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FTC Regulation of Endorsements in Advertising: In the Consumer's Behalf?

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The Federal Trade Commission, as recently as 1980, has issued Guides designed to prevent deception of consumers due to misleading product endorsement advertising by celebrities and others. The new Guides indicate that the FTC intends to continue its recent trend of finding advertisers and even endorsers liable for deceptive endorsement practices. However, a critical analysis of the Guides, in light of marketplace realities and consumer needs, raises serious question as to whether they are likely to promote accurate endorsement advertising.

This comment will explore pre-1980 regulations and trace the progression of controls through the advent of the FTC Guides. The Guides will be analyzed in light of past and present case law and alternative controls will be surveyed. Recommendations concerning the Guides will be suggested. The most important of these is a change from the present narrow and restrictive interpretive rules, which lack the force of law, to more general, substantive rules, which could be strictly enforced. The prospects for their implementation, however, appear dismal due to inertia within the FTC and federal budgetary reductions proposed by the current Administration.

I. INTRODUCTION

For centuries, entrepreneurs have tried to persuade others to buy their goods and services. They have used practically every means imaginable to achieve this end. One tried and proven method of selling has been to use the endorsements of influencial people.[1] With advances in communications technologies, adver-

1. The American Association of Advertising Agencies (AAAA) has said the following with regard to endorsements:

> Endorsements are a valuable technique for communicating product claims to consumers, adapting "word of mouth"—the user's own experience with the product—to a mass audience. The technique itself is neutral. It is not unfair or deceptive unless used to mislead. It does not convey product superiority unless a claim of superiority is expressly made or may be reasonably inferred from the advertisement as a whole. It does present the testimony of persons who use a product to other persons who are or may be interested in using the product themselves. When this testimony is true and fairly presented, the technique benefits the public as well as the advertiser.

AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, COMMENTS ON FEDERAL TRADE COMMISSION'S PROPOSED GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING (1975) [hereinafter cited as 1975 AAAA COMMENTS] (on file, Pepperdine Law Review Office). Another writer has said that

> [a]ny endorsement has an impact on a consumer's decision to make a purchase. A recommendation by the salesman at the point of purchase ("I am not just saying this to make a sale; I drive one myself, you know")

tisers are now able to reach much wider audiences with greater impact than in the past.[2] In recent years, advertisements frequently feature celebrities.[3] Organizations also assist sales campaigns by granting endorsements. Advertisers have been quick to recognize the increased influence which endorsements from these sources can add.

The use of endorsements, however, has its abuses. Even before the advent of modern communication methods, it was common for promotions to use untrue or unauthorized statements in order to sell products.[4] Pressure for governmental intervention to stem these abuses has grown greatly in recent years.[5]

With the organization of the Federal Trade Commission (FTC) in 1914, came the hope that many ills in the business world would be cured. The FTC is now recognized as having authority to regulate advertising through its power over "unfair or deceptive acts or practices" in trade.[6] In response to endorsement advertising problems, the FTC has taken an active role in policing the content of promotional campaigns. Restraints have been imposed upon advertisers under the theory that it is against public policy to al-

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affects the decisional process. So does a casual comment that Blasto gets the dirt out. A celebrity's endorsement has at least a similar impact. For example, if famed American football player John Unitas worked as a salesman at a sporting goods store and recommended a particular football shoe to a shopper, his recommendation probably would influence the shopper.

Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 645 (1973). This comment uses the term "endorsement" to refer to statements, actions, or circumstances in advertisements which imply that a particular person or organization, acting independently to at least some extent, finds a product worthy of purchase. The term also encompasses the frequently used word "testimonial." The two terms can usually be interchanged.

2. The advances referred to include the printing press, radio, and television. Communications prior to these advances were primarily either oral or handwritten; it is now possible for a single person to speak to millions. Businesses, of course, have taken advantage of the communications developments as media for advertisements.

3. *In re Cooga Mooga and Charles E. Boone*, 17 AM. BUS. L.J. 531, 533 (1980).

> Endorsement of products by celebrities has become a way of advertising life, for a famous name or face has greater potential for catching a purchaser's eye and can do so more effectively than the ordinary housewife character. Catherine Deneuve endorses perfume. O.J. Simpson pushes a fast rental car service. Joe DiMaggio bustles with coffee in the kitchen, and James Garner takes pictures for a camera company.

Id.

4. *See, e.g.*, Treece, *supra* note 1.

5. *See generally* Hammer, *FTC Knights and Consumer Daze: The Regulation of Deceptive or Unfair Advertising*, 32 ARK. L. REV. 446 (1978).

6. *See* Marinelli, *The Federal Trade Commission's Authority to Determine Unfair Practices and Engage in Substantive Rule Making*, 2 OHIO N.U.L. REV. 289, 294-95 (1974).

low anyone to profit through the use of deceptive advertising.[7]

In 1972, the FTC released proposed endorsement Guides[8] with the intent of reducing public deception due to unscrupulous or careless endorsement advertising. Although final versions of the Guides[9] were issued in 1980, it is not too early to analyze what effect they will have.

This comment will analyze the new Guides, their narrow requirements, and other problems which indicate that they are not likely to prove effective in controlling endorsement advertising abuses. Private, state, and alternative FTC actions will be examined in an attempt to find more effective solutions. In particular, the replacement of the current Guides, which are only interpretive and lack the force of law, with more general substantive rules, accompanied by strict enforcement, will be suggested as an appropriate corrective measure.

II. The Nature of the Endorsement Advertising Problem

The use of endorsements in sales promotions did not become widespread until mass communications methods were developed; previously, sellers had been limited to face-to-face discussions concerning their wares. Today, new media such as newspapers, radio, and television allow communication to much wider audiences. Advertising has become more impersonal and has developed into a societal force of great impact.[10] Direct contact

7. *See, e.g.*, Neuvill, Inc., 53 F.T.C. 436, 442-43 (1956). The following language from *Neuville* is fairly typical of that found in untrue endorsement cases:

> The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive members of the purchasing public with respect to the usual and regular retail prices of their hosiery, and to mislead and deceive dealers, retailers and members of the purchasing public with respect to the designation "Academy Award," thereby inducing the purchase of substantial quantities of their products. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

Id.

8. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (1972) [hereinafter cited as 1972 Guides].

9. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (1980) [hereinafter cited as 1980 Guides].

10. *See generally* Reed & Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733 (1977).

between a seller and a potential buyer is no longer necessarily present in the promotion of goods.

The impersonal nature of modern advertising helped provide the needed forum for endorsement advertising. Celebrities and expert endorsements, therefore, naturally followed the growth of mass media advertising, becoming effective promotional tools. However, claims have been made, even during the early days of mass media, that many advertising endorsements are either without foundation or are fraudulent.[11]

Endorsers have gradually come to be categorized into four groups: (1) celebrities and well-known persons; (2) experts; (3) consumer endorsers; and (4) organizations.[12] Celebrities and other well-known people are those immediately recognized by the public. While such persons usually possess no special skills concerning the products they endorse, their presence in advertisements increases public attention.[13] Experts, though not renowned, establish that the products being advertised are of high quality. To cause the public to be aware of an expert's status, such advertisements either explicitly state or strongly imply that the endorser is an expert.[14] Consumer endorsers are those who are portrayed in advertisements as current users of the goods or services being advertised.[15] Organizations, such as testing companies and athletic or consumer associations, have also been used extensively in advertising. Approval by a supposedly credible organization increases a product's sales.[16]

It is important to distinguish endorsers from those generally re-

11. *See, e.g.*, Von Theodorovich v. Franz Josef Beneficial Ass'n, 154 F.2d 911 (E.D. Pa. 1907). The defendant association was enjoined from use of an emperor's name and picture in advertisements and letterheads so as to not deceive any portion of the public.

12. 1980 Guides, *supra* note 9, at Introduction.

13. The celebrity's fame need not in any way relate to what is being advertised. However, a celebrity often will possess expertise regarding the endorsed product, such as would be the case if a professional race car driver were to endorse a sports car.

14. An expert for endorsement advertising purposes has been defined as "an individual, group or institution possessing, as a result of experience, study or training, knowledge of a particular subject which knowledge is superior to that generally acquired by ordinary individuals." FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(d) (1975) [hereinafter cited as 1975 Guides].

15. Consumer endorsers need not be recognized by the public or possess any expertise. There are, however, issues concerning the use of actors in advertisements and how they fit into this analysis. *See* notes 193-96 *infra* and accompanying text.

16. Organizational endorsements are distinguished from "experts" in that an organization can endorse a product without having any expertise concerning it. For example, a basketball team could permit the use of its name and logo in hamburger advertisements.

ferred to as spokespersons.[17] An endorser is one who vouches for a product and attempts to persuade others to purchase the endorsed product. Endorsers are almost invariable portrayed as independent of the organization for which the advertising is being done.[18] In contrast, a spokesperson is one who appears in advertising merely to represent the product being advertised.[19] The spokesperson is usually not recognized by the public and makes no claims of any special expertise.

It is considered inconsequential whether a spokesperson is actually connected with the company for which advertising is being done or is merely a "hired gun" representing the advertiser's product. It is assumed that a spokesperson will be viewed as an agent of the advertiser and thus, will not be able to exert any special influence over the public.[20] In contrast, an endorser is presumed not to be connected with the advertiser and, therefore, can be more convincing when vouching for a product's qualities. The key difference between the endorser and the spokesperson is that the spokesperson personally presents no distinctive trait lending credibility to the product being promoted. The spokesperson theoretically presents less opportunity for abuse because of the lesser influence which he exerts. Consequently, there is little controversy over the use of spokespersons.[21]

Though types of endorsers may differ substantially, their effect upon the public has generally been considered to be similar. All four types are assumed to have the common element of being able to influence consumers in some of their purchasing decisions.[22] Therein lies the potential for abuse with endorsements. The temptation to use endorsements may be so great that en-

17. 1980 Guides, *supra* note 9, at Supplementary Information.

18. Whether or not the portrayal of independence is authentic is another matter. This is usually one of the key issues in endorsement problems. *See* notes 158-71 *infra* and accompanying text.

19. Admittedly, the distinctions are somewhat difficult to make. However, the FTC has seen fit to exempt spokespersons from the scrutiny through which endorsers must pass under the new FTC Guides.

20. In fact, most frequently, the public will assume that the spokesperson is connected with the advertiser.

21. The comparative inability of spokespersons to influence the public is assumed to be the reason the FTC has exempted them from the new Guides. The FTC is primarily concerned about deception of the public and it must have concluded that spokespersons present little threat of such deception.

22. Case law does not tend to emphasize differences in the types of endorsers but rather examines the effect which they have upon the public and competition. *See, e.g.*, Cooga Mooga, 92 F.T.C. 310, 317-18 (1978).

dorsements may be used even if untrue. This was especially true in the past when advertisements were lightly scrutinized, if at all, by the government and consumer groups.

The general reasoning finding untruthful endorsement to be undesirable has been that such endorsements deceive the public and harm competition.[23] Advertising provides information to consumers to aid in the rational allocation of scarce resources in a free enterprise economy. Consumers are thus enabled to make wise and fully informed choices among competing goods.[24] However, it is also generally accepted that for our free enterprise system to work well, advertising information must be accurate. Many commentators have argued that there has been a major failure in advertising to provide that accurate information.[25] Their arguments center upon the self-serving nature of advertising. Critics question the motivation of businesses in disclosing any more than necessary to the buying public without external compulsion.

Although very little has been written regarding the matter, one major area of inaccuracy in advertising is that involving endorsements.[26] The special positions which endorsers occupy in society enable greater influence to be achieved over the buying public.[27] Therefore, deception of the public through misleading endorsements is an important societal concern. The concern for preventing deception of the public has been the FTC's chief motivating factor in controlling advertising, as will be demonstrated in the following sections.

III. Evolution of FTC Power Over Endorsement Advertising

A. Early FTC Intervention Into Advertising

In 1914, Congress responded to the need for federal business regulation by passing the Federal Trade Commission Act (FTC Act),[28] under which the Federal Trade Commission was established. Section 5 of the Act gave the FTC power over "unfair

23. Note 7 *supra*.

24. *See* Bernacchi, *Advertising and Its Discretionary Control by the FTC: A Need for Empirically Based Criteria*, 52 J. Urb. L. 223, 228 (1974). A list of supposed benefits derived from advertising is presented.

25. *See, e.g.*, Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977). Pitofsky argues that the free market system has failed to provide consumers with correct information.

26. This conclusion is strongly supported in the introduction by the FTC of its new endorsement Guides.

27. *See* Treece, *supra* note 1, at 645.

28. Pub. 203, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 41 (1976)).

methods of competition in commerce."[29] Though the Act did not explicitly give the FTC jurisdiction to regulate advertising, three of the five complaints it considered during its first year of operation were directed at false advertising.[30] Its advertising powers, however, were gradually restricted.

In *FTC v. Gratz*,[31] the first FTC case to reach the United States Supreme Court, it was held that the FTC's power to issue cease and desist orders[32] was valid only if courts had previously determined that the acts sought to be regulated were against public policy. This restrictive holding allowed control of only those business practices which had been found by courts to be harmful to competition.[33]

FTC v. Winsted Hoisery Co.[34] was the first FTC case to come before the Supreme Court which specifically concerned advertising. The FTC was seeking to regulate Winsted Hoisery's use of clothing labels which it considered to be deceptive. The labels, which used terms such as "Australian wool," implied that the clothing was pure wool though it actually contained only a small amount. Though the FTC's power to regulate the labels was upheld, the Court looked not to the ill effect of the labels upon consumers, but rather to how the labels affected other businesses. The harm to competitors was emphasized. The Court felt compelled to examine cases such as this for negative effects upon competition because of the wording in section 5 of the FTC Act regarding "unfair methods of competition."[35]

The greatest restriction for the FTC came in 1931 in *FTC v. Raladam Co.*[36] There, a manufacturer of an "obesity cure" was ordered by the FTC to cease misrepresenting that its product was an effective remedy for obesity. The Supreme Court held that the FTC was without jurisdiction[37] unless it could establish that (1) the methods of marketing complained of were unfair; (2) they

29. 15 U.S.C. § 42 (1976).
30. *See generally* Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964). The FTC considered itself from its origin to have jurisdiction over advertising, though the assumption has not always been shared by the courts.
31. 253 U.S. 421 (1920).
32. *See* notes 68-72 *infra* and accompanying text.
33. *See* notes 42-48 *infra* and accompanying text.
34. 258 U.S. 483 (1922).
35. *Id.* at 489.
36. 283 U.S. 643 (1931).
37. *See* note 63 *infra* and accompanying text.

were methods of competition; and (3) an FTC proceeding was in the public interest. The Court assumed the first and third elements but remanded the case for a determination on the issue of competition.[38] It held that there must be a showing of substantial competition, present or potential, and injury. Jurisdiction could not be maintained without proving the necessary element of competition, regardless of how great any harm might have been to the public.[39]

In 1938, the Supreme Court decision of *FTC v. R.F. Keppel & Bros.*[40] introducted a new era of increased FTC power. *Keppel* involved a candy manufacturer who allegedly competed unfairly by selling candy which varied in size and contained concealed prizes. The Court stated that determinations made by the FTC, a "body specially competent to deal with" business problems, would be given great weight.[41] Thus, the strict requirements of *Raladam* were relaxed, so that the FTC was not required to prove absolutely that competition would be harmed by the conduct sought to be regulated.

The passage of the Wheeler-Lea Act of 1938[42] signaled congressional approval of a more active role for the FTC in the regulation of advertising. Section 5 of the FTC Act, originally prohibiting only "unfair methods of competition,"[43] was amended by the 1938 enactment to empower the FTC to regulate "unfair or deceptive acts or practices."[44] Additionally, the FTC was explicitly given

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38. 283 U.S. at 646-67.

39. *Id.* at 646-49. The *Raladam* decision had major impact upon the FTC. One writer has referred to the decision as "potentially catastrophic." Elrod, *The Federal Trade Commission: Deceptive Advertising and the Colgate-Polmolive Company*, 12 WASHBURN L.J. 133, 135 (1973). The *Raladam* Court's rigid thinking is evidenced by the following.

> Findings of the Commission justify the conclusion that the advertisements naturally would tend to increase the business of respondent; but there is neither finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business or any competitor or of competitors generally, whether legitimate or not. None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business. The only evidence as to the existence of competitors comes from medical sources not engaged in making or selling "obesity cures," and consists in the main of a list of supposed producers and sellers of "anti-fat remedies" compiled from the files and records of the Bureau of Investigation of the American Medical Association, a list which appears to have been gathered mainly from newspapers and advertisements.

283 U.S. at 652-53.

40. 291 U.S. 304 (1934).

41. *Id.* at 314.

42. Ch. 311, § 4, 52 Stat. 111 (1938) (current version at 15 U.S.C. §§ 45, 52-55 (1976)).

43. 15 U.S.C. § 45 (1976).

44. *Id.* at § 45(a)(1).

power over advertising by the newly added section 12,[45] which provided that "[i]t shall be unlawful for any person, partnership, or corporation to disseminate . . . any false advertisement . . . [b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices or cosmetics."

Congress codified the essence of the Supreme Court's holding in *Keppel*[46] in the Wheeler-Lea Act so that no longer would FTC jurisdiction depend upon a showing that competition was being adversely affected. Rather, the FTC could now exercise jurisdiction whenever it could be shown that deception of the public was likely to occur. The impact of the Wheeler-Lea amendments cannot be underestimated. The emphasis of the FTC with respect to advertising was allowed to shift from one of preventing harm to competition to a concern for protecting the public from deception.[47]

The objective of Congress in passing the Wheeler-Lea Act was to provide the FTC with increased power to regulate advertising. Congress intended to provide a "definition broad enough to cover every form of advertising deception over which it would be humanly practicable to exercise government control. It covers every case of imposition on a purchaser for which there could be a practical remedy."[48] The FTC finally received expansive authority to effectively police advertising practices.

An understanding of the inner workings of the FTC is essential to fully appreciate the growth of FTC powers over advertising. Accordingly, the following section explains administrative law generally and then outlines those administrative procedures and remedies which are peculiar to the FTC, as well as its impact upon state law.

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45. 15 U.S.C. § 52(a) (1976).

46. 291 U.S. at 314.

47. *See* Pitofsky, *supra* note 25, at 675-76. "Deception" in this context is defined below:

> The standard for "deception" has been the "average" or "ordinary" person in the audience addressed by the ad, taking into account that many who may be misled are unsophisticated and unwary. Aside from the "ignorant, the unthinking and the credulous," an ad may have a greater or lesser capacity to deceive because of the special susceptibility of the target audience.

Id.

48. H.R. REP. No. 1613, 75th Cong., 1st Sess. 5 (1937).

B. *Administrative Procedures and Remedies*

1. General Administrative Law

Administrative law is the law that controls the governmental machinery necessary for carrying out government programs, including those that are regulatory in nature. Sources for administrative law include constitutions, statutes, common law, and agency-made law.[49] The last category, with which this article is concerned, refers to those rules made by agencies while acting in quasi-legislative[50] capacities. Rules issued by administrative agencies are grouped into three categories: procedural, interpretive, and substantive. Procedural rules describe an administrative agency's methods of operations and requirements for rulemaking and adjudicative hearings. Even if an agency is not required to adopt procedural rules, decisions by the agency will often be reversed if it can be shown to not have complied with its own rules.[51]

Interpretive rules,[52] in contrast, are those issued by an agency to serve as guides to its staff and those it regulates regarding the execution of the statutory mandate of the agency. "An interpretative rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. [They] are statements as to what the agency thinks a statute or regulation means."[53] Since an interpretive rule only sets forth an agency's opinion on the meaning of a statute, the rule is significant but not necessarily binding upon anyone, and courts are free to substitute their own understanding of the underlying statute.[54] Because they are only advisory in nature, interpretive rules are not considered to have the force of law.[55]

Finally, substantive rules[56] of administrative agencies have the same effect as if they were statutes, and thus, have the force of law. This means that agency regulations, a form of substantive law, are enforced and respected by governments as though they

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49. K. DAVIS, ADMINISTRATIVE LAW TEXT 1-2 (3d ed. 1972).

50. E. GELLHORN, ADMINISTRATIVE LAW AND PROCESS 122 (1972).

51. *Id.* at 123.

52. K. DAVIS, *supra* note 49, at 126.

53. B. SCHWARTZ, ADMINISTRATIVE LAW 154 (1976) (footnotes omitted).

54. E. GELLHORN,. *supra* note 50, at 123-24. An interpretive rule is significant only in that it indicates how the issuing agency construes the underlying statute from which it flowed.

55. *Id.* A rule, which does not have the force of law, is "not binding upon those affected, for, if there is disagreement with the [issuing] agency's view, the question can be presented for determination by a court." UNITED STATES ATTORNEY GENERAL, COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 27 (1941).

56. E. GELLHORN, *supra* note 50, at 122.

were statutes enacted by legislatures.[57] Because substantive rules are, in effect, administrative statutes, notice to the public and opportunity for comment must usually precede issuance of such rules.[58] Under the Federal Administrative Procedure Act (APA),[59] general notice of any proposed substantive rulemaking must be published in the Federal Register so that interested persons can have the opportunity to submit data or arguments. This procedure is designed to assure fairness and consideration in the agency rulemaking process.[60] An issue always to be considered in evaluating administrative rulemaking is whether the rules in question have in fact been made pursuant to statutory rulemaking authority.[61]

2. FTC Administrative Procedures and Remedies

The authority of the FTC to regulate advertising is found in sections 5 and 12 of the FTC Act,[62] which prohibit unfair methods of competition and unfair or deceptive acts or practices in commerce. Before the FTC can proceed in any advertising case, three basic jurisdictional requirements must be satisfied: (1) the advertisement is one that is "in commerce"; (2) action by the FTC is in the public interest; and (3) there is an unfair or deceptive practice.[63]

FTC involvement in a matter usually begins with the filing of a complaint, either by the public or the FTC, which alleges unfair or deceptive business practices. Broad investigative powers then rest with the FTC's Bureau of Consumer Protection, where information is received and evaluated to determine whether further action is warranted.[64] If a decision is made to proceed against the violating party, the FTC may give notice of its intent to initiate

57. B. SCHWARTZ, *supra* note 53, at 155-57.
58. E. GELLHORN, *supra* note 50, at 125.
59. 5 U.S.C. § 551-559 (1976).
60. B. SCHWARTZ, *supra* note 53, at 165.
61. W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 211 (7th ed. 1979).
62. 15 U.S.C. § 41 (1976).
63. F. MILLER & B. CLARK, CASES AND MATERIALS ON CONSUMER PROTECTION 11 (1980). The three required elements for FTC jurisdiction are found within section 5 of the FTC Act. 15 U.S.C. § 45 (1976). Prior to the Wheeler-Lea Act of 1938, 15 U.S.C. § 45, 52-55 (1976), the FTC was considered to have jurisdiction only when acts sought to be regulated were harmful to competition.
64. PRACTISING LAW INSTITUTE, LEGAL AND BUSINESS PROBLEMS OF THE ADVERTISING INDUSTRY 231 (1980).

formal complaint proceedings. The violator or respondent is then given ten days in which to notify the FTC of its interest in settling the matter by consent order.[65]

Consent orders are formal, published, agreements entered into by the FTC and those against whom it proceeds. The orders, which become final in seventy-five percent of all cases,[66] are binding in the same manner as if entered after adjudication. No admission of violation is required and terms of the orders are usually negotiable.[67] If a consent order is not reached, the FTC continues with its complaint and begins adjudicative proceedings before an FTC administrative law judge, in which a cease and desist order[68] is sought. At the proceeding's conclusion, the judge may issue the cease and desist order, which then becomes the decision of the FTC in thirty days unless the FTC orders a stay or the violator initiates an appeal. Once the cease and desist order is final, the violator has sixty days to submit a compliance report "setting forth in detail the manner and form of its compliance with the order."[69] Any appeal from an order goes directly to a federal court of appeals. Cease and desist orders, which are also published, are prospective in nature, blocking only future conduct that is offensive and usually doing nothing to remedy past wrongs.[70] However, in recent years, cease and desist orders have been used to compel "corrective" or affirmative disclosures[71] in future advertising, as was done in the famous *Warner-Lambert Co. v. FTC*[72] Listerine case of 1975.

Violation of a consent or cease and desist order under the 1975 Magnuson-Moss Warranty-Federal Trade Commission Improve-

65. E. ROCKEFELLER, DESK BOOK OF FTC PRACTICE AND PROCEDURE 53-55 (1972). The FTC also can obtain preconsent order promises of compliance and then stop the matter even prior to obtaining a consent order. F. MILLER & B. CLARK, *supra* note 63, at 12.

66. Note, *The Magnuson-Moss Amendments to the Federal Trade Commission Act: Improvements or Broken Promises?*, 61 IOWA L. REV. 222, 225 (1975).

67. PRACTISING LAW INSTITUTE, *supra* note 64, at 234.

68. The cease and desist order was the primary enforcement tool given to the FTC in the FTC Act.

69. PRACTISING LAW INSTITUTE, *supra* note 64, at 233-25.

70. F. MILLER & B. CLARK, *supra* note 63, at 13.

71. With corrective advertising orders, future advertising is permitted only if corrective advertising is performed to "dispel" misconceptions created by earlier deceptive advertising.

72. 86 F.T.C. 1398 (1975), *modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). *See* Note, *Warner-Lambert Co. v. FTC: Corrective Advertising Gives Listerine a Taste of Its Own Medicine*, 73 NW. U.L. REV. 957 (1978). In *Warner-Lambert*, the FTC found Listerine advertisements to be grossly deceptive because they made completely erroneous claims regarding the product. As a condition to future advertising, the FTC required Warner-Lambert to publish advertisements which would correct the public misconceptions.

ments Act (Magnuson-Moss Act)[73] can result in a civil action by the FTC before a federal district court, with fines up to $10,000.[74] Such orders are binding even if the party violating the order was not a party to the proceeding during which the order was issued. The FTC need only prove that the acts complained of were found to be unfair or deceptive in the earlier proceeding.[75] This significant new power of the FTC has the effect of transforming any consent or cease and desist order into an industry-wide regulation having the force of law.[76]

Advisory opinions[77] and industry guides[78] are other methods used by the FTC to control improper business practices. Industry guides, such as the endorsement Guides, are "administrative interpretations of the laws administered by the Commission."[79] The concept behind issuing industry guides is that businesses will accordingly adjust their business practices, thereby avoiding difficulties with the FTC, legal fees, and time costs. The initiative for releasing industry guides may come from within the FTC or at the request of other interested parties. Though not required to do so, the FTC usually solicits public comment prior to adopting guides in final form, as was done with the endorsement Guides.[80] Industry guides do not have the force of law[81] but failure to comply with their provisions may result in an action by the FTC. However, such proceedings are based upon violations of the statutes which underlie the guides rather than for violations of the guides themselves.[82]

In addition, the FTC is now clearly empowered under the

73. 15 U.S.C. § 45(m) (1976).

74. *Id.*

75. D. EPSTEIN, CONSUMER PROTECTION 17-21 (1976). Prior to the Magnuson-Moss Act, the FTC could do nothing more to a first-time violator than impose a consent or cease and desist order. This had the effect of giving "one free bite at the apple" to anyone violating FTC rules.

76. *See* notes 52-55 *supra* and accompanying text.

77. Advisory opinions of the FTC are not relevant to this article and are therefor not discussed. For an excellent explanation of advisory opinions, *see* G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 545-46 (1974).

78. The FTC endorsement Guides discussed in this article are industry guides.

79. E. ROCKEFELLER, *supra* note 65, at 50.

80. *See* note 132 *infra* and accompanying text. The APA requires that public comments be solicited only when agencies are creating substantive rules, as opposed to those that are procedural or interpretive.

81. *See* notes 52-55 *supra* and accompany text.

82. F. MILLER & B. CLARK, *supra* note 63, at 39.

Magnuson-Moss Act[83] to issue substantive rules,[84] though such was not always the case. The FTC rules, called trade regulation rules, are directed at specific products or prohibit specific acts. An action brought for violation of a trade regulation rule requires only that the FTC prove violation of the rule itself, as opposed to an action based upon an industry guide, which requires a showing of violation of the underlying statute.[85] Trade regulation rules are thus considered to have the force of law[86] and, under the Magnuson-Moss Act, first-time violations can now be punished with civil penalties.[87]

The Magnuson-Moss Act also gives the FTC the option of seeking civil redress for damages on behalf of anyone harmed by unfair or deceptive business practices.[88] This powerful new tool offers significant potential not only for aiding victims of unfair acts but also in controlling those who commit those acts.

The significant role of the FTC in advertising nationally indicates that a discussion of its impact upon state law is warranted.

3. FTC Preemption of State Advertising Law

The expansion of the FTC's authority primarily due to the Magnuson-Moss Act has caused it to be the most powerful regulatory body in the advertising field. However, both Senate and House reports concerning the Magnuson-Moss Act clearly indicate that preemption of state consumer protection laws was not

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83. 15 U.S.C. § 45(m) (1976).

84. *See* notes 56-61 *supra* and accompany text.

85. The paragraph below demonstrates the distinction between FTC trade regulation rules and industry guides:

> Assume that the Commission issues a trade regulation requiring that all aspirin advertisement include the statement "ALL ASPIRIN IS ALIKE." If the FTC decided to prosecute a violation of the rule, the complaint would charge a failure to include the required legend rather than allege a "deceptive practice." All the Commission would have to show was the absence of the required language; it would not have to prove the conclusion that underlies this hypothetical rule that the omission of the required language is a deceptive act. If on the other hand, the Commission merely issues an industry guide on aspirin advertising, an action by the FTC would have to be based on violation of the statute, not violation of the guide. The Commission would have to prove the Commission of a deceptive act or practice rather than merely a violation of the industry guide.

D. EPSTEIN, *supra* note 75, at 15-16.

86. *See* notes 52-55 *supra* and accompanying text.

87. D. EPSTEIN, *supra* note 75, at 20. The Magnuson-Moss Act allows civil suits for first-time violations of trade regulation rules and consent or cease and desist orders. *See* notes 73-76 *supra* and accompanying text.

88. *See* PRACTISING LAW INSTITUTE, *supra* note 64, at 236-37.

intended.[89] Although preemption of state law is not the FTC's purpose, the FTC can support state regulations which are found to be deficient. Thus, the likelihood of FTC preemption of state consumer protection laws, including those dealing with advertising, still exists.[90] Still, for the FTC to maximize its potential, it must establish close working relationships with state and local agencies.

State laws include prohibitions against many varieties of false or deceptive advertising practices. Some states have even outlawed misrepresentations concerning certain types of deceptive endorsements, such as misstatements of sponsorship, association, or approval.[91] Most state advertising laws, however, speak in general terms prohibiting only broad categories of deceptive advertising practices.[92] State consumer protection laws generally appear to be reflex reactions to particular abuses which are discovered.[93]

The foregoing discussion of early FTC advertising regulation, general administrative law, FTC procedures and remedies, and FTC preemption of state law has established the basis for a discussion of FTC control of advertising endorsements.

C. Growth of FTC Deceptive Endorsement Regulation

Even prior to the passage of the Wheeler-Lea Act,[94] which firmly fixed the FTC's power over deceptive business practices that harm consumers,[95] the FTC sought to regulate misleading endorsement advertising to the extend of its ability. In 1937, the Supreme Court heard *FTC v. Standard Education Society*,[96] a

89. Badal, *Restrictive State Laws and the Federal Trade Commission*, 29 AD. L. REV. 239, 263 (1977).

90. *See* Note, *supra* note 66, at 231.

91. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUST., SURVEY OF CONSUMER LAW FRAUD 36 (1978). *See also* Badal, *supra* note 89.

92. *See* CAL. BUS. & PROF. CODE § 17508(a) (West Supp. 1980) which states that "[i]t shall be unlawful for any person . . . to make false advertising claims that (1) purport to be based on factual, objective, or clinical evidence, or that (2) compare the product's effectiveness or safety to that of other brand or products."

93. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *supra* note 91, at 207.

94. Ch. 311, § 4, 52 Stat. 111 (1938) (current version at 15 U.S.C. §§ 45, 52-55 (1976)).

95. *See* notes 42-48 *supra* and accompanying text. Prior to the Wheeler-Lea Act, many courts held that FTC jurisdiction was limited to those cases where competition was harmed by unfair methods of competition.

96. 302 U.S. 112 (1937).

case in which the FTC had issued a cease and desist order against a company for selling encyclopedias and looseleaf services through deceptive means including fictitious endorsements. The FTC found that some endorsements had been given concerning the books but that they were exaggerated and garbled while others had been issued for a "previous work" which was substantially different. The FTC order against the company was reversed by the court of appeals, which held that buyers had not been obtained through illegal misrepresentations. The court's holding was based upon a lack of evidence to support any finding of misrepresentation of endorsements.[97] The United States Supreme Court, however, reversed the court of appeals, and held that ample evidence existed to support the FTC's order. The book distributors were prohibited from making any misrepresentations as to endorsements. The Supreme Court did not include as part of its analysis any discussion of harm to competition, as had once been required in *FTC v. Raladam Co.*[98] Rather, emphasis was upon the deceptive nature of the endorsements. The Court was concerned that by allowing the use of untrue endorsements, the books would continue to be sold by means which would harm the public.[99]

Standard Education came before the Court some six years after *Raladam Co.* and only one year prior before the passage of the Wheeler-Lea Act. Thus, at the time of this decision, the Court was increasing the jurisdiction of the FTC. The Court's attitude had changed considerably since *Raladam*, as was illustrated by *FTC v. R.F. Keppel & Bros.*[100] and subsequent decisions. The Court appeared much more willing to allow the FTC to assume a more aggressive role.

One of the earliest and most significant FTC cases to involve endorsement advertising was that of *Northam Warran Corporation v. FTC*.[101] There, the FTC claimed that the use of paid endorsers without disclosure of payment was contrary to public policy. No assertion was made that the advertiser, Northam Warren Corporation, had falsified any endorsements of its Cutex products. In fact, the FTC expressly found that the endorsements were truthful expressions of opinion.[102] The FTC, however, said

97. *Id.* at 116.
98. 283 U.S. 643 (1931). *See* notes 36-39 *supra* and accompanying text.
99. 302 U.S. at 115-16.
100. 291 U.S. 304 (1934). *See* notes 40-41 *supra* and accompanying text.
101. 59 F.2d 196 (2nd Cir. 1932).
102. *Id.* at 197. The Court said that "[t]he quality of the petitioner's products is not brought into question; nor is there a charge that its products were inadequately labeled or so testified to, by testimonials, as to induce the public to purchase from it under practices of deception." *Id.*

that the failure of Northam to disclose money payments to the endorsers had "the capacity and tendency to mislead and deceive the ultimate purchasers of said preparations into the erroneous belief that said testimonials [were] entirely voluntary and unbought" and tended to divert trade from competitors who did not use purchased testimonials in advertising their products.[103]

When the case came before the court of appeals, the issue was whether the FTC had jurisdiction[104] to prohibit the use of truthful endorsements which it claimed were unfair competition solely because the endorsements were not accompanied by statements that payments had been made to the endorsers. The court of appeals reversed the FTC order in favor of Northam, holding that because the endorsements represented honest beliefs of the endorsers, there were no misrepresentations concerning the product or harm to competition. Because there were no misrepresentations, the FTC was found to be without jurisdiction.[105] The *Northam* decision came only one year after the Supreme Court decided *FTC v. Raladam Co.*, which marked the low point in the FTC's authority.[106] *Northam* cited *Raladam* concerning the requirement of finding harm to competition before the FTC could invoke jurisdiction. It is important to note that the court of appeals opinion also contained other novel elements peculiar to endorsement advertising. Particularly, the court stated that deception of the public was central to the issue of whether endorsements could be regulated and that no presumption was made that the public could be induced to purchase the products so as to divert trade from competitors.[107]

The court of appeals in *Northam* was willing to assume that the public was not easily deceived by the use of endorsements and that most people would assume that payments were being made to endorsers. This endorsement theory has remained largely intact since *Northam* and has even been adopted in a modified form in the FTC's new endorsement Guides.[108] Thus, even today, endorsement advertisements are not presumptively condemned

103. *Id.*
104. *See* note 63 *supra* and accompanying text.
105. 59 F.2d at 198.
106. *See* notes 36-39 *supra* and accompanying text.
107. 59 F.2d at 197. It must be remembered that *Northam* incorporated the "deception" standard some six years before it was adopted by the Wheeler-Lea Act 15 U.S.C. § 45, 52-55 (1976).
108. 1980 Guides, *supra* note 9, at § 255.5.

simply because there is nondisclosure regarding payment to endorsers. This conclusion is supported by an FTC Advisory Opinion[109] which was issued in 1967, advising a school that its practice of paying students to advertise the school was not contrary to FTC policy.[110]

The FTC has aggressively sought to regulate other types of advertising endorsement problems. *In re National Dynamics Corp.*[111] held that endorsement can be used only so long as the advertiser has good reason to believe that the endorser's views toward the product have not changed. In *R.J. Reynolds Tobacco Co. v. FTC*,[112] the use of fraudulent endorsements was prohibited. Alteration of independent testing laboratory reports for advertising purposes was condemned in *Country Tweeds v. FTC*.[113] Finally, the distortion of an FTC consent order in advertising, made to look instead like an FTC endorsement, was held to be fraudulent in *Mytinger & Casselberry*.[114]

D. Endorser Liability for False Endorsements

Not only has the FTC sought to stop advertisers from using deceptive endorsements, but in recent years it has found endorsers potentially liable for their roles in advertisements. Perhaps the most famous case is that of *In re Cooga Mooga*,[115] which involved singer Pat Boone. Karr Preventative Medical Products used endorsements from Boone and his daughters to advertise its Acne-Statin product, a mail-order treatment for acne. In return for his efforts, Boone received a share of the product's sales. Advertisements involving Boone strongly implied that Acne-Statin's superior abilities had cured his daughters of acne.[116] The FTC sought to stop Boone from advertising Acne-Statin because if found that his daughters had not used the product and that it was not effective as an acne treatment. The FTC complained that Boone's

109. 72 F.T.C. 1052 (1967).

110. One commissioner dissented, stating that the practice was deceptive. *Id.*

111. 82 F.T.C. 488 (1973).

112. 192 F.2d 535 (7th Cir. 1951). Another excellent example is FTC v. A.P.W. Paper Co. There the defendant was ordered to stop using the name and symbol of the American Red Cross on its products because such use had never been authorized.

113. 326 F.2d 144 (2nd Cir. 1964).

114. 57 F.T.C. 717 (1960). Many other examples of deceptive FTC endorsement cases could be cited, but those discussed here suffice to demonstrate the wide range of such actions.

115. 92 F.T.C. 310 (1978).

116. *Id.* at 316. One advertisement read: "With four daughters, we've tried the leading acne medication at our house, and nothing ever seemed to work *until* our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin.'" *Id.* at 315.

false advertisements had the capacity to mislead the public and harm competition. Boone was ordered to refrain from representing either that his daughters had been cured by Acne-Statin or that it would cure acne.

The most important aspect of the case was an order for Boone to contribute his pro rata share of twenty-five cents per bottle of Acne-Statin toward any claims for restitution. Boone's total liability was limited to the amount he received as payment for his endorsements. Any restitution was also limited to sales made during the Boone advertising campaign.[117] By assuming personal liability in the consent order, Boone established a precedent, not legally binding, which indicates that potential product endorsers should verify product claims before agreeing to endorsements.[118] Albert A. Kramer, Director of Consumer Protection for the FTC, stated with regard to the Boone case that "the effectiveness of having a product touted by a well-known movie star or sports figure is apparent from the increasingly use of celebrity endorsements in advertising. A sales pitch by a celebrity may be more believable than the same message delivered by an unknown spokesperson."[119]

Another very significant case was that of *In re Leroy Gordon Cooper*.[120] There, former astronaut Gordon Cooper endorsed an automobile product for American Consumer, Inc., which was falsely purported to increase fuel economy of automobiles. In return for his marketing role, Cooper received a percentage of sales. In the advertisements, Cooper was represented as being an expert in the field of automotive engineering and as having no connection with American Consumer.[121] The FTC, however, found

117. *Id.* at 321-22.

118. *See In Re Cooga Mooga and Charles E. Boone*, *supra* note 3, at 533-35.

119. FTC News Summary, May 19, 1978, at 1-2.

120. 94 F.T.C. 674 (1979). *See* American Consumer, Inc., 94 F.T.C. 645 (1979); Admarketing, Inc., 94 F.T.C. 664 (1979). These were actions against the manufacturer and advertising agency in the *Cooper* case. Orders in the three cases were very similar.

121. 94 F.T.C. at 680. One advertisement read, in part, that "[i]f there's one thing an astronaut has no use for, it's a new invention that doesn't do what it's supposed to do. That's why we asked astronaut Gordon Cooper to test the G-R GAS SAVER VALVE in his independent testing laboratory." *Id.* Another read as follows:

> Hi, I'm Gordon Cooper. As you may know, I was selected to be one of the first astronauts to explore space due to my extensive engineering background. At the present time I'm actively heading my own engineering company, where we are engaged in the designing and testing of products

the advertisements to be grossly deceptive and ordered Cooper to stop misrepresenting that he possessed automotive expertise. Cooper was ordered to use endorsements only within twelve months of the date that express written and dated authorization to use the endorsements was granted. Additionally, the FTC ordered Cooper to disclose any material connection which might exist between advertisers and endorsers with which he was involved. However, "material connection," was explicitly stated not to include the payment to an endorser of a fixed sum, received prior to dissemination of the endorsement.[122] The FTC's

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for industry. The G.R. VALVE I am holding has been tested and retested by leading independent laboratories along with my own tests. And it's a fact . . . this G.R. Valve will increase your auto mileage up to twenty eight percent . . . improve your car's performance, clean you engine . . . and reduce smog emissions.

Id. at 688.

122. *Id.* at 696. Cooper's advertisements indicated that he ran an independent testing facility, which agreed to examine American Consumer's product. The FTC, however, found that Cooper was a principal in the marketing of the product, which established a "material" connection. *Id.* at 676. The FTC also ordered Cooper to cease:

> d. representing . . . any performance characteristic of [any] product or service unless (1) at the time of making the representation . . . [he] possessed and relied upon competent and reliable scientific tests substantiating the representation, and (2) . . . [he] possesses a written test report which describes both test procedures and test results. A competent and reliable "scientific test" is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, (b) an agency or department of the government of the United States, or (c) persons employed or retained by respondent if they are qualified (as defined above in this paragraph) and conduct and evaluate the test in an objective manner.
>
> e. misrepresenting in any manner the purpose, content, or conclusion of any test or survey pertaining to such product or service;
>
> f. misrepresenting in any manner either consumer preference for such product or service or the results obtained by consumer usage of such product or service;
>
> g. misrepresenting in any manner the performances, efficacy, capacity, or usefulness of such product or service.

Id., at 696-97.

Cooper also was ordered to stop endorsing products outside his area of expertise unless he had "made a reasonable inquiry into the truthfulness of his endorsement, and possesse[d] and relie[d] upon information resulting from such inquiry. . . ." *Id.* at 697. "Reasonable inquiry" was defined as:

> (1) obtaining information from at least two competent and reliable sources independent of the advertiser and any other party with an economic interest in the sale of the product or service which is the subject of the endorsement; or
>
> (2) obtaining information from the advertiser or from other parties with an economic interest in the product or service which is the subject of the endorsement and having such information independently evaluated by at least two competent and reliable sources.

Id.

requirement of disclosure of material connection was included as an attempt to further reduce possibilities for deception of the public. The underlying rationale was that if the public was aware of material connections, it would be more skeptical of any product claims made.

The position adopted in *In re Leroy Gordon Cooper* seems difficult to reconcile with the doctrine of *Northam Warren Corporation v. FTC*[123] which states that payments to an endorser need not be disclosed. It appears, though, that the FTC in *Cooper* may have been attempting to strike a middle ground. By requiring disclosure of material connections between advertisers and endorsers, the FTC was ensuring that any potential deception of the public would be minimized. Apparently, the FTC assumed that continued financial links between advertisers and endorsers could increase the likelihood of false advertisements.[124] At the same time, by not requiring disclosure of payments made prior to dissemination of endorsements, the FTC may have recognized that payments to endorsers, at least when not of a continuing nature, are not conclusively against public policy. This may have been based upon the assumption that the public knows that most endorsers, especially celebrities, are being paid.

The *Northam* doctrine thus appears to have continuing validity in at least certain circumstances. As noted in *Cooper*, compensation paid to an endorser prior to dissemination of an advertisement is not considered to be material. Therefore, endorsers do not have to disclose payments received in every case.[125]

Having examined the role of the FTC in advertising and its evolving impact upon endorsement advertising, the stage is set to examine the new FTC endorsement Guides.[126]

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123. 59 F.2d 196 (2d Cir. 1932).

124. A good analogy is that of an informant witness in a trial. While it is commonly understood that experts are paid flat sums of money for testifying in court, it is also commonly understood that a contingency fee arrangement for an informant is less preferable. This is because a contingency fee arrangement will give the informant a vested interest in the outcome of the trial. Most lawyers consider it better to "avoid even the appearance of impropriety" and therefore do not enter into contingency fee arrangements with informant witnesses.

125. The rule in the *Cooper* case, however, has been limited by the FTC endorsement Guides, which require disclosure of any payments made only to consumer endorsers, whether made only prior to dissemination of the advertisement or not. *See* notes 160-62 *infra* and accompanying text.

126. 1980 Guides, *supra* note 9; 1975 Guides, *infra* note 14; 1972 Guides, *supra* note 8.

IV. NEW FTC ENDORSEMENT GUIDES

On January 18, 1980, the FTC released final versions of its Guides Concerning Use of Endorsements and Testimonials in Advertising (Guides).[127] The Guides, which touch upon almost every aspect of endorsements advertising, do not have the force of law[128] nor have they been explicitly exercised to date. However, the Guides clearly indicate that violations may subject both endorsers and advertisers to FTC proceedings.[129] This is especially true in light of the recent cases of *In re Cooga Mooga*[130] and *In re Leroy Gordon Cooper*[131] which were both brought against endorsers.

When proposed versions of the Guides were first issued by the FTC in 1972, they were accompanied by notice to the public of an opportunity to submit suggestions or objections.[132] After much discussion, the FTC released other Guides in 1975, but it was not until 1980 that the Guides were issued in final form. During this period, the Guides attracted media attention, primarily because of the impact which they were predicted to have upon celebrities.[133]

The Guides have also generated much discussion among those in the advertising industry. Several organizations in the field, including two of the most powerful, National Association of Broadcasters (NAB) and American Association of Advertising Agencies (AAAA), have made efforts to keep their members appraised of the Guides and their impact.[134] Such organizations were responsible for much of the public comment made to the FTC on the new Guides. Because of substantial changes made in some Guides between the proposed and final versions, it is clear that the FTC took cognizance of comments it received. In fact, the AAAA considers itself as being primarily responsible for certain changes.[135]

The following discussion will analyze the new 1980 Guides, and contrast them with the proposed 1972 and 1975 versions. Also,

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127. 1980 Guides, *supra* note 9.

128. *See* notes 52-55 *supra* and accompanying text.

129. 1975 Guides, *supra* note 14.

130. 92 F.T.C. 310 (1978). *See also* notes 115-19 *supra* and accompanying text.

131. 94 F.T.C. 674 (1979). *See also* notes 120-25 *supra* and accompanying text.

132. The solicitation of public comments was done at the option of the FTC, since the APA requires such solicitations only when agencies are creating substantive rules.

133. *See, e.g.*, *FTC: Celebrities Must Use Products They Pitch*, 66 A.B.A.J. 274 (1980).

134. *See, e.g.*, NATIONAL ASSOCIATION OF BROADCASTERS *Code Authority*, Code News, (June, 1975); AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, BULLETIN NO. 3280 (1975).

135. *Id.*

criticisms of the Guides will point out their deficiences and unresolved issues.

A. General Considerations Guide

The Guide entitled "General Considerations"[136] was first proposed in 1975 to state "certain basic principles that are applicable to all endorsements." Subsection (a), finalized in 1980, states that "[e]ndorsements must reflect the honest opinions, findings beliefs, or experiences of the endorser. Furthermore, they must not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser."[137] This incorporates the long standing rule against statements in endorsements that cannot be supported if presented in the advertiser's words rather than the endorser's.[138] The rule is well-illustrated by *United States v. John J. Fulton*,[139] in which a drug company was found to have deceptively advertised worthless drugs as being effective under the guise that it had received letters from doctors verifying the curative values of the drugs. The court held that the company could not escape responsibility for the advertisements by claiming that others, the endorsing doctors, had made the deceptive statements.

Subsection (b) in this proposed 1975 Guides[140] required that endorsements not be distorted or presented out of context. This embodies the holding of *In re Country Tweeds*,[141] which prohibited alterations in advertisements of product testing results which

136. 1975 Guides, *supra* note 14, § 255.1.
137. *Id.*
138. The NAB Code Authority's Radio and Television Codes have very similar provisions. *See* NATIONAL ASSOCIATION OF BROADCASTERS, THE RADIO CODE 16 (1980). "Advertising testimonials should be genuine, and reflect an honest appraisal of personal experience." *Id.* *See* NATIONAL ASSOCIATION OF BROADCASTERS, THE TELEVISION CODE 15 (1980). "Personal endorsements . . . shall be genuine and reflect personal experience. They shall contain no statement that cannot be supported if presented in the advertiser's own words." *Id.* It is possible, because of the similarity in wording between 1975 Guide and the Code provisions as quoted above, that the 1980 Code references to endorsements were patterned after the 1975 Guide. The implications of the advertising industry's self-regulations are important to consider in any analysis of government regulation of advertising.
139. 33 F.2d 508 (9th Cir. 1929).
140. 1975 Guides, *supra* note 14, § 255.1(b).
141. 326 F.2d 144 (2d Cir. 1964).

made the advertised product look much more desirable.[142] While this rule does not preclude the editing of an endorser's exact words, it does prohibit changes which do not accurately present the endorser's statements.[143] No assistance is provided in interpreting the extent to which changes can be made, but it is assumed that exaggeration of the endorser's opinion in favor of a product would be improper.

The concluding sentence of subsection (b) introduced the significant requirement that an advertiser may use an endorsement only so long as there exists good reason to believe that the endorser continues to subscribe to the views presented in the endorsement.[144] This places a duty upon advertisers to periodically check with their endorsers to see that their views have not changed. An example of just such a duty is found in the 1973 case of *In re National Dynamics Corp.*,[145] in which a seller of a battery additive was ordered to cease from publishing any endorsements unless (1) written authorization had been obtained and (2) the advertiser also had good reason to believe that the endorsers' views had not changed.[146]

The requirement to verify endorsers' views would have application only in those situations where an advertisement is used for an extended period of time, such that the endorser has an opportunity, with the lapse of time, to adopt other viewpoints regarding the advertised product.[147] The major issue concerning this continuing duty is the frequency with which checks should be made, but it can be assumed that verification every six of twelve months would be sufficient as a reasonable time. It is also most interesting to note that no corresponding duty is found in subsection (b) which requires endorsers to notify advertisers if they change their views toward the advertised products. This is especially important in light of the new findings of endorser liability in the cases of *In re Cooga Mooga*[148] and *In re Leroy Gordon Cooper*.[149] At first glance it may seem to be grossly inconsistent to require advertisers to verify endorsers' beliefs about endorsed products and yet not require endorsers to notify advertisers of changed beliefs. However, the FTC may have been assuming that most en-

142. Tests performed by testing companies which are then referred to in advertisements are considered to be endorsements.
143. 1975 Guides, *supra* note 14, § 255.1(b).
144. *Id.*
145. 82 F.T.C. 488 (1973).
146. *Id.* at 569.
147. There is the increased likelihood, with the passage of time, that an endorser can change his or her views with regard to the endorsed products.
148. 92 F.T.C. 310 (1978).
149. 94 F.T.C. 674 (1979).

dorsers are paid a flat sum of money at the time of endorsement and thereafter have no continuing ties with the advertised product. If this assumption is correct, then endorsers would have little motivation to contact advertisers regardless of what might occur since they would consider themselves as having no further obligations to the advertisers.

In 1980, subsection (b)[150] was altered to require verification of an endorser's beliefs about endorsed products only if the endorser is either a celebrity or an expert. Thus, consumer endorsers have been exempted. Although no explanation was given, the FTC probably exempted advertisers from periodically verifying consumer endorsers' views for two reasons. First, it is generally understood that because consumer endorsers by definition are not recognized by the public, their opinions will be valued more lightly than those of celebrities and experts. Second, it can be assumed that the FTC recognized problems inherent in requiring advertisers to periodically verify the beliefs of the many consumer endorsers. It can be argued that it is easier to contact celebrities and experts than obscure consumers.[151]

Subsection (c)[152] of this Guide provides that where an advertisement represents that an endorser uses the endorsed product, then the endorser must have been a bona fide user of it at the time of the endorsement. In addition, the advertiser may continue to run an advertisement only so long as he has good reason to believe that the endorser remains a bona fide user of the product. *In re Cooga Mooga*[153] provides an excellent example of an endorser being presented as a bona fide user of a product. There, Pat Boone indicated in advertisements that his daughters were users of Acne-Statin, an acne treatment, though they actually were not. The FTC found the advertisements to be misleading and therefore ordered not only the advertising company, but also Boone, to stop falsely representing that his daughters were Acne-Statin users. Liability was thus imposed upon both the advertiser and Boone for their deceptive advertisements.

The requirement of bona fide use presents several difficult

150. 1980 Guides, *supra* note 9, § 255.1(b).
151. For example, it is likely that experts and celebrities would sign contracts with advertisers whereas consumer endorsers might not. Thus, an advertiser might not even know how to contact a particular consumer endorser.
152. 1975 Guides, *supra* note 14, § 255.1(c).
153. 92 F.T.C. 310 (1978).

questions. For example, in its 1975 Letter of Comment to the FTC,[154] the AAAA suggested that examples be given along with subsection (c) "to clarify the requirement of 'bona fide use' by distinguishing those occasions where the person who utters the advertising message acts as a 'spokesman'[155] or 'expert' [endorser]."[156] Apparently following this suggestion, the FTC added a new example to the subsection in 1980[157] which presents an expert, who after a blind test, states the benefits of a particular product being advertised. A comment at the conclusion of the example states that the expert probably is not presented as a user of the product because she was involved only in a test. Thus, the bona fide user requirement would not apply. However, the example would have presented a much more difficult question if no blind test had been performed since the example would then have simply presented an expert describing why one product was superior to others. Another similar problem arises when, for example, a well-known professional golfer endorses a line of inexpensive golf clubs which bear his or her name. If the golfer were pictured in an advertisement as using the clubs, then it could be argued that the bona fide use requirement of subsection (c)

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154. 1975 AAAA COMMENTS, *supra* note 1, at 4.

155. *See* notes 17-21 *supra* and accompanying text.

156. The AAAA suggested two new examples to the FTC:

> *Example 2*: A TV commercial for an automobile shows a well-known personality, not identified with the automobile industry, who states that the automobile has disc brakes and torsion bar suspension and that its gasoline consumption was rated at 34 miles per gallon by the Environmental Protection Agency. This person need not be a bona fide user of the automobile since he is a spokesman, not an endorser.
>
> *Example 3*: The facts are the same except that the personality making the statements is widely known as an expert in the design or operation of automobiles. Because of his known expertise, this person is an expert endorser. While his endorsement should comply with § 255.3 (expert endorsements), he need not be a bona fide use of the automobile as defined in proposed § 255.1 unless the advertisement represents that he uses the product.

AAAA COMMENTS, *supra* note 1, at 4.

157. 1980 Guides, *supra* note 9, § 255.1. Example 2 reads as follows:

> *Example 2*: A television advertisement portrays a woman seated at a desk on which rest five unmarked electric typewriters. An announcer says "We asked Mrs. X, an executive secretary for over ten years, to try these five unmarked typewriters and tell us which one she liked best."
>
> The advertisements portrays the secretary typing one each machine, and then picking the advertiser's brand. The announcer asks her why, and Mrs. X gives her reasons. Assuming that consumers would perceive this presentation as a "blind" test, this endorsement would probably not represent that Mrs. X actually uses the adversiser's machines in her work.

Id.

would apply. However, this could lead to the absurd result of the professional golfer being found to have violated the bona fide use requirement when it would be impractical to require him or her to use any but the very best, custom-made clubs. Though the bona fide use requirement sounds good in theory, it is questionable in practice because of its ambiguities.

B. Disclosure Of Material Connections Guide

In 1972, the "Disclosure of Material Facts" Guide stated that "[w]hen there exists a connection between an endorser and a seller of a product being advertised, and when that connection is a material fact in the context of the advertisement, then the connection should be fully disclosed."[158] Another version of the Guide, proposed by the FTC in 1975,[159] was altered to require disclosure of connections which might "materially affect the weight or credibility" of endorsements. Thus, the FTC changed the Guide from requiring that all "material facts" be disclosed from requiring disclosure of connections which might affect the endorsement's credibility.

"Connection" was stated in the 1975 Guide to ordinarily not "include the payment or promise of payment to an individual endorser so long as the advertiser did not represent that the endorsement was given without compensation."[160] However, this exemption from disclosure of compensation is valid only if the endorser is a celebrity or an expert. In other words, all payments to consumer endorsers must be disclosed, regardless of when made.

158. 1972 Guides, *supra* note 8, § 255.3.
159. 1975 Guides, *supra* note 14, § 255.5.
160. *Id.* This definition was retained in the 1980 Guide, which reads as follows:

> When there exists a connection between the endorser and the seller of the advertised product which might materiality [*sic*] affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience) such connections must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and *in exchange* for the endorsement or the fact that the endorser know or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.

1980 Guide, *supra* note 9, § 255.5 (emphasis added).

Requiring disclosure of payment to any endorser is in conflict with the holding of *Northam Warren Corporation v. FTC*.[161] There, compensation to endorsers was explicitly considered not to impute any taint or implication of deception to advertisements. If this is the case, the wisdom of carving out a requirement that only consumer endorsers disclose compensation is questionable. Apparently, the FTC's rationale rests upon the assumption that the public knows experts and celebrities are being paid for their endorsements whereas consumer endorsers are portrayed as acting voluntarily because of the virtues of the products they endorse. The FTC considers any payments to consumer endorsers to be material connections requiring disclosure. Taken literally, all advertisements using paid consumer endorsers must now state that payment has been made.[162]

The 1980 Guide pertaining to "Disclosure of Material Connections" is also more specific than before because it defines "connection" in terms of something "not reasonably expected by the audience."[163] One can only guess what is meant by "not reasonable expected," but it can be assumed to include anything which might materially affect a potential customer's decison either to buy or not to buy the product being advertised. The FTC has surprisingly determined in the 1980 Guide that when consumer endorsers knew or should have known that they would be in advertisements if they said the "right things," then such facts should be disclosed. Example three to the Guide, which illustrates the rule, involves an actual restaurant patron who is interviewed for a television commercial while seated at the restaurant counter. The patron, who is presented as neither an expert nor a celebrity, is asked for his spontaneous opinion of a new food product being served in the restaurant.[164] Thus, the requirement

161. 59 F.2d 196 (2d Cir. 1932).

162. It is also of interest to note that consumer endorsers probably have much less influence than celebrities and experts over the buying public since the public might tend to view consumer endorsers as being much like themselves. If consumer endorsers truly do have less influence over the public than other endorsers, one is led to question the propriety of the FTC's rigid rule of always requiring disclosure of payments to consumer endorsers.

163. 1980 Guide, *supra* note 9, § 255.5.

164. Because the restaurant patron knew he might be in an advertisement, a statement to that effect must accompany the endorsement.

> *Example 3*: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as past of its TV promotion of its new soy protein "steak." This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers

that all payments to consumer endorsers be disclosed now includes even intangible benefits such as the opportunity to be televised in an advertisement.[165]

It is not clear how this new Guide will impact the advertising industry. The 1980 version marks the first time that the FTC has even required an unpaid consumer endorser to disclose any information in advertisements. One might ask what there is to disclose, and how the disclosure should be done. Though it is clear that the FTC is attempting to eliminate what it considers to be deceptive endorsements, this very narrow and restrictive rule will do little except arguably bring within its coverage all consumer endorsements. It is therefore conceivable that all consumer endorsements of every type will be required to disclose a form of "compensation." If the FTC intends to enforce compliance with this new disclosure requirement, the public may soon see unfamiliar notices in many advertisements.[166]

In its Letter of Comment[167] to the FTC, the American Association of Advertising Agencies did not criticize the 1975 Guide itself, but attacked one of its examples which required disclosure of an advertiser's role in commissioning an independent test, which was used in an advertisement. The AAAA objected to the requirement of "disclosure of 'the advertiser's role in orginating and financing' any study for which it had paid a substantial share of the expenses and [which] would also require disclosure of advertiser participation in the test design." This would be unfair, the AAAA argued, to both advertisers and independent research organizations and would disserve consumers who would be led by a

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of the advertisement should be clearly and conspicuously informed of the circumstance under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the "hidden camera" only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Id.

165. The FTC's broad interpretation of what constitutes "payment" to a consumer endorser seems to encompass virtually every situation where the consumer endorser is aware beforehand that an advertisement is being made.

166. For example, it would be surprising to see an advertisement with the following disclosure: "The views stated by the consumer may have been biased because the consumer believed or had reason to believe that he could be in this advertisement by saying favorable things about product x."

167. 1975 AAAA COMMENTS, *supra* note 1, at 13-14.

kind of "reverse" deception to suspect the validity of any research findings. The Letter also stated that it is normal for independent testing laboratories to be paid for doing research, just as it is normal for manufacturers and advertisers to actually assist in test procedures. The AAAA urged that if testing results are accurate and unbiased, no disclosure should be required, regardless of who participates.[168]

A new example proposed in the AAAA Letter, based upon the same factual setting as the FTC's, stated that no disclosure of the advertiser's involvement would be required "unless the company has reason to believe that the research design or procedures are biased or otherwise invalid."[169] In the final Guide released in 1980, the FTC changed the example which the AAAA criticized so that it now does not require any disclosure of payment by an advertiser to a research laboratory.[170] Thus, the AAAA suggestion concerning testing by independent agencies was followed. Due to this adoption, the Example in the 1980 Guide now takes the opposite position it did in 1975. This change of position indicates both the impact which public comments have had upon formulation of the Guides and the questionable nature of some FTC endorsement philosophies.[171]

C. Expert Endorsement Guide

An "expert" endorser is defined by the Guides as "an individual, group or institution possessing, as a result of experience, study or training, knowledge of a particular subject, which knowl-

168. The AAAA proposal looked more to whether deception had occurred than to the application of a mechanical rule requiring disclosure of advertiser involvement.

169. 1975 AAAA COMMENTS, *supra* note 1, at 14. The proposed example was as follows:

> *Example 1*: A drug company commissions research on its product by an independent research organization. The company pays all or a substantial share of the expenses of the research product and participates in the test design. A subsequent advertisement by the company desribes the research finding. Unless the company has reason to believe that the research design or procedures are biased or otherwise invalid, the advertisement need not disclose the payment to the research organization or the advertiser's share in the test design.

Id.

170. The 1980 example is identical to the 1975 version except it does not contain the last two sentences pertaining to the disclosure requirement. Rather, it now concludes by stating that "the advertiser's payment of expenses to the research organization need not be disclosed in this advertisement. Application of the standards set by [the Guides entitled 'Expert Endorsements' and 'Endorsement by Organizations'] provides sufficient assurance that the advertiser's payment will not affect the weight of credibility of the endorsement." 1980 Guides, *supra* note 9, § 255.5.

171. *See* notes 214-25 *infra* and accompanying text.

edge is superior to that generally acquired by ordinary individuals."[172] The 1972 proposed Guide concerning experts[173] stated that an endorsement by an expert had to be based on an actual exercise of the expertise, which the endorser is represented to possess. The Guide also required that any study upon which the endorsement is based must conform to what consumers are led to believe.

The final form for the Guide concerning experts, issued in 1975,[174] additionally required that an expert endorsement must be supported by an actual exercise of the endorser's expertise, with the endorser being held to the standard of what any other person with similar expertise would do. The establishment in the 1975 Guide of this standard by which to evaluate expert endorsers is significant. Where the expert was required under the 1972 Guide to conform only to what consumers were led to believe, the expert now must measure up to the standard of the "average reasonable expert."[175] The perception of consumers really becomes secondary, since it is now possible for an expert endorser to be found in violation of this Guide without actually deceiving anyone. While the primary purpose for establishing the Guides initially was to control deception of the public with respect to endorsements, deception now does not really appear to be an issue in this particular Guide. Rather, this Guide now looks to the care exercised by an expert in endorsing products.[176]

Perhaps the best example of a case involving a supposed "expert" endorser is that of *In re Leroy Gordon Cooper*.[177] Though he actually was not, Cooper was portrayed in advertisements as being an expert in the field of automotive engineering and as hav-

172. 1975 Guides, *supra* note 14, § 255.0(d).
173. 1972 Guides, *supra* note 8, § 255.2.
174. 1975 Guides, *supra* note 14, § 255.3.
175. No longer is the expert held only to what consumers are led to expect. Rather, now the expert is judged by what other similar experts would do in similar circumstances.
176. This requirement of "care" implies that there might be circumstances where an expert could meet the test of evaluating a product in a manner compatible with what other similar experts would do and yet give a product endorsement that is deceptive. Although the FTC gave no reason for requiring that experts be held to the standard of what other similar experts would do, it can be assumed that the FTC was trying to establish objective criteria by which to evaluate expert endorsements. This, however, presents the very real possibility that an expert can violate the standard without actually deceiving anyone.
177. 94 F.T.C. 674 (1979).

ing conducted tests upon the product which he endorsed.[178] The FTC found not only that Cooper was not an expert, but also that he had not performed any tests as he had represented. This case, though, does not represent the potential power of this Guide. Had Cooper in fact been an expert and performed tests, the FTC would have been able, under the new Guide, to evaluate his opinions and procedures as an expert with regard to the endorsed product.[179] This seems to be an unwarranted and restrictive intrusion into the advertising field, especially in light of the fact that no FTC cases indicate that endorsements by true experts present significant problems.

Another aspect of this Guide merits examination. According to the 1975 Guide, if an advertisement implies that an expert made a comparison between products, such a comparison must actually have been included as part of the expert's evaluation. Where the "net impression" created by an endorsement is that the advertised product is superior to other products, the expert must have in fact found such superiority.[180] This raises the possibility that a violation of the 1975 Guide can be based upon something possibly not even intended by the advertiser or the expert endorser. The caveat here is that the exaggeration or "puffing" of product's characteristics, which has been tolerated in advertising for years, can be dangerous if found to be within the same advertisement in which an expert has endorsed a product.[181] Even though the exaggeration may not have been done by the expert himself, it is possible that an examination of the advertisement under the "net impression" test will evidence that a violation has occurred because it is possible to construe an expert's product endorsement as supporting all claims made within the advertisement.[182]

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178. *See* notes 120-25 *supra* and accompanying text.

179. *See* notes 174-75 *supra* and accompanying text.

180. The relevant language of the Guide is quoted below:

> Where, and to the extend that, the advertisement implies that the endorsement was based upon a comparison such comparison must have been included in his evaluation, and as a result of such comparison, he must have concluded that, with respect to those features on which he is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitor's products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority.

1975 Guides, *supra* note 14, § 255.2(b).

181. The exaggeration referred to here, which is often call "puffery" in the advertising industry, occurs frequently when products are cast in unduly favorable light. Although puffery has often been carried too far by advertisers, it traditionally has been tolerated by both competitors and the FTC. See D. ROHRER, MASS MEDIA, FREEDOM OF SPEECH, AND ADVERTISING 269 (1979).

182. The "net impression" test might give rise to situations where experts give

This Guide requires that expert endorsements meet two criteria. First, an endorsement by an expert must be with regard to characteristics of the product about which the expert possesses expertise, and second, the endorsement must also be with respect to those features "which are relevant and available to an ordinary consumer."[183] The terms "relevant and available" are not defined in the Guide nor illustrated in the accompanying examples. It appears that the terms make reference to those characteristics which would be considered in purchase decisions and also be capable of duplication by consumers. These standards, however, are of limited aid. Taken in their literal sense, it is questionable whether a professional race car driver could demonstrate that a particular sports car handled well at high speeds on a race track, since the handling characteristics of the car under those conditions are neither "relevant nor available" to the average consumer.[184]

Both examples to this Guide point out other items worth noting. One example states that if an expert claims to use a product, that product must measure up to consumer expectations even though the expert says nothing more than that he uses the product.[185] This means that the expert endorser's statement that he

truthful endorsements, but due to other misleading factors within the same advertisement the experts' statements, are found to be deceptive.

183. 1975 Guides, *supra* note 14, § 255.3(b).

184. One can argue strongly that an advertisement should not be restricted only because it presents a product in a manner which is not "available" to consumer. In fact, it might be an effective marketing approach in some cases. Using the sports car example, the advertisement might increase sales by demonstrating that because the car handles well on a race track, it will also be a good car for the average driver.

185. *Example 4*: The president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser in its business. Since the cleaning service's professional success depends largely upon the performance of the cleansers it uses, consumers would expect the service to be expert with respect to judging cleansing ability, and not be satisfied using an inferior cleanser in its business when it knows of a better one available to it. Accordingly, the cleaning service's endorsement must at least conform to those consumer expectations. The service must, of course, actually use the endorsed cleanser. Additionally, on the basis of its expertise, it must have determined that the cleansing ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of competing products with which the service has had experience and which remain reasonable available to it. Since in this example, the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely

uses a product will be taken as meaning that the product is worthy of his use. The other example indicates that if an organization, which is considered to be an expert, selects a product for official use, an advertisement so stating will be deceptive if the product relates to the organization's expertise and the organization has failed to perform comparison tests with other products.[186] This implies a duty for an expert organization to perform comparison tests even though the organization may have used the endorsed product for an extended period with good results. An example might be where a police department agrees to endorse a particular type of automobile it has used for several months. No longer are expert organizations free without restriction to state in advertisements that they endorse any product.[187]

D. Consumer Endorsement Guide

The proposed 1972 Guide entitled "Consumer Endorsements" simply stated that "[a]dvertisements employing endorsements by a 'typical consumer', i.e., one who has no special expert knowledge beyond normal use of the product, should in relating facts about the endorser's experience with the product also reflect the average and ordinary experience of consumers generally with the product."[188] The relatively clear 1972 Guide, however, was short-lived because another much more complex Guide was proposed in 1975. Subsection (a) of the 1975 Guide[189] embodied the concept of the 1972 version, but also stated that if an atypical performance of a product was depicted in an advertisement, then the

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upon its accumulation experience in evaluating cleansers without having to have performed side-by-side or scientific comparisons.
1975 Guides, *supra* note 14, § 255.3.

186. *Example 5*: An association of professional athletes states in an advertisement that it has "selected" a particular brand of beverages as its "official breakfast drink." As in Example 4, the association would be regarded as expert in the field of nutrition for purposes of this section, because consumers would expect it to rely upon the selection of nutritious foods as part of its business needs. Consequently, the association's endorsement must be based upon an expert evaluation of the nutritional value of the endorses beverage. Furthermore, unlike Example 4, the use of the words "selected" and "official" in this endorsement imply that it was given only after direct comparisons had been performed among competing brands. Hence, the advertisement would be deceptive unless the association has in fact performed such comparisons between the endorsed brand and its leading competitors in terms of nutritional criteria, and the results of such comparisons conform to the net impression created by the advertisement.
1975 Guides, *supra* note 14, § 255.3.

187. This Guide indicates that expert organizations have the duty to insure that their endorsements are not misleading especially since organizational endorsements will be held to a higher standard than those given by individuals. *See* notes 206-07 *infra* and accompanying text.

188. 1972 Guides, *supra* note 8, § 255.4.

189. 1975 Guides, *supra* note 14, § 255.2.

advertisement must disclose conspicuously what typical performance would be. The FTC indicated that an excuse such as "[n]ot all consumers will get this result" would be insufficient. Apparently the FTC was seeking affirmative disclosures[190] as to what could be expected rather than common disclaimers. This position called into question disclaimers as to performance of products. For example, if a consumer is shown washing very stained clothing in a washing machine to demonstrate the cleansing power of a detergent, it would traditionally be acceptable for the advertisement to use a disclaimer stating that consumers might not get the same result. The 1975 Guide, however, would require that disclosure be made of the actual results of the demonstration. Thus, the advertisement would either have to show the consumer removing partialy stained clothing or orally state that the detergent would not completely remove the stain.

The AAAA was also concerned that subsection (a) of the 1975 Guide would reduce the effectiveness of consumer endorsements that truthfully relate experiences with a product out of fear that the public might be misled into expecting equivalent performance.[191] Accordingly, the 1980 Guide was changed to allow disclaimers to be used in addition to disclosures. However, introductory remarks to the Guide make it clear that disclaimers as to product performance must be prominent and integrated with the endorsements, with the burden of proof being upon the advertiser.[192]

190. *See* note 71 *supra* and accompanying text.

191. 1975 AAAA COMMENTS, *supra* note 1, at 4.

192. The introductory remark is helpful in understanding the FTC's position:

> Advertisers should understand that the Commission strongly favors consumer endorsement that, in fact, depict a typical experience. However, the Commission recognizes that a consumer endorsement representing a non-typical experience with a clear disclaimer, or with a disclosure of what is typical may not be deceptive. Generally, a disclaimer along probably will not be considered sufficient to dispel the representation that the experience is typical, but because the Commission is not prepared to hold that in every instance a bare disclaimer would be inadequate, reliance thereon will not be considered a per se violation of Section 5 of the Federal Trade Commission Act. In any instance where only a disclaimer is made, however, the advertiser should be certain that it is as prominent as, and integrated with, the endorsement itself and that the circumstances surrounding the endorsement itself and that the circumstances surrounding the endorsement minimize the message that it is a typical experience. Advertisers should also know that a simple statement that "not all consumers will get this result" or a similar disclaimer will not be considered as adequate. The advertiser should realize, further, that the net effect of the advertisement will be studied to determine if it has the capacity to

Subsection (b) to the proposed 1975 Guide[193] required that if an advertisement depicted persons as "actual consumers" who were not consumers in fact, then the advertisement had to disclose that it used professional actors appearing for compensation. Because of public comments submitted, the FTC subsequently determined that its purpose of avoiding public deception might be served by a less extensive means. The FTC realized that disclosure of the fact that actors were being used might imply that the substance of the advertisement was not genuine.[194] Had the 1975 disclosure requirement been allowed to remain, not only might the public have been misled to think that advertisements with the disclosures were untrustworthy, but also advertisers themselves might have suffered substantial profit losses.[195] Therefore, under the final 1980 Guide, disclosure must indicate only that the persons depicted are not actual consumers; no mention need be made that they are professional actors.[196] This seems to be an attempt at balancing the public's need to have accurate advertising information with the harm which might result to advertisers under the stricter 1975 standard. However, it must be noted that not only did the FTC substantially alter its position concerning the requirement that the use of professional actors had to be disclosed, but also that the change came because of public comments submitted to the FTC. This demonstrates the potential danger that the FTC can be insensitive to the needs of the marketplace and consumers by requiring unrealistic measures.

Subsection (c), first proposed in 1975,[197] required that claims concerning the efficacy of drugs or related materials for use in humans or animals may not be advertised by lay endorsement. The AAAA referred to this as "singling out a class of products for . . . draconian treatment" and stated that the proposed Guide raised the serious question of the desirability of banning all lay endorsements of over-the-counter drugs without regard to the truthfulness of the endorsements.[198] Introductory remarks to the 1975 Guide indicated that it was included at the suggestion of the

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deceive. If the Commission has reason to believe that such a deception is imparted by the consumer endorsement, the endorsement may be subject to a Commission challenge.

1980 Guides, *supra* note 9, § 255.2(a).

193. 1975 Guides, *supra* note 14, § 255.2(b).

194. 1980 Guides, *supra* note 9, § 255.2, Introduction.

195. The losses to advertisers might have occurred either because of disclosures that professional actors were being used or because less effective methods of advertising might have been employed in order to avoid the "professional actor" disclosure requirement.

196. 1980 Guides, *supra* note 9, § 255.2(b).

197. *Id.* at § 255.2(c).

198. 1975 AAAA COMMENTS, *supra* note 1, at 2.

Lehigh Valley Committee Against Health Frauds.[199] However, the suggestion was submitted by the committee without any evidentiary support.[200] The committee's one page letter was submitted without substantiation such as studies or cases which would indicate that such a ban was warranted. The restrictive Guide was included at the suggestion of one organization. This only serves as further indication of the FTC's tendency to draft the Guides without consultation of parties concerned and in narrow and restrictive fashions.

Not suprisingly, subsection (c) released in its final form in 1980,[201] was altered to permit lay endorsements of "any drug or device" if the advertiser has adequate scientific substantiation for the endorsement, and the endorsements are not contrary to Food and Drug Administration determinations. The FTC, in its introductory remarks to the 1980 Guide, stated that it had determined that the 1975 prohibition was unnecessary and that the public could be adequately protected by compliance with the more relaxed 1980 Guide.[202] The result is that advertisements can continue, within limits, to contain lay endorsements for drug products.

Dramatic changes in the "Consumer Endorsements Guide," prior to it becoming final in 1980, clearly point out that industry guides for endorsement advertising are difficult to formulate. In just this Guide alone, the FTC completely changed its positions with respect to disclosures of the use of professional actors[203] and the use of consumers for drug endorsements.[204] Though public comment periods brought in suggestions, which significantly helped the FTC in formulating the final Guides,[205] there is yet no assurance that the Guides in their present form accurately reflect the best means by which to control endorsement abuses.

E. Endorsements by Organizations Guide

The Guide concerning organizational endorsements as pro-

199. 1975 Guides, *supra* note 14, § 255.2 Introduction.
200. 1975 AAAA COMMENTS, *supra* note 1, at 2.
201. 1980 Guides, *supra* NOTE 9, § 255.2(C).
202. *Id.* at Introduction.
203. *See* notes 193-95 *supra* and accompanying text.
204. *See* notes 197-02 *supra* and accompanying text.
205. *See* note 132 *supra* and accompanying text.

posed in 1972[206] stated that endorsements by groups could be held to a more stringent standard of truthfulness than those of individuals, since organizations usually offer the collective judgment of many people. The FTC felt such advertisements imply that definite standards had been used by the group in the evaluation of a product. The FTC, however, has given nothing to support its underlying assumption that the buying public is more persuaded by organizational endorsements than those given by individuals.[207]

The final Guide,[208] released with little comment in 1975, added that organizational endorsements must be based upon a process, which ensures that the endorsements actually reflect the organization's collective judgment. Apparently, the FTC is trying to avoid situations where one or few members of an organization grant endorsements, which are not representative of the thinking of the organization's members as a whole. The 1975 Guide also indicates that if the organization is one which might be considered an expert[209] in a particular field, then it must utilize experts or suitable standards for judging the relevant merits of the product it wishes to endorse. An example of an endorsement by an expert organization is approval of a toothpaste brand by an association of dentists. The approval would, under the Guide, have to (1) be based upon some type of objective evaluation of the toothpaste according to dental standards, and (2) be based upon a process which would accurately reflect the association's collective judg-

206. 1972 Guides, *supra* note 8, § 255.5.

207. This is another indication of the questionable foundation upon which the endorsement Guides are based.

208. 1975 Guides, *supra* note 14, § 255.4.

> Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors which vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3 (Expert endorsements), it must utilize an expert or experts recognized as such by the organization and suitable for judging the relevant merits of such products.
>
> Example: A mattress seller advertises that its product is endorsed by a chiropractice [*sic*] association. Since the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an expert evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the particular attributes of the advertised mattress in mind.

Id.

209. The term "expert," as defined by the FTC, can encompass organizations. *See* notes 206-10 *supra* and accompanying text.

ment.[210]

The rigid requirements give rise to cause for concern. Because of the liability imposed upon a "supposed" expert in the case of *In re Leroy Gordon Cooper*,[211] it is likely that expert organizations will be more hesitant to publicly endorse products for fear of liability. If this occurs, consumers would lose the benefits which accompany product endorsements by professional or consumer groups, and have less information with which to make purchase decisions. Also, it is not likely that the Guides will add credibility to endorsements given by organizations since credibility of such endorsements does not appear to be a significant problem.[212]

F. Criticism of the Endorsement Guides

The present FTC endorsement Guides present many difficult issues, which raise questions as to the advisability of their continued existence. Two major factors, however, indicate that alternatives to the Guides should be sought. First, the Guides appear in many areas to be excessively narrow and restrictive regarding both advertisers and endorsers. For example, compensation given by an advertiser to a consumer endorser is considered by the Guides to be a material connection requiring disclosure. At the same time, however, compensation paid to a celebrity or expert endorser need not be disclosed because it is considered to be immaterial.[213] The basis for such a distinction is questionable in theory and practice. What is required of the consumer endorser who over time becomes known to the public so that a celebrity status is obtained?[214] What is to be made of the difficult provision in the Guides that even nontangible forms of payments to consumer endorsers, such as the opportunity to be on television, must be disclosed?[215] Another example of the narrowness of the new Guides is demonstrated by the requirement

210. 1975 Guides, *supra* note 14, § 255.4

211. 94 F.T.C. 674 (1979).

212. Credibility problems with organizational endorsements usually arise only when an advertiser falsely claims that his product has received an organization's approval. *See* Mytinger & Casselberry, 57 F.T.C. 717 (1960), where the FDA was falsely represented as endorsing the defendant's products. The FTC organizational endorsement Guide would not apply in such cases because no endorsement is given.

213. 1980 Guides, *supra* note 9, § 255.5. *See* notes 163-65 *supra* and accompanying text.

214. *See generally* 1980 Guides, *supra* note 9, § 255.5.

215. 1980 Guides, *supra* note 9, § 255.5.

that if an expert's endorsement gives the "net impression" that he or she performed a comparison of the advertised product with others, then such comparisons must have occurred. This provision, in effect, prohibits an expert from making any statements about a product which cannot be demonstrated as being factual.[216] This is especially restrictive when one considers that the new Guides require that an expert conform his product evaluations to what other experts with the same skill would do.[217] One also cannot overlook the fact that some of these requirements appear to be the original thinking of the FTC and not the result of needs found in the marketplace or of requests from consumers.

The narrowness of the FTC Guides is also shown by the number of significant changes which the FTC made in different versions of the Guides. An excellent example is subsection (c) to the 1975 "Consumer Endorsements Guide", which originally prohibited all drug endorsements by lay persons.[218] The FTC did a complete about-face in the 1980 Guide, and apparently only due to suggestions from the public.[219] The fact that the FTC originally took such a radical position and subsequently reversed itself raises questions as to the criteria upon which the FTC based its Guides. This also vividly points out that endorsement advertising is not well adapted to narrow and restrictive controls. Rather, broader definitions of proscribed acts are more likely to ensure that the FTC does not unduly burden those in advertising. The Guides, because of the narrowness of their language, indicate an attitude of single-mindedness on the part of the FTC. It seems that throughout the Guides there is a presumption that endorsement advertising tends to be deceptive and harmful to the public.[220] The Guides do not reflect solutions to problems which actually exist, but rather they are evidence only of the FTC's views.

The second factor which indicates that alternatives to the Guides should be sought is that they do not have the force of law.[221] Because they are "industry guides," they are merely interpretive of underlying FTC statutes and thus cannot be directly used to prove that deceptive endorsements have occurred. This creates two problems for the FTC. First, the burden of proof is

216. 1975 Guides, *supra* note 14, § 255.3. *See* notes 181-84 *supra* and accompanying text.

217. *See* notes 174-75 *supra* and accompanying text.

218. 1980 Guides, *supra* note 9, § 255.2(c). *See* notes 197-205 *supra* and accompanying text.

219. *See* note 199 *supra* and accompanying text.

220. This is shown by endorsement Guides which do not seem to be responsive to actual endorsement abuses. *See* note 212 *supra* and accompanying text.

221. *See* notes 52-55 *supra* and accompanying text.

very great which the FTC must meet to prove that an endorsement is violative of the underlying statute.[222] In this case, an endorsement can be found deceptive only if the FTC can establish that it is an "unfair or deceptive act or practice" within the meaning of section 5 of the FTC Act.[223] This leads to the second problem, which is that the Guides will not be used in actions brought by the FTC against deceptive endorsement advertising.[224] Since the endorsement Guides do not have the force of law and the FTC must prove violations of section 5, little good would come from bringing the Guides into any legal action. This is an undesirable result since the Guides will not have an opportunity for judicial development; their parameters will not be explored and others will not learn the level of acceptable conduct.

FTC trade regulation rules in place of the Guides would have a much different result since actions could be brought directly for their violation. For example, if the FTC were to pass a trade regulation rule requiring disclosure of continuing payments to endorsers, then the FTC would be required in its complaint to establish only that the disclosure should have been made and that the advertiser failed to do so.[225] This would considerably lighten the burden of proof upon the FTC and at the same time allow others potentially affected to know what could to be done to avoid similar problems.

The foregoing discussion indicates that the Guides in their present form are ineffectively narrow. This, coupled with the fact that they do not have the force of law, demonstrates that the endorsement Guides do not represent the best means by which to control endorsement abuses.

V. Alternative Methods of Controlling Deceptive Endorsements

The FTC endorsement Guides provide only one means of promoting truthful endorsement advertising. Because of the limited effectiveness of the Guides in correcting endorsement abuses,[226] other alternatives should be examined in an attempt to find a

222. *See* notes 78-82 *supra* and accompanying text.
223. 15 U.S.C. § 41 (1976).
224. *See* notes 78-82 *supra* and accompanying text.
225. The FTC would not have to establish that any underlying statute was violated.
226. *See* notes 213-25 *supra* and accompanying text.

more desirable solution to the endorsement problem. This section will discuss a broad range of possible solutions.

A. Private Causes Of Action

Private causes of action, as discussed here, refer to those actions brought by nongovernmental parties such as consumers or business corporations. This discussion of private causes of action will be divided into two portions, one dealing with actions typically brought by consumers and the other with those which would be brought by competitors of the endorser.

It has been well established in consumer law that false advertising claims which lie in tort are actionable where some type of injury results from reliance upon those misrepresentations.[227] Deceit, perhaps the most common of such actions, requires that the following elements be proven: (1) a false representation of fact; (2) knowledge or belief on the part of the seller that the advertisement is false or knowledge that it is lacking a sufficient basis; (3) an intention to cause the buyer to act in reliance upon the advertisement; (4) justifiable reliance by the buyer; and (5) damages caused by the reliance.[228]

The first element, a showing of false representation of fact, has traditionally been the most difficult to prove in false advertising actions, since the opinion or "puffing" of the seller is usually not considered to be expression of fact. Even if it can be shown that the representation was false, the consumer still must prove that damages occurred.[229] Though this element may be very difficult to establish in false advertising cases, it is not outside the realm of possibility. The difficulties of proving the elements combined with the typically high costs, both in time and money, however, make this a relatively unattractive alternative for policing untrue endorsements.

Other actions are also available to consumers in combating false endorsements, though their use for this purpose has been unsuccessful. These include tort claims such as invasion of privacy and both public and private nuisance.[230]

Due to the foregoing problems making private suits against deceptive advertisers impractical, some writers have advocated that consumers should be allowed to bring private actions based upon prior FTC administrative findings of violations of statutory

227. *See generally* G. ALEXANDER, COMMERCIAL TORTS 269-99 (1973).
228. D. EPSTEIN, *supra* note 75, at 22.
229. *Id.*
230. PRACTICING LAW INSTITUTE, *supra* note 64, at 337-41.

duty.[231] Such actions would be similar to those implied to investors under the Securities Exchange Act of 1934 for rule 10b-5[232] violations. The FTC would determine the existence of a statutory duty, which was breached, and then allow consumers to use that finding as the basis for their action. The actions, however, have traditionally been turned away on the ground that the FTC Act did not imply private causes of action.[233] Perhaps the best known case of this sort is that of *Holloway v. Bristol-Meyers Corporation*,[234] where a class action was denied against the manufacturer of Excedrin for deceptive advertising. However, at least one case, *Guernsey v. Rich Plan*,[235] has allowed a private suit based upon a failure of a business to comply with a cease and desist order which the FTC had entered against it.

Competitors bringing actions for harm caused by deceptive endorsements have several alternatives to consider, but few that offer hope of success. One alternative which has been victorious is based upon the broad tort of unfair competition. In *Thomas A. Edison, Inc. v. Shotkin*,[236] the defendent used the term "Certified by Edison" in advertising electrical products. The plaintiffs, who nationally sold electrical products under the name of Edison, successfully argued that the defendent's acts were deceptive and that they constituted unfair competition.

It is also possible for a business competitor to bring the tort action of passing off. In one case,[237] a mattress manufacturer, who rightly promoted his products as being advertised in *Life* magazine and as having the *Good Housekeeping* Seal of Approval, successfully brought an action against another mattress manufacturer who falsely claimed to have the same "endorsements."

An action for disparagement[238] might also lie where one damages the property interests of another's reputation. For exam-

231. *See, e.g.*, *Private Judicial Remedies for False and Misleading Advertising*, 25 SYRACUSE L. REV. 747 (1974).

232. 17 C.F.R. § 240.0-1-.31-1 (1980); 17 C.F.R. § 240.10b-5 (1980).

233. *See* F. MILLER & B. CLARK, *supra* note 63, at 13; Schulman, *Little F.T.C. Act: The Neglected Alternative*, 9 JOHN MARSHALL J. PRAC. PROC. 351, 366 (1975).

234. 485 F.2d 986 (D.C. Cir. 1973).

235. 408 F. Supp. 582 (N.D. Ind. 1976).

236. 69 F. Supp. 176 (D. Colo. 1946), *appeal dismissed*, 163 F.2d 1020 (10th Cir. 1946), *cert. denied*, 332 U.S. 813 (1947).

237. Friedman v. Sealy, Inc. 274 F.2d 255 (10th Cir. 1959).

238. E. KIUTER, PRIMER ON THE LAW OF DECEPTIVE PRACTICES 140-41 (2d ed. 1978).

ple,[239] an advertiser marketed air conditioners claiming they were rated as the "best buy" by an independent research organization, *Consumer Reports* magazine, the plaintiff, successfully objected to the advertisement's misleading statement that it had endorsed the advertiser's air conditioners. In reality, the products were only comparatively evaluated with those made by competitors.

Despite the existence of the common causes of action discussed above, problems of proof and defenses have made them seldom successful. Requirements such as standing, causation, special damages, as well as the high costs of litigation, have made private causes of action unattractive alternatives for the control of deceptive advertising.[240]

B. State Causes Of Action

Early in this century, many states adopted versions of "Printer's Ink" statutes, which generally provided misdemeanor penalties for untrue, deceptive, or misleading advertisements. The statutes proved to be largely ineffective in curbing deceptive endorsements, primarily due to reluctance on the part of prosecutors to institute criminal proceedings for such violations.[241]

Certain states, such as California, have taken steps to provide more effective remedies for deceptive advertising. In 1972, California Business and Professions Code section 17535[242] was enacted, which permits any city attorney, district attorney, or the attorney general to seek whatever equitable relief the courts deem necessary to prevent deceptive advertising. The statute increases the possibility that state or city actions can be brought for deceptive advertising. For example in 1980, the San Francisco district attorney's office began investigations to determine whether athlete Bruce Jenner actually used Wheaties breakfast cereal as part of his training diet as he has so often indicated when endorsing the product.[243]

Another inventive avenue is being explored which offers potential for control of deceptive advertising at the state level. This is commonly referred to as the "Little"[244] or "Baby"[245] FTC Act. At least two states, Illinois and Texas, have enacted legislation patterned after the FTC Act which explicitly provide for private

239. Consumers Union of the United States v. Admiral Corp., 186 F. Supp. 800 (S.D.N.Y. 1960).
240. E. KINTER, *supra* note 238, at 139-41.
241. D. EPSTEIN, *supra* note 75, at 24-25.
242. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1980).
243. *FTC: Celebrities Must Use Products They Pitch*, 66 A.B.A.J. 274 (1980).
244. Schulman, *supra* note 233, at 545.
245. F. MILLER & B. CLARK, *supra* note 63, at 13.

causes of action against those using deceptive advertisements. The Texas statute allows courts to award damages and attorneys in the private suits.[246]

State laws are traditionally regarded as inadequate in dealing with deceptive advertising.[247] Though efforts are made to provide increased consumer protection,[248] it is not likely that state laws will be able to adequately meet the challenge. The best hope for curbing advertisement abuses lies with the nation's most powerful advertising standards enforcer, the FTC.

C. Alternative FTC Approaches To Endorsement Advertising

The limited effectiveness of the present endorsement Guides in preventing deceptive endorsements[249] coupled with difficulties in private[250] and state[251] actions indicates that the primary burden for providing effective solutions to endorsement abuses still rests with the FTC. Several alternatives should be considered. First, and most importantly, the FTC could abolish its present endorsement Guides and replace them with trade regulation rules.[252] This would have the effect of establishing FTC rules concerning endorsing, which would have the force of law.[253] The trade regulation rules should indicate to all what would be required by the FTC in endorsement advertising. The rules would be utilized in FTC and court cases and therefore be molded to fit the changing needs of consumers and advertisers. However, along with establishing trade regulation rules, the FTC should change its emphasis from specifying narrow, unneeded requirements[254] to instead providing broad, clear standards, which address real advertising issues. Following this approach, the FTC could formulate the legal parameters within which advertisers would be required to work while providing administrative law judges and courts with latitude to encounter newly arising situations.

The second viable alternative for controlling endorsement abuses is through the use of FTC-directed civil redress actions

246. *Id.*
247. E. KINTER, *supra* note 238, at 55.
248. *See* notes 241-46 *supra* and accompanying text.
249. *See* notes 213-25 *supra* and accompanying text.
250. *See* notes 227-40 *supra* and accompanying text.
251. *See* notes 241-48 *supra* and accompanying text.
252. *See* notes 83-87 *supra* and accompanying text.
253. *See* notes 52-55 *supra* and accompanying text.
254. *See* notes 213-25 *supra* and accompanying text.

under the Magnuson-Moss Act.[255] The FTC could demonstrate that it is willing and able to move against violating endorsers and advertisers with its full strength, utilizing cease and desist orders, civil penalties, and lawsuits to obtain civil redress for individuals or for a class.[256] In so doing, the FTC would at once prevent deceptive endorsements and provide consumers with compensation for their losses. However, implementation of an FTC policy favoring aggressive civil redress actions is not foreseen, especially in light of traditional FTC policies[257] and limited finances under the Reagan administration, as will be discussed below.[258]

VI. Impact Of the New FTC Endorsement Guides

The FTC Endorsement Guides present significant implications which should be considered. Perhaps foremost is the signal to advertisers and endorsers that the FTC intends to police more closely advertising abuses. The trend of the FTC toward active regulation of advertising has been clear since *FTC v. R.F. Keppel & Bros.*[259] However, it was not until the 1978 decision of *In re Cooga Mooga*[260] that the full extent of the FTC's powers became evident. *In re Cooga Mooga*, which imposed personal liablity upon an endorser, might be considered as a product of the FTC endorsement Guides, even though they were never mentioned in the decision, because both the 1972 and 1975 Guides had already been released prior to institution of the *Cooga Mooga* action.

The primary goal of the FTC endorsement Guides is to prevent the deception of consumers by deceptive endorsement advertising. Advertisers and endorsers alike will almost undoubtedly respond with caution.[261] However, one matter that remains to be seen is whether the Guides, with the passage of time, will actually reduce the magnitude of deceptive endorsement advertising. Several factors stand in the way of the FTC successfully accomplishing its goal. First, it is almost impossible for one governmental agency to police any but the most serious of all endorsement violations due to the enormous number of endorsement advertisements[262] and the limited size of the FTC staff. This consideration

255. 15 U.S.C. § 45(m) (1976).
256. *See* Note, *supra* note 66, at 259.
257. *Id.* at 258.
258. *See* note 263 *infra* and accompanying text.
259. 291 U.S. 304 (1934). In *Keppel*, the Supreme Court relaxed the requirement that FTC jurisdiction could exist only where harm to competition was shown.
260. 92 F.T.C. 310 (1928). *See* notes 115-19 *supra* and accompanying text.
261. Jones, *Celebrity Endorsements: A Case for Alarm and Concern for the Future*, 15 New Eng. L. Rev. 521, 544 (1980).
262. By one estimate, almost one out of every three television commercials

is most important in light of federal budget cutbacks proposed by the Reagan administration.[263] It is unlikely that the FTC will experience significant growth in the coming years so that it will be almost impossible for it to aggressively monitor endorsement advertising. Civil redress actions under the Magnuson-Moss Act[264] will also be less likely to be used for exactly the same reason. Thus, it seems that a more active role of the FTC in bringing its own actions or lawsuits against advertising violators is unlikely.

The second factor which will hinder eradication of endorsement problems will be resistance from those in the advertising industry. Although it is assumed that most people agree in principle with the Guides, reality would indicate that acceptance of the Guides will be less than universal.[265] Even those who do not have propensities to violate laws may be offended by the narrow and technical Guides. The very nature of the Guides themselves invites evasion of their parameters since the FTC has entered an area of regulation which is difficult to control with exacting requirements. This, coupled with the fact that the Guides do not have the force of law,[266] leads to the conclusion that ultimately they will have little impact upon the advertising industry. As suggested earlier, replacement of the present Guides with trade regulation rules[267] which are broader in scope and have the force of law could do much to ensure compliance from advertisers and endorsers.[268] However, the FTC has given no indication that this change is likely to occur so that it can be assumed the Guides will remain for the foreseeable future. This means that endorsement abuses will almost certainly continue unchecked until the FTC resorts to an alternative form of regulation.

In light of the foregoing, one can have little hope of seeing significant improvements in the control of deceptive and misleading

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uses a celebrity. *Id.* at 525. This does not even include non-celebrity endorsers such as experts, consumers, and organizations.

263. *See* NEWSWEEK, Mar. 2, 1981, at 22-34; Los Angeles Daily Journal, Mar. 4, 1981, § 1, at 6, col. 6.

264. 15 U.S.C. § 45(m) (1976). Significant use of the civil redress provisions of the Magnuson-Muss Act would require concentrations of both time and money. *See generally* Note, *supra* note 66.

265. *See, e.g.*, notes 197-98 *supra* and accompanying text.

266. *See* notes 52-55 *supra* and accompanying text.

267. *See* notes 83-87 *supra* and accompanying text.

268. The fact that violation of the trade regulation rules could be punished would be a strong incentive for advertisers and endorsers to pay heed to their requirements.

advertising. The FTC's new endorsement Guides will do little, if anything, to provide needed solutions, so that consumers will continue to be victimized by the unscrupulous. Clearly, then, there is a need for the FTC to develop alternatives which both effectively penalize violators and protect consumers.[269]

In developing alternatives to the new Guides, the FTC must not forget that businesses have legitimate interests in being free to promote themselves without being unnecessarily fettered by governmental controls. Concerns for limiting the paternalistic attitudes of governments toward their citizenry are not without merit. First amendment free speech, even though commercial, is also a very important concern in formulating any endorsement controls.[270]

Serious interests are at stake in the endorsement advertising question. The most effective methods for controlling abuses in such advertising are yet to be implemented. Whatever those methods might be, whether trade regulation rules,[271] civil redress actions,[272] or other alternatives, they must also be rational in light of the many competing demands.

VII. CONCLUSION

The introduction of Guides pertaining to endorsement advertising marks an important event in advertising history and FTC control of trade. The FTC, following a history of gradually increasing power over deceptive advertising,[273] has promulgated its Guides in an effort to provide advertisers and endorsers with standards by which their advertisements can be measured. However, instead of furthering the purported goal of reducing deceptive practices in advertising, the Guides are likely to have little impact since they are too narrowly drafted[274] and do not have the force of law.

Closer examination of alternatives to the new Guides is encouraged so that other solutions may be implemented which more effectively meet consumers' needs for protection from deceptive

269. *See* notes 213-25 *supra* and accompanying text.

270. *See generally* Knapp, *Commercial Speech, the Federal Trade Commission and the First Amendment*, 9 MEM. ST. U.L. REV. 1 (1978); *Constitutional Law—First Amendment—Freedom of Speech—Commercial Speech and Advertising*, 12 AKRON L. REV. 300 (1978); *Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MISS. L. REV. 64 (1978).

271. *See* notes 83-87 *supra* and accompanying text.

272. *See* note 88 *supra* and accompanying text.

273. *See* notes 29-47 *supra* and accompanying text.

274. *See* notes 213-25 *supra* and accompanying text.

endorsement practices while also recognizing the competing interests of free enterprise.

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