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# The Federal Trade Commission's Deception Policy in the Next Millenium: Evaluating the Subjective Impact of Cliffdale Associates

Jack E. Karns

Alan C. Roline

# THE FEDERAL TRADE COMMISSION'S DECEPTION POLICY IN THE NEXT MILLENNIUM: EVALUATING THE SUBJECTIVE IMPACT OF *CLIFFDALE ASSOCIATES*

JACK E. KARNS* AND ALAN C. ROLINE**

## I. INTRODUCTION

In 1981, James Miller became Chairman of the Federal Trade Commission (FTC) and initiated agency action to alter the qualitative standard used by the Commission to determine whether a business firm had engaged in deceptive advertising. As an economist, Miller espoused the view that the traditional "tendency to deceive" standard was overly protective of consumers. As such, it deterred many firms from undertaking advertising campaigns since they might be held liable merely because a consumer could have the capacity to be deceived by the advertisement.[1] Alternatively, Miller stated that the FTC should evaluate advertisements according to a different standard. Miller argued that the focus should be on whether a "consumer acting reasonably under the circumstances could possibly be deceived, as opposed to providing protection by preempting an advertisement simply where any consumer might be deceived.

The task facing Chairman Miller was somewhat daunting since the traditional "deception standard" had been in place for nearly fifty years and was supported by innumerable Commission and federal court decisions. Nevertheless, Miller approached Congress with a request that the Federal Trade Commission Act of 1914 (FTCA) be amended so as to

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* Professor of Business Law, East Carolina University. LL.M. (Taxation), 1992, Georgetown University; J.D., 1981, Tulane University; M.P.A., M.S., 1974, B.A., 1973, Syracuse University.

** Assistant Professor Business Law, University of Minnesota-Duluth. J.D., 1987, M.B.A., 1984, University of Minnesota; B.S., 1983, Bemidji State University

1. In his testimony before Congress in 1982, Miller stated:

> There are specific problems with the Commission's definition of deception. First, the definition is not clear, despite its 44 year history. The courts tend to give the Commission very wide latitude and the Commission's own case law is not clear and consistent. As a result, businesses do not know what they can and cannot do. Consumers do not know what protections they do, and do not have. The Commission really does not know what cases to bring and what not to bring, and the courts do not know which Commission decisions to affirm and which to reverse. As a result, they tend to defer to the agency.

*FTC's Authority Over Deceptive Advertising: Hearing Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science & Transp.*, 97th Cong. 3 (1982) [hereinafter *Advertising Hearings*].

include his "reasonable consumer" standard.[2] He argued before a Congressional Committee that the revised standard more accurately reflected a free-market system of business enterprise, and that the marketplace would adjust where advertisements deceived only a few consumers. Simply stated, he claimed that firms which perpetrated such ads would find that the free flow of information in the market would soon render their campaign ineffective as word of the deception spread. As for the few consumers who would be misled, their injuries were not sufficient to justify federal intervention where it was clear that the vast majority of reasonable consumers had determined that the advertisement was deceptive on its face.

At the time Miller pursued this effort to establish a deception standard by statute, he was joined in the effort by the two Republican commissioners. Likewise, he was opposed by commissioners who had been appointed by the previous administration. Opponents argued that the change represented a significant step back relative to consumer protection and that firms would minimize the impact of the new standard by engaging in marketing campaigns that would push its interpretation to the limit. Interestingly, Congress refused to act on Miller's request, and accordingly, in October 1983, he and the other majority commissioners issued a *Policy Statement on Deception*[3] which effectively encompassed the key points of the position advocated to the legislature. The effort to rewrite the deception standard culminated in March 1984. Chairman Miller utilized the *Cliffdale Associates*[4] case to reject the "tendency to deceive" standard and to adopt by case law precedent the standard enunciated in the Policy Statement.[5] *Cliffdale* was a garden variety deceptive advertising case in which the Administrative Law Judge (ALJ) ruled against the company finding that its advertisements violated the traditional standard. The company appealed to the full Commission, and in an opinion written by Chairman Miller and joined by the other majority commissioners, the ALJ's decision was upheld, but his reliance on the existing standard was rejected. Instead, then Chairman Miller stated that in the future the Commission would judge marketing practices according to their impact on reasonable consumers. As such, five decades of reliance on the tendency to deceive standard came to an end.

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2. Miller recommended that a deceptive act be defined as a "material misrepresentation that: (a) Is likely to mislead consumers, acting reasonably in the circumstances, to their detriment; or (b) The representor knew or should have known would be misleading." *Advertising Hearings*, *supra* note 1, at 8-9.

3. *See In re* Cliffdale Associates, Inc., 103 F.T.C. 110, 174-84 (1984) (Federal Trade Commission Policy Statement on Deception).

4. 103 F.T.C. 110 (1984).

5. *In re* Cliffdale Associates, Inc., 103 F.T.C. 110, 164-65 (1984).

What followed the *Cliffdale* decision can only be characterized as a monumental difference of opinion as to whether the qualitative change in the standard would produce significant adverse results in terms of consumer protection efforts. Free-market commentators such as Miller argued that the change more accurately reflected the manner in which the Commission actually reviewed deception cases. More importantly, it provided private enterprise with a more workable standard in terms of the risk assessment decision-making that typically goes into producing a marketing campaign. However, opponents argued that *Cliffdale* represented the worst of legislating by administrative fiat, and was blatantly pro-business in that it was forcefully promoted by one of President Reagan's most ardent free-market advocates.

A decade has passed since the *Cliffdale* decision. Although much has been written about the projected impact the case would have on the Commission's deception enforcement policy, commentators have undertaken a less thorough review of the actual cases decided since 1984. This article addresses whether the focus now ought to be on determining if this wording change was as cataclysmic as some commentators predicted, or in the overall scheme, whether it is really the vigor with which the Commission pursues its deception enforcement policy that is more significant, regardless of the qualitative standard employed. Following a brief review of the development of the federal law of deception through the issuance of the *Cliffdale* opinion, the subsequent case line is examined in detail to determine any visible shift in overall impact on the deception enforcement policy. Finally, some concluding remarks will be offered regarding this ongoing controversy.

## II. EVOLUTION OF THE FEDERAL DECEPTION STANDARD

### A. "TENDENCY TO DECEIVE"

As originally enacted, Section 5 of the FTCA was viewed as supplementing the Federal Government's antitrust arsenal by empowering the Commission to regulate "unfair methods of competition." The Commission subsequently extended its jurisdiction over anti-competitive practices to include advertising, raising the issue for Supreme Court review in the 1931 case, *FTC v. Raladam*.[6] In *Raladam*, the Court issued a very strict interpretation of Section 5 powers and directed that the only type of advertising that fell within the Commission's agency purview was that which impacted on or related directly to free competition. The connection between the advertisement and a resulting impact on competition

6. 283 U.S. 643, 649 (1931).

was paramount to that of any discernible injury to consumers. As such, commission jurisdiction could not be based solely on consumer deception.

Faced with more creative advertising campaigns which adversely affected consumers, the Court revisited the scope of the Commission's jurisdiction in 1934. In *FTC v. R.F. Keppel and Brother*,[7] the Court examined a company's advertising practice of including coins in some of its boxes of candy, thereby providing a young purchaser with the incentive to gamble by way of recovering all or part of the purchase price.[8] The Court was clearly troubled by the impact of the advertising campaign on children, but was particularly conscious of the *Raladam* precedent requiring that marketing practices have a direct, if not substantial, impact on competition in order to fall within the FTC's domain. Finding the merchant's advertising to be an "unfair method of competition," the Supreme Court left open a clear possibility that it might allow an expansion of the type of business practice that fell within Section 5.

In 1938 Congress responded to these rulings by passing the Wheeler-Lea Act. This Act amended Section 5 of the FTCA by expanding the Commission's jurisdiction to cover "unfair and deceptive trade practices," regardless of any impact on competition. Although the clear intent of the statute was to provide the FTC with authority to regulate unfair and deceptive advertising, Congress did not provide any guidance in terms of a working definition of "unfair" or "deceptive." This interpretation was left to the Commission and to the federal courts.

Prior to 1938, the Court considered cases involving deceptive advertising pursuant to the *Raladam* interpretation of "unfair methods of competition." In *FTC v. Algoma Lumber Co.*,[9] the Court held an anticompetitive practice in violation of Section 5 since it had a "capacity to deceive" the consuming public.[10] Over the next five decades, this decision established what would come to be known as the Commission's traditional "tendency to deceive" advertising standard. Henceforth, the Commission would look to the "impression made by the advertisements as a whole," regardless of any actual harm inflicted on consumers. The most important consideration was the propensity of the advertisement to cause deception among the consuming public.

The case line that developed eventually distilled the traditional deception standard into three component parts: 1) a marketing practice

7. 291 U.S. 304 (1934).
8. F.T.C. v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 307 (1934).
9. 291 U.S. 67 (1934).
10. F.T.C. v. Algoma Lumber Co., 291 U.S. 67, 81 (1934).

having a tendency or capacity to deceive; 2) which was material to potential purchasers; and 3) that gave special consideration to targeted consumer groups, such as children. Qualitatively, the standard did not require any evidence of actual injury to consumers, nor could respondent companies defend their questionable campaigns with arguments that they acted in good faith, had no specific intent to deceive the public, or did not feel that the practice was deceptive when initiated. Further cases even held that a firm could make representations that were technically correct but which presented information in a manner that had a tendency to mislead consumers, which was a violation of the traditional standard. Cases of omission were judged to present credible claims of deception since the missing information would be deemed "material" to a potential purchaser. Perhaps the best illustration of the extent to which the traditional standard could be taken was offered by one court which held that even "the ignorant, the unthinking and the credulous" were worthy of Commission protection. It was against this backdrop in 1981 that Chairman Miller assumed what would become his pivotal role in reshaping the federal deception standard.

### B. "REASONABLE CONSUMER"

After taking over the chairmanship of the Commission, Chairman Miller openly stated his preference for changing the traditional deception standard. In testimony before Congress in 1982, he argued that the then-existing standard had significant adverse effects on consumers and that the agency pursued complaints against companies based on minor issues. The Commission had trivialized its deception enforcement policy by prohibiting advertising practices that would benefit a clear majority of consumers simply because a few consumers might be deceived. The House Committee did not act on the suggested amendment to Section 5, but did ask the Chairman to prepare a statement describing its enforcement policy. As a result of this request, the Policy Statement was presented to Congress in October 1983, and it incorporated the statutory changes that had been previously advocated.

Based on its opinion that the Policy Statement was too argumentative, the Committee directed the Commission to produce a statement that presented a "definitive, neutral analysis." Miller prepared a response to the Committee request, but it never attained any significance in the process that was to define the new federal deception standard. The Commission considered the Policy Statement to be a correct reflection of the FTC enforcement policy, and it intended to rely on the document in deciding future cases. Despite Congressional objections, no formal action was taken to derail the Policy Statement and it was firmly

entrenched by March 1984 when the *Cliffdale Associates*[11] case was appealed to the full Commission.

The company had marketed a device called the "Ball-Matic Gas Saver Valve," which allegedly improved gasoline mileage on all cars except Volkswagens and those with diesel or fuel injection engines. Emphasizing the lack of adequate scientific substantiation for its marketing claims, the ALJ ruled that the firm must cease and desist from making any gas mileage savings claims. The advertisements as employed by the company were ruled deceptive based on the theory that "any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the FTCA."[12] On appeal to the Commission, Chairman Miller affirmed the holding but rejected the ALJ's reliance on the traditional standard as inappropriate. Instead, the Commission majority stated that the standard as set forth in the Policy Statement generally established the correct model for evaluating the efficacy of advertising practices.[13] The opinion was issued over a strong dissent but received no formal reaction from Congress. Accordingly, *Cliffdale* established the federal deception standard as one requiring the Commission to find that a questionable marketing practice is "likely to mislead consumers acting reasonably under the circumstances."

## III. THE CLIFFDALE CASE LINE

### A. THOMPSON MEDICAL COMPANY

The first application of the "reasonable consumer" standard after the decision in *Cliffdale* occurred in the *In re Thompson Medical Co., Inc.*[14] case involving advertisements for an over-the-counter topical ointment called "Aspercreme." Since this case originated before the release of the 1983 Policy Statement, the complaint was set forth in terms of the traditional "tendency to deceive" standard.[15] The complaint alleged that Thompson had used deceptive advertisements which misrepresented that Aspercreme contained aspirin, that it was a recently developed drug, that it was more effective than aspirin tablets, and that the company

11. 103 F.T.C. 110 (1984).
12. *Id.* at 156.
13. *Id.* at 164-65 (opinion of the Commission).
14. 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).
15. *In re* Thompson Med. Co., Inc., 104 F.T.C. 648, 651 (1984). The complaint stated that the advertisements had the "capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true." *Id.*

possessed scientific evidence substantiating such claims.[16] Finding that the majority of the representations made by Thompson were deceptive,[17] the ALJ ordered the firm to refrain from: 1) using the brand name Aspercreme without also disclosing that the product did not contain aspirin; 2) making claims that it was a new product; and 3) misrepresenting the results of any test or study to give the impression that they had substantiation for their efficacy claims.[18]

Although the deceptive practices alleged in the complaint would likely have been found to violate the traditional deception standard, the Commission took advantage of the opportunity to reinforce its adoption of the new standard announced in *Cliffdale* just a few months earlier.[19] The opinion reiterated the rationale for the new deception standard in terms of allaying the concerns of advertisers that they might be held liable for unreasonable interpretations.[20] After establishing *Cliffdale* as the controlling precedent, Commissioner Douglas addressed the three elements of the reasonable consumer standard: 1) whether Thompson made the alleged representations; 2) whether the representations were material; and 3) whether the claims were likely to mislead consumers acting reasonably under the circumstances.[21]

Dispensing quickly with the four representations which Thompson acknowledged that it had made,[22] the Commission turned to the claims alleged in the complaint which were implied by the company's advertisements.[23] In addressing the allegation that a number of Thompson's

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16. *Id.* at 650 (complaint).

17. *Id.* at 787. The ALJ found that Thompson's claim that the use of Aspercreme will result in no side effects was not deceptive. *Id.*

18. *Id.*

19. Commissioner Bailey dissented from the application of the new standard in *In re Thompson Med. Co., Inc.* as she had in *In re Cliffdale Assocs., Inc.*, although she acknowledged that the company's practices would be deceptive under either the old or the new standard. *Id.* at 788 n. 4.

20. *Id.* at 788.

21. *Id.* The *In re Thompson Med. Co., Inc.* opinion follows very closely Chairman Miller's discussion of the three elements set forth in the *In re Cliffdale Assocs., Inc.* case which were deemed necessary for the Commission to find an act or practice deceptive. *See generally In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984).

22. These four acknowledged claims included:

1) Aspercreme is an effective drug for the relief of minor arthritis and its symptoms;
2) Aspercreme is as effective a drug as orally-ingested aspirin for the relief of minor arthritis and its symptoms;
3) Aspercreme is an effective drug for the relief of rheumatic conditions and their symptoms; and
4) Aspercreme acts directly penetrating through the skin to the site of the arthritic disorder.

*In re Thompson Med. Co., Inc.*, 104 F.T.C. at 791.

23. These four implied claims included:

1) Aspercreme contained aspirin;
2) Aspercreme was a recently developed drug;
3) Aspercreme was more effective than aspirin tablets; and

advertisements represented that Aspercreme contains aspirin, the Commission focused on the "net impression" likely conveyed to consumers regarding the aspirin content of the product,[24] and what consumers interpret the word "aspirin" to mean. Based on its own analysis of the advertisements and the reference to extrinsic evidence,[25] the opinion concluded that a majority of the company's advertisements were likely to give consumers who interpreted them reasonably, the net impression that Aspercreme contained aspirin.[26]

Thompson contested the ALJ's conclusion that the advertisements in question conveyed an implied message that Aspercreme contained aspirin. However, the firm argued in the alternative that such representations should not be considered deceptive because consumers understand the term "aspirin" to mean a generic reference to pain relieving analgesics, rather than to any specific ingredients. As such, Thompson claimed that if such a representation was made, it should be interpreted as referring only to the pain relieving properties of Aspercreme rather than implying the existence of any specific ingredients. In deciding what interpretation a reasonable consumer would make, the Commission found three factors persuasive. First, Thompson's own advertisements repeatedly distinguished between aspirin and Aspercreme, thus indicating that aspirin is not a reference to all analgesics. Second, the dictionary definition of the word "aspirin" does not define it as a generic reference to all pain killers. Finally, the advertising of non-aspirin analgesics makes it unlikely that reasonable consumers would equate aspirin with analgesics.[27]

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4) Thompson had substantiation for its claims that Aspercreme was effective.

*Id.* at 650 (complaint).

24. The Commission described the two-part process of evaluating whether an advertisement contains implied claims as follows:

> One is to look at evidence from the advertisement itself. We often conclude that an advertisement contains an implied claim by evaluating the contents of the advertisement and the circumstances surrounding it . . . If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. For example, in this case the conflicting messages in some elements of Aspercreme's ads caused us to examine extrinsic evidence to determine what net impression(s) the entire ad could reasonably be interpreted as giving to consumers.

*Id.* at 789.

25. *Id.* at 794. Extrinsic evidence considered by the FTC included: testimony by marketing experts employed by Thompson, a consumer survey, and a Video Storyboard Test. *Id.*

26. Perhaps because of the strong implications created by the brand name "Aspercreme," the only ads found not to create a net impression that Aspercreme contained aspirin were two which repeatedly contrasted Aspercreme with aspirin and used phrases such as "aspirin-like" and "non-aspirin" pain reliever. *Id.* at 800.

27. *Id.* at 809-10.

Reviewing the allegation that Thompson had represented that Aspercreme was superior to aspirin, the Commission found that Thompson expressly claimed, in seven of its advertisements, that its product was more effective because it provides faster relief than aspirin tablets without the attendant side effects.[28] Relative to the representation that Thompson had evidence substantiating the efficacy claims, the complaint charged that the company improperly claimed a particular level of substantiation and that it made objective product claims implying the existence of substantiation without representing a particular level.[29] Thompson expressly represented that it had a particular level of substantiation in three ads which made reference either to tests by a medical specialist, to "clinical tests," or stated that the product was "clinically proven." None of these claims were supported by scientifically acceptable evidence.[30] Although the Commission did not find any other express or implied claims of a particular level of substantiation, it noted that advertisements which, make objective product claims must be supported by a "reasonable basis." The Commission concluded that Thompson's efficacy claims were objective product claims which went beyond mere "puffing," which is not generally considered the type of affirmative product claims for which documentation is normally expected. The Commission also found that the claims implied the existence of a reasonable basis which was not supported by the record.[31]

The next issue addressed was the materiality of the representations. After defining a material misrepresentation or practice as "one that is

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28. However, the Commission rejected the conclusion of the ALJ that three other ads impliedly made such superiority claims:

> a simple examination of the ads does not provide us with the sufficient information to determine whether reasonable consumers come away from these ads with the impression [of superiority]. Therefore, this is a situation where we require extrinsic evidence before we can conclude with confidence that the ads imply Aspercreme is superior to aspirin . . . .

After reviewing the record, the Commission could not find sufficient probative evidence to support the ALJ's opinion that the ads made such superiority claims. *Id.* at 812.

29. *Id.* at 650-51 (complaint). The requirement that advertisers making representations of specific levels of substantiation actually have that level of substantiation, and that making objective claims which imply the existence of substantiation have at a minimum a "reasonable basis" for making such claims is commonly referred to as the advertising "Substantiation Doctrine." This doctrine was first established in *In Re Pfizer*, 81 F.T.C. 23 (1972), wherein the Commission ruled a lack of such a basis was an unfair practice in violation of the FTCA. The failure to have a reasonable basis was later found to also constitute a deceptive practice in violation of the FTCA in *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd and remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

30. *In re Thompson Med. Co., Inc.*, 104 F.T.C. at 820-21. The Commission requires an advertiser who makes an express claim to possess a particular level of substantiation which has sufficient corroborating evidence. *Id.*

31. "Puffing," or an opinion that is so obviously exaggerated that any reasonable consumer should know that it was not reliable, is not covered by the deception standard. Porter & Dietsch, Inc. v. F.T.C., 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

likely to affect a consumer's choice of or conduct regarding a product,"[32] the Commission next looked to the traditional presumptions of materiality made in the case of express claims and those implied claims deliberately made by an advertiser. Following prior case precedent, Thompson's express claims regarding Aspercreme's efficacy, its superiority to aspirin, and the possession of substantiation evidence were determined to be presumptively material.[33]

As for the implied claims, the opinion focused on the claims that Aspercreme contained aspirin and that it was a newly developed product. Implied claims generally pertain to the central characteristics of a product or service, such as safety, efficacy, or cost. Since Thompson's claims did not fit into any of these categories which are presumed by the FTC to be material, the Commission analyzed the facts on the record to determine whether or not a "reasonable consumer" would consider the claims to be important.[34] The opinion reaffirmed the ALJ's determination that, based on studies which showed significant consumer preference for aspirin over non-aspirin products for treatment of minor arthritic pain, the representations should be considered material. Although the ALJ failed to specifically address his rationale for determining that the new product claims were material, such claims must be considered material because they implied product efficacy to arthritis pain sufferers who could be expected to "enthusiastically try new remedies in the hope that these remedies will provide relief beyond what they are obtaining from existing remedies."[35]

In addressing the reasonableness element of the new deception standard, the Commission stated that although Thompson made a variety of express and implied claims that were material to reasonable consumers, the claims may not be deceptive if they are accurate and are not likely to mislead.[36] Two methods have been used for evaluating

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32. *In re Thompson Med. Co., Inc.*, 104 F.T.C. at 816.

33. *Id.* Although the Commission stated that such claims were presumptively material, it was cautious to note that:

> "we do not use our presumptions as an inflexible rule that eliminates our need to look at materiality on a case-by-case basis. On the contrary, the presumption simply reflects our general judgment that substantive claims in advertisement (in other words, claims other than "puffery" or window dressing) would not have been made except to affect a consumer's choice regarding a product."

*Id.* at 816 n.45.

34. *Id.* at 817. *See, e.g., In re* Bristol-Myers Co., 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984); *In re* Sterling Drug, Inc., 102 F.T.C. 395 (1983), *aff'd*, 741 F.2d 1146 (9th Cir. 1984); *In re* J.B. Williams Co., 68 F.T.C. 481 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967).

35. *In re Thompson Med. Co., Inc.*, 104 F.T.C. at 817.

36. The Commission provided something of a forecast of its yet to be delivered opinion in *In re International Harvester Co.* by referencing deception by omission: "Commission precedent also treats as likely to mislead both practices conveying a material false impression and omissions of material

whether representations are likely to mislead. First, the FTC may simply show that the claims made were false. In the instant case, the Commission concluded that two of the implied claims were clearly false and would be likely to mislead a consumer who was acting reasonably. These claims included statements that Aspercreme contained aspirin and that Thompson possessed clinically valid tests supporting its efficacy representations.[37]

The second method for evaluating the likelihood that a representation may mislead, and which was applied to the efficacy claims in this case, permits the FTC to show that the advertiser lacked a reasonable basis for asserting that the message contained in the advertisement was true.[38] Although Thompson did not imply a particular level of substantiation through their objective product claims, by merely making the claims there was the implication that a reasonable basis existed. The record was insufficient for the Commission to conclude that the claims were false. However, in accordance with the agency's policy statement on advertising substantiation, the Commission determined that the company did not have a reasonable basis for its efficacy claims.[39]

### B. INTERNATIONAL HARVESTER COMPANY

Unlike the *Cliffdale* and *Thompson* cases, in *In re International Harvester Co.*,[40] the Commission was faced with a seller's omission rather than an express or implied representation made in an advertisement. More specifically, the issue was when and under what circumstances does a manufacturer have a duty to notify customers about hidden hazards in its products. Harvester manufactured and marketed a line of gasoline-powered farm tractors which occasionally experienced a condition called "fuel geysering." Fuel geysering occurs when gasoline is heated to

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information doing the same." *Id.* at 818 n.51.

37. *Id.* at 819-21.

38. The Commission stated that this method of proof is only available for objective product claims, such as "X is true." The burden could then be sustained by either proving X is false, or showing that the substantiating evidence possessed by the advertiser did not provide a reasonable basis for the claim. *Id.* at 819 n.52.

39. The Commission formalized its requirement of a reasonable basis for advertising claims first established in *In re Pfizer, Inc.* through the issuance of an FTC Policy Statement Regarding Advertising Substantiation. *See In re Thompson*, 104 F.T.C. at 839. This Policy Statement set forth six factors which the Commission would evaluate and weigh in determining what level of substantiation is necessary to satisfy the reasonable basis requirement:

1. The product involved;
2. The type of claim;
3. The benefits of a truthful claim;
4. The ease of developing substantiation for the claim;
5. The consequences of a false claim; and
6. The amount of substantiation experts in the field would agree is reasonable.

*Id.* at 839-42.

40. 104 F.T.C. 949 (1984).

extreme temperatures due, in part, to the proximity of the fuel tank to the engine, and is forced out under extreme pressure through an improperly loosened cap. Hot gasoline would then spray up into the air as much as twenty feet from the tractor, sometimes landing on the operator or even spontaneously igniting.[41] Such incidents occurred at least ninety times and resulted in twelve serious burn injuries and one death.[42] Harvester apparently knew of the conditions for seventeen years before notifying its customers of the potential danger, even though there was evidence that the accidents could have been avoided entirely by the operators if they followed certain safety precautions.

The ALJ found that Harvester's omission was its failure to issue proper warnings to its customers and constituted both "unfair and deceptive acts and practices" in violation of Section 5 of the FTCA.[43] In an opinion written by Commissioner Douglas, the full Commission reversed the ALJ's finding with respect to the deception charge, noting that the terms "unfair" and "deceptive" are not synonymous.[44] Harvester's omission was found only to have violated Section 5 of the Act as an unfair practice since it: 1) created a serious consumer injury; 2) the injury exceeded any offsetting consumer benefits; and 3) the consumer could not have reasonably avoided that particular type of injury.[45] Rejecting the ALJ's conclusion that Harvester's omission was also deceptive, the Commission stated:

> While failure to disclose certain material facts may cause consumer injury and lead to liability under Section 5, it is important to distinguish between the circumstances under which such omissions are *deceptive*—in that they are likely to cause injury to consumers by affirmatively misleading their informed choice and the circumstances under which they amount to an unfair practice—one which causes substantial, unavoidable injury to consumers that is not outweighed by any countervailing benefits.[46]

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41. *In re* International Harvester Co., 104 F.T.C. 949, 1051 (1984).

42. *Id.* at 1052.

43. *Id.* at 1049.

44. An unfairness doctrine has evolved in a separate case line. The concept of "unfairness" subsumes the Commission's deception doctrine and holds a practice to be unfair if it: 1) offends public policy as it has been established by statutes, the common law, or otherwise; 2) is immoral, unethical, oppressive, or unscrupulous; or 3) causes substantial injury to consumers, or competition, or other businessmen. 29 Fed. Reg. 8325, 8351 (1964); *see* F.T.C. v. Winsted Hosiery Co., 258 U.S. 483 (1922); F.T.C. v. R.F. Keppel & Bros., 291 U.S. 304 (1934). The above factors were judicially endorsed by the Supreme Court in *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

45. *In re* International Harvesters Co., 104 F.T.C. at 1064.

46. *Id.* at 1050-51.

As the Commission reviewed the law of deception to be applied in the case, it restated and elaborated the three elements set forth in the 1983 Policy Statement. First, there must be a representation, practice, or omission that is likely to mislead the consumer, the Commission noted that although there must be some evidence which shows a likelihood of misleading the consumer, there is no requirement that the evidence show an actual false belief held by a consumer.[47] The second element required that consumers act reasonably. The Commission clarified that the standard requires only that consumers act in a way consistent with the "broad range of ordinary or average people."[48] Only if the representations are targeted to a specific audience will the reasonable consumer be considered a representative of that group.[49] The third element addresses the fact that the misleading effects must be material. The Commission noted that the "effect" with which they are concerned is the distortion caused to the "ultimate exercise of consumer choice." This distortion opens the door to claims that omissions, as well as false and misleading statements, fall under its theory of deception.

This case was unique in that it was the first case after the 1983 Policy Statement to address the deception standard in the context of omissions rather than false or misleading representations. As such, it provides additional insights into the Commission's application of the new deception standard in omission cases. Before deciding that the omission here was not deceptive, the Commission acknowledged that a deception action can reach seller omissions in two instances. First, deception may occur if the seller tells only a half truth and fails to disclose qualifying information necessary to prevent an affirmative statement from creating a misleading impression.[50] Second, deception can also occur where the seller remains silent if he or she does so under circumstances that make such silence the equivalent of an implied but false representation. Such circumstances could arise either where the product appearance, surrounding circumstances of a specific transaction, or ordinary consumer expectations of minimum performance standards create an implied but false representation and the seller takes no remedial action. The Commission explicitly recognized that the very act of offering goods for sale creates a representation that they are reasonably fit for their intended uses. The Commission even went so far as to admit that this may include a further implied representation that the products are free of

47. *Id.* at 1056.
48. *Id.* at 1057.
49. *Id.*
50. *Id.* (citing P. Lorillard Co. v. F.T.C, 186 F.2d 52, 58 (4th Cir. (1950s)).

gross safety hazards, although not that the product was necessarily free of all or relatively improbable dangers.[51]

This latter comment addressing gross safety hazards was particularly important when considered within the context of the overall decision. In establishing that the deception can encompass omissions in two circumstances, the Commission distinguished these "non-pure" omissions from a new category of "pure" omissions where the seller has said nothing and such silence has no particular implied meaning. Harvester's omission of the warning information was considered a "pure" omission which did not constitute a misrepresentation under the reasonable consumer standard, and therefore, could not amount to deception. To rule otherwise would create a tremendous economic burden on sellers to consider all potential consumer interpretations in order to avoid a deception charge, and that in these cases corrective disclosures would not necessarily be in the public interest.[52]

In applying the cost-benefit analysis to the facts of the instant case, the Commission held that Harvester's silence was not deceptive since the risk of harm was slight[53] and that the use of the tractor could not be considered "inherently unreasonable or imprudent."[54] Therefore, the omissions in this case did not rise to the level of a breach of an implied warranty of fitness, and thus did not meet the first element of the deception standard. This establishment of a new cost-benefit analysis which must result in a net gain to consumers before the case will "qualify for the streamlined legal procedures of a deception action"[55]

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51. *Id.* at 1058-59.

52. The Commission stated:

> If we . . . were to proceed under a deception theory without a cost benefit analysis, it would surely lead to perverse outcomes. The number of facts that may be material to consumers—and on which they may have prior misconceptions—is literally infinite. Consumers may wish to know about the life expectancy of clothes, or the sodium content of canned beans, or the canners' policy on trade with Chile. Since the seller will have no way of knowing in advance which disclosure is important to any particular consumer, he will have to make complete disclosures to all . . . There are literally dozens of ways in which one can be injured while riding a tractor, not all of them obvious before the fact, and under a simple deception analysis these would presumably all require affirmative disclosure. The resulting costs and burden on advertising communication would very possibly represent a net harm for consumers.

*Id.* at 1059-60.

53. The geysering accident rate was less than .001% over a 40 year period. *Id.* at 1063.

54. *Id.*

55. *Id.* at 1064. In a footnote, the Commission attempted to distance itself from prior agency decisions which found deception in cases where there was a similar non-disclosure of a safety risk that was quite improbable, but also quite serious. Rejecting those cases as precedents, the Commission stated:

> These cases are from the 1950s and early 1960s, however. They date from a time when unfairness law was poorly developed, and when, for the most part, a case had to be described in terms of deception if it was to be brought within the FTC Act at all. Without

was particularly disturbing to Commissioner Bailey. Commissioner Bailey dissented from this portion of the decision, calling the approach "entirely novel and nearly incomprehensible."[56]

C. SOUTHWEST SUNSITES, INC.

Less than one month after the final order in *International Harvester*, the Commission issued another opinion in the third case in the *Cliffdale* case line, *In re Southwest Sunsites, Inc.*[57] In this case the company, along with four other respondents, was charged with deceptively marketing certain parcels of land in West Texas. More specifically, the complaint alleged that Southwest had:

> 1) misrepresented that the parcels were good investments involving little or no financial risk and failed to disclose material information regarding their financial risk; 2) misrepresented that the properties were suitable for use as homesites, farms, and ranches and failed to disclose material facts regarding the suitability of the properties for such uses; and 3) refused to refund the sales proceeds of parcels that were of little or no value.[58] Misrepresentations also alleged to have been made by Southwest included that the land had the potential for commercial development and thus increased resale values, because "oil production was underway" in the area. The commercial prospects for the property were further supported by an "oil map" which was given to prospective purchasers and by references to the possible construction of a nuclear power plant.[59]

Following a hearing the complaint was dismissed. Although the broker retained by Southwest had misrepresented the nature and value of the investments, Southwest was held not liable under Section 5 of the FTCA. The company took actions to correct the situation, including a

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in any way questioning the substantive outcome of those cases, therefore, we suggest that if they were brought today they would be brought under an unfairness theory.

*Id.* at 1064 n.53.

56. Commissioner Bailey stated:

> I dissent because the Commission has concluded that Harvester's conduct, while unfair, was not deceptive. In order to reach that conclusion, the Commission has adopted an entirely novel and nearly incomprehensible theory of the law of deception. This is not a complicated case. It is a straightforward example of a manufacturer's duty to warn customers of a latent safety hazard in its product. But the Commission today decides that failure was not deceptive because it involved a "pure omission" of material fact, which according to this opinion is not a deceptive act or practice.

*Id.* at 1077.

57. 105 F.T.C. 7 (1985).

58. *In* re Southwest Sunsites, Inc., 105 F.T.C. 7, 10-11 (1985) (complaint).

59. *Id.* at 115-16.

liberal refund policy and the termination of the brokers who had sold the land parcels.[60] The ALJ further determined that the deception charges were unwarranted because there were no "insurmountable obstacles" preventing the use of the parcels as homesites, and that information relating to costs of development had been sufficiently disclosed to the buyers. The ALJ reasoned that he could not conclude that the parcels were of "little or no value," particularly since he had found that they could feasibly be used as homesites. This meant that Southwest had obtained the money for the properties lawfully, and as such, retention of the sales proceeds was not an unfair trade practice.[61]

On appeal, the ALJ's decision was unanimously overturned. Commissioner Bailey, writing for the Commission, evaluated each of the claims alleged in the complaint. The opinion first analyzed the claim that the respondents had represented that the land was a good, profitable, safe, and an easily resold investment with little or no risk of loss. Since many of these representations were express and their meanings clear, consumers would have reasonably interpreted that these claims were made. With respect to the implied representations alleged, Commissioner Bailey reaffirmed the Commission's "net impression" approach previously discussed in *Thompson*,[62] stating:

> Other representations were implied and required the Commission to determine how consumers reasonably would have interpreted them. We did so by considering the net impression of respondents' claims made on consumers giving due regard to the influence various express statements had on consumers' interpretations of implied claims, and noting the extrinsic evidence in the record in the form of consumers' testimony as to how they interpreted claims made to them.[63]

Using the net impression approach, prospective purchasers could reasonably have interpreted the implied representations regarding oil exploration and construction of a nuclear power plant in general, to

60. The ALJ concluded that the respondents were not liable for the misrepresentations because "there must come a point where a respondent is permitted to exculpate himself." *Id.* at 97-98 (initial decision).

61. *Id.* at 99 (initial decision).

62. *In re* Thompson Med. Co., Inc., 104 F.T.C. 648, 793 (1984). In determining the implied representations contained in a particular advertisement, the Commission typically looks first at what representations are implied on the face of the advertisement itself and, if that is not conclusive, then to extrinsic evidence regarding the implied representation the ad can reasonably be interpreted as conveying to consumers. The focus is on the "overall, net impression" made by an advertisement rather than how consumers might react to a particular element of an ad when taken out of the context of the advertisement itself. *Id.* at 790; *see also In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 178 n.26 (1984) (Federal Trade Commission Policy Statement on Deception).

63. *In re Southwest Sunsites, Inc.*, 105 F.T.C. at 148 (footnote omitted).

convey the net impression that the land was a good investment because of the presence or prospect of commercial and industrial development.[64] In light of the affirmative statements respondents made about the potential investment value of the property, the absence of any disclosures regarding the risk associated with the purchase of said land and the difficulty that purchasers might encounter in trying to resell it, the Commission concluded that Southwest's omissions qualified as deceptive acts or practices.[65]

In finding the above representations material to consumers, the Commission stated that it infers that all express representations are material. In addition, the Commission found that implied representations and omissions which pertained to the central characteristics of the land, such as performance quality, cost, and purpose of the property were also material.[66] The Commission generally describes a "material" claim as one that is likely to affect a consumer's choice of or conduct regarding a product.[67] In addition to express claims, one of the categories of claims which is considered to be presumptively material includes implied claims which pertain to the "central characteristics of a product or service, such as those relating to its purpose, safety, efficacy, or cost."[68] Since it had already been concluded that the property's investment value, oil exploration and undertakings, and commercial development representations were inaccurate, the Commission also found that they were likely to mislead reasonable consumers:

> It is axiomatic that inaccurate representations about the investment value of land can mislead consumers . . . consumers'

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64. *Id.* at 149.

65. Although the Commission did not directly use the terms "pure" or "non-pure" omission, its conclusion that such omissions resulted in a deceptive practice under Section 5 indicates that it considered the omissions in the instant case to be of the "non-pure" variety:

> Respondents' omissions of information as to the riskiness of the land as investment property were likewise deceptive acts or practices, because respondents failed to disclose qualifying information needed to correct consumer misimpressions they created . . . Consumers would not reasonably have anticipated these risks because respondents expressly promised otherwise.

*Id.* at 150.

The Commission first distinguished "pure" from "non-pure" omissions in *In re International Harvester Co.* *See* 104 F.T.C. 949, 1059 (1984). A pure omission was described as arising where "the seller has simply said nothing, in circumstances that do not give any particular meaning to his silence." *Id.* While the FTC has also noted that "pure" omissions can nevertheless lead to erroneous consumer beliefs if the consumer had a false, pre-existing conceptions which the seller fails to correct, it has refused to rule that these omissions rise to the level of deception since disclosure requirements would be unduly burdensome to the seller and "very possibly represent a net harm for consumers." *Id.* at 1060.

66. *See In re Thompson Med. Co., Inc.*, 104 F.T.C. at 816-17.

67. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984).

68. *In re Thompson*, 104 F.T.C. at 816-17.

> reasonable expectations about the land's investment value were not met, and they were therefore likely to been mislead. Moreover, the record shows that consumers actually were mislead by respondents' misrepresentations.[69]

Similarly, the representations that the land offered for sale was suitable for homesites, farming, and ranching constituted express and implied representations that were material and likely to mislead reasonable consumers. The representations described half-truths regarding the significant costs and limitations that a consumer would encounter in attempting to use the land accordingly.[70] Somewhat unclear, however, is the cryptic footnote discussing the Commission's evaluation of such implied representations. The footnote states: "It is important to remember that this evaluation does not focus on whether it was reasonable for consumers to believe or act on the representations at issue. It focuses instead on whether consumers could reasonably interpret the advertising or statements to convey the implied representations."[71]

Rather than emphasizing any actual consumer conduct, the Commission looked toward the interpretation reasonable consumers could take from such implied representations. This language may indicate a small step backwards towards the "tendency to deceive" standard. However, it must be recognized that the language in the footnote was written by one of the two Commissioners who most strongly opposed the adoption of the "likely to mislead" standard. Although the Commission was unanimous in its decision to overrule the ALJ's dismissal of the complaint in this case, Commissioner Bailey made it clear the unanimity did not extend to the use of the "likely to mislead" standard:

> Commissioner Bailey believes that respondents' practices were deceptive and violated Section 5 of the FTC Act because they tended to mislead a substantial number of consumers in a material way by presenting respondents' land, inaccurately, as attractive, money-making investment property that was suitable for a wide range of uses and did not have any significant drawbacks or limitations. She also agrees that these practices were likely to mislead consumers acting reasonably under the circumstances in a material way, though she does not endorse the use of this standard.[72]

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69. *In re Southwest Sunsites, Inc.*, 105 F.T.C. at 150.
70. *Id.* at 152.
71. *Id.* at 148 n.80.
72. *Id.* at 147 n.79.

After the full Commission had reversed the earlier dismissal, Southwest appealed to the Ninth Circuit Court of Appeals which affirmed the ruling.[73] In what was the first review of the revised deception standard by a federal court, the Ninth Circuit also upheld the Commissions's adoption of the new "likely to mislead" standard, indicating that the new standard did in fact impose a higher burden of proof on the FTC:

> Each of the three elements of the new standard challenged by petitioner imposes a greater burden of proof on the FTC to show a probable, not possible deception ("likely to mislead," not "tendency and capacity to mislead"). Second, the FTC must show potential deception of "consumers acting reasonably in the circumstances," not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonably relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.[74]

Given the obvious deceptive nature of the representations at issue in *Southwest Sunsites*, it is difficult to accept the Ninth Circuit's conclusion without further inquiry. Clearly, the conduct and practices in question would have been considered deceptive regardless of whether the traditional standard or its replacement had been employed. However, a federal court had spoken to the burden of proof issue, thereby making the analysis and rationale contained in future deception cases even more critical to developing an informed opinion as to whether Cliffdale constituted the significant change predicted by many commentators.

### D. FIGGIE INTERNATIONAL, INC.

In 1986, the Commission had another opportunity to revisit the *Cliffdale* standard with respect to alleged misleading representations in advertisements. In *In re Figgie International, Inc.*,[75] a manufacturer and distributor of "Vanguard" heat detectors and smoke detectors had been charged with representing in its promotional literature that the heat detectors provided immediate early warning of fires and that they did so faster than smoke detectors.[76] In its complaint, the FTC alleged that the company had misrepresented that: 1) the Vanguard heat detectors provide sufficient warning to allow safe escape from most residential fires; and 2) the combination of Vanguard heat and smoke detectors

73. Southwest Sunsites, Inc. v. F.T.C., 785 F.2d 1431, 1439 (9th Cir. 1986).
74. *Id.* at 1436.
75. 107 F.T.C. 313 (1986).
76. *In re* Figgie Int'l, Inc., 107 F.T.C. 313, 372 (1986).

provide significantly greater fire warning protection for occupants than smoke detectors alone.[77] The ALJ found the first of these representations deceptive since Figgie had not disclosed that dangerous levels of smoke, heat, and carbon monoxide could develop before the heat detectors would activate. He further found the second representation deceptive since it was not disclosed that fire protection standards require that a smoke detector be placed outside each sleeping area and on each additional story of a residence.[78]

Figgie appealed the ALJ's initial decision on the ground that the evidence on the record supported their claims that heat detectors provide the necessary warning time to make a safe escape.[79] In evaluating Figgie's arguments on appeal, Commissioner Azcuenaga reiterated the *Cliffdale* deception elements, albeit in footnote language. Commissioner Bailey's disagreement with the use of the new standard was again dutifully noted in a footnote following the discussion of the standard to be applied to the case.[80] To analyze the alleged representation that Vanguard heat detectors provide the necessary warning to allow safe escape from most residential fires, the general claim was divided into two component claims.

First, there was the representation that Vanguard heat detectors provide enough warning for safe escape from at least some fires, meaning that the devices are effective as residential fire warning devices. This representation was found to have been expressly made by statements in Figgie's promotional materials such as: they provide "fast response to hot fires," and "immediate early warning." In addition, Figgie impliedly offered that "thousands of lives have been saved by Vanguard heat detectors," the product for sale as residential fire warning devices.[81] The second component of the representation was the claim that Vanguard heat detectors provide the necessary warning in most fires. This representation was found to have been made expressly through references to statistics, such as 734 of 1107 (66.2%) of reported activations were the

77. *Id.* at 314 (complaint).

78. *Id.* at 372-73.

79. *Id.* at 373. Figgie also claimed that it was not given adequate notice of "the matters of fact . . . asserted" in the proceeding as required under § 554(b) of the Administrative Procedures Act and that the ALJ's decision was based on theories not alleged in the complaint. *Id.* However, the Commission found both such claims to be without merit. *Id.* at 392-93.

80. In a footnote, the Commission stated:

> As Commissioner Bailey noted in her Concurring and Dissenting Statement in *Cliffdale*, she believes that a deceptive act or practice is best analyzed as one that has the tendency or capacity to mislead a substantial number of consumers in a material way. While we have followed the analysis used in *Cliffdale*, we agree that respondent's practices in this case were deceptive under either analysis of a deceptive act or practice.

*Id.* at 374 n.6 (citations omitted).

81. *Id.* at 377.

types of fires that "might be responded to best by heat detectors," or impliedly by statistics such as fifty-seven percent of reported fires of known origins stated in kitchens or other areas where smoke detectors should not be installed.[82] The evidence was more than sufficient to affirm the ALJ's decision that both representations had, in fact, been made by Figgie.

The Commission also agreed with the ALJ's conclusion that Figgie had made express claims in its promotional materials by stating that combining heat and smoke detectors provides significantly greater fire warning protection than smoke detectors alone.[83] Figgie had represented that the combination provided significantly greater protection in three different ways: 1) they may be located in kitchens and other areas where smoke detectors are not recommended; 2) they are more reliable since they require no maintenance and are mechanically and not electrically operated; and 3) they may provide earlier response to hot fires that "generate heat but little smoke."[84] These express claims also passed the test of materiality. First, since the majority of representations alleged in the complaint had been found to have been made expressly by Figgie, they should be presumed to be material under the Commission's longstanding presumption of materiality for such claims. Second, the Commission also presumes that representations which relate to the primary features of the product, such as effectiveness, are material.[85] In this case, the single most important characteristic of a heat detector was its effectiveness as a fire warning device. Therefore, Figgie failed to present any evidence to rebut the presumptions of materiality.[86]

Finally, the Commission addressed whether the representations in this case were likely to mislead consumers. The ALJ found that the "likely to mislead" standard was satisfied because Figgie had failed to disclose certain qualifying information needed to correct impressions left by the representations made expressly or impliedly in Figgie's promotional materials. The Commission concluded that Vanguard heat detectors do not provide the necessary warning to allow safe escape from most residential fires and therefore, Figgie's representations to the contrary were likely to mislead and were deceptive. However, looking at the three claims incorporated within the representation that heat detectors were significantly better than smoke detectors alone, the Commission found that only one of the claims were likely to mislead.

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82. *Id.*
83. *Id.* at 378.
84. *Id.*
85. *In re* International Harvester Co., 104 F.T.C. 949, 1057 (1984).
86. *In re Figgie Int'l, Inc.*, 107 F.T.C. at 379.

The Commission also examined the fact that even a relatively small amount of additional protection from death or serious injury could be considered significant by some consumers. The commission determined that the representations that heat detectors provided a significant amount of additional protection when installed in areas where smoke detectors would not function properly, and the claims that heat detectors do provide some additional protection because they are maintenance free and mechanically rather than electrically operated, were found not to be necessarily deceptive as long as they were substantiated and not exaggerated.[87] However, test results were examined which indicated that smoke detectors give earlier warning of both smoldering fires and flaming fires. In addition, the National Fire Protection Association concluded that "the results of full-scale experiments conducted over the past several years . . . indicate that detectable quantities of smoke precede detectable levels of heat in nearly all cases." As such, the Commission determined that Figgie's claim that heat detectors provide a significant additional protection because they respond more quickly than smoke detectors to hot, flaming fires was found to be false and misleading.[88]

### E. REMOVATRON INTERNATIONAL CORPORATION

In *In re Removatron International Corp.*,[89] the Commission was again dealing with express and implied claims, this time in advertisements regarding the "Removatron" epilator, a tweezer-type hair removal device employing radio frequency energy. In September 1985, the FTC issued a complaint alleging that the company, under the direction of its president, had represented through various advertising and promotional materials that the Removatron device permanently removed hair and was effective on a long-term basis.[90] The company was also charged

87. Commissioner Bailey dissented from that portion of the opinion which agreed that the heat detectors provided significantly greater fire warning protection than smoke detectors alone and that they are more reliable than smoke detectors. *Id.* at 396.

88. *Id.* at 392.

89. 111 F.T.C. 206 (1988), *aff'd*, 884 F.2d 1489 (1st. Cir. 1989).

90. *In re* Removatron Int'l Corp., 111 F.T.C. 206, 206-07 (1988) (complaint). The FTC's complaint cited the following statements made by Removatron International in its advertising and promotional materials:

1. Permanent hair removal;
2. Removatron. It lets you say goodbye to temporary solutions like messy cremes.;
3. The method is fully . . . effective . . . All hairs can be treated successfully . . . Removatron is more effective than any electrolysis machine on the market.;
4. Unwanted hair is no longer a problem, with a series of treatments, it can be Removatroned forever!;
5. [T]he Removatron method uses modern electronic tweezers to EFFECTIVELY remove unwanted hair . . .;
6. Alternative to electrolysis.

*Id.* at 207.

with representing that they possessed and relied upon a reasonable basis for their permanency claims, when in fact they had none. The FTC's complaint further charged that the company had falsely claimed that the Federal Communications Commission (FCC) had approved the Removatron hair removal method, when in reality the FCC had only approved the operation of the device at a particular radio frequency.

In July of 1987, the ALJ issued his decision and concluded both that the representations alleged in the complaint had been made and that they constituted unfair and deceptive acts or practices in violation of Section 5. The order prohibited the company from making such representations in the future unless they were supported by at least two controlled, double-blind clinical studies. Additionally, the order prohibited the company from making representations: 1) that the device removed hair, unless they also disclosed that there is no reliable evidence that the device provides anything more than temporary hair removal; and 2) that the device was FCC approved, absent a clear and conspicuous statement regarding the limitation of the FCC approval. Finally, the order required the company to send to past purchasers a copy of the order and notification not to rely on Removatron advertising or promotional materials containing the prohibited representations and to provide a copy of the order to future purchasers.

Removatron International appealed the ALJ's decision on three grounds. First, the company challenged the conclusion that it had falsely represented the permanent nature of its hair removal achieved by the Removatron device and that the company had a reasonable basis for such claims. Second, the company questioned the judge's ruling that its scientific evidence was insufficient to constitute a reasonable basis for the claims, and his determination that in order for the company to show a reasonable basis for its claims, it had to be able to provide reliable scientific evidence consisting of at least two scientific studies. Third, Removatron International claimed that the order was overbroad and had no reasonable relationship to the alleged violations.

The Commission opinion began with a rather routine recitation of the reasonable consumer standard, citing both *Thompson* and *Cliffdale* as the controlling precedents. After a brief discussion of the Commission's method of evaluating what express and implied claims might be contained in an advertisement, the Commission focused on the advertisement as a whole, as well as the impact it had on the target audience: "In short, the Commission considers the net impression that the ad makes on reasonable members of the public. We avoid interpretations that would render an ad deceptive merely because it could be

unreasonably misunderstood by a very small and unrepresentative segment of the audience to whom it was directed."[91]

The Commission agreed with the conclusions of the ALJ that Removatron International's representations included both express and implied claims regarding the permanency of hair removal.[92] The opinion then turned to the representation that Removatron had adequate scientific evidence substantiating the permanency claims and concluded that since the company had failed to conduct any clinical tests on this issue, the requisite scientific basis to substantiate such claims was lacking.[93] In comparison to the lengthy analysis of the express and implied claims allegedly made in the advertisements and the thorough handling accorded the issue of substantiation, the majority opinion provides only a short, conclusory treatment of the issue of whether the advertising violated the FTCA. The majority again cited *Cliffdale* in holding:

> The Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material. A claim is material if it involves information that is important to consumers and hence, likely to affect their choice of or conduct regarding the product. The Commission presumes as material express claims and implied claims pertaining to a product's purpose, safety, efficacy or cost.[94]

Although the Commission's discussion reflected a clear intention to follow the *Cliffdale* standard, the opinion made no explicit finding that the representations were "likely to mislead consumers acting reasonably under the circumstances." Instead, the Commission directly concluded that the advertising and promotional materials that contained certain representations concerning the permanency of the Removatron's

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91. *Id.* at 292 (opinion of the commission) (citations omitted).

92. *Id.* at 293. Express claims included statements that hair removal would be "permanent," that unwanted hair is "no longer a problem" and could be "removed" or "Removatroned forever." *Id.* at 292. Implied claims were found in statements that Removatron is "effective," is an "alternative to electrolysis," or "works." *Id.* at 293.

93. *Id.* at 296. A lengthy portion of the Commission's opinion dealt with Removatron International's contention that the ALJ had erred in determining that it did not possess adequate scientific substantiation for their claims of permanency to meet the reasonable basis standard. The FTC reiterated the standard it had previously set forth in *In re Thompson Medical Co, Inc.*, that when advertising expressly or impliedly represents that it is based on scientific evidence, the advertiser must have the level of substantiation, and in particular, must satisfy the relevant scientific community that the claim is true. *Id.*; *see In re* Thompson Medical Co., 104 F.T.C. 648, 813 (1984); *In re* Bristol-Meyers Co., 102 F.T.C. 21, 321 (1983).

94. *In re Removatron Int'l Corp.*, 111 F.T.C. at 309 (citations omitted).

treatments, and the representations that such claims were supported by scientific proof, were without merit. These conclusory comments were followed by an analysis of the issue of claim materiality. With respect to materiality, the FTC determined that such claims were material insofar as they pertained to the very purpose and efficacy of the product. Therefore, Removatron International's failure to provide adequate substantiation rendered their advertising false and deceptive in direct violation of FTCA Sections 5 and 12.[95]

The Commission's decision was appealed to the First Circuit. While numerous issues were advanced on appeal, Removatron International specifically challenged the FTC's decision with respect to their findings that: 1) their advertisements contained representations that the Removatron could remove hair permanently in all people; and 2) such claims were unsupported by adequate scientific evidence. Removatron International claimed that the advertisements, while specifically stating that treatments removed hair permanently and were effective, should have been interpreted by the Commission to mean that the treatments permanently removed hair for most people most of the time. In support of their "common-sense" approach, they pointed out two qualifying statements made in one of their sales brochures. However, the court found the qualifications made in other advertisements to be ineffective:

> Each advertisement must stand on its own merits; even if other advertisements contain accurate, non-deceptive claims, a violation may occur with respect to the deceptive ads. Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.

The court also agreed with the Commission's findings with respect to the lack of scientific substantiation for the claims made in the advertisements. Unpersuaded by Removatron's argument that the use of the phrase "clinically tested" would not be taken by a reasonable person as meaning "supported by rigorous scientific tests," the court noted: "Regardless of any actual differences there may be between 'clinical'

95. Section 12 of the FTCA prohibits false advertising of any food, drug, or device. The statute defines a "device" as "any instrument apparatus, or contrivance intended to affect the structure or function of the body." 15 U.S.C. § 55(d) (1994). The Commission determined that the Removatron fell within the purview of this definition. *In re Removatron Int'l Corp.*, 111 F.T.C. at 309 (opinion of the Commission).

and 'scientific' evidence, petitioners have offered no basis for us to find that laypeople would make such a fine distinction.

Removatron also challenged the requirement of the Commission's order that it have at least one well-controlled scientific study before they would be permitted to make a claim of permanent hair removal in their advertisements. The company argued that regardless of the fact that any well-controlled scientific study was lacking, the material it did possess amounted to a "reasonable basis" for their claims of permanent hair removal. The court held that "[w]ithout such a study, petitioners could not, as a matter of law, have a reasonable basis for their establishment claims. Without such a reasonable basis their ads were deceptive and in violation of [Section 5]." They further noted that such a requirement prevents the making of even non-establishment claims with respect to the permanency of the treatments and held that the Commission's requirement was a reasonable "fencing in" provision and within the Commission's discretionary powers.

Finally, they challenged the order's requirement that they send a copy of the order and a notice to all past purchasers, and that they include a disclaimer in any advertisement which includes any claims of hair removal stating such removal is only temporary. The court distinguished the disclaimer and notifications required here from corrective advertising, since the disclaimers were not required in all future advertisements regardless of the content of those advertisements. Rather, the court held that the disclaimers here were only a form of affirmative advertising, required only when it was claimed the Removatron could remove hair, and could be avoided simply by ceasing to make such claims.

Despite its relatively brief treatment of the deception standard, the *Removatron* case was significant in two ways. First, it further clarified the issue of at what point the "net impression" of the representations should be measured. Removatron International argued that the "net impression" made by the representations should be based upon the sales process as a whole, rather than by reference to the impressions left by any individual ads. However, both the Commission and the First Circuit rejected such an argument and held that it was instead proper to consider the net impression of the individual ads without regard to the context provided by the advertising campaign or subsequent qualifications of those representations. Second, *Removatron* was significant for its clarification of the advertising substantiation doctrine. In determining the necessary level of substantiation for the company's claims of permanent hair removal, both the Commission and the Court held that a "reasonable basis" for making such claims could only be accomplished

by having well-controlled scientific studies. Both also adopted the ALJ's finding that such a determination could be made regardless of whether a specific analysis of the six *Pfizer* factors is undertaken, so long as the advertisements in question expressly or impliedly represent that such scientific proof existed.

### F. RELIABLE MORTGAGE CORPORATION

The next opportunity for the full Commission to address the reasonable consumer arose in the unusual circumstances of an interlocutory order issued by the Commission in its dismissal of a show cause proceeding. This opportunity developed during the FTC's reconsideration of a decision and order issued originally in *In re Reliable Mortgage Corp.*[96] Reliable's chief executive officer had violated the Truth-in-Lending Act (TILA) and Regulation Z by advertising a mortgage interest rate without disclosing the annual percentage rate (APR). In January 1989, a full fourteen years after issuance of the original order against Reliable, the FTC issued an order to show cause as to why the proceeding should not be reopened. The agency staff urged the Commission to modify its prior decision to expressly state that the practice at issue, advertising a finance charge without state the APR, also constituted an unfair or deceptive act or practice in violation of the FTCA. The proceeding was reopened in September 1989.

The FTC staff suggested that the language of the TILA and its legislative history indicated Congressional intent to classify the TILA violation as an unfair or deceptive act or practice under sections of the FTCA. Alternatively, it was urged that the act which constituted the TILA violation would independently meet the unfairness and deception criteria under Section 5.[97] Although the Commission rejected both arguments and dismissed the show cause proceeding, the Commission again initiated its analysis of the deception claim with the *Cliffdale* standard, referring to it as "*the* deception standard."[98] However, much to the concern of Chairman Steiger, the opinion went on to list two alternatives by which it might determine the practice was deceptive. First, *Thompson* was cited pursuant to the proposition that under certain circumstances the Commission may determine without extrinsic evidence that an advertisement conveys a particular claim and is misleading. Second, the majority opinion noted that they could review the record to determine if the staff had proven that the practice was deceptive. The

96. 113 F.T.C. 816 (1990).
97. *In re* Reliable Mortgage Corp., 113 F.T.C. 816, 818 (1990).
98. *Id.* at 819-20 (emphasis added).

Commission commented on the unfortunate situation created by this lack of evidence:

> There is simply no supporting evidence from which we can conclude that consumers were in fact misled by the advertising in question. Nor can we resolve whether consumers believed the advertised rate represented the APR. In short, absent a record with supporting evidence, we cannot find that Reliable's practice was deceptive.[99]

Perhaps more instructive than the Commission's opinion in *Reliable Mortgage* of the reasonable consumer standard is the separate concurring statement of Chairman Steiger. She expressed her concern that the Commission's opinion could be read to require a finding that consumers were actually misled by the advertising at issue before a finding of deception could be made.[100] Chairman Steiger pointed out that although the record in this particular case was devoid of any showing of actual deception, such evidence was not necessary in light of previous case law and the Policy Statement.[101]

G. KRAFT, INC.

In the most recent opinion by the full Commission addressing the evolving deception standard, the FTC analyzed *In re Kraft, Inc.*[102] The case addressed whether Kraft's advertisements for its Kraft Singles American Pasteurized Cheese Food "Kraft Singles," violated the FTCA by materially misrepresenting the product's calcium content and relative calcium benefit in various broadcast and print advertisements that ran nationwide from 1985-87. In its complaint, the FTC alleged that Kraft had misrepresented, directly or by implication, that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the "milk equivalency") claim, that Kraft Singles contain more calcium than do most imitation cheese slices (the "imitation superiority" claim), and that the company misrepresented that it had a reasonable basis for making such claims (the "reasonable basis" claim). The ALJ found that the Kraft advertisements contained material misrepresentations regarding both the calcium equivalency and imitation superiority claims, and prohibited Kraft from making such claims in its advertising of

99. *Id.* at 820.
100. *Id.* at 823 (separate statement of Chairman Steiger).
101. *Id.* (separate statement of Chairman Steiger).
102. 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

any "individually wrapped slices of pasteurized process, imitation or substitute cheese products."[103]

Kraft appealed the ALJ's decision and order to the full Commission, citing four principal arguments: 1) that the ALJ did not have the authority to base his findings solely on a review and analysis of the challenged ads; 2) that the ALJ erred in his finding that, based on the extrinsic evidence in the record, consumers would take the alleged implications from the ads; 3) that the ALJ erred in determining that the calcium claims were material to consumers; and 4) that the ALJ's order would amount to an unconstitutional restraint on commercial speech by preventing truthful informative advertising for the covered products.[104] Despite Kraft's arguments, the Commission agreed with the ALJ's finding of liability and proceeded to expand the order's scope to include not only individually wrapped products, but also "any product that is a cheese, related cheese, imitation cheese, or substitute cheese" as was originally proposed by the complainants' counsel in the notice order.[105]

The Commission's opinion in *Kraft* began the analysis of the legal framework in terms of its traditional reference to the reasonable consumer standard: "The Commission will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message."[106] The majority then distinguished between express and implied claims, making it clear that both express and implied claims may subject a company to liability if such claims are deceptive, whether or not the deception was intentional.[107]

After reiterating the Commission's allegiance to the reasonable consumer standard, the opinion then addressed the first of two arguments made by Kraft on appeal by describing the process by which the Commission evaluates what claims an advertisement might convey to

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103. *In re* Kraft, Inc., 114 F.T.C. 40, 112-13 (1991) (initial decision). The ALJ rejected the broader scope proposed by the notice order attached to the complaint because he concluded that Kraft had not intended to make the representations, that there was insufficient evidence of a persistent, long-term pattern of deceptive advertising, and that the broader scope of the order would expose Kraft to liability in the future for "unpredictable interpretations of its ads." *Id.*

104. *Id.* at 119.

105. *Id.* at 149 (final order).

106. *Id.* at 120 (opinion of the Commission). Citing a recent study of the cereal industry by the FTC's Bureau of Economics which indicated the effectiveness of advertising in disseminating information on health benefits, the majority noted that the standard was "intended to ensure that the flow of useful and accurate product information conveyed to consumers through advertising is not deterred." *Id.* at 120 n.7.

107. The Commission noted that "Advertisers can be liable for misleading consumers by innuendo as well as by outright false statements." *Id.* at 121 (citing *In re* Cliffdale Assocs., 103 F.T.C. 110, 170-71, 175 n.4, 176-77 (1984) (Federal Trade Commission Policy Statement on Deception)).

reasonable consumers. The Commission expressly rejected Kraft's argument that as a matter of law, the agency could not reach a conclusion regarding claims made by an advertisement without relying on extrinsic evidence. The Commission stated that in some instances the advertisement contains language or depictions which are clear enough to enable them to conclude, without examining other evidence, that the advertisements convey a particular implied claim to consumers acting reasonably under the circumstances.[108] If the FTC is unable to conclude with confidence, based on a review of the advertisement itself, that an ad can reasonably be read to contain a particular implied claim, it will not find the advertisement to have made such a claim unless extrinsic evidence permits the conclusion that such a reading is reasonable.[109] Finally, the Commission summed up its response to Kraft's first two arguments by noting that only a small number of reasonable consumers need to be misled in order to uphold a finding of deception:

> Whether looking at evidence from the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it. An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive.[110]

Although the methodology employed by the Commission in evaluating implied claims was not new, it is perhaps the most detailed analysis of such claims that the Commission has produced. In fact, one commissioner has recently referred to Commissioner Owen's opinion in *Kraft* as "a clear statement of the Commission's approach to evaluating implied claims—the central question of many deceptive advertising cases."[111]

Once again, the Commission only briefly addressed the issue of whether the claims were likely to mislead a reasonable consumer.

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108. *In re Kraft, Inc.*, 114 F.T.C. at 121 (opinion of the Commission).

109. The Commission indicated that extrinsic evidence could include:

> reliable results from methodologically sound consumer surveys . . . common usage of terms . . . generally accepted principles drawn from market research showing that consumers generally respond in a certain manner to advertisements that are presented in a particular way . . . [and] the opinions of expert witnesses in the proceeding as to how the advertisement might reasonably be interpreted, if such opinions are adequately supported.

*Id.* (citing *In re* Thompson Medical Co., Inc., 104 F.T.C. 648, 790 (1984)).

110. *Id.* at 122 (citations omitted) (emphasis added).

111. Remarks of Chairman Janet D. Steiger before the American Advertising Federation Government Regulations Conference, March 12, 1991, TRADE REG. REP. (CCH) ¶ 50,052.

Having found that certain calcium claims were implied in Kraft's advertisements, the Commission determined that the claims were likely to mislead a reasonable consumer based on the fact that Kraft had not appealed the ALJ's findings that these claims were false and unsubstantiated. As such, the Commission adopted the ALJ's findings on the issue. However, the FTC also noted that it was reasonable to presume that consumers were not generally aware that the calcium in the five ounces of milk is reduced during the processing of Kraft Singles, nor that imitation cheese slices may be fortified with calcium. Consequently, because reasonable consumers would not be generally aware of these facts, the claims were likely to mislead consumers acting reasonably under the circumstances.[112]

The *Kraft* Commission did include a detailed discussion of the materiality element of the reasonable consumer standard in addressing the company's third argument on appeal. It was noted that several types of claims are considered to be presumptively material, such as express claims, implied claims where evidence suggests such claims were intended, and claims or omissions involving health, safety, or other areas with which reasonable consumers would be concerned.[113] Without directly contradicting the ALJ's conclusion that the implied calcium claims were presumptively material since they made significant health claims, the Commission elected to examine the issue of materiality of the implied "milk equivalency" and "imitation superiority" claims individually.

As to the "milk equivalency" claims, considerable weight was placed on Kraft's own survey results which suggested that calcium was important to consumers, especially those with calcium deficiencies. The evidence in the record also suggested Kraft had designed the marketing campaign to target these particular consumers. With respect to this evidence, the Commission concluded that the company believed that its marketing effort directly contributed to these consumers making decisions to purchase.[114] As for the "imitation superiority" claims, the ALJ's finding that Kraft had intended that the advertisements convey such a claim was affirmed, and from this finding it was proper to presume materiality.[115] This conclusion was further supported by the

112. *In re Kraft, Inc.*, 114 F.T.C. at 133 (opinion of the Commission).

113. *Id.* (citing *In re Thompson Medical Co.*, 104 F.T.C. at 816-817).

114. *Id.* at 137. The Commission stated: "We find it reasonable to infer from Kraft's persistence in using the challenged ad copy under these circumstances, and in making only minor modifications, that Kraft believed this copy contributed to consumer purchases of Kraft Singles." *Id.*

115. *Id.* at 138. The Commission rejected Kraft's argument that its materiality survey, which showed calcium ranked seventh out of nine characteristics in terms of the participants' decision to purchase Kraft Singles, was proof the imitation superiority claim was not material to consumers. *Id.* Instead, it focused on the survey's conclusion that over 71% of participants ranked a source of calcium as an "extremely" or "very important" factor in their purchasing decision. *Id.* at 138 n.30.

fact that the advertisement actually led to increased sales of Kraft Singles even though the product was priced about forty percent higher than other imitation cheese slices.

As previously mentioned, the FTC rejected Kraft's argument that the First Amendment required reliance on external evidence in determining the existence of implied claims. The company's fourth argument, that the finding of liability fails to distinguish meaningfully between lawful nondeceptive and unlawful deceptive advertising thereby violating the First Amendment, was also rejected. Kraft had essentially claimed that because certain advertisements not challenged in the proceeding would be subject to the terms of the order as it was written, it was unconstitutionally vague in distinguishing what constitutes lawful and unlawful advertising. The Commission responded that the company's attempt to invalidate the order by virtue of reliance on advertisements that were not in issue was improper given the scope of the material evidence as presented.[116]

After the opinion of the full commission was handed down in January of 1991, Kraft filed an appeal with the Seventh Circuit Court of Appeals arguing, *inter alia*, that the FTC erred as a matter of law in not requiring extrinsic evidence of consumer deception or, alternatively, that the FTC's findings were not supported by substantial evidence.[117] They argued both: 1) that there was insufficient evidence suggesting that the ads contained a milk equivalency claim; and 2) even if they did, there was a lack of evidence that such claims were material to consumers.[118] The other major issue on appeal involved the extent of the Commission's order, which by its terms applied to all Kraft cheeses and cheese-related products. In that regard, Kraft argued that the order was unconstitutionally broad because it bans constitutionally protected commercial speech, and it was not rationally related to Kraft's violation of the Act.[119]

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116. *Id.* at 132-33. The Commission supported its conclusion by stating:

> It is no defense to a finding of deception in this case to assert that unchallenged ads might also be deceptive . . . Moreover, it would be inappropriate to speculate on the likelihood that we would find the unchallenged ads to which respondent refers to be deceptive, since a full record on the potential of those ads to deceive has not been developed and is not now before us.

*Id.*

117. *In re* Kraft, Inc. v. F.T.C., 970 F.2d 311, 318 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

118. *Id.* at 322.

119. *Id.* at 324-327. The court held in favor of the Commission with regard to both of Kraft's arguments in this respect. *See id.* First, it held that the scope of the order was not broader than reasonably necessary to prevent deception, and thus not violative of the Kraft's First Amendment rights. *See id.* Second, it held that the scope was reasonably related to the violation such that the order constituted a valid multi-product order ("Fencing-in" order) necessary to prevent Kraft from engaging in similar practices in the future. *Id.* at 326.

Like most other appeals of deception cases, Kraft did not fare any better in court than it had done with the full Commission. The Seventh Circuit declined to review the FTC's findings *de novo* and instead reaffirmed that the appropriate standard for review in such cases was the substantial evidence test.[120] The court next turned to the issue of the use of extrinsic evidence in determining the claims conveyed by an advertisement when implied claims are at issue. While the court rejected Kraft's arguments, it did acknowledge that they had "some force as a matter of policy."[121] Ultimately, the long line of precedents which recognized the FTC's authority to use its own reasoned analysis rather than extrinsic evidence prevailed over policy.[122] The court held that: "[T]he Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear on the face of the advertisement."[123]

Kraft's allegations of a lack of substantial evidence supporting the FTC's conclusions were also decided in favor of the Commission. The court agreed with the Commission's findings that the ads' visual and verbal emphasis on the fact that five ounces of milk go into a slice of Kraft Singles created a link to calcium content and strongly implied that the consumer gets the calcium found in five ounces of milk. The fact that the ads were literally true—that singles were made from five ounces of milk and that they do have a high concentration of calcium (about seventy percent of that in five ounces of milk)—was rejected because the court agreed that an average consumer is not likely to know that thirty percent of the calcium is lost in processing.[124] Finally, the court also rejected Kraft's clam that materiality should turn not on the overall subject matter of the claim, i.e., calcium content generally, but rather on

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120. *Id.* at 318.

121. *Id.* at 319. The court stated:

> Our holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject make[s] a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception. Along those lines, the Commission would be well advised to adopt a consistent position on consumer methodology—advertisers and the FTC, it appears, go round and round on this issue—so that any uncertainty is reduced to an absolute minimum.

*Id.* at 321.

122. *See* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965); F.T.C. v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40-41 (D.C. Cir. 1985); Bristol-Myers Co. v. F.T.C., 738 F.2d 554, 563 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); American Home Products Corp. v. F.T.C., 695 F.2d 681, 687 n.10 (3d Cir. 1982); Simeon Management Corp. v. F.T.C., 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); National Bakers Servs., Inc. v. F.T.C., 329 F.2d 365, 367 (7th Cir. 1964); *In re* Thompson Medical Co., Inc., 104 F.T.C. 648 (1984).

123. *Kraft, Inc.*, 970 F.2d at 319

124. *Id.* at 322.

whether consumers would have acted differently with the specific knowledge that Singles contained only seventy percent of the calcium contained in five ounces of milk.[125]

In addition to being the most recent discussion by the full Commission of the deception standard, the Kraft case is important to the law of deception for three reasons. First, it settled, at least for the time being, the issue of whether the FTC can determine for itself what implied claims are conveyed by a particular advertisement. By rejecting Kraft's argument that extrinsic evidence of consumer deception must be presented, the court tacitly approved the considerable degree of discretion with which the FTC has been entrusted through prior case precedents.[126] The second major impact of the *Kraft* ruling was the reaffirmation that even literally true statements, such as Kraft singles are made from five ounces of milk and that they do have a high concentration of calcium, can be deceptive by leaving consumers with a misleading impression about the calcium content.[127] Third, the court refused to adopt Kraft's argument that any determination of materiality must turn on whether the claim itself (milk equivalency), rather than the subject matter of the claim (calcium content generally), is likely to affect the consumer's conduct or decision with regard to a product. Instead, the court properly upheld the Commission's conclusion of materiality since it was clear that consumers place great importance on calcium consumption and it could thus be reasonably inferred that a claim which exaggerated the calcium content by thirty percent was a nutritionally significant claim that would affect consumers' purchasing decisions.[128]

### H. PANTRON I CORPORATION[129]

The most recent addition to the *Cliffdale* line of cases is, unlike the preceding seven cases, not a decision of the full Commission. Instead, *FTC v. Pantron I Corp.* originated in the U.S. District Court for the Central District of California upon the FTC's request for an injunction against the seller of the hair loss product known as "The Helsinki Formula."[130] The FTC, in seeking the injunction, claimed that the company

125. *Id.* at 323-24. *See In* re Cliffdale Assocs., Inc., 103 F.T.C. 110, 175 (1984) (Federal Trade Commission Policy Statement on Deception stating that a claim is material when it is "likely to affect the consumer's conduct or decision with regard to a product").

126. *See* Dennis P. Stolle, Note, *The FTC's Reliance on Extrinsic Evidence in Cases of Deceptive Advertising: A Proposal for Interpretive Rulemaking*," Kraft, Inc. v. F.T.C., 970 F. 2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993), 74 NEB. L. REV. 352 (1995).

127. *Kraft, Inc.*, 970 F.2d at 322.

128. *Id.* at 323-24.

129. F.T.C. v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994).

130. *Id.* at 1090.

and its president and sole owner, Hal Z. Lederman, had made representations both that the product was effective and that its effectiveness had been substantiated by scientific evidence.[131]

At trial, the FTC introduced the testimony of three medical experts, all of whom concluded that the two ingredients in the Helsinki Formula that the company claimed were effective, polysorbate-60 and polysorbate-80, had never been scientifically proven to reduce hair loss or promote hair regrowth.[132] In support of this, the FTC also introduced two studies, both of which were randomized and double-blinded, and one of which was placebo-controlled, that both concluded that polysorbate-based products were ineffective in stopping hair loss and promoting hair regrowth.[133] In its defense, Pantron introduced the testimony of eighteen satisfied users who had experienced hair regrowth or a reduction in hair loss. They also offered the results of two studies conducted by European medical doctors which, although they did not conform to scientific standard generally-accepted in the U.S., were nevertheless claimed by Pantron to show that polysorbate-based products were effective treatments for baldness. In addition, the company relied for support on the results of an impromptu survey of users, and the fact that over half the company's orders came from repeat customers. Finally, the company emphasized that less than three percent of customers had ever exercised their right under the money-back guarantee.[134]

In September of 1991, the district court held that while Pantron had made the representations of efficacy and scientific support that the FTC had alleged, there was "no evidence in the record to support a contention that the Helsinki Formula is wholly ineffective . . ." and that the anecdotal evidence suggested "that the compound works for some people some of the time."[135] Thus, the court determined that the FTC had failed to carry its burden of proving that Pantron made an entirely false claim when it represented that the Helsinki Formula was effective. However, the court went on to conclude that because there was no "scientifically valid evidence" that the ingredient in the Formula was "effective for treatment of hair loss or for inducing growth," the FTC had "marginally carried its burden on the charge of falsity in defendant's claims of scientific proof."[136]

131. *Id.* at 1095.
132. *Id.* at 1092-93.
133. *Id.*
134. *Id.* at 1093-94.
135. *Id.* at 1094.
136. *Id.*

As a result, in its order the court barred Pantron from making any claims that scientific evidence establishes the effectiveness of the Helsinki Formula, while at the same time allowing then to state that "the Helsinki Formula, or a product similar thereto was the subject of medical investigative work by responsible European Physicians," if the statement was accompanied by a disclosure that the work did not conform to "recognized standards in the United States for medical/scientific studies." The order also allowed Pantron to state that the Formula was "effective to some extent for some people in dealing with male pattern baldness," as long as such statement was also accompanied by a similar disclosure to the effect that it is not explained or supported by scientific studies recognized under standards in use in the United States.[137] Both parties appealed the decision of the district court, and in 1994 the Ninth Circuit Court of Appeals overruled the district court, and directed that the parts of the order challenged by the FTC be modified.[138]

The FTC's primary arguments on appeal were directed at the district courts conclusion that there was "no evidence" that the Formula was "wholly ineffective" and that it "most probably works some of the time for a lot of people."[139] Therefore, the Ninth Circuit was squarely faced with the issue of whether it was lawful for a seller to represent a product as "effective" when its efficacy results solely from a "placebo effect."[140] The Ninth Circuit concluded that the answer to that question was "no" and that the representations made by the company, both the effectiveness claim itself and the claim that the Formula's effectiveness had been substantiated by scientific evidence, constituted a "false advertisement" under section 12 and was thus an "unfair or deceptive act or practice in or affecting commerce" within the meaning of FTCA Section 5. However, en route to reaching its conclusion the court made a significant step toward judicial recognition of the "reasonable consumer" standard first enunciated in Cliffdale:

> In its own adjudications, the F.T.C. has to some extent clarified the legal standards which apply in section 12 cases. In *Cliffdale Assocs.*, the Commission announced a three-part test for determining whether an advertisement is misleading and deceptive in violation of section 12 . . . The Commission has consistently adhered to the Cliffdale Associates standard. Although we have not heretofore explicitly adopted the test, we

137. *Id.*
138. *Id.* at 1095.
139. *Id.*
140. *Id.* at 1090 n.1.

> have stated that "[t]he new standard became binding on the F.T.C. when it was adopted in Cliffdale Associates." As we previously suggested in Southwest Sunsites, we believe that the general outlines of the Cliffdale Associates test set forth the appropriate general principles for determining whether advertising is deceptive. Except as noted below. . . we adopt this standard.[141]

Applying the Cliffdale "reasonable consumer" standard to the case at hand, the court found that there was no question that Pantron had represented that the Helsinki Formula was effective, or that the effectiveness claims were material to consumers. Since Pantron did not challenge either of these conclusions, however, the court made it clear that they were not deciding whether the representation made must be "likely to affect [consumers'] choice of, or conduct regarding, a product" in order to be material.[142] The only question left before the court, then, was whether Pantron's representations were likely to mislead or deceive consumers. At this point, the court carefully limited its holding. Since the case involved express objective product claims rather than implied claims that could be interpreted in different ways by consumers, the court specifically refrained from making any conclusion regarding the applicability of *Cliffdale*.[143]

However, the court did hold that the district court had erred when it concluded that Pantron's efficacy representations did not amount to false advertising. They declared that the "overwhelming weight" of evidence made it clear that any effectiveness was due solely to the Formula's placebo effect.[144] Reversing the lower court, the Ninth Circuit held that the FTC was not required to prove that a product is "wholly ineffective" in order to show that a seller's representations are false and/or misleading. Where a product's effectiveness arises solely as a result of a placebo effect, any claim of effectiveness will be misleading because "the [product] is not inherently effective, its result being attributable to the psychosomatic effect produced by the advertising and marketing of the product."[145] Accordingly, it held that Pantron's claim of effectiveness was misleading under the reasonable consumer standard because the evidence developed under accepted standards of scientific research demonstrated that the product had no force beyond its placebo effect. The court then ordered that the injunction be modified to

141. *Id.* at 1095.
142. *Id.* at 1096 n.20.
143. *Id.* at 1096 n.21.
144. *Id.* at 1097.
145. *Id.* at 1100.

prohibit Pantron from making any representations concerning the Formula's effectiveness at all and from providing any scientific support for such claims, regardless of any qualifying disclosures.[146]

## IV. CONCLUSION

Due to its unusual origin, the impact of the *Pantron I* case may not necessarily be felt at the Commission level. However, its importance cannot be discounted merely because it arose outside of the FTC's adjudicative process. For the first time, a federal circuit court placed an imprimatur on the "reasonable consumer" standard first set forth in the October 1983 Deception Policy Statement, and ultimately adopted in revised form in the *Cliffdale* case. This express adoption of the current FTC subjective standard cannot be overlooked, especially since the Ninth Circuit is not unaccustomed to handling appeals from FTC decisions.

In light of the foregoing, the key question is whether the *Cliffdale Associates* case brought forth any substantive change to the subjective standard used by the Commission in evaluating deception cases. Perhaps this question is answered, at least in part, by considering the number of Commission decisions in deception cases since 1984. There was a flurry of cases immediately following *Cliffdale* that abated with the decision in *Kraft*. The question remains whether this is a coincidence, or merely an indication that it is the vigor with which the Commission pursues deception cases that is most important, rather than the actual wording of the standard. Given the declining number of deception cases, along with Commission opinion language that strongly suggests that the practices in question would likely have been found deceptive under the traditional standard, it appears that the subjective change has not had the effect that Chairman Miller's opponents predicted.

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146. *Id.* at 1101.