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Fair Trial v. Unfair Advertising: Jury Award Advertising and the First Amendment

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FAIR TRIAL v. UNFAIR ADVERTISING: JURY AWARD ADVERTISING AND THE FIRST AMENDMENT

INTRODUCTION

During the late 1970's, three of the nation's largest liability insurance carriers—Aetna Life & Casualty Company (Aetna), Crum & Forster Insurance Companies (Crum & Forster) and The St. Paul Companies, Inc. (St. Paul)—launched a controversial multi-million dollar advertising campaign\(^1\) in the print media\(^2\) expressing their views on "America's dis-tort-ed tort law system."\(^3\) In

1. In 1977, Aetna was the nation's third largest property-casualty underwriter with net premiums of nearly three billion dollars. Standard & Poor's, Insurance, in Industry Surveys I-15 (1979) (excludes life insurance premiums). Crum & Forster was the nation's fourteenth largest property-casualty underwriter that same year with net premiums of $1.3 billion, \(id.,\) and St. Paul was the nation's sixteenth largest property-casualty underwriter with net premiums of one billion dollars. \(id.\) See generally Moody's Investors Service, Inc., Moody's Handbook of Common Stocks (S. Berkson ed. Wint. 1978-79). Liability insurance \(\text{r}e\)fers to the form of coverage whereby the insured is protected against injury or damage claims from other parties \(\text{or any}\) form of coverage whereby the insured is protected against claims of other parties from specified causes. \(\ldots\) The insured's liability for damages under such claims may arise from his negligence or through the operation of law or a contract." L. Davids, Dictionary of Insurance Terms 86 (R. Osler & J. Bickley eds. 1972).


one set of advertisements the insurer-advertisers communicated their belief that jury awards in personal injury lawsuits were often excessive. In addition, they suggested that such excessiveness had and would continue to result in higher insurance premiums for everyone. For example, a St. Paul advertisement asked readers: “You really think it's the insurance company that's paying for all those large jury awards?” St. Paul went on to answer its own question: “When awards are out of line, everyone pays more. In the form of higher insurance rates.”

5. Other advertisements dealt with such issues as medical malpractice, see Newsweek, Sept. 19, 1977, at 86 (St. Paul advertisement); Newsweek, June 14, 1976, at 82 (Crum & Forster advertisement), arson-for-profit, see Newsweek, June 13, 1977, at 2 (Crum & Forster advertisement); id. at 56 (St. Paul advertisement), product liability laws, see Newsweek, Apr. 18, 1977, at 16-17 (St. Paul advertisement); Time, Sept. 12, 1977, at 1 (Crum & Forster advertisement), and similar topics of concern to the liability insurance industry.


9. Id.
These advertisements outraged many personal injury plaintiffs and their lawyers, who accused the advertisements' sponsors of attempting to "brainwash" jurors into minimizing personal injury awards by linking the size of such awards with the amount of the jurors' own premiums. Specifically, they claimed that the advertisements, which were targeted to reach seventy million potential jurors, prejudiced their right to a fair trial because jurors who had been exposed to the advertisements would be reluctant to award the plaintiffs the damages legally due them.

In response, the insurer-advertisers denied the charges of jury tampering and asserted that they were simply speaking out on an important public issue: rising insurance costs. Their stated objective was to encourage public discussion that would in turn lead to changes in the tort liability system. Further, they argued that any ban on the advertisements would be an unconstitutional infringement on free speech.

This controversy between the advertisements' sponsors and opponents raises several new and significant issues. The most prominent of these is whether

11. An Aetna advertisement, for example, captioned "[t]oo bad judges can't read this to a jury," pictures a judge reading the following jury instruction: "When awarding damages in liability cases, the jury is cautioned to be fair and to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves." Newsweek, Dec. 5, 1977, at 74-75. The advertisements' opponents have suggested that the insurer-advertisers' motive is profit-oriented because "a reduction in jury awards would operate to the financial advantage of liability insurance carriers." Rutledge v. Liability Ins. Indus., 5 Media L. Rep. (BNA) 1153, 1155 (W.D. La. 1979). Under this argument, the insurer-advertisers' costs will be reduced because they will be required to pay out less in awards. Brief for Appellant at 18, Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980) (per curiam).
12. See Adman, supra note 3, at 132.
15. Id. at 1; see Ad Suit Seen as Free Speech Issue, Nat'l Underwriter, Apr. 28, 1978, at 67 (prop. & cas. ed.) [hereinafter cited as Ad Suit].
19. Although the conflict between the right to an unbiased jury in a criminal trial and the guarantee of freedom of the press has been termed "almost as old as the Republic," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976), the conflict between the right to an unbiased jury in a civil trial and the guarantee of freedom of speech is comparatively recent. See, e.g., Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979) (court rule prohibiting extrajudicial comments by attorneys in
the first amendment prohibits regulation of advocacy advertisements\textsuperscript{21} when the effect of such advertisements may be to interfere with a civil litigant's right to a fair trial. A second issue, assuming the first amendment does not prohibit regulation, centers on the proper method and extent of such regulation.

I. CONSTITUTIONAL CONSIDERATIONS

A. Current First Amendment Analysis

Until recently, the Supreme Court tested restrictions on advertising against a primary purpose analysis.\textsuperscript{22} Under this approach, if the advertiser's primary purpose was "commercial," the advertisement was deemed unprotected by the first amendment,\textsuperscript{23} which was held to protect only purely political speech.\textsuperscript{24} As a result, a door-to-door salesman had no first amendment right to peddle his goods\textsuperscript{25} and a hawker had no first amendment right to distribute handbills on city streets\textsuperscript{26} if their primary purpose in doing so was commercial. If, on the other hand, their primary purpose was noncommercial, both actions would be fully protected by the first amendment.\textsuperscript{27}

all civil cases overbroad); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257-59 (7th Cir. 1975) (same), cert. denied, 427 U.S. 912 (1976); cf. CBS Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975) (per curiam) (court order prohibiting extrajudicial comments by civil trial participants considered a prior restraint of the press).

20. This controversy has taken on renewed importance as a result of a second campaign recently initiated by at least one insurer-advertiser. See Newsweek, Feb. 25, 1980, at 12-13 (Aetna advertisement). Although to date these advertisements have not dealt with jury awards, later advertisements in this new campaign may do so.

21. "[A]dvocacy advertising attempts to tackle controversial issues and presents facts and arguments that project the sponsor in the most positive light and opponents' arguments in the worst." S. Sethi, supra note 3, at 8. Advocacy advertising should be distinguished from public service advertising, which tends to promote general social well-being, product promotions that are inherently linked to controversial public issues, and corporate image advertising, which is designed to promote the advertiser's public standing. International Advertising Ass'n, Controversy Advertising 24-34 (1977).


23. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). In Chrestensen, the plaintiff challenged a New York City anti-litter ordinance that prohibited the distribution of "commercial and business advertising matter" on the streets of the city. Id. at 53 n.1. After being prohibited from distributing such a handbill, he printed a protest message on the handbill's back. Id. at 53. The Court, however, found that the appended message was printed only to circumvent the ordinance and that the plaintiff's primary purpose remained commercial. Id. at 55


27. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (door-to-door solicitation by
The demise of the primary purpose test was marked by the Court's landmark decision in *New York Times Co. v. Sullivan.* In *New York Times,* the plaintiff in a civil libel action argued that because the newspaper's primary purpose in selling advertising space to the sponsors of the allegedly libelous advertisement was commercial in nature, the newspaper was not protected under the first amendment. The Court, however, rejected the significance of the profit motive, terming it as "immaterial" as the fact that the newspaper was sold. Focusing instead on the advertisement's content, the Court noted that it contained important information on a topic of public concern. As a consequence, the Court found it deserving of first amendment protection.

In *Bigelow v. Virginia,* the Court found that an advertisement for an abortion referral service provided information of value not only to those women who may have been in need of the services offered, but also to society as a whole. Seizing upon this latter value, the Court held that the advertisement was constitutionally protected under the *New York Times* rationale, although it declined to decide whether commercial advertising was to be afforded first amendment protection under all circumstances. One year later, however, the Court extended first amendment protection to purely commercial advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* There, the Court noted that product and price information was often as important to the consumer as information contained in traditionally protected forms of speech. Because of this importance, the Court concluded that such advertising warranted first amendment protection, notwithstanding the advertiser's purely economic motive.
Under the Supreme Court's current analysis, therefore, the content of an advertisement, not the motive of the advertiser, determines whether it is entitled to first amendment protection. If the advertisement contributes information of value to society—either political or commercial in nature—it should be protected. The extent of that protection, however, presents a much more difficult question.

A conclusion that an advertisement's content warrants first amendment protection is only the initial inquiry required under the current analysis. Once this assessment is made, it must be weighed, according to the Court, against the public interest served by the proposed or actual restriction on the speech. Under this balancing approach, specific regulations will be valid as applied to some forms of speech and invalid as applied to others. For example, regulations designed to prevent deception would be valid as applied to a commercial advertisement for a medical product that made false claims about the product's safety, because the value to society from false commercial advertising is low and the interest to society in protecting consumers from health hazards is high. A similar regulation would probably be invalid as applied to an advertisement soliciting contributions for a right-to-life or a pro-abortion group. In this second situation, the value to society from discussion of important public issues is greater and the societal interest in preventing misstatements is less than in the former situation. Between these two extremes, however, lie hundreds of advertisements and only a handful of court precedents.

Two important conclusions with respect to advertising can be drawn from the recent Supreme Court decisions on protected speech. First, pure commercial advertising is afforded a lesser degree of protection than that afforded noncommercial advertising. For example, the Court recently sustained a state bar association rule that prohibited in-person or mail solicitation as applied to a solicitation that was solely for the attorney's own pecuniary benefit, while striking down a similar rule as applied to a solicitation by an American Civil

41. See J. Barron & C. Dienes, supra note 39, § 4:4, at 164. In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court described its analysis: "We have recently held that the First Amendment affords some protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection." Id. at 68 (footnote omitted).


Liberties Union (ACLU) attorney. The latter solicitation, the Court found, was "undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain." Although on its face this distinction appears to rely on the former primary purpose test, the Court in fact employed the content-based balancing approach. It concluded that although the state's interest in protecting the public from overzealous solicitations outweighed the value to society from uncontrolled commercial solicitations, it did not outweigh society's interest in uninhibited political discussion.

Second, the mere assertion that a state interest will be served by a proposed regulation is insufficient to sustain that regulation. Rather, advocates of the regulation must be able to prove that it will in fact substantially further the asserted state interest. For example, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court held invalid a state statute that prohibited the advertising of prescription drug prices because Virginia failed to show that such a ban substantially furthered its asserted interest in maintaining the professionalism of pharmacists. Similarly, in Linmark Associates, Inc. v. Township of Willingboro, the Court struck down an ordinance that prohibited the placing of "for sale" and "sold" signs in front of homes because there was no evidence that the ordinance substantially furthered the township's asserted interest in preventing a racially motivated exodus of white homeowners from the area.

Restrictions on advertising, therefore, are currently tested through application of a content-based balancing approach. Under this analysis, the advertisement's content is weighed against the state interest actually furthered by the

50. Id. at 422; see J. Nowak, R. Rotunda & J. Young, supra note 22, at 156 (1979-1980 Supp.). Although the Court expressly distinguished Primus from Ohralik as to the objectives of each solicitation, see In re Primus, 436 U.S. at 422, the Court's opinions also reflect its concern with the manner of the two solicitations. See id.; J. Nowak, R. Rotunda & J. Young, supra note 22, at 156-58 (1979-1980 Supp.).
51. See notes 22-27 supra and accompanying text.
52. See notes 28-46 supra and accompanying text.
59. Id. at 95-97.
60. See Meiklejohn, Commercial Speech and the First Amendment, 13 Cal. W. L. Rev 430, 440 (1977); Roberts, supra note 22, at 127; notes 28-42 supra and accompanying text.
proposed regulation.\textsuperscript{61} If this state interest outweighs society's interest in the advertisement's content, the regulation is valid;\textsuperscript{62} if it does not, the regulation is invalid.\textsuperscript{63}

\textbf{B. Application of the Content-Based Balancing Approach to Jury Award Advertising}

Insofar as the advertisements address themselves to the problem of runaway insurance rates,\textsuperscript{64} they clearly provide information of value on a topic of public concern. Some readers, for example, might otherwise be unaware of the recent rise in the size and number of awards in personal injury cases.\textsuperscript{65} Others may not have previously understood, or even considered, the relationship between such awards and insurance rates in general. As a consequence, these advertisements warrant presumptive protection under the content-based analysis.\textsuperscript{66}

Two conflicting considerations enter into a determination of the extent of the protection to be afforded jury award advertisements. On the one hand, the advertisements contain noncommercial information of value to society.\textsuperscript{67} As such, the extent of their protection is suggested by the Court's recent opinion in \textit{First National Bank v. Bellotti}.\textsuperscript{68} In \textit{Bellotti}, the Court held that the publication of a corporate-sponsored noncommercial message of public interest could be prohibited only upon a showing of a "'subordinating interest which is compelling.'"\textsuperscript{69} This heightened degree of protection for noncommercial advertisements is primarily grounded on the desire to promote the dissemination of information, opinions and ideas from as many diverse sources on as many topics of public concern as possible.\textsuperscript{70}

\textsuperscript{61} See Roberts, \textit{supra} note 22, at 136-37; \textit{Virginia Pharmacy, supra} note 22, at 86-87; \textit{Constitutional Doctrine, supra} note 22, at 236-37; notes 43-59 \textit{supra} and accompanying text.


\textsuperscript{64} Affidavit of Douglas J. Alspaugh, Director of Advertising, Aetna Life & Cas. Co., at 2, Quinn v. Aetna Life & Cas. Co., 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978). The advertisements' sponsors are able to offer an important perspective and unusual insight into any discussion of the insurance ratemaking process. \textit{Cf. Lawyers Retaliate, supra} note 2, at 39 ("'we feel we have a right and an obligation to publicly comment on issues affecting the rising costs of liability insurance'").

\textsuperscript{65} In 1962, for example, the first million dollar verdict was returned in a personal injury case. In 1976, there were 46 such awards. \textit{Protesting Too Much, supra} note 17, at 7.

\textsuperscript{66} In this context, presumptive protection refers to the protection afforded speech before its content is weighed against the state interest allegedly served by any regulation of it. \textit{See generally} Roberts, \textit{supra} note 22, at 127-28 & n.81.

\textsuperscript{67} See notes 64-66 \textit{supra} and accompanying text.

\textsuperscript{68} 435 U.S. 765 (1978).

\textsuperscript{69} \textit{Id.} at 786 (citations omitted).

\textsuperscript{70} \textit{See id.} at 777; \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 266 (1964). Under traditional first amendment theory, the central purpose of the amendment is to protect political expression. \textit{See}}
On the other hand, the advertisements also contain commercial information inasmuch as they attempt to justify the company's high rates to its policy-holders. In this regard, their protection would be considerably less. It is clear, however, that the introduction of a commercial element does not, in itself, reduce the first amendment protection of an otherwise noncommercial advertisement. For example, in *Bigelow v. Virginia*, the Court noted that even though the advertisement at issue solicited business for a "for-profit" abortion referral service, this solicitation in no way interfered with, or otherwise affected, the noncommercial message of the advertisement. Because the commercial element in jury award advertisements is similarly noninterferential, its introduction does not reduce the first amendment protection otherwise afforded the advertisements. Jury award advertising, therefore, should be suppressed only upon a showing of a compelling or similar interest.

Opponents argue that a ban on these advertisements would further such a subordinating interest: the preservation of a civil litigant's constitutional right to a fair trial. The advertisements, they contend, threaten that interest by tampering...
ing with the impartiality of juries. If true, such a threat warrants serious consideration in light of the importance the courts have attached to the maintenance of impartiality. The Supreme Court has repeatedly noted that the very purpose of the courts is to provide a forum for the resolution of disputes in which all parties can be afforded the traditional and constitutional safeguards due them. One of these safeguards is the fundamental right to have all decisions made by an impartial decision maker. Without this right, all other procedural safeguards would be meaningless because the tribunal's decision would not rest on the evidence adduced at trial but on evidence from some other source. Because the overall fairness of the trial depends upon the maintenance of impartiality, preservation of neutrality and its concomitant fairness may be a compelling interest within the meaning of the Bellotti standard.

As noted earlier, the first amendment also requires that before speech may be constitutionally regulated the asserted state interest must in fact be substantially furthered by the proposed regulation. Opponents, therefore, must show that the advertisements are, in fact, likely to have a serious effect on personal injury plaintiffs' rights to a fair trial. Recent clinical evidence suggests that jury award advertisements pose a significant threat to the right to an impartial jury. In 1977, Dr. Elizabeth Loftus conducted an experiment in which half of her subjects were exposed to one of these advertisements prior to being asked to sit as mock jurors and award damages to an automobile accident victim. The subjects who had been exposed

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81. See Patterson v. Colorado, 205 U.S. 454, 462 (1907).

82. See, e.g., Hirschkop v. Sneed, 594 F.2d 356, 373 (4th Cir. 1979) ("our system of justice properly requires that civil litigants be assured the right to a fair trial"); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975), ("we rightfully place a prime value on providing a system of impartial justice to settle civil disputes"); ceter. denied, 427 U.S. 912 (1970); CBS Inc. v. Young, 522 F.2d 234, 241 (6th Cir. 1975) (per curiam) ("the right to a fair trial, both in civil and criminal cases, is one of our most cherished values").

83. See notes 54-59 supra and accompanying text.


85. Loftus, supra note 2, at 69. The 86 people who participated in the experiment were divided into two equal groups—a control group and an experimental group—and were assigned a number of "filler activities" to camouflage the purpose of the experiment. In addition to these filler activities, each group was shown several magazine advertisements. Included in the advertisements distributed to the experimental group was a St. Paul advertisement entitled "You really think it's the insurance company that's paying for all those large jury awards?" The next day, the subjects, after again
to the advertisements awarded a lower amount\textsuperscript{86} than those who had not been exposed, leading Dr. Loftus to conclude that “a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give.”\textsuperscript{87} If verified by further studies,\textsuperscript{88} this conclusion could arguably withstand the Court’s furtherance requirement.

Finally, opponents of the advertisements must show that no viable alternatives exist that could accomplish the desired result without infringing on first amendment protections.\textsuperscript{89} In meeting that burden, opponents have argued that traditional trial techniques are ineffective in combating the effect of these advertisements.\textsuperscript{90} The primary impediment, they argue, is the long-accepted doctrine that the mere mention of insurance by the plaintiff is grounds for reversal because it improperly suggests to the jury that the defendant is insured.\textsuperscript{91} Relying on this doctrine, a majority of the states that have ruled on the question prohibit inquiry concerning the advertisements during voir dire.\textsuperscript{92} As a result, plaintiffs’ counsel have no opportunity to challenge veniremen who may be prejudiced as a result of viewing the advertisements. Moreover, even if such inquiry is permitted, it is likely that it would be counterproductive. Questioning about the advertisements may only reinforce their content to the veniremen.\textsuperscript{93} For the same reasons, an instruction by the judge to disregard the advertisements is both prejudicial to the defendant,\textsuperscript{94} and counterproductive to participating in a number of filler activities, were presented with information about an automobile accident and were asked to play the role of jurors in awarding damages to the victim. Id.


87. Loftus, supra note 2, at 69.

88. It is nearly impossible to determine the overall effect that these advertisements have on actual personal injury lawsuits. First, any overall increase or decrease in the amount of damages awarded during any two periods would be inconclusive because it would be subject to many uncontrollable variables, including inflation, the number of legitimate suits and the quality of representation. Second, the prohibition in many states against inquiry into this area during voir dire, see note 92 infra and accompanying text, prohibits specific findings of prejudice which could be extrapolated to show the overall effect of the advertisements.


the plaintiff.\textsuperscript{95} A sanitized instruction—to consider, for example, only the evidence presented—assumes that the advertisements have only a conscious effect and would, at most, be of limited use.\textsuperscript{96} Finally, techniques such as change of venue or sequestration of the jury, although effective in criminal trials,\textsuperscript{97} would probably be ineffective when the prejudice results from advertisements distributed nationally and already seen by most prospective jurors.\textsuperscript{98}

To date, none of the three courts that have considered the constitutionality of regulating jury award advertisements has fully and properly applied the content-based balancing approach.\textsuperscript{99} In Quinn v. Aetna Life \& Casualty Co.,\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{95} Cf. Kupferman, The Press, Broadcasting and the Constitution: The First Amendment in the Era of Mass Communications, 1 Com. \& L. 91, 92-93 (1979) (instruction by judge to disregard the fact that defendant is insured is counterproductive to defendant).
\item \textsuperscript{96} Loftus, supra note 2, at 70; see Kronzer, supra note 71, at 421-22 ("more often than not these attacks are invidious in that they are calculated to subliminally affect the mind of the targeted person and only rarely may be recalled even under direct interrogation on the subject"). See also Stanga, Judicial Protection of the Criminal Defendant Against Adverse Press Coverage, 13 Wm. \& Mary L. Rev. 1, 2 (1971).
\item \textsuperscript{97} See D. Pember, Mass Media Law 261-66 (1977); Comment, Pretrial Publicity, Voir Dire and a Fair Trial, 21 S.D.L. Rev. 373 (1976).
\item \textsuperscript{98} See note 12 supra and accompanying text.
\item \textsuperscript{99} Additional actions were brought in Naylor v. Case \& McGrath, Inc., 585 F.2d 557 (2d Cir. 1978), and Parris v. Garner Commercial Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, appeal dismissed, 297 N.C. 455, 256 S.E.2d 808 (1979). In Naylor, the plaintiff sought relief under a recently enacted Connecticut statute that prohibited false and misleading advertising. 585 F.2d at 558-59. After removal, the federal district court dismissed the action, holding that the plaintiff had no standing to sue under the statute. Id. at 559. On appeal, the Second Circuit held that the action should have been remanded to the state court because the case presented questions of first impression under the state statute and, therefore, the state court was the appropriate forum for their resolution. Id. at 563-66. In Parris, the plaintiff in a personal injury action sought an injunction against Aetna, the defendant's insurer. 40 N.C. App. at 283, 253 S.E.2d at 30. Aetna challenged service of process but the North Carolina Court of Appeals held the service proper under the state long-arm statute. Id. at 291, 253 S.E.2d at 35 ("Defendant would have us allow it the benefit and protection of our laws; but deny us the right to assert jurisdiction to prevent contravention of our laws. We may properly consider our legitimate interest in protecting our plaintiff residents' rights to have a jury reach a verdict free of outside influence." (citations omitted)). Litigation that arose from a similar campaign sponsored by the insurance industry during the 1950's was similarly ineffective in restraining the advertisements. See, e.g., Hoffman v. Perrucci, 117 F. Supp. 38, 40-41 (E.D. Pa. 1953) (injunction and criminal contempt citation denied), appeal dismissed, 222 F.2d 709 (3d Cir. 1955); United States ex rel. May v. American Mach. Co., 116 F. Supp. 160, 163 (E.D. Wash. 1953) (civil contempt citation denied); People ex rel. Barton v. American Auto. Ins. Co., 132 Cal. App. 2d 317, 327-28, 282 P.2d 559, 565 (injunction denied), cert. denied, 350 U.S. 886 (1955); Note, Newspaper Advertising—An Interference with a Fair Trial by Jury?, 22 U. Pitt. L. Rev. 601, 603-05 (1961) (hereinafter cited as Newspaper Advertising). These decisions, however, are of minor significance today because they were decided prior to the Supreme Court's recent decisions in the First Amendment area and reflect the former protected-protected dichotomy. See notes 22-27 supra and accompanying text.
\item \textsuperscript{100} 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978). In Quinn, three personal injury plaintiffs sought an injunction against Aetna requiring it to discontinue its jury award advertisements. Id. at 548, 409 N.Y.S.2d at 474. The court, although finding the advertisements unprotected, see note 101 infra and accompanying text, denied the plaintiffs' motion for a preliminary injunction because they had failed to meet the burden of proof required for the injunction's issuance. Id. at 559-60, 409 N.Y.S.2d at 481-82.
for example, a New York state court found that the advertisements contained false and misleading commercial speech and were therefore unprotected by the first amendment. This conclusion is inconsistent with a proper application of the content-based test. Even if the court found the advertisements to be primarily commercial, such content should only diminish, not eliminate, their public interest value. In contrast, the federal district court to which Quinn was eventually removed ruled that the advertisements contained fully protected political speech. Although the court enunciated a content-based test, it did not elaborate upon its superficial conclusion that the speech was protected. In Rutledge v. Liability Insurance Industry, however, a federal district court in Louisiana both enunciated and applied the content-based test to the advertisements. After noting that "[s]peech is not stripped of First Amendment protection merely because it is made in the form of a paid advertisement [or because] it reflects the advertiser's commercial and financial interest," the court explained that the advertisements should be protected notwithstanding their "commercial aspect" because they contained important information and opinions on a topic of public concern.

No court has yet properly applied the second requirement of the test—the balancing process—to the advertisements. The state court in Quinn, operating from the premise that the speech was unprotected, had no occasion to employ it. Both federal district courts, on the other hand, assumed that because the speech was protected it could not be constitutionally enjoined.

101. The court found the advertisements to be misleading in that they suggested that jury awards are often excessive and unwarranted without disclosing that truly excessive or unwarranted awards may be set aside or reduced. Id. at 554, 409 N.Y.S.2d at 478; see Kronzer, supra note 71, at 413, Affirmation of Martin L. Baron, Attorney for Plaintiff, at 3, Quinn v. Aetna Life & Cas. Co., 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

102. See notes 67-76 supra and accompanying text.

103. When the court denied the plaintiffs' motion for a preliminary injunction, it also dismissed the action against two magazine publishers that had run the advertisements and had been named as defendants. 96 Misc. 2d at 559-60, 409 N.Y.S.2d at 482. This dismissal created complete diversity among the parties. Seizing upon this, Aetna removed the action to the federal district court. Quinn v. Aetna Life & Cas. Co., 482 F. Supp. 22, 25 (E.D.N.Y. 1979), aff'd per curiam, 616 F.2d 38 (2d Cir. 1980).


105. "The degree of protection afforded the expression is not lessened by the fact that it is contained in a paid advertisement, or that the speaker is a corporation rather than a natural person." Id. at 29 (citations omitted).

106. 5 Media L. Rep. (BNA) 1153 (W.D. La. 1979). In Rutledge, an attorney who regularly represented personal injury claimants on a contingent fee basis sought to enjoin liability insurers as a class from sponsoring jury award advertisements. Id. at 1154.

107. Id. at 1155.

108. Id.

109. Id.

110. The court did, however, note that it believed that the advertisements had an adverse effect on jurors, that such effect was not remote, and that it could not be cured by voir dire. 96 Misc. 2d at 558-59, 409 N.Y.S.2d at 481-82.

their reliance on this protected-unprotected dichotomy, they made no attempt to balance the value of the advertisements' contents against the right to a fair trial.112 The proper balancing of these factors might well have led to the conclusion that the advertisements could be subject to some form of constitutionally legitimate regulation.

II. FEDERAL TRADE COMMISSION REGULATION OF JURY AWARD ADVERTISEMENTS

If jury award advertisements are not totally protected against regulation, the problem of defining the proper method and extent of such regulation remains. Because of its traditional exercise of jurisdiction over advertising,113 and because of the failure of alternative means,114 the Federal Trade Commission (FTC) is the proper source of such regulation.115 The FTC has a broad statutory

112. Contrary to the state court opinion in Quinn, both federal district court opinions suggest that alternative measures are available to control the advertisements' effects. See Quinn v. Aetna Life & Cas. Co., 482 F. Supp. 22, 28 (E.D.N.Y. 1979) ("voir dire, proper jury instructions, and the jurors' oath"), aff'd per curiam, 616 F.2d 38 (2d Cir. 1980); Rutledge v. Liability Ins. Indus., 5 Media L. Rep. (BNA) 1153, 1155 (W.D. La. 1979) ("[v]oir dire, jury instructions and other safeguards").

113. The original Federal Trade Commission Act gave the FTC the power to regulate "unfair methods of competition." Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 45(a)(1) (1976)). Despite the lack of any express reference in the Act to advertising, the FTC asserted jurisdiction over the practice almost immediately. See, e.g., Block & Co., 1 F.T.C. 154 (1918); A. Theo. Abbott & Co., 1 F.T.C. 16 (1916); Yagle, 1 F.T.C. 13 (1916). This asserted jurisdiction was upheld on the grounds that unfair advertising had an adverse effect on competition and was, therefore, an unfair method of competition under the Act. See FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922). In 1931, however, the Supreme Court held that advertising that did not in fact have an adverse effect on competition was not within the FTC's jurisdiction. See FTC v. Raladam Co., 283 U.S. 643, 646-50 (1931). In response, Congress amended the Act to give the FTC explicit jurisdiction over not only "unfair methods of competition," but also "unfair or deceptive acts or practices," Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)(1) (1976)); see Sabatino, Federal Government Agency Activities in Consumer Protection from Deceptive Advertising, in Consumer Protection From Deceptive Advertising 2, 3 (F. Stuart ed. 1974), thereby firmly establishing the FTC's authority to regulate advertising. See Statement of Basis and Purpose of Trade Regulation Rule, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8348-55 (1964) [hereinafter cited as Statement of Basis].

114. Although two state insurance commissions have prohibited the further use of two jury award advertisements that contained false statements, see Geisel, Insurer Agrees to Avoid Deceptive Ads, Bus. Ins., July 24, 1978, at 9; see generally Geisel, Horror Story Ads Untrue?, Bus. Ins., Oct. 31, 1977, at 1, 66; Kronzer, supra note 71, at 409-10; Adding Insult to Injury, 43 Consumer Rep. 412, 414 (1978), no state insurance commission has otherwise acted to prohibit the use of jury award advertisements despite numerous requests to do so. See Trial-Lawyer Fire, supra note 2, at 531; Lawyers Retaliate, supra note 2, at 39. Opponents have been similarly ineffective in their attempt to have the advertisements enjoined by the courts. See, e.g., Naylor v. Case & McGrath, Inc., 585 F.2d 557 (2d Cir. 1978); Quinn v. Aetna Life & Co., 482 F. Supp. 22 (E.D.N.Y. 1979), aff'd per curiam, 616 F.2d 38 (2d Cir. 1980); Rutledge v. Liability Ins. Indus., 5 Media L. Rep. (BNA) 1153 (W.D. La. 1979); notes 99-112 supra and accompanying text; cf. Quinn v. Aetna Life & Cas. Co., 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978) (inadequate showing made to support preliminary injunction).

115. When the advertisements first appeared in 1976, the FTC declined to act on them, stating: "The Commission's position is that advertisements which elicit primarily a political
mandate under section 5 of the Federal Trade Commission Act (the Act) to prevent "unfair or deceptive acts or practices in or affecting commerce." Until recently, however, the FTC has tested advertising only against the Act's deceptive standard and not against its unfairness standard. In fact, the first judicial endorsement of the unfairness doctrine did not come until 1972, when the Supreme Court, in FTC v. Sperry & Hutchinson Co., considered a Fifth Circuit ruling that the FTC's antitrust powers were limited to proscribing either a per se violation or a violation of the spirit of the antitrust laws. In describing the FTC's powers, the Court explained that the "Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws. To guide both the FTC and the lower courts, the Court listed three factors that should be considered in determining whether a contested act or practice is unfair, including "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or response rather than an economic one are entitled to protection under the First Amendment. In view of these First Amendment considerations, the staff is not prepared to recommend that the Commission take action with respect to these advertisement[s]." Letter from Richard B. Herzog, Asst. Director for Nat'l Advertising, FTC Bureau of Consumer Protection, to Morris Brown, Esq. (June 4, 1976) (on file with the Fordham Law Review). See generally FTC Staff, Statement of Proposed Enforcement Policy Regarding Corporate Image Advertising 21 (Dec. 4, 1974) [hereinafter cited as FTC Proposed Policy], reprinted in Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Sourcebook on Corporate Image and Corporate Advocacy Advertising 1487, 1507 (Comm. Print 1978) [hereinafter cited as Sourcebook]. Inasmuch as this position concludes that political speech can never be regulated, it reflects the now outmoded protected-protected dichotomy. See pt. I(a) supra. The FTC should therefore not consider itself bound by the strictures of its earlier—and possibly incorrect—decision.

It should be noted that Congress has legislated that the Federal Trade Commission Act, along with the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976), applies to the "business of insurance" only to "the extent that such business is not regulated by State law." McCarran-Ferguson Act, ch. 20, §§ 1-5, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011-1015 (1976)); see Section of Antitrust Law, ABA, Antitrust Law Developments 396-98 (1975). In recent years, however, the Supreme Court has severely limited this statute's application. In SEC v. National Sec., Inc., 393 U.S. 453 (1969), for example, the Court held that the "business of insurance" meant only the "contract of insurance" between the insurer and the insured. Id. at 460. Because the effect of these advertisements is to prejudice the rights of personal injury plaintiffs who are not parties to the contract of insurance, these advertisements clearly do not fall within the scope of the McCarran-Ferguson Act.

118. 405 U.S. 233 (1972).
119. See Sperry & Hutchinson Co. v. FTC, 432 F.2d 146, 150 (5th Cir. 1970), modified, 405 U.S. 233 (1972). See generally Consumer Unfairness, supra note 117. at 1089-84.
120. 405 U.S. at 244 (footnote omitted).
otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers . . . ."\(^{121}\)

It is clear, however, that even when an advertisement is analyzed in light of these factors, the *S&H* decision leaves the FTC with a great deal of latitude in defining an unfair act or practice.\(^{122}\)

Application of the *S&H* criteria to jury award advertising indicates that such advertising may fall within the unfair practice category. It has been suggested, for example, that these advertisements offend the clearly established public policy against jury tampering.\(^{123}\) Although there has been no proof that the insurer-advertisers actually intended to influence the outcome of a specific action, as required under jury tampering statutes,\(^{124}\) there is an "inescapable implication" that the advertisements were designed to influence jurors and prospective jurors.\(^{125}\) As a result, they fall at least within the penumbral prohibition of such statutes.

The second *S&H* criterion requires that the advertisements be "‘immoral, unethical, oppressive, or unscrupulous.’"\(^{126}\) Opponents have suggested that these advertisements meet this requirement in two respects. First, they argue that the insurer-advertisers, the real parties in interest in many personal injury lawsuits, are engaging in unethical conduct by trying their cases in the media with inadmissible evidence.\(^{127}\) Just as plaintiffs are prohibited from suggesting to a jury that a defendant is insured, defendants are prohibited from suggesting that any award given to the plaintiff will financially affect the jurors.\(^{128}\) By making these suggestions out of court, in an attempt to avoid

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121. *Id.* n.5 (quoting Statement of Basis, *supra* note 113, at 8355).
122. *See* E. Kintner, *A Primer on the Law of Deceptive Practices* 104-05 (2d ed. 1978); Comment, *Psychological Advertising: A New Area of FTC Regulation*, 1972 Wis. L. Rev. 1097, 1106-11. In *Pfizer Inc.*, 81 F.T.C. 23 (1972), the commissioners noted that an "unfairness analysis . . . will permit a broad focus in the examination of marketing practices. Unfairness is potentially a dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy." *Id.* at 61 (footnote omitted). *See also FTC v. Standard Educ. Soc.*, 86 F.2d 692, 696 (2d Cir. 1936) (L. Hand, J.) (the FTC's "duty . . . is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop"), *rev'd on other grounds*, 302 U.S. 112 (1937). Although *S&H* involved the commission's antitrust powers, as opposed to its advertising powers, it is considered valid authority for both areas of the FTC's jurisdiction. *See* Thain, *supra* note 117, at 372; *Note, Fairness and Unfairness in Television Product Advertising*, 76 Mich. L. Rev. 498, 527 n.161 (1978) [hereinafter cited as *Television Product Advertising*].
128. *Kronzer, supra* note 71, at 407 & n.43.
the traditional prohibition against such statements, the insurer-advertisers are arguably engaging in unethical conduct. Second, the opponents argue that the advertisements are oppressive because the assertions made in them cannot be effectively challenged, either in or out of court, by those with opposing views. Opponents cannot contest the advertisements' statements in court due to the traditional prohibition against the mention of insurance; they cannot contest them out of court because no individual plaintiff can effectively match the $10 million spent on the campaign by the insurer-advertisers. The insurer-advertisers have therefore used their wealth to place their speech beyond challenge.

Finally, the S&H test requires that the advertisements cause " 'substantial

129. See notes 90-98 supra and accompanying text.

130. Kronzer, supra note 71, at 408. In addition, counteradvertising by the bar is impractical because many members of the bar are defense attorneys and "a counter-advertisement would not be to their best interest." Newspaper Advertising, supra note 99, at 607.

131. Such one-sidedness has already been recognized as unfair in another context. In its Cigarette Rule, the FTC noted: "The cigarette industry's massive, continuous, mounting, and forceful advertising, coupled with the refusal to acknowledge or take any steps to inform the consuming public of the hazards to health, has blunted public awareness and appreciation of these hazards. . . ." Statement of Basis, supra note 113, at 8357. The FTC noted that although counteradvertisements were being sponsored by various groups, the overkill of the cigarette industry advertising cancelled out any real effect these public service messages might have Id at 8360-61.

The jury award advertisements' oppressiveness may also reduce their first amendment protection. Language in the Court's decision in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), can be construed as meaning that, notwithstanding the value of speech's content, its overall standing in the first amendment hierarchy may be lowered when it threatens to "drown out other points of view." Id. at 789. When this happens the speech may, in the Court's words, "denigrat[e] rather than serv[e] First Amendment interests." Id. This language may reflect the Court's recognition of the failure of the marketplace theory in this area. Under that theory, government intervention is normally unnecessary because the marketplace of ideas is self-correcting See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"), Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"), Coase, Advertising and Free Speech, in Advertising and Free Speech 1, 25 (A. Hyman & M. Johnson eds. 1977). See also Rosenfeld, The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas, 44 Fordham L. Rev. 877 (1976). This theory assumes, however, "that all speakers will have roughly comparable power, resources and access to audiences." Address by Tracy Weston, Deputy Director, FTC Bureau of Consumer Protection, Brooklyn Law School and Brooklyn Law Review Symposium on Commercial Speech and the First Amendment, at 7 (Nov. 10, 1979) (on file with the Fordham Law Review). This assumption is not always true, especially when one party to a controversy is a large corporation. Id. at 25-27; see Energy and Environmental Objectives: Hearings Before the Subcomm. on Environment of the Senate Comm. on Commerce, 93d Cong., 2d Sess. 79-80 (1974) (pt. 2) (statement of Lester G. Fant), 42 Tenn. L. Rev. 573, 582-83 (1975). See generally L. Tribe, supra note 42, § 12-1, at 576-77. When this assumption is not met the marketplace theory fails and the government must step in to prevent domination of the marketplace and its attendant harms. Cf. Banzhaf v. FTC, 405 F.2d 1082, 1102-03 (D.C. Cir. 1968) (fairness doctrine), cert. denied, 396 U.S. 842 (1969) See also J Hohenberg, A Crisis for the American Press 224-25 (1978). Because the Bellotti Court, however, did not believe that such domination had been shown, it did not elaborate on its remark.
injury to consumers." It is helpful to divide this third requirement into two components. The first is that of substantial injury. As mentioned earlier, it is impossible to determine the actual number of plaintiffs who have been injured by these advertisements. It is similarly impossible in many cases to determine the actual number of consumers who have been injured by deceptive product advertising. As a result, it is well settled that such evidence is not required to support FTC action. It is sufficient that the challenged advertisement tends to have a harmful effect on an "appreciable" number of people as determined from all the available facts. Because these advertisements were designed to be read by seventy million people, many of them jurors and potential jurors, it is arguable that they are likely to have a harmful effect on an appreciable number of people. Second, this third criterion refers to injury "to consumers." The term "consumers," however, is overly restrictive inasmuch as modern advertising is often directed at much larger audiences. For example, corporate image advertising is directed not only at consumers but at stockholders and other investment groups, banks and other financial institutions, prospective employees, suppliers, and government regulators. To regulate such modern advertising techniques effectively, therefore, the FTC must not be handcuffed by a requirement of direct injury to "consumers." Instead, it should be able to protect any identifiable group that is threatened with substantial injury from an unfair advertisement.

133. See note 88 supra.
137. See note 12 supra and accompanying text.
139. See Address by Lewis A. Engman, FTC Chairman, to the Antitrust Section of the State Bar of Michigan (Feb. 15, 1974), reprinted in 5 Trade Reg. Rep. (CCH) ¶ 50,200, at 55,376-77.
140. "Corporate image advertising is that type of advertising by a business which creates in the mind of the public a favorable image of the advertiser but does not espouse the merits of the advertiser's product or service and is thus not related directly to the product and/or service from which the advertiser derives its income." Bird, Goldman & Lawrence, Corporate Image Advertising: A Discussion of the Factors that Distinguish Those Corporate Image Advertising Practices Protected Under the First Amendment From Those Subject to Control by the Federal Trade Commission, 51 J. Urb. L. 405, 406 (1974); see Ludlam, Abatement of Corporate Image Environmental Advertising, 4 Ecology L.Q. 247, 251-55 (1974).
141. See FTC Proposed Policy, supra note 115, at 2-10, reprinted in Sourcebook, supra note 115, at 1488-96; Dennison, Corporate Image Advertising and the FTC, in Crosscurrents in Corporate Communications 40, 42-43 (1973); Ludlam, supra note 140, at 255-60.
142. See Ludlam, supra note 140, at 273.
143. See Bird, Goldman & Lawrence, supra note 140, at 415; Corporate Image Advertising, supra note 22, at 216-17.
identifiable group consists of potential personal injury plaintiffs. Jury award advertisements thus appear to meet all three requirements of the S&H test.

The second jurisdictional requirement under the Act is that the unfair act be "in or affecting commerce."144 In S. Klein Department Stores, Inc.,145 the respondent challenged the FTC's jurisdiction over its interstate advertising, arguing that the FTC was limited to regulating advertising that resulted in interstate sales.146 The FTC rejected this argument and held that it had jurisdiction whenever the business engaged in interstate advertising for commercial purposes.147 The statutory requirement that the jury award advertisements be "in or affecting commerce," therefore, is met if the advertisements serve a commercial purpose. Opponents argue that the advertisements serve such a purpose in two ways. First, the advertisements attempt to increase the sponsors' profits by reducing the amount the insurer-advertisers must pay out in awards.148 Second, the advertisements serve to "sell" the companies' high rates to their policyholders by explaining that the high rates are inevitable under the present tort system.149 Thus, it would appear that jury award advertising, disseminated in interstate commerce for a commercial purpose, also falls within the Act's commerce requirement.

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145. 57 F.T.C. 1543 (1960), dismissed on other grounds, 60 F.T.C. 388 (1962).

146. 60 F.T.C. at 393.

147. "It is well established that commerce among the states is not confined to transportation, but comprehends all commercial intercourse between different states and all component parts of such intercourse. Interstate communications for commercial purposes constitute commerce within the meaning of the Constitution." 57 F.T.C. at 1544 (citation omitted); accord, Simeon Management Corp., 87 F.T.C. 1184, 1213 (1976), enforced, 579 F.2d 1137 (9th Cir. 1978); Encyclopaedia Britannica, Inc., 87 F.T.C. 421, 490 (1976), aff'd, 605 F.2d 964 (7th Cir. 1979), cert. denied, 100 S. Ct. 1329 (1980); Great Atl. & Pac. Tea Co., 85 F.T.C. 601, 622-63 (1975), Tarry Sleep Prods., Inc., 73 F.T.C. 523, 553-54 (1968); S. Klein Dep't Stores, Inc., 60 F.T.C. 388, 393-94 (1962), see Deceptive Advertising, supra note 134, at 1022-23. See generally G. Rosden & P. Rosden, supra note 135, § 4.03[1]; Sadowski, Broadcasting and State Statutory Laws, 18 J. Broadcasting 433, 434 (1974); see also Bankers Sec. Corp., 57 F.T.C. 1219, 1225 (1960), aff'd, 297 F.2d 403 (3d Cir. 1961).

148. "[The advertising herein was] of a type calculated in every sense of the word, to increase the profits of [Aetna] by reduction of its costs of operations, to wit, the sums it is compelled to pay out via jury verdicts." Brief for Appellant at 18, Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980) (per curiam); see Rutledge v. Liability Ins. Indus., 5 Media L. Rep. (BNA) 1153, 1155 (W.D. La. 1979).

If jury award advertising is an unfair practice in commerce within the meaning of the Act, the FTC has the power to ban the advertisements and may also have the power to require the insurer-advertisers to present opposing viewpoints. The FTC may ban the advertisements either through the issuance of a cease and desist order or through a trade regulation rule. The cease and desist order, whereby the FTC orders a named advertiser to discontinue a specific advertisement,\textsuperscript{150} is the more frequently employed method.\textsuperscript{151} Such orders are initiated by the issuance of a complaint\textsuperscript{152} and may be challenged in adversary proceedings.\textsuperscript{153} Trade regulation rules that define specific acts or practices as unfair or deceptive, on the other hand, are developed through a substantive rulemaking process.\textsuperscript{154} Although the FTC would normally have wide discretion to use either method,\textsuperscript{155} it must, when regulating advertisements that contain more than pure commercial messages, be careful not to impose a prior restraint on the advertisements' content.\textsuperscript{156}


\textsuperscript{151} See E. Kintner, supra note 122, at 69; Corporate Image Advertising, supra note 22, at 218.

\textsuperscript{152} 16 C.F.R. § 3.11 (1980).

\textsuperscript{153} After the issuance of the complaint, an adversary hearing is held before an administrative law judge (ALJ). Id. §§ 3.41-.46. This proceeding is procedurally similar to a federal court action. See 4 R. Callman, supra note 150, §§ 95.3-.6(c). The ruling made by the ALJ is called the "initial decision," 16 C.F.R. § 3.51 (1980), and may be appealed to the full commission by either the advertiser or the FTC's complaint counsel. Id. § 3.52. If neither party appeals to the full commission, the determination by the ALJ becomes final and a cease and desist order will issue if the initial decision went against the advertiser. Id. § 3.51. If the initial decision is appealed to the full commission, it may affirm, modify or reverse the ruling made by the ALJ. Id. § 3.54. If the full commission's ruling is against the advertiser, it will issue a cease and desist order. Id. Finally, the advertiser may appeal the decision of the full commission to a federal court of appeals, which may then affirm, enforce, modify or set aside the commission's order. 15 U.S.C. § 45(b)-e (1976).

\textsuperscript{154} See Statement of Basis, supra note 113, at 8364-73. The formulation of a trade regulation rule begins with the publication of a proposed rule. 15 U.S.C. § 57a(b)(1) (1976). The commission is then required to hold a legislative-type hearing on the proposal, id. § 57a(b)(2)-(3), after which it may formally issue the rule. Id. § 57a(b)(4). Any "interested person" may seek judicial review of a trade regulation rule within 60 days after it is officially promulgated. Id. § 57a(e)(1)(A). Once a trade regulation rule has been issued, it is enforced by issuing a complaint against the alleged violator. Because the rule has already classified the act or practice as unfair or deceptive, however, the only issue to be resolved at the hearing is whether the advertiser committed the prohibited act. See Thain, supra note 117, at 384-85. In this regard, a trade regulation rule should be distinguished from an "Industry Guide," which is a non-binding interpretation of the Act. See E. Kintner, supra note 122, at 65-67. See generally 4 R. Callman, supra note 150, § 95.2(c); 2 G. Rosden & P. Rosden, supra note 135, § 32.04[2][c]; E. Rockefeller, supra note 144, at 78-80.

\textsuperscript{155} See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965); FTC v. Cement Inst., 333 U.S. 683, 726 (1948); Jacob Siegel Co. v. FTC, 327 U.S. 608, 611-13 (1946); Simeon Management Corp. v. FTC, 579 F.2d 1137, 1147 (9th Cir. 1978); L.G. Balfour Co. v. FTC, 442 F.2d 1, 23 (7th Cir. 1971); Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661 (1977); Reich, Consumer Protection and the First Amendment: A Dilemma for the FTC?, 61 Minn. L. Rev. 705 (1977).

\textsuperscript{156} This consideration is normally absent in FTC actions because the prior restraint doctrine is inapplicable to pure commercial advertising. See Virginia State Bd. of Pharmacy v. Virginia
A prior restraint may take two forms. It may be either a restraint on speech prior to its publication\textsuperscript{157} or a restraint on speech prior to a judicial determination of the constitutionality of the restriction.\textsuperscript{158} Because these advertisements have already been published, any restriction on them, whether by a cease and desist order or by a trade regulation rule, is outside the first type of prior restraint. Moreover, because a cease and desist order does not become final until the appellate review process is complete,\textsuperscript{159} it is outside the second type of prior restraint as well.\textsuperscript{160} In contrast, a trade regulation rule becomes final before the appellate review process is completed.\textsuperscript{161} It is, therefore, arguably within the second type of restraint. Because the reviewing court has the power to grant "interim relief,"\textsuperscript{162} however, the court could stay the enforcement of the rule, thus remedying its prior restraint deficiency. As between these two methods of regulation, the cease and desist order, which poses no prior restraint problems,\textsuperscript{163} is the preferable form.

In addition to, and perhaps more important than, its authority to ban advertisements, the FTC may require advertisers to include affirmative disclosures in their advertisements to prevent unfairness or deception.\textsuperscript{164} For example, in \textit{J. B. Williams Co. v. FTC},\textsuperscript{165} the court upheld an FTC order prohibiting Geritol advertisements that failed to disclose that iron-poor blood was only rarely the cause of the tiredness symptoms that Geritol claimed to cure.\textsuperscript{166} It can be argued,
therefore, that the insurer-advertisers could be required to present opposing viewpoints,\textsuperscript{167} thereby making their advertisements less one-sided.\textsuperscript{168} It should be noted that the FTC has never employed such a novel approach in an unfairness action.\textsuperscript{169} Nevertheless, such an order would be consistent with the previously discussed objective of stimulating public debate on topics of public concern.\textsuperscript{170} By providing a forum for the presentation of both sides of a controversy, both the amount of information and the diversity of opinions are increased. Moreover, if disclosure is ordered the FTC would be bound by the established doctrine of fashioning, when first amendment rights are involved, the narrowest possible remedy to prevent unfairness or deception.\textsuperscript{171} Because of the benefit to the public and the safeguards for the advertisers, therefore, a regulation requiring some form of affirmative disclosure would be the most preferable method of FTC regulation.

**CONCLUSION**

In recent years, the Supreme Court has been increasingly unwilling to restrict the free flow of valuable information in society.\textsuperscript{172} At the same time, however, the Court has refused to afford any form of speech absolute protection,\textsuperscript{173} relying instead on a more critical balancing analysis.\textsuperscript{174} Under that approach, speech is subject to regulation if the interest furthered by such regulation outweighs society's interest in the speech's content.

Because jury award advertising contains important noncommercial speech of value to society, it should, under this analysis, be restricted only if such restriction would further a compelling state interest. Opponents of the advertisements...

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\textsuperscript{167} Because it is normally impractical to require the sponsor to present both sides of a controversy, see S. Sethi, supra note 3, at 295-96, the advertiser could be required to purchase and provide advertising space to opponents.

\textsuperscript{168} See Television Product Advertising, supra note 122, at 530-31.

\textsuperscript{169} In its proposed trade regulation rule regarding children's advertising, however, the FTC has proposed affirmative disclosure in separate advertisements, paid for by the children's advertisers. Notice of Proposed Trade Regulation Rulemaking and Public Hearing, Children's Advertising, 43 Fed. Reg. 17,967, 17,969 (1978).

\textsuperscript{170} See note 70 supra and accompanying text. See also Television Product Advertising, supra note 122, at 542.


have argued that a restriction on the advertisements would further the maintenance of the right to an impartial jury in a civil action. Although such an interest is arguably a compelling one, there has been no showing to date that the advertisements pose a substantial threat to that right. This does not mean, however, that the advertisements are immune from regulation; further and more extensive research may disclose the existence of the required threat. If so, the insurer-advertisers should not be allowed to construe the first amendment as giving them a constitutional right to make an increased profit at the expense of innocent victims.

Specifically, if further research concludes that the advertisements pose a serious threat to fair trials, the FTC should regulate the advertising as an unfair practice. Because a simple ban on the advertisements would suppress valuable speech as well, the FTC should require the insurer-advertisers to provide for the presentation of both sides of the controversy. Such a requirement would eliminate the advertisement's unfairness and at the same time further society's long-standing interest in promoting "the widest possible dissemination of information from diverse and antagonistic sources."175

Bernard J. Rhodes