

HD2500
.B17
NO. 10

TESTIMONY OF
Commissioner Patricia P. Bailey
before the
Subcommittee on Commerce,
Subcommittee on Commerce, Tourism and Transportation
of the
Committee on Energy and Commerce
United States House of Representatives
concerning
1982 Reauthorization of the
Federal Trade Commission

April 1, 1982

Mr. Chairman and members of the Committee, it is a pleasure to be here today, with my colleagues, to discuss the Federal Trade Commission's 1982 reauthorization. This process just two years ago resulted in several fundamental reforms to the agency's operations. I know that you have invited us here today to offer what assistance we can in explaining the possible ramifications of a series of additional proposals advanced, mainly, to deal with the business community's continued perception that the Commission needs checks on its statutory authority to prohibit unfair and deceptive practices in the marketplace. It will be obvious to you, as we do so, that there are some areas where we disagree on how best to address the persistent criticisms leveled at our agency. To a great extent, these disagreements are the healthy byproduct of a collegial body like the Commission, which has a long tradition of intense internal debate about the agency's mission.

These disagreements, however, should not divert attention from the large areas of consensus among us. We are, for example, unified in our opposition to perhaps the most important special interest proposal pending before you: The removal of the professions from antitrust and consumer protection scrutiny.

Also, we are unified in a belief that, should the Congress feel it necessary to define with greater specificity the Commission's authority to police unfair trade practices, it should do so by adopting the standards the Commission articulated in its December 1980 statement on that subject. Finally, although we have varying views on the precise level of funding appropriate for the agency, we all recognize prevailing national policies of budgetary restraint and we are committed to assisting Chairman Miller in his efforts to streamline and manage as efficiently as possible the daily law enforcement activities of the agency.

In my statement today, I will focus on the three central substantive proposals to amend the FTC Act which have been presented to the Committee: first, the total exemption of state-licensed professionals; second, the exemption of commercial advertising from the Commission's jurisdiction over unfair trade practices; and, finally, the adoption of a more narrow definition of the Commission's jurisdiction over deceptive acts or practices. I will, of course, be pleased to answer any questions the Committee may have.

Jurisdiction over the Professions

The law enforcement initiatives and economic studies which have provoked pleas that you exempt the professions from the Commission's jurisdiction are referred to generically within the agency as the "occupational deregulation" program. I emphasize

the "de" in "deregulation" because I think that one syllable most accurately summarizes the overriding goal of all our efforts in this area. And, Mr. Chairman and members of the Committee, let me assure you that I recognize the difference between deregulation and regulation. I have, as you know, appeared before you on two occasions to defend the Commission's efforts to regulate, if only mildly, used car sales, and I am carefully attentive to the difference between regulation and deregulation.

As the Commission has repeatedly pointed out, most recently in our letter to Senators Packwood and Kasten last month, the occupational deregulation program combines traditional anti-trust enforcement with efforts to challenge restrictions on advertising and other forms of commercial practice by competing health professionals. Thus, we have brought cases involving allegations of price fixing, boycotts and other private agreements or conspiracies to restrain or eliminate competition by other health professionals. */ Other rules and enforcement actions have been patterned on landmark Supreme Court cases such as Virginia State Bd. of Pharmacy v. Virginia Citizens

*/ See, for example, American Medical Association, 94 F.T.C. 701, 996 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd per curiam, No. 80-1690 (Slip op. March 23, 1982). See, also, consent agreements involving Indiana Dental Association, 93 F.T.C. 392 (1979); Forbes Health Systems Medical Staff, 94 F.T.C. 1042 (1979); American Society of Anesthesiologists, 93 F.T.C. 101 (1979); and Hope, et al., Docket No. 9144.

Consumer Council */ and Bates v. State Bar of Arizona **/
which recognized that competitors and consumers may have a
constitutional right to the free flow of truthful commercial
information. The Commission's theory in these initiatives is
that unwarranted restrictions on commercial speech are also
unfair to competitors and consumers. ***/

One major objection to the occupational deregulation
program which has been advanced by some professional groups is
that it interferes with the states' right and responsibility to
supervise the quality of health care received by their citizens.
There are two basic responses to that concern. First, the
Commission draws a sharp distinction between regulations designed
primarily to ensure quality of care and those that merely
restrict business practices which, if permitted, could enhance
competition. Our deregulatory efforts are focused on the latter

*/ 425 U.S. 748 (1976).

**/ 433 U.S. 350 (1977).

***/ See, for example, the Eyeglasses Rule, 16 CFR 456, which
was upheld in part and remanded in part by the D.C. Circuit in
American Optometric Association v. FTC, 627 F.2d 896 (D.C. Cir.
1980).

type of restriction. Of course, in any area as complex as health care regulation, quality of care issues can become intertwined with what appear to be purely commercial considerations. In those instances, the Commission demands a rigorous showing that any efforts on our part to enhance competition in the commercial aspects of health professionals' practice will not undermine efforts to ensure the quality of care given to the public.

Second, I believe that the Commission has shown and will continue to show extreme sensitivity to the concerns and prerogatives of the states. We have studied carefully the federal courts' development of the state action doctrine, which has established standards for federal government scrutiny of practices which are not directly regulated by the states. As a matter of policy, the Commission has clearly adopted this doctrine as an integral part of case selection criteria. I am firmly committed to a continuation of that policy.

Recognition of clear state prerogatives in this area, however, does not mean that we cannot contribute significantly to continued efforts to deregulate the health care marketplace. Put simply, we can offer the perspective of 67 years of anti-trust and economic expertise on a national scale. Our contribution may be unique and I can only hope that we will be able to continue to explore ways in which to address any legitimate

problems that may arise due to any overlaps between our jurisdiction and that of the states. The Commission has moved very cautiously in this area and no actions which we have taken in the occupational deregulation program in any way justifies the total exemption of any professional group or groups from antitrust and consumer protection jurisdiction.

Before I leave this subject, let me offer one final thought. When we talk about the benefits derived from the occupational deregulation program, we think primarily in terms of consumer dollars saved. Another clear and related benefit of efforts to deregulate the marketplace is the potential for increased services to those who have little or inadequate access to any of them now. There are many classes of professionals who strive for the chance to offer different forms of health care services to the public. Dental hygienists, nurse practitioners and nurse midwives -- to name just a few -- all have a tremendous stake in the success of these deregulatory efforts. Those trained in these professional categories view their work, not as a substitute for, but rather as a complement to the kind of health care offered by the dominant sectors of the medical profession. One has only to look at the state of health care services available in the inner cities and in many rural areas of the country to understand the compelling need to expand the availability of their services.

Unfairness and Commercial Advertising

As I mentioned at the beginning of my statement, the Commission is united in its recommendation concerning the standards Congress should adopt should it determine that a more specific definition of the Commission's authority to proscribe unfair trade practices is necessary. Those standards, taken from our December 1980 policy statement, include (1) whether the practice causes substantial injury to consumers; (2) whether such injury is reasonably avoidable by consumers; and (3) whether the injury is outweighed by any countervailing benefits to consumers or competition derived from the practice. The Commission should also consider whether the practice violates any established public policy.

The only point I would highlight concerns the type of analysis the Commission should be required to undertake in evaluating offsetting benefits and costs. As we noted in our letter to Senators Packwood and Kasten, there is a risk that a benefit/cost analysis requirement could unnecessarily complicate or delay an investigation or litigation if the requirement is read to mandate a highly quantitative, dollar and cents kind of result. In many cases, a far more subjective analysis would be the more reasonable approach. This observation is especially important in cases where we have adopted a remedy which gives business many future options. For example, we might impose an information disclosure requirement

that could lead a company either to negotiate over price, to offer increased warranty coverage or to adopt a satisfaction guaranteed or dispute resolution program. In such cases, we may have difficulty predicting with precision the dollars and cents benefits which will be achieved by consumers. Any requirement that we quantify such benefits before the remedy has had a chance to take effect will only serve to limit our flexibility in adopting the most reasonable alternative approaches to the problem because it will force us to select a single, rigidly defined remedy with easily predictable results.

Despite what I consider to be the Commission's strenuous efforts to articulate the standards we have used in exercising unfairness authority (the months of meetings leading up to the December 1980 statement are still clear in my mind), the advertising community, has urged the total exemption from the FTC's unfairness jurisdiction for "commercial speech". As much as I regret the fundamental difficulties which occurred in recent years between the Commission and some segments of the advertising community, I cannot endorse on any basis this kind of extreme approach to perceived problems which can be, as recent history illustrates very well, addressed in other forums and dealt with effectively. The plain fact is that if the advertisers prevail with their proposal, those ultimately injured will be not only consumers but members of the advertising industry. I think it extremely likely that the public will perceive the exemption

they seek as a license to perpetuate unfair advertising in the media. However simplistic and, arguably, unfair this perception may be from the industry's perspective, I believe it will occur and that it could undermine decades of cooperative work to build the public confidence in the integrity of advertising which has come to exist.

Finally, I would bring one disturbing and possibly unintended ramification of the proposal to the committee's attention. As explained in their testimony before our Senate oversight committee last month, the advertisers propose that "the Federal Trade Commission Act be permanently amended to provide that the term 'unfair ... acts or practices' does not apply to commercial speech." (emphasis added) */ Read both literally and broadly, this proposal could exempt virtually any form of interchange between seller and consumer including promotional materials distributed at the point of sale, sales presentations to groups of potential buyers or even one-on-one conversations between a sales representative and a consumer. Thus, even the most blatant forms of high pressured sales solicitations could be exempt from challenge.

*/ Joint Statement of the American Advertising Federation, the American Association of Advertising Agencies and the Association of National Advertisers Proposing and Supporting Amendments to the Federal Trade Commission Act (at page 6) before Subcommittee on the Consumer, of the Committee on Commerce, Science and Transportation of the United States Senate (March 19, 1982).

As a companion to their proposal that commercial speech be exempted from the FTC's jurisdiction over unfair practices, the advertisers also ask that you repeal Section 5(m)(1)(B). That section gives the Commission the authority to go to federal court for civil penalties if a company violates prior adjudicated determinations of the Commission with "actual knowledge" that the conduct had been previously declared unlawful. The advertisers argue that unless Congress repeals this authority, the Commission could use previous unfairness cases to seek civil penalties against many members of their industry, thereby accomplishing "back door" rulemaking concerning unfairness.

In considering this proposal, it is important to understand exactly how Section 5(m)(1)(B) operates. The typical case begins with the Commission serving a synopsis describing the conduct previously determined to be unlawful on industry members who may be engaging in similar practices. The synopsis is accompanied by a letter warning the recipient that the Commission may seek civil penalties if the conduct does not cease. All recipients, as a matter of policy, are given a period of time to bring their practices into compliance. If the alleged violations persist, the Commission may consider filing a complaint in federal district court. However, the Commission has always conceded, and one district court has held, that during the subsequent court proceedings the recipient of the synopsis must have an opportunity to argue not only that it did not engage in the conduct alleged to be unlawful but also

that the Commission's prior determinations concerning the illegality of such conduct were wrong. */

The Commission's authority under Section 5(m)(1)(B) has proven to be an extremely effective and efficient way to enforce the law. Perhaps the best recent example of its use involved 67 companies, primarily sellers of new homes, which received letters and synopses in 1979 concerning the deceptive advertising of interest rates. Given the volatile state of the housing market, accurate interest rate information has become perhaps the most important single factor affecting consumers' search for a home. The Commission became concerned about possible deceptive advertising in this area after receiving several complaints from homebuilders alleging that their competitors were advertising artificially deflated rates in an effort to attract customers who would not discover the true rate until the transaction was well advanced.

After giving the 67 companies several months to come into compliance with the law, and offering to advise them informally concerning their compliance obligations, the Commission was able to close its investigations of 55 companies, or over 85 per cent of those who received synopses. We signed consent agreements with the remaining 12 companies, securing a total of \$488,000 in penalties, all of which were subsequently approved by the federal district court. Apart from the high level of voluntary

*/ U.S. v. Braswell, Inc., No. C81-558A (N.D. Ga, 1981), reported at CCH Trade Cases ¶64,325 (1981).

compliance achieved quickly and at a low cost through this program, I think it is noteworthy that the problem was identified in the first place by competitors' complaints about unlawful business practices. Repeal of Section 5(m)(1)(B) would inhibit the Commission's ability to protect not only consumers, but also honest business from unfair or deceptive trade practices.

Redefinition of Deception

Three different proposals to define by statute the Federal Trade Commission's jurisdiction over deceptive trade practices have been advanced in recent weeks. The first, contained in S.1984, which was introduced by Senators McClure and Melcher, and the second, suggested by the Chamber of Commerce and the National Association of Manufacturers, would require application of cost/benefit analyses to cases challenging deceptive practices. The third, suggested by Chairman Miller, would (1) require a finding that the challenged act or practice was "material" as that term is understood in the common law; (2) exempt statements of opinion; and (3) limit deception to situations where "reasonable" consumers are likely to be deceived, except in cases where vulnerable groups of consumers are involved and the company knew or should have known a practice was deceptive.

I cannot agree that the Commission's deception authority should be redefined. I am unaware of any sustained criticism of the Commission's use of its deception jurisdiction by the business community. Those who must live with the standards of

conduct the agency has developed over the years appear to understand pretty clearly both the law's parameters and the agency's procedures in enforcing it. But beyond the observation that the system seems to be working for all concerned, I believe considerable legal mischief would ensue should any change be made, no matter its purpose or intent. Prevention of deceptive practices would inevitably be made more difficult, time-consuming and costly at a time when shrinking budgets demand just the opposite result.

To understand the potential impact of each of the three proposals to redefine deception, it is necessary to analyze critically what such changes would mean to 44 years of precedent defining the agency's and the states' authority to proscribe deceptive practices and therefore how the proposals would affect future federal and state enforcement in this area.

I emphasize state enforcement because one important aspect of any revision to Section 5 which is all too often overlooked is the impact it would have on state law enforcement. Any changes to Section 5 of the Federal Trade Commission Act would also change the law in many states which have adopted "little FTC Acts" modeled on the federal law. Forty-nine states and the District of Columbia have enacted statutes more or less like the FTC's to prevent deceptive and unfair trade practices. In many of the states, these "little FTC Acts" track the FTC Act's exact language, and several states either by statute or court decision also provide that Commission cases shall be used in

interpreting the scope of state law. */ It is clear, then, that the states would be bound by any limitation of the FTC's authority to police deceptive practices, and to the degree that confusion and uncertainty over the scope of our jurisdiction followed such a change, the same confusion and uncertainty would also be introduced into state enforcement activities. I have attached to this testimony a recent resolution adopted unanimously by the Executive Committee of the National Association of Attorneys General which opposes proposed amendments to Section 5's prohibition on unfair or deceptive acts or practices because of their potential impact on state law.

The above noted, as I believe it must be, I do not see the need for any change in Section 5's deception standard.

The FTC Act has prohibited "deceptive acts or practices" since 1938, and during the intervening 44 years there have been hundreds of administrative and judicial decisions construing that term. Even before the 1938 Wheeler Lea Amendments added jurisdiction over deceptive practices to the FTC Act, a large body of common law had developed the concept of false, deceptive or misleading trade practices. Since 1938, cases brought under the UCC and other state laws have continued to amplify on these

*/ See, e.g., statutes in Illinois, Ill. Ann. Stats. ch. 121 - 1/2 §262 (Smith-Hurd 1960 & Supp. 1981); Washington, Wash. Rev. Code Ann. §19.86.020, .920 (1978 & Supp. 1981); Massachusetts, Mass. Gen. Laws Ann. Ch. 93A §2 (West 1972 & Supp. 1981); Maryland, Md. Com. Law Code Ann. §§13-105, 13-301, 13-303 (1975 & Supp. 1981); Maine, Me. Rev. Stat. Ann. title 5 §207 (1979 & Supp. 1981); and New York, N.Y. Gen. Bus. Law §349 (McKinney Supp. 1981).

concepts and on the principle that fraud in the inducement of a contract, through misleading representations or material omissions of fact, is illegal.

A large body of case law has developed in this way, and there is little evidence that I am aware of that the authority to prohibit deceptive practices has been used by the FTC, (or the states or private litigants for that matter) in a manner that has consistently injured consumers or businesses--except, of course, for those businesses that have engaged in deceptive practices. Without some substantial indication of what types of worthwhile business practices are supposedly being stifled by the application of the current statutory definition, Congress is being asked to remedy a "problem" which cannot be demonstrated to exist.

It is no trivial matter to alter 44 years of jurisprudence. If the prohibition on "deceptive practices" is altered, no matter how benign the intentions of those making the change, the natural assumption of the legal community, including state and federal judges, will be that Congress intended to change the actual effect of the law. The inevitable result will be that at least some deceptive practices which are now illegal under current law will become legal, as judges and lawyers are cast adrift from precedent to search for the new law's meaning. Only one thing is certain -- any change will be a bonanza for lawyers. With 44 years of legal doctrine tossed out the window, every new FTC case will have to be decided without the benefit of established precedent.

The first step then for lawyers representing a company that has been sued by the FTC for engaging in "deceptive practices", no matter how blatant the client's practices, would be to ask the agency or the federal courts to reconsider the action, and determine first whether the lawsuit could be justified under the new statutory standard. Added litigation and delay in the work of the Commission and the courts is virtually certain. Further, any change could cast into doubt the validity of hundreds of cease and desist orders issued in accordance with past precedent. It is fully predictable that the agency would be flooded with requests to reopen and reconsider all orders issued over the past four decades. This kind of administrative nightmare could also occur on the state level, particularly in states which pattern enforcement on FTC precedent.

Let me turn now to an analysis of the possible ramifications of the proposals which have been advanced thusfar. The bill introduced by Senators McClure and Melcher, S.1984, would require a showing that a deceptive act or practice "causes substantial consumer injury that outweighs the benefits derived from such act." The Chamber of Commerce and NAM have proposed to amend Section 5 to prohibit "...deceptive acts or practices... where such acts or practices directly cause or may foreseeably result in substantial injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor

outweighed by countervailing benefits to consumers or competition...". */

These proposals appear similar in intent--i.e. to apply a requirement that the Commission find costs outweigh benefits before prohibiting deception under Section 5. However, since the Chamber and NAM have discussed in some detail how they intend such a provision to operate, I will focus my comments on their proposals. I would note, though, that the kind of approach taken in S.1984 could easily pose the same problems for future Section 5 enforcement that I identify below.

The Chamber of Commerce and NAM have charged that in applying its authority to proscribe deceptive acts or practices, the Commission has ignored the "requirement" intended by the Congress that it prove consumers suffered "actual injury" as a result of the deceptive practice. The Chamber and NAM explain that proof

*/ The Commission itself, in December, 1980, formulated the "substantial injury/not reasonably avoidable/not outweighed by countervailing benefits" standards in explaining the exercise of its authority to proscribe unfair trade practices. */ These standards were derived from an analysis of all prior unfairness cases. That analysis took several months and involved a painstaking effort both to describe the development of unfairness doctrine and distinguish it from the development of deception doctrine. Any effort to apply the unfairness standards to the Commission's deception authority ignores the separate development of these two doctrines and would be done without the benefit of a responsible analysis of how the deception doctrine has evolved over 44 years in both federal and state caselaw. (See Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). See also the Commission's opinion in the matter of Horizon Corporation, Docket No. 9017, Slip op. at 62 (May 15, 1981), which incorporated the standards stated in the letter.)

of "actual injury" means proof that consumers would have made a different purchasing decision but for the deceptive misrepresentation. They have criticized a long line of Commission cases, upheld by several federal circuit courts, which stand for the principle that the Commission need not probe the minds of all those who heard the deceptive statement to determine whether they would have bought the product without it; rather, the Commission need only show that the statement has the "tendency and capacity to deceive" consumers. Their proposal appears to be clearly designed to reverse this doctrine and to require instead that the Commission prove a direct causal link between the deceptive representation and substantial, "actual" consumer injury.

The Chamber asserts that its proposal would not impair the Commission's ability to condemn and prevent "actual" deception. It says that falsehoods and "intentionally misleading" representations have no proper place in a well-functioning free market and that "by their very nature" such "fraudulent" behavior is "intended to inflict and does inflict substantial injury on consumers." Because such conduct "has no redeeming virtue and cannot reasonably be avoided," Commission enforcement actions against such acts or practices could continue under the Chamber/NAM proposal. */

*/ Statement of the Chamber of Commerce (at page 28) before the Subcommittee on the Consumer of the Commerce, Science and Transportation Committee, United States Senate (March 19, 1982).

Despite the Chamber's contention that law enforcement efforts against "actual" deception could continue uninterrupted, it is clear that both the Chamber and NAM intend their proposal to change dramatically the burden of proof the Commission must assume to prove even a false (much less a misleading, or unsubstantiated) advertising case:

[The proposal] would require the Commission to take questionable consumer practice one step beyond the intuitive finding that conduct may potentially or even actually result in consumer injury. The Commission would be required to show, on the record, that the actual injury at issue could reasonably have been foreseen. Thus, the Commission must clearly prove that enough information exists by which the Commission can draw the conclusion that absent federal intervention injury is not only likely to occur, but is foreseeable under the circumstances. (emphasis added) */

Perhaps the most helpful way to illustrate how the Chamber/NAM proposal could operate in practice is to review how it would change the prosecution of one of the Commission's best-known false advertising cases -- the case involving Listerine mouthwash. **/

That case challenged the claim that Listerine could "cure" or "prevent" colds, which was one of several claims included in a typical advertisement for the product. The Commission proved to the satisfaction of the circuit court of appeals that there probably is no "cure" for the common cold and that, in any event,

*/ Statement of James F. Carty on Behalf of the National Association of Manufacturers (at page 9) before the Subcommittee on the Consumer of the Committee on Commerce, Science, and Transportation, United States Senate (March 18, 1982).

**/ Warner-Lambert Company v. FTC, 562 F.2d 749 (D.C. Cir., 1977).

Listerine certainly was not such a cure. Satisfied by this fundamental finding of false advertising, the court upheld the Commission's order barring future misrepresentations and requiring corrective advertising to reverse the general misimpression in the minds the American public that gargling with Listerine every morning would prevent colds and sore throats.

Under the Chamber/NAM proposal, future Listerine cases could not be considered in nearly such a straightforward manner. In fact, as I read the proposal, the Commission could be forced to jump through the following procedural hoops in order to find the same violation of Section 5:

First, we would have to conduct a statistically valid survey to prove that a substantial number of the consumers who bought the mouthwash after seeing the ad did so because they thought it would cure colds and not for any other reason. It would not be enough for us to draw the common sense inference that this central claim probably caused consumers to purchase the product; instead, we would have to prove a direct causal link between the claim and their behavior.

Second, once we had proven that a substantial number of people bought the product only because they thought it would cure colds, we would then have to explore whether consumers could have avoided any injury caused by their purchase of the product. Could they, and if so, how long would it take for them to discover that repeated applications of the mouthwash did not dispose of their colds?

Once we had assembled empirical evidence to show that consumers could not discover Listerine's failings for themselves -- by proving through expert testimony, for example, that all colds go away sooner or later anyway and so it is hard to tell whether time or mouthwash "cures" them -- we would then have to explore exactly what kind of injury consumers suffered when they bought the product. Did they pay more for Listerine? Even if they did, could the Listerine have helped ease their cold symptoms more than other products and was the additional relief worth the extra money? What was the alternative to Listerine? Another, cheaper mouthwash which was not as good? Or no mouthwash at all? What are the health or cosmetic benefits of using a mouthwash? What if consumers hadn't bought Listerine or any other mouthwash but instead had realized they needed to buy a completely different kind of symptom reliever? Would those other products have been effective? Answers to all these questions could be necessary to demonstrate and quantify the "actual" injury caused by the concededly false advertisement.

Finally, under the Chamber/NAM proposal we would have to show that this injury was "reasonably foreseeable" by Listerine. In the original case, the company had some inadequate studies showing that Listerine might help ease the symptoms of a cold. Would these studies immunize its false advertising from an FTC "cease and desist" order? Why should intent be an element of proof when the remedy for the practice is not criminal but merely a prospective order prohibiting its repetition?

The preparation of the kind of case I have outlined above would be very costly not only for the Commission but also for the respondent company. The higher the FTC's burden of proof, the more information we would have to obtain by compulsory process from the target of an investigation. We would undoubtedly bring far fewer cases, but the targets of those we did bring might soon wish the definition of deception had never been changed.

In addition to severely complicating the prosecution of a straight falsity case, the revised standards of proof could also have the effect of eliminating the Commission's advertising substantiation program because it might be almost impossible for us to establish a casual link between the lack of substantiation and consumer behavior. The purpose of the ad substantiation program is to encourage advertisers to have support for the claims they make before disseminating commercial messages. Under the Chamber/NAM proposal, we might have to prove that had consumers known a specific claim could not be substantiated, they would have changed their purchasing behavior. We might also have to prove that the claim was in fact false since otherwise it would probably be argued that consumers suffered no injury from relying on it.

In sum, the Chamber of Commerce and NAM proposal could require the Commission and the states to carry a well-nigh impossible burden of proof by having to demonstrate that the majority of those exposed to a deceptive claim would have made

a different purchasing decision but for the deception. */ The proposal would appear to threaten the Commission's advertising substantiation program, which is the basis for an extensive network of industry self-regulatory mechanisms. At the same time, it would cast doubt on 44 years of precedent and cripple the Commission's efforts to exercise its authority to proscribe deceptive acts or practices for many years to come.

Chairman Miller has proposed to redefine deception by incorporating a "materiality" element, exempting statements of opinion and limiting the agency's jurisdiction to practices which would deceive only "reasonable" consumers, except in those cases involving practices aimed at vulnerable groups where the Commission could show the company "knew or should have known" the practice was deceptive.

It is my understanding that a "material" misrepresentation, under the common law, is a misrepresentation on which consumers are likely to rely in making a marketplace decision. The Commission and the federal courts have already construed Section 5 to apply only to "material" misrepresentations. **/ However, the Courts have recognized that the Commission may reasonably infer that a deceptive statement would materially affect consumers' marketplace decisions without requiring the Commission to

*/ In the case of advertising in the mass media, the Commission would presumably have to track down not only all those who saw the ad, but also all those who subsequently bought the product.

**/ FTC v. Colgate-Palmolive, 380 U.S. 374, 392 (1965).

conduct an expensive survey of actual consumer behavior. If addition of an express "materiality" standard to the FTC Act would mean imposing this type of proof requirement before the Commission can prohibit a demonstrably deceptive statement, the Commission will find it prohibitively expensive to pursue many cases of false advertising in the marketplace for the same reasons noted in my comments on the Chamber/NAM proposal. If the Chairman's change is not designed to eliminate the Commission's authority to infer materiality, then the change is unnecessary. Unfortunately, however, courts do not assume that Congress legislates without effect, and so any change is likely to invite litigants and judges to read in the proof requirement noted above.

As for the second change, limiting deception to statements of "fact," not "opinion," I would observe that existing law already makes that distinction to the extent it is desirable, and the proposed modification is likely at best to sow confusion and at worst to provide a refuge for future false advertising.

Courts have long recognized that "mere puffery" is not actionable by the FTC. If a claim is not objectively verifiable, and is by its nature a matter of opinion, an advertiser cannot be sued for making it. For example, the statement "our cookies taste best" is clearly puffery. On the other hand, the statement "you can earn \$100,000 a year as our franchisee" is a statement that can be verified by experience and supported by analysis, and an advertiser will be held liable for its accuracy and supportability.

Explicitly limiting the ban on "deception" to statements of "fact" invites unscrupulous advertisers to dress up misleading statements in the guise of opinion, in order to take advantage of the express exemption granted opinion statements. */

The third proposed change would inject a requirement that consumers behave "reasonably" before they are entitled to protection by the FTC. For vulnerable groups like children or the elderly, who presumably are not capable of behaving "reasonably", the Commission would have to show that a company "knew or should have known" the practice was deceptive.

As the law now stands it protects against any claims likely to deceive a substantial number of citizens. No inquiry is required to determine whether the conduct of those fooled meets some undefined standard of "reasonableness." In practice, of course, the Commission would not pursue a case involving conduct that would be likely only to fool someone behaving capriciously. The difficulty with the proposed change is that it could be read as a direct repudiation of the existing judicial standard, which was designed to protect the average consumer from deception.

*/ If the Chairman's standard is meant to turn on "substance" rather than "form" (i.e. whether consumers actually understand a statement of opinion as a statement of fact, regardless of whether the word "opinion" is used), then the standard will add nothing to existing law except confusion and litigation as lawyers and judges struggle to determine just what change the new provision is intended to effect. For an example of existing law that already draws this distinction, see Koch v. FTC, 206 F. 2d 311 (6th Cir., 1953).

Take, for example, the following quotation from a 1942 case involving the sale of a product called "Triple X Compound", which had been advertised as a cure for delayed menstruation in women. The product was both ineffective and dangerous. The advertiser argued that its artfully worded advertisements did not literally claim the product would be effective and that consumers (especially reasonable ones, presumably) should have understood the literal meaning of the ad. In rejecting this argument, the seventh circuit Court of Appeals wrote:

"The law is not made for experts but to protect the public--that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions....Advertisements are intended not "to be carefully dissected with a dictionary at hand, but rather to produce an impression upon prospective purchasers." Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

Would this case be overruled by a reasonableness requirement? Perhaps that is not the intent of the proposal but it is by no means certain what kinds of consumer behavior could be labeled "unreasonable" by the courts. To cite just a couple of examples: is it "reasonable" to buy undeveloped land sight unseen? Tens of thousands of consumers have done so and, where the Commission found the sales pitch they were given was deceptive, we have obtained redress for them. Is it reasonable to permit yourself to be baited and switched to a more expensive product than you came to the store to buy? You are always free to leave the store and I can easily envision a court holding that "reasonable" consumers would have avoided being deceived by this practice which is routinely held to be deceptive.

As for the suggestion that the Commission prove that a company "knew or should have known" a practice affecting "vulnerable" groups was deceptive, I believe that an intent standard is certainly reasonable in a law that imposes monetary fines on an individual, and that standard already applies in the FTC Act where penalties are permitted. */ But the FTC Act is also remedial. It is designed to protect consumers from false advertising and other deceptive practices, not to punish business. The only relevant question in determining whether to challenge a practice should be whether the practice is deceptive, not whether the person engaged in it knows it is.

If a company is engaged in a campaign of false advertising, and this can be proven, it should not also be necessary for the government to show that the company should have known its advertising was false before the false ads can be halted. A businessperson's intent does not mitigate injury to customers and competitors caused by false advertising. Further, the knowledge standard could be read to mean that a businessperson could only know that his or her practices were deceptive if they had been challenged in some other context before. Thus, the change could have the effect of introducing an actual notice requirement into the law, thereby virtually freezing the development of consumer protection at the date of its enactment. Ironically, the adoption of this standard would make it more, rather than less difficult for the Commission to protect vulnerable groups.

*/ See 15 U.S.C. §45(m) (1) (B).

In closing, I would note that in developing his proposal, the Chairman has identified several past Commission cases which he believes were serious mistakes and which he believes could not be brought under a weakened test for deception. In one of the cases the Chairman cites (Kroger, Docket No. 9012), I dissented from the majority's finding of liability and discussed at some length why I thought the Commission's interpretation of the advertisement as deceptive was misguided. And while that is true and remains my opinion of that case, I do not believe that that dissent, nor any of the other cases cited by the Chairman, supports a modification of the deception standard for several reasons:

First, it makes no sense to me to jeopardize the results of hundreds of good and sensible cases in order to preclude a handful of ill-chosen ones about which business men and women have no serious concern. Second, the proponents of a weakened deception standard have given absolutely no indication at all of just how their various new standards would operate to eliminate the ill-chosen cases and at the same time enable the pursuit of meritorious cases without making prosecution of such "good" cases excessively burdensome, time-consuming and expensive. For example, if the new standard would operate to prevent one of the allegedly ill-chosen cases by requiring the Commission to produce a survey to prove that consumers relied on a false claim, instead of being able to infer reliance as it now does, then it is fully

predictable that courts will similarly read the new standard to require a survey in a strong, meritorious case. While the Commission would theoretically be able to obtain such a survey in a strong case, it has not sought to do so in many cases involving blatantly false claims -- including some brought by unanimous consent of the Commission within the past five months -- both because such evidence is not required under current law and because of the substantial time and expense involved.

Undoubtedly the Commission has on occasion brought ill-advised cases, just as other prosecutorial bodies have. But the solution for that problem lies in the exercise of better prosecutorial discretion, not in weakening the law in a way that threatens to make the large majority of justifiable cases much more expensive and difficult to bring. A law should be changed where there is a serious abuse that can be remedied, and the costs do not outweigh the benefits. In this instance, the proponents of a change in the deception standard have not pointed to any serious abuse, nor do I believe they have thought through the consequences of their proposals on the vast majority of the agency's cases. This is in part, no doubt, because those consequences are, in all honesty, impossible to predict.

I do not believe that most honest businessmen and women have any interest in weakening the laws that prevent deceptive commercial practices. The proposed change, while accomplishing no significant benefit, will enormously complicate, lengthen, and make more expensive the task of FTC attorneys who must endeavor on dwindling resources to prevent deceptive practices. Especially at a time when we have pledged to deliver to the public more value for less money, I must take strong issue with a legislative proposal that will almost certainly effect the opposite result.

**NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
EXECUTIVE COMMITTEE MEETING
March 28 - 30, 1982
Washington, D. C.**

FTC AUTHORIZATION

Whereas, the Congress is considering amendments to Section 5(a) of the Federal Trade Commission Act, which would change the FTC's jurisdiction over deceptive or unfair acts or practices; and

Whereas, such amendments include the codification of cost-benefit analysis, which is an appropriate policy making tool in the development of unfairness cases but is unnecessarily restrictive as the standard to be used in all cases; and various restrictive and unwarranted changes in the definition of deception; and

Whereas, an amendment providing an exemption for commercial speech beyond the First Amendment exemption is unnecessary in light of the existence of a well developed body of case law that has already resolved this issue; and

Whereas, consumer protection statutes of 33 states mirror the FTC's bar against "unfair or deceptive acts or practices," and 13 others declare deceptive practices to be unlawful; (see attached table); and

Whereas, 20 state statutes explicitly say state courts should follow Commission and federal court interpretations of the FTC Act and where statutes don't contain this explicit directive, most state courts have interpreted state statutes consistently with the FTC Act; and

Whereas, if the FTC Act is changed, it may moot case law already developed in the states and further, will throw the state consumer protection statutes into a period of great uncertainty; and

Whereas, these changes have been proposed without consultation with state officials;

Now therefore be it resolved that the National Association of Attorneys General :

1. Opposes any amendments to Section 5(a) of the FTC Act that would circumscribe the scope of consumer protection statutes at the state level and would undermine the ability of states to protect their citizens; and
2. Urges the Congress that if it wishes to amend the FTC Act in such a way that will impact on state law, these changes should be subject to extensive study and consultation with state governors, legislators, and Attorneys General prior to enactment.
3. Authorizes its General Counsel to transmit these views to the appropriate members of the Administration and Congress.

Approved unanimously by
The Executive Committee

TABLE OF STATE STATUTES
(State Deceptive Practices Acts)

<u>Jurisdiction</u>	<u>Statutory Cite (et seq.)</u>	<u>Unfair or Deceptive Practices</u>	<u>Deceptive Practices Only</u>	<u>Private Actions</u>
Alabama	Ala. Code Title 8 §19-1			
Alaska	Alaska Stat. §45.50.471		X	X
Arizona	Ariz. Rev. State §44-1521		X	
Arkansas	Ark. Stat. Ann. §70-901		X	
California	Cal. Civ. Code §3369 (Deering); Cal. Bus. & Prof. Code §17500 (Deering)	X	X	X
Colorado	Colo. Rev. Stat. §6-1-102		X	X
Connecticut	Conn. Gen. Stat. §42-110			X
Delaware	Del. Cod tit. 6, §25	X		
District of Columbia	D.C. Code tit. 28 App. §1	X	X	X
Florida	Fla. Stat. §501.201			X
Georgia	Ga. Code §106.1201	X	X	X
Hawaii	Haw. Rev. Stat. §481A			X
Idaho	Idaho Code §48-601		X	X
Illinois	Ill. Rev. Stat. ch.121 1/2, §261			X
Indiana	Ind. Code §24-5-0.5		X	X
Iowa	Iowa Code §713-24		X	
Kansas	Kan. Stat. §50-623		X	X
Kentucky	Ky. Rev. Stat. §367.110	X		X

<u>Jurisdiction</u>	<u>Statutory Cite (et seq.)</u>	<u>Unfair or Deceptive Practices</u>	<u>Deceptive Practices Only</u>	<u>Private Actions</u>
Louisiana	La. Rev. Stat. Ann. §51:1401 (West)			X
Maine	Me. Rev. Stat. tit. 5, §206			X
Maryland	Md. Com. Law Ann. §13-101	X	X	X
Massachusetts	Mass. Gen. Laws Ann. ch. 93A			X
Michigan	Mich. Comp. Laws §445.901	X	X	X
Minnesota	Minn. Stat. Ann. §325.771 (West)		X	X
Mississippi	Miss. Code Ann. §75-24-1		X	X
Missouri	Mo. Ann. Stat. §407.010		X	X
Montana	Mont. Rev. Codes Ann. §85-401			X
Nebraska	Neb. Rev. Stat. §59-1601			X
Nevada	Nev. Rev. Stat. §598-360		X	
New Hampshire	N.H. Rev. Stat. Ann. §358-A:1		X	X
New Jersey	N.J. Stat. Ann. §56:8-1 (West)		X	X
New Mexico	N.M. Stat. Ann. §49-15-1	X	X	X
New York	N.Y. Gen. Bus. Law §349 (McKinney)		X	
North Carolina	N.C. Gen. Stat. §75-1			X
North Dakota	N.D. Cent. Code §51-15-01		X	
Ohio	Ohio Rev. Code Ann. §1345.01 (Page)	X	X	X
Oklahoma	Okla. Stat. Ann. tit. 15, §751 (West)		X	
Oregon	Or. Rev. Stat. §646.605	X	X	X

<u>Jurisdiction</u>	<u>Statutory Cite (et seq.)</u>	<u>Unfair or Deceptive Practices</u>	<u>Deceptive Practices Only</u>	<u>Private Actions</u>
Pennsylvania	Pa. Stat. Ann. tit. 73, §201-1 (Purdon)		X	X
Rhode Island	R.I. Gen. Laws §6-13.1-1		X	X
South Carolina	S.C. Code §39-5-10			X
South Dakota	S.D. Compiled Laws Ann. §37-24-1		X	X
Tennessee	Tenn. Code Ann. tit. 47-18	X	X	X
Texas	Tex. Bus. & Comm. Code Ann. tit. 2, §17.41 (Vernon)		X	X
Utah	Utah Code Ann. §13-11-1		X	X
Vermont	Vt. Stat. Ann. tit. 9, §2451(a)			X
Virginia	Va. Code §59.1-196		X	X
Washington	Wash. Rev. Code §19.86.010			X
West Virginia	W.Va. Code §46A-6-101		X	X
Wisconsin	Wis. Stat. Ann. §100.20			X
Wyoming	Wyo. Stat. §40-102		X	X