinguish *Virginia Pharmacy* by arguing that the ordinance involved a time, place, or manner restriction and therefore the Court should use something less than a strict scrutiny standard for reviewing the regulations. The Court found, however, that the ordinance forbade only realty advertising and thus was directed at the content of the signs, not their time, place, or manner. *Id.* at 93-94.

106. *Id.* at 98.

107. 433 U.S. 350 (1977).

108. *Id.* at 383. The Court found that both the *Virginia Pharmacy* statute and the Arizona Bar's disciplinary rule prohibiting attorney advertising served "to inhibit the free flow of commercial information and to keep the public in ignorance." *Id.* at 365.

ing constitutional protection only for the advertisement of routine legal services.[109] Moreover, the Court noted that its decision did not restrict the regulation of certain types of commercial speech, including the false or misleading advertising of attorney services.[110]

The Supreme Court cases decided since *Virginia Pharmacy* have either directly or implicitly acknowledged the "degree of protection" approach, which allows a comparatively rigorous regulation of certain types of advertising. None of these decisions, however, have attempted to elaborate the proper constitutional standard against which such regulation is to be tested. The absence of a clear standard of review has had a significant impact on recent circuit court decisions that have examined FTC remedial orders imposing restraints on false or misleading advertisement.

IV. Recent Judicial Developments Affecting the FTC's Regulation of Advertising

A. Beneficial Corp. v. FTC

Three months after the *Virginia Pharmacy* case was decided, the Third Circuit Court of Appeals in *Beneficial Corp. v. FTC*[111] overturned an FTC cease and desist order[112] that prohibited a loan company from using a misleading advertising slogan.[113] In upholding the FTC's finding that the commercial loan slogan was misleading, the court indicated that whether an advertisement is misleading

109. *Id.* at 372. *Bates* involved an advertisement by a legal clinic that performed routine legal services such as uncontested divorces and simple adoptions for a modest fee to persons of moderate income. The Court expressed the concern, however, that certain professional services are too complex to be presented, as to either quality or price, in a manner normally found in commercial advertising.

110. *Id.* at 383-84.

111. 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

112. Beneficial Corp., 86 F.T.C. 119 (1975).

113. Having found that most of its tax service customers received yearly tax refunds, Beneficial developed a loan program offering an "instant tax refund." This program, however, was merely Beneficial's normal loan service based on the credit wortbiness of the horrower. The Commission found that the use of the copyrighted phrase "instant tax refund" constituted an unfair and deceptive trade practice and thus violated § 5 of the FTC Act. The Commission concluded:

> The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special is that this cash advance is different from a normal consumer loan.

542 F.2d at 617.

more closely resembles a finding of fact than a conclusion of law.[114] Thus the Court declined to second guess the Commission's finding.[115]

In its review of the Commission's remedial order, however, the court took a less deferential approach. While acknowledging that it ordinarily must defer to the FTC's exercise of discretion in framing remedies,[116] the court cited *Virginia Pharmacy* in asserting that the regulation of commercial speech, like other forms of first amendment expression, must be carefully scrutinized.[117] The court also placed substantial emphasis on the *Jacob Siegel-Royal Milling* "least drastic means" reasoning[118] to support the proposition that the FTC must not abuse its discretion in ordering the excision of trade names and other valuable business assets from advertising.[119] Based on this rationale, the court adopted a standard of review requiring that the remedy go "no further in imposing a prior restraint on protected speech than is reasonably necessary to accomplish the remedial objective of preventing the violation."[120] Applying this standard, the court closely scrutinized the Commission's decision and held that the FTC had abused its remedial discretion.[121] The court suggested that qualifying language could be used in the advertisement to avoid the inherent deception found by the FTC.[122]

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114. *Id.* at 617.

115. *Id.* at 618.

116. *See* notes 49-58 *supra* and accompanying text.

117. 542 F.2d at 618-19.

118. *See* notes 54-57 *supra* and accompanying text.

119. 542 F.2d at 619-20. The court rejected the Commission's attempts to differentiate between the long-established trade names found in the *Jacob Siegel* and *Royal Milling* cases, and the advertising slogan used by *Beneficial.*

120. *Id.* at 619. The court supported this statement by citing United States v. O'Brien, 391 U.S. 367, 382 (1968); New Jersey State Lottery Comm'n v. United States, 491 F.2d 219 (3d Cir. 1974); and Veterans & Reservists v. Regional Comm'r of Customs, 459 F.2d 676 (3d Cir.), *cert. denied,* 409 U.S. 933 (1972).

121. 542 F.2d at 620.

122. One proposed statement suggested by the court read: "Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service." *Id.* at 619. In offering this example, the court rejected the FTC's explicit finding that no qualifying language could properly dispel the deception inherent in Beneficial's advertising slogan. On administrative appeal, the Commission had concluded:

> [S]ince its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers . . . confirms what we believe to be obvious. No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer.

Id. at 622.

B. Warner-Lambert Co. v. FTC

In *Warner-Lambert Co. v. FTC*,[123] the Court of Appeals for the District of Columbia Circuit upheld the Commission's first litigated corrective advertising order,[124] which required the manufacturer of Listerine mouthwash to disclose in future advertisements that its product would not help to prevent colds or sore throats.[125] The court found substantial evidence supporting the FTC's ruling that advertisements portraying Listerine as an effective cold remedy were false. In determining the validity of the corrective order, however, the court focused on three major areas: the legislative history of the Federal Trade Commission Act, the first amendment protection afforded commercial speech, and the judicial precedent supporting corrective advertising.[126] In its first amendment analysis, the court cited *Virginia Pharmacy* for the proposition that the first amendment presented no obstacle to the regulation of false or misleading advertising.[127] In a supplemental opinion on the first amendment question,[128] the court reaffirmed its view, stating that the corrective advertising order was likely to have only a minimal chilling effect. Furthermore, this regulation would not burden the free flow of truthful information because, without the corrective message, the advertisements would continue to mislead the public.[129]

Despite this acceptance of corrective advertising as a proper FTC remedy, the court developed a more stringent standard of review for examining the constitutional impact of the Commission's remedial order. The court cited the *Beneficial* decision in stating that the FTC has a special responsibility "to order corrective advertising only if the restriction inherent in its order is no greater than

123. 562 F.2d 749 (D.C. Cir. 1977).

124. *See* notes 43-48 *supra* and accompanying text.

125. 562 F.2d at 762-64. The court ordered that these corrective advertisements were to be continued until Warner-Lambert spent an amount equalling the average annual Listerine advertising budget during the past ten years, approximately $10,000,000 according to FTC estimates.

126. The court rejected the arguments that corrective advertising orders were retrospective or punitive in nature and adopted a standard for the imposition of corrective advertising that required two factual inquiries: "(1) did Listerine's advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases?" *Id.* at 762.

127. *Id.* at 758. The court supported this statement by noting the Supreme Court's "different degree of protection" language.

128. *Id.* at 768-71.

129. *Id.* at 770. The court again supported this statement by referring to *Virginia Pharmacy*'s suggestion that commercial speech may not require the same degree of protection as other forms of speech. Rather, the court stated, "the opposite conclusion seems the more appropriate one." *Id.*

necessary to serve the interest involved."[130] The court also suggested that the first amendment might require that the regulation be the "least restrictive means" of achieving the governmental objective.[131] Applying these standards, the court upheld the vast majority of the FTC's decision, but deleted a confessional preamble to the corrective advertisement[132] which indicated that the disclosure was "contrary to prior advertising."[133]

C. National Commission on Egg Nutrition v. FTC

In the recent case of *National Commission on Egg Nutrition v. FTC*,[134] the Seventh Circuit Court of Appeals upheld an FTC cease and desist order that prohibited an advertiser from making false claims about the relationship between egg consumption and heart disease,[135] but modified a companion order requiring the affirmative disclosure of specific medical evidence.[136] The court deferred to the Commission's finding that the advertising claims were false, acknowledging the FTC's special expertise in the area of advertising regulation.[137] In upholding the cease and desist order, the court rejected the advertiser's contention that the first amendment requires that a commercial misrepresentation on a controversial public issue be governed by the same standards that apply in cases involving libel of public figures.[138] The court also indicated that the Supreme

130. *Id.* at 758.

131. *Id.* at 768-69.

132. *Id.* at 763. The Commission's corrective order required the advertisements to state that "contrary to prior advertising, Listerine will not prevent colds or sore throats or lessen their severity." The FTC argued that the preamble was required in order to attract attention that a correction was forthcoming.

133. *Id.* The court indicated that the preamble would be required only if the advertiser deliberately deceived the public.

134. [1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 61,751 (7th Cir. Nov. 29, 1977).

135. The FTC order barred the National Commission on Egg Nutrition (NCEN), an association of egg producers formed to counter anticholesterol attacks on eggs, from running false and misleading advertisements that claimed there existed no scientific evidence relating egg consumption to an increased risk of heart disease. *Id.* at 73,096.

136. In future advertisements involving the relationship between egg consumption and heart disease, the FTC ordered NCEN to disclose that "many medical experts believe that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease." *Id.*

137. *Id.* at 73,097. The court had earlier granted a temporary injunction against NCEN to cease its allegedly false advertising campaign during the pendency of the Commission's administrative proceeding, subject to the condition that NCEN not be prohibited from "making a fair representation of its side of the controversy." FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 489 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

138. [1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 61,751 at 73,098-99. NCEN argued that the standard formulated in *New York Times*, that a statement is actionable only if made with deliberate or reckless disregard of the truth, should be applied.

Court's concern in *Virginia Pharmacy* with the regulation of false and misleading advertising[139] suggests that commercial speech be broadly defined to include "false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product."[140]

Turning to the affirmative disclosure order, however, the court cited *Beneficial* for the proposition that the "First Amendment does not permit a remedy broader than that which is necessary to prevent deception."[141] In applying this constitutional standard, the court held that the Commission's disclosure order was overbroad and stated that in most advertisements involving the egg consumption-heart disease controversy, a less severe disclosure would suffice.[142] The advertiser would be required to print the more stringent FTC statement only if its advertisement made representations as to the state of available evidence concerning the controversy.[143]

V. Comparison and Analysis of Recent Judicial Developments

A. *Establishment of a Standard of Judicial Review*

The three circuit court cases[144] have indicated in varying ways that allowing the Commission to regulate false or misleading advertising is consistent with the constitutional protection afforded commercial speech in the *Virginia Pharmacy* decision.[145] In reviewing the scope of the FTC's remedial orders, however, the courts have seemingly adopted the "as are necessary" phrase from *Virginia*

139. The court cited *Virginia Pharmacy* as expressly recognizing that the first amendment did not interfere with the government's dealing effectively with the problem of false or misleading advertising. *Id.* at 73,098.

140. *Id.* at 73,099.

141. *Id.* at 73,100. The court also stated that the same standard would be applied to corrective advertising orders designed to correct the efforts of past deception.

142. *Id.* at 73,095, 73,100. The court's modified affirmative disclosure order required that whenever NCEN represents in its advertisements that eating eggs will not increase the risk of heart disease or makes any representation concerning the relationship between egg consumption and heart disease, it must disclose "that there is a controversy among the experts and NCEN is presenting its side of tbe controversy."

143. *Id.* at 73,100.

144. This article has focused on the first amendment restriction imposed by *Virginia Pharmacy* on the FTC's regulation of advertising. In the recent case of Chrysler Corp. v. FTC, 561 F.2d 357 (D.C. Cir. 1977), the court modified an FTC cease and desist order involving the deceptive advertisement of auto gas mileage. In reaching its decision, however, the court ignored the first amendment issues posed by *Virginia Pharmacy* and instead emphasized that the violations were unintentional and not continuing.

145. The acknowledgement of this fact has ranged from the suggestion in *Warner-Lambert* that the Supreme Court has proposed a "degree of protection" approach to provide for the regulation of false or misleading advertising, to the *Beneficial* court's general sidestepping of the issue.

Pharmacy[146] and have developed standards of constitutional review requiring the remedy to be "reasonably necessary," "no greater than necessary," or "no broader than that which is necessary."[147] Although the extent of the courts' actual intervention in these cases has varied greatly, the courts apparently are utilizing a strict scrutiny standard of review that requires the least drastic remedy possible for obtaining the government's objective.[148]

A close reading of *Virginia Pharmacy* strongly suggests, however, that the phrase "as are necessary" was not intended to indicate the proper standard of review. "Necessary" implies a strict scrutiny standard in which the regulation must be the least restrictive means available. In *FTC v. Royal Milling Co.*,[149] for example, the Court used a "reasonably necessary" standard to examine closely whether the regulation of a company's trade name, a business asset receiving special consideration,[150] was accomplished in the least drastic manner possible. This strict degree of review, though traditionally applied in cases affecting first amendment expression, is plainly inconsistent with *Virginia Pharmacy*'s finding that deceptive commercial speech may be more rigorously regulated than inaccurate expression in the noncommercial setting. Furthermore, the cases the Court cited after the "as are necessary" phrase do not support its adoption as a standard of review, but rather indicate that the government in the past has had the power to regulate the content of commercial speech.[151]

That *Virginia Pharmacy* did not establish a strict standard of review is implicit in *Beneficial*. The *Beneficial* court did not purport to rely on *Virginia Pharmacy* but instead justified its standard of review by citing a series of cases involving first amendment questions that are totally distinct from those associated with commercial speech.[152] The court further supported its strict scrutiny approach by emphasizing the similarities between *Beneficial*'s advertising slogan and the trade names protected in the *Jacob Siegel-Royal*

146. *See* note 101 *supra* and accompanying text.

147. *See* notes 120, 130, & 141 *supra* and accompanying text.

148. *See* note 131 *supra* and accompanying text. Former FTC Commissioner Philip Elman, speaking at a conference of the Food and Drug Law Institute, stated that the recent extension of freedom of speech protection to commercial speech will require government regulators to use the least restrictive method of regulation possible. ANTITRUST & TRADE REG. REP. (BNA) No. 837, at A-7 (Nov. 3, 1977).

149. 288 U.S. 212, 217 (1932).

150. *See* notes 54-57 *supra* and accompanying text.

151. *See* note 101 *supra*.

152. *See* note 120 *supra*.

Milling line of cases.[153] Thus, although *Beneficial* applied a strict scrutiny review to the regulation of commercial speech, its holding may have been based primarily on the special protection afforded trade names. This contention is given further credence by the adoption in *Beneficial* of the standard of review used in *Royal Milling.*[154]

The confusion created by the *Beneficial* decision is reflected in the *Warner-Lambert* and *National Egg* cases. Both cases broadly deferred to the Commission's findings that the advertisements were false or misleading. Similarly, the court in *Warner-Lambert* upheld the Commission's first contested corrective advertising order, and the *National Egg* decision adopted a broad definition of the type of false or misleading advertising that can be regulated under *Virginia Pharmacy.* Both courts, however, relied upon *Beneficial* in establishing stringent standards for reviewing the FTC's remedial orders. In contrast to *Beneficial,* though, the latter holdings only modified the Commission's decisions and did not overrule them. Thus, not only is the reasoning supporting the strict scrutiny standards questionable, but the manner in which the circuit courts have applied these tests has been inconsistent.

The utilization of a strict scrutiny standard for reviewing FTC regulation of false or misleading advertising presents serious problems. In addition to the obvious restraints that increased judicial intervention will place on the Commission's ability to prevent deceptive advertising, this intervention necessitated by use of the strict scrutiny standard, and the factual complexity of the cases, will also add to general court costs, overcrowding, and delays. Similarly, the courts will be confronted with the burdensome task of examining voluminous amounts of economic, consumer, and product data produced by these complex situations. Moreover, if in adopting these standards of review, the courts' primary concern is constitutionally safeguarding the free flow of truthful information,[155] there is no persuasive reason why the Commission's fact finding should receive more deference than does its selection of remedies.[156] In both cases, the rationale behind judicial deference is that the Commission's greater expertise makes it the more appropriate forum for resolution. If the Court undertakes strict scrutiny of remedies, deference to findings of fact upon which remedies are based serves no logical purpose. Thus the courts may feel compelled to

153. *See* notes 54-57 *supra* and accompanying text.
154. *See* text accompanying notes 118 & 149-50 *supra.*
155. *See* text accompanying notes 93-94 *supra.*
156. *See* Reich, *supra* note 27, at 721.

determine whether the advertisement is actually false or misleading. This intervention, if adopted, would logically extend to the fact finding and remedial orders of other agencies regulating advertising, such as the Federal Communications Commission and the Securities and Exchange Commission. Finally, because strict scrutiny standards have been applied inconsistently in recent decisions, there is no indication that future courts will develop a more uniform approach.

B. A Proposed Alternative

As an alternative to the strict judicial scrutiny suggested by the circuit courts, this Recent Development proposes that the courts adopt a more limited scope of review, intervening only when the Commission's remedial order is not reasonably related to correcting the unlawful practice found to exist. This alternative comports with the suggestion presented in *Virginia Pharmacy* that false or misleading advertising should receive a "different degree of protection" than similar expression in the noncommercial area.[157] By preserving the FTC's ability to regulate deceptive advertising effectively, this approach also supports the first amendment's concern with the free flow of accurate commercial information. Moreover, the proposed standard is consistent with the Supreme Court's previous review of FTC decisions, which placed special emphasis on the Commission's expertise in areas such as the regulation of advertising.[158] A less intrusive standard also will provide for more consistent rulings by the circuit courts.

This alternative standard of review does not propose that the courts adopt a complete "hands-off" approach to FTC decisions. Rather, *Virginia Pharmacy*'s concern with the constitutional protection of truthful commercial information indicates that judicial intervention may be required if the Commission's remedial order is excessively vague or does not directly relate to the particular false or misleading advertisement found to exist. If the regulation is directed at a specific deceptive advertisement or series of advertisements, however, and the FTC has presented sufficient evidence to support the reasonableness of its remedial order, the courts should defer to the Commission's decision. Applying this standard to the *Beneficial* case, for example, the court should have upheld the Commission's cease and desist order as a reasonable means of preventing the dissemination of a deceptive advertisement, especially in light

157. *See* notes 95-99 *supra* and accompanying text.

158. *See* notes 49-52 *supra* and accompanying text.

of the Commission's finding that no qualifying language could adequately correct the advertisement's deceptive qualities.[159]

VI. CONCLUSION

The Supreme Court has suggested a "degree of protection" approach to reconcile the first amendment protection of commercial speech with the need to effectively regulate false or misleading advertising. In so doing, however, the Court has failed to establish clearly the judicial standard of review appropriate in examining regulative measures. In the absence of adequate guidance, several circuit court decisions have adopted an unjustified standard of strict judicial scrutiny. The continued use of this standard by the circuit courts in reviewing FTC decisions will present increasing institutional problems for the courts and will seriously undermine the Commission's ability to protect consumers through the regulation of deceptive advertising. To avoid these consequences, the courts should employ a more deferential standard of review, intervening only in cases in which the FTC's regulation is not reasonably related to preventing deception of the public.

ROBERT D. ECKINGER

159. *See* note 122 *supra*.