

IN THE MATTER OF
BRISTOL-MYERS COMPANY, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8917. Complaint, Feb. 23, 1973—Final Order, July 5, 1983

This order requires a New York City manufacturer of nonprescription drug products, among other things, to cease advertising that "Bufferin," "Excedrin," "Excedrin PM" or any other nonprescription internal analgesic has been proven to be safer and more effective than other pain relieving products, unless such claim has been substantiated by two well-controlled clinical tests. The manufacturer must have a reasonable basis to support claims of freedom from side effects, or any claim which represents that its pain relievers are therapeutically superior to others. The order prohibits respondents from advertising that its products contain any unusual or special ingredient, when in fact such ingredient is commonly used in similar products; or from making any claim which misrepresents the identity of a product's analgesic ingredient. The manufacturer and the Ted Bates ad agency are further barred from claiming that doctors recommend Bufferin more often than any other pain reliever, or from otherwise falsely claiming any endorsement or recommendation for their products.

Appearances

For the Commission: *W. Benjamin Fisherow, Ira Nerken, Leslie R. Fax, Randell Ogg, James H. Skiles, Melvin Orlans and Teresa Hennessy.*

For the respondents: *Gilbert H. Weil, Gerald Guttman, Bruce R. Hafner and Lydia C. Russo, Weil, Guttman & Davis, New York City, for respondent Bristol-Myers Company. Gerald J. Brown and Donald Mulvihill, Cahill, Gordon, Sonnett, Reindel & Ohl, Washington, D.C. and Elhanan C. Stone, in-house counsel, for respondent Ted Bates and Company. Sidney S. Rosdeitcher and Ronald W. Meister, Paul, Weiss, Rifkind, Wharton & Garrison, Washington, D.C., for respondent Young & Rubicam, Inc.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bristol-Myers Company, a corporation, and Ted Bates & Company, Inc., a corporation, and Young & Rubicam, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing

to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

1. *Commerce* means commerce as defined in the Federal Trade Commission Act.

2. *False advertisement* means false advertisement as defined in the Federal Trade Commission Act.

PAR. 2. Respondent Bristol-Myers Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 345 Park Avenue, New York, New York.

Respondent Ted Bates & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1515 Broadway, New York, New York. [2]

Respondent Young & Rubicam, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 285 Madison Avenue, New York, New York.

PAR. 3. Respondent Bristol-Myers Co., is now and for some time last past has been engaged in the manufacturing, advertising, offering for sale, sale and distribution of certain non-prescription internal analgesic preparations which come within the classification of "drug", as said term is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparations, the active ingredients thereof, and directions for use are as follows:

1. *Designation:* Bufferin

Active Ingredients:

Acetylsalicylic Acid
Aluminum Dihydroxyaminoacetate
Magnesium Carbonate

Directions for Use:

DOSAGE: 1-2 tablets, 1-6 times daily as needed. For children 5-12, one-half dose.

2. *Designation:* Excedrin

Active Ingredients:

Acetylsalicylic Acid

Salicylamide
Acetaminophen
Caffeine

Directions for Use:

Adults, two tablets with water. Repeat if necessary every four hours or follow directions of your physician. Dosage should not exceed 8 tablets per day. For children (6-12) use half the adult dosage.

Designation: Excedrin PM

Active Ingredients:

Acetylsalicylic Acid
Salicylamide
Acetaminophen
Methapyrilene Fumarate [3]

Directions for Use:

For best results take 2 tablets at bedtime to help relieve pain and aid sleep. May be repeated once, after 4 hours. For children (6-12) use half the adult dosage.

Respondent Ted Bates & Co., Inc., is now, and for some time last past has been, an advertising agency of Bristol-Myers Co., and now and for some time last past, has prepared and placed for publication and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of Bufferin.

Respondent Young & Rubicam, Inc., is now, and for some time last past has been, an advertising agency of Bristol-Myers Co., and now and for some time last past, has prepared and placed for publication and has caused the dissemination of advertising referred to herein, to promote the sale of Excedrin and Excedrin PM.

PAR. 4. In the course and conduct of its aforesaid business respondent Bristol-Myers Co. causes the said drugs, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent Bristol-Myers Co. maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce. The volume of business in such commerce has been and is substantial.

PAR. 5. In the course and conduct of their said businesses, respondents Bristol-Myers Co., Ted Bates & Co., and Young & Rubicam, Inc.,

have disseminated, and caused the dissemination of, certain advertisements concerning the said drugs by the United States mail and by various means in commerce, including but not limited to, advertisements inserted in magazines and newspapers, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drugs, and have disseminated, and caused the dissemination of, advertisements concerning said drugs by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drugs in commerce.

PAR. 6. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following: [4]

A. By respondents Bristol-Myers and Ted Bates, for Bufferin:

1) The television commercial entitled "Solarization" opens with a surrealistic depiction of two women's bodies. One woman's stomach contains a tablet marked "A", and the other's, a tablet marked "B". In the illustration, the tablet marked "B" disintegrates more quickly than the other, and the disintegrated particles move more quickly to the head.

ANNOUNCER: What happens inside your system to plain aspirin and Bufferin? This illustrates most of Bufferin—with its extra speed is already going to your headache, when most of plain aspirin is still in your stomach. So with Bufferin, there's less to upset your stomach, when there's more pain reliever going to your headache. Bufferin—Faster to your headache. Better for your stomach.

2) The television commercial entitled "Camping" shows a family at a rustic camp site. The father does not appear to feel well as his children ask him to fix something and to take them into the canoe. A Bufferin bottle is shown, and the commercial then depicts a wrist watch cut in half to illustrate the statement that Bufferin goes to work in half the time. After taking Bufferin, the father again is shown with his children, returning from a fishing trip in the canoe. Instead of appearing to have a headache, he is happy and smiling.

GIRL: Daddy, breakfast's ready.

BOY: Hey, Dad, will you fix this for me? It got all tangled up.

GIRL: Daddy, when are you going to take me out in the canoe?

ANNOUNCER: What a time for a headache. You could take aspirin. But Bufferin goes to work in half the time. Half the time. Why? Because in the first critical minutes,

Bufferin speeds its pain reliever to your headache twice as fast as simple aspirin. So Bufferin goes to work in half the time. Half the time—that's Bufferin's time.

3) The television commercial entitled "Changing Face-Revised" opens showing a woman's face. At first, she is shown in the film negative and appears to have a painful headache. Gradually, the negative portions of the film disappear, and the woman begins to smile, her headache obviously gone. [5]

ANNOUNCER: Headache, every second can be a painful throb. Bufferin can change that fast, Bufferin goes to work fastest of the three leading headache tablets. Its pain reliever starts to your headache in just sixty seconds. Minutes later, relief without the stomach upset plain aspirin can cause. Of all leading brands you can buy, doctors specify Bufferin most. Faster, gentler, Bufferin.

4) The television commercial entitled "Arthritis/Applause" opens showing a grandmother with her grandchild at a concert. At the end of one musical piece, they begin clapping. However, the grandmother obviously finds clapping to be very painful because of arthritis in her hands. She takes two Bufferin tablets, and then is shown clapping with apparently no discomfort or pain.

GIRL: Didn't you like it, Grandma?

ARTHRITIC: I loved it, dear.

ANNOUNCER: Arthritis can do this. Its minor pain and stiffness can take a lot of enthusiasm out of hands, fingers. Take Bufferin. Doctors specify Bufferin for minor pain more than any leading brand of pain reliever you can buy. Tests published in medical journals show that in the first critical minutes, Bufferin delivers twice as much pain reliever as simple aspirin. Twice as much. Bufferin brings fast relief. Hours of relief from arthritis' minor pain and stiffness, so arthritic hands and fingers regain flexibility. And Bufferin can prevent the stomach upset aspirin often causes arthritic sufferers. For relief of arthritis' minor pain and stiffness, rely on Bufferin.

5) The television commercial entitled "College Professor" opens in a book-lined office, as a college professor is having a confrontation with a student militant. The student makes demands and the professor arranges a meeting for later in the day. The professor, who appears upset and emotionally involved in the situation, then takes two Bufferin tablets. He appears to become more relaxed.

STUDENT: Why don't you listen to us? This college has got to change.

PROFESSOR: Agreed.

STUDENT: But not your way.

PROFESSOR: All right. I've read it, Greg. Now can we keep our cool and all get together here at six?

STUDENT: Okay.

ANNOUNCER: Often, people who are sensitive to others can be more sensitive to headache pain. Bufferin is for these people. It's strong medicine that treats you gently.

Plain aspirin's fine, but Bufferin goes to work much faster, yet is gentler to your stomach. Because tough problems are tougher on sensitive people, we believe the strong medicine you need should treat you gently. Faster, gentler Bufferin. Strong medicine for sensitive people. [6]

6) The television commercial entitled "New Housing" opens with a government relocation official preparing to inform an elderly couple that their apartment building has been condemned and that they must move. He appears to be emotionally upset at the prospect of informing the tenants. In anticipation, he takes two Bufferin tablets. He then appears calmer and is shown smiling and telling the aged couple about their new home.

ANNOUNCER: What you have to tell them isn't easy. Not for you. Often, people who are sensitive to others, can be more sensitive to headache pain. They want all the help they can get as quickly as possible. Bufferin is for these people. It's better than plain aspirin because most of Bufferin has already started working at your headache when most of aspirin is still in your stomach.

MAN: That's the way it is. So you'll have to be out by Thursday.

OLD MAN: You know, our kids were born right here.

MAN: Wait'll they see your new place.

ANNOUNCER: Bufferin. For sensitive people. It's much better than plain aspirin.

7) The television commercial entitled "Father/Son" shows a father, mother and teenage son standing in a wooded area. The father shoots a rifle at a target and then offers the rifle to his son. The son states that he does not want it and walks away. The father appears angry and abruptly turns and fires the rifle. The mother tries to calm him by stating that the son does not believe he can shoot as well as the father. The scene then shifts inside the house where the son is shown looking out the window at his father, while the mother takes two Bufferin tablets. She then appears more calm and is shown moving towards her son, obviously attempting to console him.

FATHER: Go ahead, Son. Try it.

SON: I don't want to, Dad.

FATHER: I bought it for you. It's expensive. Now look.

MOTHER: You're such a good shot. He'll just feel inferior.

ANNOUNCER: Often, people who are sensitive to others can be more sensitive to headache pain. Bufferin is for these people. It's strong medicine that treats you gently. Plain aspirin's fine, but Bufferin goes to work much faster—yet is actually gentler to your stomach. We believe the strong medicine you need should treat you gently. Faster, gentler Bufferin. Strong medicine for sensitive people.

B. By respondents Bristol-Myers and Young & Rubicam, for Excedrin:

1) The television commercial "First Baby" shows a man sleeping in

bed. His pregnant wife wakes him and informs him that she is about to have the baby. He appears very nervous and [7] excited and has trouble finding his clothes and shoes. Finally, half dressed, he rushes out what he believes to be the front door, but which is really a closet, leaving his wife still in the house. The commercial then depicts the chemical formulae, but not the names, of Excedrin's four ingredients. One ingredient is described as giving "quick relief", one as giving "long lasting" relief, one as a tension reliever, and one as an anti-depressant.

ANNOUNCER: Excedrin headache Number 27. The first baby.

WOMAN: Honey, wake up.

MAN: I'm awake.

WOMAN: Let's go to the hospital.

MAN: You're going—

WOMAN: I'm ready.

MAN: You're going to have the baby?

WOMAN: Right away.

MAN: Are you? You're okay?

WOMAN: Everything's fine.

MAN: I just need my pants.

WOMAN: I have them.

MAN: I got my pants, honey.

WOMAN: Better put some shoes on, honey.

MAN: There they are. Oh, I've got the worst headache I've ever had. I got an Excedrin headache.

WOMAN: Oh, sweetheart, just a minute, I'll get you some Excedrin.

MAN: Would you, honey?

WOMAN: Here we are. And a little water.

MAN: And a little water.

WOMAN: That a boy. Easy.

MAN: OK now. Can't waste anymore time. Gotta go. I'll see you later, honey.

ANNOUNCER: The modern Excedrin formula gives you quick relief, long lasting relief, a tension reliever to relax you, an anti-depressant to help restore your spirits. Four ingredients, not just two. That's Excedrin. The Extra-Strength pain reliever.

2) The television commercial "Garner/Voodre/Arico" shows two women and a man describing how Excedrin helps them cope with everyday tense problems, such as fighting traffic and monetary trouble.

ANNOUNCER: These are Excedrin Headaches. Listen.

MRS. GARNER: You know, you have to drive back and forth fighting the freeway traffic and everything.

MR. VOODRE: Like I said, we've been having money problems.

MRS. ARICO: Being a mommy. (laughs)

ANNOUNCER: For Excedrin Headaches you want the Excedrin formula, with four ingredients, to relieve pain and its tension. [8]

MRS. GARNER: Well it's fast. Your headache doesn't come back.

MR. VOODRE: When you take two Excedrin you're able to cope with your problems a lot better.

MRS. ARICO: My biggest reason for buying it and using it is because it works for me.

MRS. GARNER: Well, it's extra strength. It does the job.

ANNOUNCER: Four ingredients. Not just one or two. That's Excedrin. The Extra-Strength pain reliever.

3) The television commercial "Miss Teresa Parkening" shows a young woman explaining how Excedrin relieved her headache quickly.

ANNOUNCER: What is an Excedrin headache? Listen.

TESTIMONY: Last night, as a matter of fact, I was at a recording session and they had, oh, so many strings and a Moog synthesizer and tympani players and gongs, and it was so loud, and I walked in there with a headache. So I took two Excedrin during one of the breaks, ten minute breaks, and it was gone. The sound was still loud but it went away.

ANNOUNCER: Excedrin works fast. It has a special ingredient for quick relief.

TESTIMONY: Something that works ZAP! It's really good.

ANNOUNCER: There are all kinds of Excedrin headaches, but there's only one Excedrin. The Extra-Strength pain reliever.

4) The television commercial "Snowdrift" shows snow blowing across a field. The audio describes how Excedrin is more effective for the relief of colds than other cold remedies.

ANNOUNCER: It's common about this time every year. And everyone seems to catch it. It's the common cold. But this year, you don't have to settle for common relief of its aches and pains. You can take Excedrin. It has more pain relievers, more fever reducers, more total strength than the common aspirin tablet. For the pains of the common cold, take Excedrin for uncommon pain relief.

5) The television commercial "Atlantic City" shows the actor David Janssen standing on a balcony overlooking Atlantic City, New Jersey. He describes a hospital study comparing Excedrin and aspirin.

DAVID JANSSEN: This is David Janssen. A hospital study has shown there may be something even more effective than aspirin for pain relief. At a medical convention held right here in Atlantic City, doctors heard the results of a new clinical study about how pain relievers perform among hospitalized patients. A study on pain, different, more [9] prolonged than headache pain. In this study it took more than twice as many aspirin tablets to give the same pain relief as two Excedrin. More than twice as many aspirin to be as effective as Excedrin. Not three aspirin, not even four aspirin. But more than double the recommended dosage of aspirin to give the same pain relief as two Excedrin. Yes, there may be something even more effective than aspirin. That's what this study among hospitalized patients showed. Two Excedrin were more effective for the relief of pain than twice as many aspirin. Isn't it time you tried Excedrin?

C. By respondents Bristol-Myers and Young & Rubicam, for Excedrin PM:

1) The television commercial "Difference" opens with the actor David Janssen.

DAVID JANSSEN: This is David Janssen. I'm not here to tell you about Excedrin. I'm here to tell you about Excedrin PM. They are different. Excedrin PM is the extra-strength nighttime pain reliever. Its special formula contains three pain relievers plus a mild sleeping aid. So it gives you extra-strength for relief from nighttime pain, and extra help to sleep. Two very good reasons to try Excedrin PM. The nighttime pain reliever.

2) The television commercial "Day into Night" opens on a scene showing several houses during the day. Gradually, night falls, and the lights in the houses go out one by one. Finally, one light is left, and it too ultimately is turned off.

ANNOUNCER: Daytime pain and nighttime pain can be different as day and night. Because at night, when it's quiet, even a tiny pain can hurt a lot. You could take a simple pain reliever. But it doesn't have anything extra to help you sleep. Excedrin PM does. It combines pain relievers with an additional ingredient to gently help you to sleep. Excedrin PM. The nighttime pain reliever.

3) The television commercial entitled "Sleeping Man" shows a middle-aged man sleeping peacefully.

ANNOUNCER: A short while ago, John Martin was too tense and achy to sleep. Nothing serious enough for a strong sleeping tablet. So he took Excedrin PM, a new nighttime formula from the makers of Excedrin. It combines pain relief with a special nighttime ingredient, that gently helps you sleep. Excedrin PM is a new idea. Excedrin PM. The nighttime pain reliever.

PAR. 7. Through the use of these advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication, [10]

A. By respondents Bristol-Myers and Ted Bates, that it has been established that:

- 1) Bufferin relieves pain faster than aspirin relieves pain;
- 2) Bufferin relieves pain twice as fast as aspirin relieves pain;
- 3) A recommended dose of Bufferin relieves twice as much pain as a recommended dose of aspirin will relieve;
- 4) Bufferin will not upset a person's stomach; and
- 5) Bufferin will upset a person's stomach less frequently than aspirin.

B. By respondents Bristol-Myers and Young & Rubicam, that it has been established that:

- 1) A recommended dose of Excedrin relieves more pain than a recommended dose of aspirin or any other non-prescription internal analgesic will relieve;
- 2) A recommended dose of Excedrin relieves twice as much pain as a recommended dose of aspirin will relieve;
- 3) Excedrin relieves pain for a longer period of time than a recommended dose of aspirin or any other non-prescription internal analgesic;
- 4) Excedrin relieves pain faster than aspirin or any other non-prescription internal analgesic relieves pain;
- 5) Excedrin reduces fever more effectively than aspirin;
- 6) Excedrin is a more effective pain reliever than aspirin or any other non-prescription internal analgesic;
- 7) Excedrin is a more effective pain reliever than aspirin or any other non-prescription internal analgesic because it contains four active ingredients;
- 8) A recommended dose of Excedrin PM will relieve more pain than a recommended dose of aspirin;
- 9) A recommended dose of Excedrin PM is more effective for the relief of pain which occurs during the night than a recommended dose of aspirin or any other non-prescription internal analgesic; and
- 10) Excedrin PM is a more effective pain reliever than aspirin because it contains three analgesic ingredients. [11]

PAR. 8. In truth and in fact, none of said representations has been established, for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of all such representations.

PAR. 9. Furthermore, through the use of these advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication,

A. By respondents Bristol-Myers and Ted Bates, that:

- 1) Bufferin relieves pain faster than aspirin relieves pain;
- 2) Bufferin relieves pain twice as fast as aspirin relieves pain;
- 3) A recommended dose of Bufferin relieves twice as much pain as a recommended dose of aspirin will relieve;
- 4) Bufferin will not upset a person's stomach; and
- 5) Bufferin will upset a person's stomach less frequently than aspirin;

B. By respondents Bristol-Myers and Young & Rubicam, that:

- 1) A recommended dose of Excedrin relieves more pain than a recommended dose of aspirin or any other non-prescription internal analgesic will relieve;
- 2) A recommended dose of Excedrin relieves twice as much pain as a recommended dose of aspirin will relieve;
- 3) Excedrin relieves pain for a longer period of time than a recommended dose of aspirin or any other non-prescription internal analgesic;
- 4) Excedrin relieves pain faster than aspirin or any other non-prescription internal analgesic relieves pain;
- 5) Excedrin reduces fever more effectively than aspirin;
- 6) Excedrin is a more effective pain reliever than aspirin or any other non-prescription internal analgesic;
- 7) Excedrin is a more effective pain reliever than aspirin or any other non-prescription internal analgesic because it contains four active ingredients;
- 8) A recommended dose of Excedrin PM will relieve more pain than a recommended dose of aspirin; [12]
- 9) A recommended dose of Excedrin PM is more effective for the relief of pain which occurs during the night than a recommended dose of aspirin or any other non-prescription analgesic; and
- 10) Excedrin PM is a more effective pain reliever than aspirin because it contains three analgesic ingredients.

PAR. 10. There existed, at the time of said representations, a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such representations.

PAR. 11. Furthermore, respondents made said representations without disclosing the existence of such a substantial question as to the validity of each representation. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus, respondents have failed to disclose material facts.

PAR. 12. Through the use of the aforesaid advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Bristol-Myers and Ted Bates, that Bufferin relieves nervous tension, anxiety and irritability and will enable persons to cope with the ordinary stresses of everyday life,

B. By respondents Bristol-Myers and Young & Rubicam, that Excedrin and Excedrin PM relieve nervous tension, anxiety and irritability.

ty and will enable persons to cope with the ordinary stresses of everyday life, and

C. By respondents Bristol-Myers and Young & Rubicam, that Excedrin PM is an effective mild sedative.

PAR. 13. There existed, at the time of said representations, no reasonable basis for making the above representations, in that respondents had no competent and reliable scientific evidence to support such representations. [13]

PAR. 14. Furthermore, in advertising for Bufferin and Excedrin, respondents Bristol-Myers, Ted Bates and Young & Rubicam referred to the results of scientific tests or studies and the following representations were made directly or by implication:

A. By respondents Bristol-Myers and Ted Bates, that such tests or studies prove claims that Bufferin is twice as fast and twice as strong as aspirin in relieving pain; and

B. By respondents Bristol-Myers and Young & Rubicam, that such tests or studies prove claims that Excedrin is more than twice as strong as and more effective than aspirin in relieving pain.

PAR. 15. There existed, at the time of said representations, a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, concerning the validity, significance, or interpretation of such tests as they relate to such representations.

PAR. 16. Furthermore, respondents made said representations without disclosing the existence of such a substantial question. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus, respondents have failed to disclose material facts.

PAR. 17. Furthermore, in advertisements for Bufferin, and particularly through the use of the phrase "Doctors specify Bufferin for minor pain more than any leading brand of pain reliever you can buy," respondents Bristol-Myers and Ted Bates represented directly, or by implication, that physicians recommend Bufferin more than any other non-prescription internal analgesic products.

PAR. 18. There existed at the time of said representation no reasonable basis for making the above representation, in that respondents had no competent and reliable evidence to support such representation.

PAR. 19. Furthermore, respondents Bristol-Myers and Ted Bates marketed and advertised Bufferin and respondents Bristol-Myers and Young & Rubicam marketed and advertised Excedrin and Excedrin

PM, without disclosing in the advertising for such products that such products contain aspirin and that Excedrin contains caffeine. [14]

PAR. 20. In truth and in fact, aspirin and caffeine are well-known, commonplace substances, widely available in many products. Moreover, the use of aspirin or caffeine may be injurious to health and may cause undesirable side effects. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such products.

PAR. 21. Furthermore, in advertisements for Bufferin, respondents Bristol-Myers and Ted Bates represented, directly or by implication, that the analgesic ingredient in Bufferin is other than ordinary aspirin; and in advertisements for Excedrin, respondents Bristol-Myers and Young & Rubicam represented, directly or by implication, that the ingredient giving "long lasting relief" is other than ordinary aspirin and that the "anti-depressant" is other than caffeine.

PAR. 22. In truth and in fact, the analgesic ingredient in Bufferin is ordinary aspirin; the ingredient giving "long lasting relief" in Excedrin is ordinary aspirin; and the "anti-depressant" in Excedrin is caffeine.

PAR. 23. Furthermore, in advertisements for Excedrin PM, respondents Bristol-Myers and Young & Rubicam have represented, directly or by implication, that it contains a special sedative or sleep-inducing agent available only in Excedrin PM.

PAR. 24. In truth and in fact, the substance referred to in the advertisement is methapyrilene fumarate, an antihistamine which is available in several other non-prescription preparations including, but not limited to, Cope, manufactured by Sterling Drug, Inc.

PAR. 25. The advertisements referred to in Paragraphs Seven, Nine, Fourteen, Nineteen, Twenty-One, and Twenty-Three were and are misleading in material respects as alleged in Paragraphs Eight, Eleven, Sixteen, Twenty, Twenty-Two, and Twenty-Four and constituted, and now constitute, false advertisements.

PAR. 26. The making of representations as alleged in Paragraphs Ten, Thirteen, Fifteen, and Eighteen constituted, and now constitutes, unfair or deceptive acts or practices in commerce. [15]

PAR. 27. The use by respondents of the aforesaid deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of said drugs of respondent Bristol-Myers, by reason of said erroneous and mistaken belief.

PAR. 28. In the course and conduct of its aforesaid business, and at

all times mentioned herein, respondent Bristol-Myers has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of drugs of the same general kind and nature as those sold by respondent.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Ted Bates has been, and now is, in substantial competition in commerce with other advertising agencies.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Young & Rubicam has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 29. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY

MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 28, 1979

PRELIMINARY STATEMENT

On February 23, 1973, the Federal Trade Commission ("Commission" or "FTC") issued a Complaint charging Bristol-Myers Company ("Bristol-Myers"), Ted Bates & Company, Inc. ("Ted [2] Bates"), and Young & Rubicam, Inc. ("Y&R") with violations of Sections 5 and 12 of the Federal Trade Commission Act, as amended (15 U.S.C. 45 and 52), in connection with certain advertisements for Bufferin, Excedrin and Excedrin P.M. Similar complaints were issued on the same date against American Home Products Corporation (Docket No. 8918) [98 F.T.C. 136 (1981)] and Sterling Drug Inc. (Docket No. 8919) [102 F.T.C. 395 (1983)], in connection with certain advertisements for certain nonprescription or over-the-counter ("OTC") internal analgesic products marketed by these firms.

On May 7, 1973, Bristol-Myers filed its answer to the Complaint, and on May 9, 1973, Ted Bates and Y&R filed their answers to the Complaint, each denying that it violated Sections 5 or 12 of the amended Federal Trade Commission Act. ALJ William K. Jackson, originally assigned to this proceeding, entered a Prehearing Order, dated March 13, 1974, setting forth the issues of fact and law to govern

