"Reconsidering Advertising Substantiation Forum and Remedy Policies"

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I. Introduction[1]

Good afternoon. I would like to start by thanking the ANA for inviting me to speak at the ANA/BAA's 39th Marketing Law Conference. This conference brings together the nation's leading advertising counsel and major brands to discuss consumer protection topics. I am pleased to be here today to present my views about how and why I think the Federal Trade Commission should reconsider its current approach to forum and remedies in advertising substantiation cases. During the last decade, the FTC has increasingly brought advertising substantiation cases in federal court under Section 13(b) of the FTC Act and obtained millions of dollars in monetary relief from national advertisers. In my view, the time is now ripe to consider the costs and benefits of this approach in cases that do not involve dishonesty or fraud.

II. Consumer Protection Reform at the FTC

I have been the Acting Director of the FTC's Bureau of Consumer Protection for about nine months. Under the leadership of Acting Chairman Maureen Ohlhausen, during my tenure we have made important and necessary changes in the FTC's consumer protection work. We have reformed our investigative process to make it less burdensome and more transparent. We have eliminated or modified rules and guides to decrease compliance burden and to reflect changes in markets and technology. We have integrated economics even more into our analysis

[1] The views expressed today are my own and do not necessarily represent the views of the Commission or any Commissioner.

and our actions, including commencing efforts to base our privacy and data security work on a solid economic foundation. Through these and many other measures, we have begun changing the direction of the FTC's consumer protection program. My hope is that under Acting Chairman Ohlhausen's continued leadership and future FTC leadership we will be able to accelerate reforms so that we can protect consumers without imposing unnecessary or undue burdens on industry.

As counsel for many of the nation's leading advertisers, you likely noticed a significant omission from my list of topics we have addressed, namely, advertising substantiation. I firmly believe – consistent with FTC's long-held view - that truthful, non-misleading advertising is beneficial to consumers and competition. We need to adopt, adapt, and implement consumer protection policies that eliminate unnecessary disincentives for advertisers to make truthful and substantiated advertising claims. In particular, we should reconsider the costs and benefits of the FTC's current approach of bringing advertising substantiation cases not involving dishonesty or fraud in federal court and obtaining monetary relief for those unsubstantiated claims, because it may unnecessarily chill truthful, non-misleading advertising claims.

III. Value of Truthful, Non-misleading Advertising

In considering our approach to advertising substantiation cases, we must begin with a keen understanding and appreciation of the role of advertising in our economy. Law and economics both have long recognized the value of commercial speech, including advertising, to consumers.[2] The Supreme Court has explained that commercial speech is "indispensable" to helping consumers make "intelligent and well-informed" decisions about market choices.[3] Economic theory recognizes that truthful, non-misleading advertising allows consumers to make the best

[2] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).
[3] *Virginia Bd. of Pharmacy*, 425 U.S. at 765.

use of their resources by finding products whose price, quality, and other attributes best match their needs.[4] In addition, truthful, non-misleading advertising reduces the costs to consumers of seeking and evaluating information from a variety of sources. Relatedly, as former BCP Director Howard Beales has articulated truthful, non-misleading advertising helps buyers "locate preferred products [which] gives sellers an incentive to compete to improve their offerings by allowing buyers to find and reward (with patronage) the seller whose offer they prefer. Without such information, the incentive to compete on price and quality will be weakened, and consumer welfare will be reduced."[5]

Although there is significant value to advertising, First Amendment commercial speech jurisprudence and economic theory also recognize the harm to consumers and competition from false or misleading advertising. Such advertising harms consumers by undermining their ability to make well-informed purchasing decisions. Moreover, businesses that are making truthful, non-misleading claims about their products cannot compete effectively with false or misleading claims tainting the marketplace, and thus these businesses are placed at a competitive disadvantage. This harm to competition further contributes to consumer harm, because consumers are deprived of information about useful products that would help them make better-informed purchase decisions. Due to these adverse effects on consumers and competition, the First Amendment permits the government to prohibit advertising that is false or misleading.[6]

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[4] J. Howard Beales, et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491, 492 (1981) ("Information about price, quality, and other attributes allows buyers to make the best use of their budget by finding the product whose mix of price and quality they most prefer.").

[5] Beales, et al., supra note 4 at 492; see Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 670 (1977) ("[s]ellers can accumulate and substantiate descriptive data about each product line once and make it available to all consumers; each consumer, if society left the task to consumers, would have to do it separately for every purchase of each individual item.").

[6] *Central Hudson*, 447 U.S. 557, 566 (1980); *see also In re R.M.J.*, 455 U.S. 191, 200 (1982) ("False, deceptive, or misleading advertising remains subject to restraint").

IV. FTC Advertising Substantiation Law

As you know, the FTC's primary source of national advertising enforcement authority is in Sections 5 and 12 of the Federal Trade Commission Act. Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce." Section 12 more specifically prohibits the dissemination of false advertisements for foods, drugs, devices, or cosmetics.

The FTC's advertising substantiation doctrine is rooted in its authority to challenge unfair or deceptive acts and practices. In its seminal *Pfizer*[7] decision, the FTC held that, even if an advertiser does not specify a level of support for its claims, i.e., it does not make an "establishment claim," it nevertheless must have a "reasonable basis" for making objective product claims. The Commission in *Pfizer* identified five factors to apply in determining what constitutes a "reasonable basis," in other words, substantiation. The FTC's Policy Statement on Advertising Substantiation similarly recognizes that what constitutes a reasonable basis for advertising claims depends on "a number of factors relevant to the benefits and costs of substantiating a particular claim."[8] These factors include the five *Pfizer* factors: "the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable."[9] FTC staff currently is rigorously applying these factors in making decisions whether to seek settlements with and recommend complaints concerning advertisers, and we will continue to do so.

The FTC's substantiation doctrine provides advertisers with flexibility in supporting their claims and strikes the best balance between risks to consumers. As two former FTC Chairmen

[7] *Pfizer, Inc.*, 81 F.T.C. 23 (1972).
[8] FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).
[9] *Id*.

and a former BCP Director cogently explained, "[t]o best protect consumers, the government must consider the costs of both mistakenly prohibiting and allowing particular claims. Government should err on the side of protecting consumers, but doing so depends on which risk is more serious – mistakenly prohibiting truthful claims or mistakenly allowing false ones."[10]

When advertisers make unsubstantiated claims for products, the FTC has the authority to bring law enforcement actions against them. Under Section 5 of the FTC Act, the FTC can challenge in an administrative proceeding unfair or deceptive acts and practices, including making unsubstantiated advertising claims. If the FTC determines in that proceeding that an advertiser has engaged in unfairness or deception, Section 19 of the FTC Act allows the Commission to bring a follow-on action in federal district court to obtain consumer redress if the FTC can show a reasonable person would conclude that the advertiser's conduct was "dishonest or fraudulent."[11]

As an alternative to an administrative proceeding, Section 13(b) of the FTC Act gives the agency the authority to seek injunctive relief from a federal district court "[w]henever the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission."[12] Section 13(b) specifically provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[13] Courts have long held that invoking the court's power to issue a permanent injunction gives it the full panoply of its equitable powers, including the authority to require the defendant to pay redress to consumers, rescind contracts, or to disgorge ill-gotten gains to the U.S. Treasury.

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[10] J. Howard Beales, Timothy J. Muris, and Robert Pitofsky, *In Defense of the Pfizer Factors*, 12-49 George Mason University Law and Economics Research Paper Series (May 2012), at 11.
[11] 15 U.S.C. § 57b(2) (1975).
[12] 15 U.S.C. § 53(b) (2012).
[13] *Id.*

Some commentators have argued that as a matter of law "proper cases" under Section 13(b) of the FTC Act is limited to cases involving dishonesty or fraudulent conduct. Specifically, they contend proper cases do not include "traditional substantiation case[s], which typically "involve a reputable national advertiser making claims about the features or benefits of its product or services."[14] The federal courts, however, that have addressed this argument have been unwilling to adopt the position that traditional FTC advertising substantiation cases are not "proper cases" under Section 13(b) of the FTC Act[15] and instead have defined the term to mean any clear violation of laws the FTC enforces. The Commission as a matter of law thus has the discretion to bring advertising substantiation cases either in an administrative proceeding or in federal court.

V. Prosecutorial Discretion in Advertising Substantiation Cases

From the *Pfizer* decision in 1974 to about 2009, the Commission typically challenged unsubstantiated advertising claims in administrative proceedings.[16] If the Commission determined at the end of the administrative proceedings that the claims were unsubstantiated, it would issue a cease-and-desist order with core and fencing-in relief. The FTC rarely filed follow-on actions in federal district court to obtain consumer redress pursuant to Section 19 of the FTC Act. Consequently, for about 25 years, the FTC generally used administrative

[14] *See, e.g.*, J. Howard Beales and Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash. L. Rev. 2157, 2201 (Nov. 2015).
[15] *See, e.g.*, *FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014); *FTC v. Bronson Partners*, 654 F.3d 359, 366 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988); *FTC v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985); *FTC v. United Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982).
[16] D. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, Vol. 83 No. 6 (Nov. 2015), at 2113-2114; A. Abbott, *Time to Reform FTC Advertising Regulation*, Heritage Foundation Report (Oct. 29, 2014), at 8.

proceedings to obtain cease-and-desist orders and no monetary relief in its advertising substantiation cases, including cases involving national advertisers.[17]

In the last decade, however, the Commission has changed dramatically its traditional approach to advertising substantiation cases. As explained by one of the architects of that change, the rationale for the new approach was that "the market remains rife with advertisements that lack substantiation or, even worse, are contradicted by the company's substantiation."[18] To respond to the perceived prevalence of unsubstantiated claims in the marketplace, the Commission often has commenced challenging unsubstantiated advertising claims in federal court pursuant to Section 13(b) of the FTC Act. In many of these cases, the Commission has obtained millions of dollars from advertisers, sometimes tens of millions of dollars, as consumer redress or disgorgement.

As I discussed earlier, the great weight of the case law indicates the Commission has the legal authority to challenge unsubstantiated claims in an administrative proceeding or in federal court. The FTC now has a decade of experience filing Section 13(b) actions in federal court to challenge unsubstantiated advertising claims in the absence of dishonesty or fraud and obtaining monetary relief in these actions. In light of this experience and consistent with a good government philosophy of periodically evaluating the effectiveness of our policies, I believe the time has come to assess the costs and benefits of this approach and determine if it or an alternative approach would be better for consumers and competition. Any such change of course is up to the Commission.

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[17] *See, e.g., Thompson Medical Co*., 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Removatron Int'l Corp*., 111 F.T.C. 206 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *Honeywell, Inc.*, 126 F.T.C. 202 (1998); *The Dannon Corp*., 151 F.T.C. 62 (2010); *POM Wonderful, LLC*, 155 F.T.C. 1, *aff'd* 777 F.3d 478 (D.C. Cir. 2015).

[18] D. Vladeck *supra* note 16, at 2112.

Let me discuss first the issues of seeking monetary relief in advertising substantiation cases. The FTC rarely has brought actions in federal court under Section 19 of the FTC Act following FTC administrative proceedings to obtain redress from advertisers in advertising substantiation cases. Rather, the FTC commonly has brought actions in federal court under Section 13(b) of the FTC Act to challenge unsubstantiated advertising claims, and sought and obtained consumer redress or disgorgement as part of the permanent injunctions entered in those actions.

Monetary relief of course can have benefits in terms of deterring false or misleading advertising claims and returning money to injured consumers. Monetary relief, however, also certainly has costs in terms of chilling truthful, non-misleading advertising claims that would be beneficial to consumers and competition. The optimal approach to monetary relief would maintain sufficient deterrence of false or misleading claims while minimizing the chilling effect on truth, non-misleading claims. In my view, one approach worth considering is as a matter of prosecutorial discretion seeking monetary relief in advertising substantiation cases only if the advertiser engaged in dishonest or fraudulent conduct.

In cases in which an advertiser engaged in dishonesty or fraud in making unsubstantiated advertising claims, the FTC seeking monetary relief creates the proper incentives for advertisers. Not only does it deter false and misleading advertising claims, yet it does so without being likely to chill others from making truthful, non-misleading claims that would be beneficial. In particular, if a scam artist is making cancer prevention or treatment claims for a bogus product without any substantiation, the risk that the FTC seeking monetary relief would chill others from making claims that would be worthwhile to consumers and competition appears very low.

On the other hand, in cases in which an advertiser's making of unsubstantiated claims was not dishonest or fraudulent, the FTC seeking monetary relief poses a much greater risk of chilling truthful, non-misleading claims. As discussed above, determining if an advertiser has a reasonable basis for its non-establishment claims involves a weighing of the *Pfizer* factors. A proper application of these factors interjects critical flexibility to the analysis. However, it also creates some uncertainty as to the nature, level, and type of support advertisers need to have to make lawful claims. The expected cost of paying millions of dollars in consumer redress or disgorgement in an FTC action is a critical consideration for advertisers in making decisions in the face of this uncertainty. This exposure seems very likely to deter advertisers from making claims that could be beneficial to consumers and competition.

One critical question in evaluating the merits of such an approach is distinguishing between circumstances in which an advertiser has and has not made unsubstantiated advertising claims in a dishonest or fraudulent manner. As noted above, "dishonest and fraudulent" is the legal standard in Section 19 of the FTC Act, but there has been little case law interpreting or applying this language. Accordingly, if the FTC were to incorporate this standard into its exercise of prosecutorial discretion, we may need to do more analysis to put some "meat on the bones" of this standard.

A final but absolutely critical point about monetary relief: Advertisers will not get off scot-free if they are not subject to monetary relief in FTC advertising substantiation cases in absence of dishonesty or fraud. Advertisers who violate the law will liable still will be subject to orders with core and fencing-in relief. The FTC can bring enforcement actions against advertisers who violate their orders. Moreover, the FTC challenging an advertiser's unsubstantiated claims without seeking money is likely to have powerful, negative effect on the reputation of

advertisers, a key consideration for many national advertisers who have invested heavily in their names and in their brands.[19] Reasonable minds can differ on how much deterrence we need to prevent unsubstantiated advertising claims, but preventing them is an objective I am certain we all share.

Under the approach I have outlined, the Commission would seek monetary relief in advertising substantiation cases involving dishonesty or fraud and it would seek that relief in federal district court pursuant to Section 13(b) of the FTC Act. Although this approach generally creates the correct incentives for advertisers, in some circumstances it will be in the public interest for the Commission to bring advertising substantiation cases in administrative proceedings even in the presence of dishonesty or fraud.

As many of you know, Congress empowered the FTC to enforce the prohibitions on "unfairness" and "deception" in the FTC Act, while at the same time Congress recognized the elasticity of these concepts. Congress intended the FTC to develop the law through administrative litigation before the Commission. As Acting FTC Chairman Ohlhausen has succinctly explained, the "FTC's [administrative proceeding] authority is a powerful tool for developing and clarifying the law."[20]

In addition, Congress intended that the Commission would apply its institutional expertise and experience in administrative litigation to resolve difficult and complicated issues of fact, law, and policy. As Acting Chairman Ohlhausen has explained, "[t]he institutional framework of the FTC with the Bureaus of Competition, Consumer Protection, and Economics – combined with the agency's research policy and enforcement experience – provides the Commission with a

[19] S. Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & Econ. 403 (1981) ("The story the stock market appears to be telling is that an FTC complaint implies simply a wiping out of the brand's advertising capital.").
[20] M. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, Journal of Competition Law and Economics, 1, 9 (2016).

solid foundation [to exercise substantive expertise on consumer protection matters]."[21] The Commission can apply its institutional expertise more readily in administrative proceedings where it adjudicates issue of fact, law, and policy than in federal court where the FTC's role is as a prosecutor.

The FTC has continued to bring advertising substantiation cases in administrative litigation over the past decade. In some of these proceedings, the Commission sought to develop the law of substantiation, just as it did in formulating its advertising substantiation doctrine many years ago in *Pfizer*. In other proceedings, the Commission has used its experience and expertise to resolve how to weigh each of the *Pfizer* factors in deciding what support advertisers needed to have to have a reasonable basis for their claims. A recent example is the Commission's extensive and careful treatment of the substantiation issues in its *POM Wonderful* opinion.[22] Most administrative proceedings involving advertising substantiation have not involved conduct that was dishonest or fraudulent. Moreover, even where advertising substantiation matters do involve dishonest or fraudulent conduct, it would be appropriate in some cases for the Commission to determine that the value of using administrative proceedings to develop the law or apply its expertise or experience in resolving difficult or complicated issues outweighs the benefits of seeking monetary relief in federal court.

VI. Conclusion

Under the leadership of Acting Chairman Ohlhausen, we have been reforming the way the Commission approaches consumer protection. The time has come for us to consider what changes we need to make to the FTC's approach to advertising substantiation cases. And I would like to start with assessing the costs and benefits of the FTC's current approach to choice of

[21] *Id*. at 31 n. 123.
[22] *POM* Wonderful, 155 F.T.C. 1.

forum and seeking monetary relief in these cases. Today, I ask national advertisers, consumer advocates, and other stakeholders to work with us in making this assessment so that we can develop and implement policies that protect consumers without imposing undue or unnecessary costs on advertisers.

Thank you.