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DECEPTIVE ADVERTISING, FTC FACT FINDING AND THE SEVENTH AMENDMENT

The extent of the seventh amendment's¹ guarantee to trial by jury in "suits at common law" has raised difficulties since the adoption of the Constitution.² Courts were quick to recognize that the right extended beyond the common law as it existed in 1791,³ and thus focused their attention on developing a process for examining the jury trial guarantee.⁴ The process has not been a static one,⁵ but has developed according to the demands of the law.

At the time of the seventh amendment's adoption the distinction between a trial by jury and a trial by the court was the distinction between law and equity.⁶ The determination of what was a suit at common law was made along historical lines. Justice Story summed up this approach in 1830:

By common law [the framers] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.⁷

Despite the merger of law and equity, the historical distinction has retained importance for jury trial purposes. An historical analysis appears indispensable to any jury trial inquiry⁸ and was emphasized in the post-merger evaluation process outlined by the Supreme Court in the leading case of *Ross v. Bernhard*:

1. U.S. Const. amend. VII provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. The federal courts in the early 1800s held that the seventh amendment referred to the common law of England, not colonial or state practices. *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 221-24 (1818); see *Simler v. Conner*, 372 U.S. 221, 222-23 (1963); James, *Right to a Jury Trial in Civil Actions*, 72 *Yale L.J.* 655, 655-64 (1963) [hereinafter cited as James]; Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 *Nw. U.L. Rev.* 503, 506 (1973) [hereinafter cited as *History Adrift*].

3. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). Later decisions include: *Ross v. Bernhard*, 396 U.S. 531, 532-33 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). A restrictive interpretation of the seventh amendment is set forth in *Ross v. Bernhard*, 396 U.S. 531, 543-51 (1970) (Burger, C.J., Stewart, & Harlan, JJ., dissenting) and *Dimick v. Schiedt*, 293 U.S. 474, 476-77, 487 (1935).

4. See notes 9-44 *infra* and accompanying text.

5. See James 664.

6. *Fenn v. Holme*, 62 U.S. (21 How.) 481, 486-87 (1858).

7. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830) (Louisiana allowed reviewing courts to reverse jury determinations of fact; such review not available in federal courts); see *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823). See also James 657-63; *History Adrift* 506-08.

8. But see *The Supreme Court*, 1969 Term, 84 *Harv. L. Rev.* 1, 172-76 (1970).

[T]he "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.⁹

In *Ross* the Court's awareness of the flexibility necessary for appraisal of the jury trial question was significant. There a derivative action was brought by the shareholders of a corporation. The Court acknowledged that the shareholders' right to sue was equitable,¹⁰ but noted the process by which equitable practices "worked over into law":

[F]rom 1789 until 1938, the judicial code expressly forbade courts of equity from entertaining any suit for which there was an adequate remedy at law. . . . If, before 1938, the law had borrowed from equity, as it borrowed other things, the idea that stockholders could litigate for their recalcitrant corporation, the corporate claim, if legal, would undoubtedly have been tried to a jury.¹¹

Since the remedy sought—money damages—was traditionally legal,¹² a jury trial was required. The Court, concerned with the obstacles equitable procedural devices might present to the adjudication of legal substantive rights, observed that the guarantee of a jury trial "should not turn on how the parties happen to be brought into court."¹³ The decision can be seen as the logical outcome of the merger of law and equity in the federal courts.¹⁴

While the right to jury trial may be affected by the posture of the action, it

9. 396 U.S. 531, 538 n.10 (1970); see *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 836 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964) (first jury trial granted in derivative suit).

10. 396 U.S. at 538.

11. *Id.* at 539 (footnote omitted); see James 657-63.

12. See *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1018 (4th Cir. 1965) (suit against union for damages, jury trial awarded).

13. 396 U.S. at 542 n.15. After the merger of law and equity the test applied by the courts looked to the basic nature of the issue. If the complaint set forth a single equitable claim, there was no jury trial. If a legal and equitable claim were joined, the seventh amendment was applicable. See 5 J. Moore, *Federal Practice* ¶ 38.16, at 153-62.2 (2d ed. 1974). However, the Court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) rejected such a narrow approach since the right to a jury trial depended to a great extent upon the plaintiff's formulation of his claim for relief. In *Beacon*, the Court held that the defendant was entitled to a jury trial on his counterclaim for treble damages, although the plaintiff's complaint sought only declaratory relief. The underlying premise was that once the equitable claim was determined, the issues in the legal claim might be *res judicata*. See 359 U.S. at 510-11; cf. *Fleitman v. Welsbach Co.*, 240 U.S. 27, 29 (1916). In *Dairy Queen* the plaintiff sought an injunction against trademark infringement and an accounting for damages. The Court awarded a jury trial, stating that the guarantee could not be defeated by casting a legal issue in an equitable form. 369 U.S. at 479. The *Ross* decision was an extension of this analysis since it indicated that *Dairy Queen* was not limited to cases where independent actions at law could have been brought. See 5 J. Moore, *Federal Practice* ¶ 38.16, at 162.5 (2d ed. 1974).

14. The dissent opposed this analysis: "Somehow the Amendment and the Rules magically interact to do what each separately was expressly intended not to do, namely, to enlarge the right to a jury trial in civil actions brought in the courts of the United States." 396 U.S. at 543 (Burger, C.J., Stewart, & Harlan, JJ., dissenting).

can also be affected by what has occurred prior to the judicial proceeding. In some fields, Congress has allocated the duty to conduct fact finding to administrative agencies, in light of their expertise.¹⁵ Thus, in matters concerning, *inter alia*, trade practices and labor relations the "jury" function is to some extent in the agency, and the administrative hearing process is to some extent a surrogate for jury trial.¹⁶

Matters within the authority of federal agencies arguably are not "suits at common law," concerned as they are with problems which are mainly products of modern society. However, the seventh amendment may attach and the private party may invoke a jury right.¹⁷ Here, as in other areas, the federal courts have attempted to employ a flexible analysis, and the scope of jury trial in administrative review has been narrow, in deference to agency expertise and in recognition of the "practical abilities and limitations of juries."¹⁸

Nevertheless, a recent decision by the United States Court of Appeals for the Second Circuit appears to have fallen away from any flexible inquiry in its award of a jury trial to an advertiser following over ten years of administrative hearings by, and judicial review of, the Federal Trade Commission. *United States v. J.B. Williams Co.*¹⁹ held, *inter alia*, that when a factual dispute arises as to whether an advertisement is violative of a presently existing FTC cease and desist order, a jury must resolve the issue.

The leading decision concerning the jury right in the agency context is *NLRB v. Jones & Laughlin Steel Corp.*²⁰ The Supreme Court there upheld an award of back pay without a jury trial in an unfair labor practice proceeding. Although back pay awards have been described as equitable in nature,²¹ the decision was based on effecting the agency function. The Court stated:

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Rein-

15. See *Curtis v. Loether*, 415 U.S. 189, 194 (1974); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937); *History Adrift* 518. See generally *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1267-68 (3d Cir. 1974) (agency has "greatest degree of latitude" in conducting proceedings).

16. See *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974); *Aronberg v. FTC*, 132 F.2d 165, 170 (7th Cir. 1942) (FTC as "triers of the facts"); L. Jaffe, *Judicial Control of Administrative Action* 87-99 (1965); *History Adrift* 531-33.

17. E.g., *United States v. J.B. Williams Co.*, 498 F.2d 414, 421-22 (2d Cir. 1974); *United States v. Hindman*, 179 F. Supp. 926, 928 (D.N.J. 1960).

18. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

19. 498 F.2d 414 (2d Cir. 1974).

20. 301 U.S. 1 (1937). In *Harkless v. Sweeny Indep. School Dist.*, 278 F. Supp. 632, 637 (S.D. Tex. 1968), the court stated that *Jones & Laughlin* was overruled by *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), but the decision was reversed at 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971). The erroneous assumption of the district court was that *Jones & Laughlin* was based on a theory of incidental jurisdiction.

21. *Harkless v. Sweeny Indep. School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971) (back pay award part of main equitable claim); *Smith v. Hampton Training School*, 360 F.2d 577, 581 n.8 (4th Cir. 1966) (back pay award integral part of equitable remedy).

statement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement.²²

An adjunct of the agency function rationale is the theory of an equitable public right.²³ The basis of this theory was set forth in *Agwilines v. NLRB*,²⁴ again as part of an argument that back pay awards were to be exempted from the seventh amendment:

Statutory provisions of this kind in the public interest are not considered as conferring common-law rights requiring trial by jury. They provide for public proceedings, equitable in their nature. They exert power to restore status disturbed in violation of statutory injunction similar to that exerted by a chancellor in issuing mandatory orders to restore status.²⁵

It has been suggested that "public right language" might thus remove any statutory scheme from the strictures of the seventh amendment where "litigation involved issues . . . more concerned with 'public policy' than with 'private right.'"²⁶

Courts have also examined the impact the seventh amendment would have on the efficiency of the statutory proceeding itself. *Jones & Laughlin* has recently been re-affirmed on such a basis, the Court pointing out that a jury trial "would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme."²⁷ Similarly, in *Katchen v. Landy*,²⁸ a Bankruptcy Act

22. 301 U.S. at 48-49; see *Agwilines v. NLRB*, 87 F.2d 146, 150 (5th Cir. 1936). In *Guthrie Nat'l Bank v. Guthrie*, 173 U.S. 528, 537 (1899), the defendants questioned the authority of a district court to proceed without a jury in approving determinations by a territorial commission of claims which arose against certain municipalities before they were incorporated. The Supreme Court rejected the applicability of the seventh amendment since the "proceeding under [the act was] not in the nature of a suit at common law." See also History Adrift 527-30.

23. See History Adrift 517-20.

24. 87 F.2d 146 (5th Cir. 1936).

25. *Id.* at 151. But see Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 Harv. L. Rev. 720 (1946). Under the National Labor Relations Act only administrators have standing to sue. *Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir.), cert. denied, 409 U.S. 1024 (1972). Similarly, in *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988-89 (D.C. Cir. 1973), the court held that there was no private cause of action to enforce unfair or deceptive trade practices prohibited under the Federal Trade Commission Act. See 16 C.F.R. § 2.2 (1974). The absence of a private cause of action is suggested as one basis for applying the equitable public right theory. History Adrift 518 n.75.

26. History Adrift 518. Compare Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 Harv. L. Rev. 914, 919 (1966): "In situations when individuals stand to suffer serious liabilities as a consequence of administrative action, justice may be served by demanding increased procedural protections."

27. *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (footnote omitted). Professor Jaffe, who favors jury trial in FTC penalty proceedings, see text accompanying note 101 *infra*, noted with regard to the NLRB that "the concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." L. Jaffe, *Judicial Control of Administrative Action* 90 (1965). But cf. *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 684 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

28. 382 U.S. 323 (1966).

proceeding,²⁹ the Supreme Court was apprehensive over possible interference by a jury. There the plaintiff filed a claim for the balance of a debt owed him by the bankrupt. The trustee counterclaimed alleging that the plaintiff had already received a voidable preference. Though recovery of the preference would have required a jury trial if the trustee had sued initially, the court's right to adjudicate the question in a summary proceeding was upheld. To do otherwise would result in "dismembering" a statutory scheme which Congress had "prescribed," and would be contrary to Congress' intention that such claims be "summarily determined."³⁰ The Court's reliance on the danger of dismembering the statutory scheme is of interest since the statute did not characterize³¹ the right involved as legal or equitable, and did not expressly mention the desirability of prompt trial of these claims. The decision relied

29. Equity's incidental jurisdiction was formerly a basis for denying a jury trial, especially in bankruptcy proceedings. The Court in *Katchen* recognized this: "So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control." *Id.* at 337, quoting *Barton v. Barbour*, 104 U.S. 126, 134 (1881). The Court in *Jones & Laughlin* stated that the seventh amendment "has no application to cases where recovery of money damages is an incident to equitable relief." 301 U.S. at 48. The rejection of "incidental relief" as a basis for denial of a jury trial in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962) does not affect these decisions based on broad statutory schemes. See text accompanying notes 20-26 *supra*. But see *McFerren v. County Bd. of Educ.*, 455 F.2d 199, 204 (6th Cir.), cert. denied, 407 U.S. 934 (1972).

30. 382 U.S. at 339.

31. One of the main problems in jury trial inquiry is congressional characterization of the statutory right or absence of it. Conflict arises not only as to whether the action is to be tried by judge or jury, but also as to whether the proceeding is civil or criminal. In the latter situation, the courts are to make the determination by disregarding the statutory label and looking to the substance, application, purpose and remedy of the statute. See *Trop v. Dulles*, 356 U.S. 86, 94-96 (1958); *United States v. Constantine*, 296 U.S. 287, 294 (1935); *Irey v. Occupational Safety and Health Review Comm'n*, No. 73-1765, at 7-8 (3d Cir., Nov. 4, 1974). Generally, however, where "Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word." *United States v. J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974); see *Hepner v. United States*, 213 U.S. 103 (1909) (penalty); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 542-43 (1871) (reliance on statutory language "be sued for and recovered" as denoting civil action). See also *History Adrift* 530-31.

In determining the nature of the civil action, congressional silence has to some extent prompted the development of the different procedures for examining the jury trial right. However, even where a legislative characterization is given, it is not controlling since there are limits to legislative restriction of the seventh amendment. See *Scott v. Neely*, 140 U.S. 106, 109 (1891) ("[T]he enforcement in the Federal courts of new equitable rights created by the States [may not impair] any right conferred . . . by the Constitution or laws of the United States."). See also *Straley v. Universal Uranium & Milling Corp.*, 289 F.2d 370, 373 (9th Cir. 1961). It has been suggested that constitutional problems in this area could be avoided by Congress entrusting to an administrative agency the functions of a jury. *History Adrift* 532-33 & 534 n.154. This would be accomplished pursuant to congressional power under Article III to ordain and establish inferior courts, which includes the power to fix federal jurisdiction for new statutory rights. *Id.* at 531. See generally *L. Jaffe, Judicial Control of Administrative Action* 99 (1965); 83 Cong. Rec. 401

on what the Court considered to be the exigencies of bankruptcy administration.³²

Analogous to the situation where a jury might hamper the efficiency of the proceeding is the affirmation in recent decisions of Congress' power to avoid a jury trial by entrusting the jury's functions to an administrative agency. In *Curtis v. Loether*³³ an action for damages was brought for violations of the Fair Housing Provisions in Title VIII of the Civil Rights Act of 1968.³⁴ Although a jury trial is not required in an action for back pay under the Fair Employment Provisions of Title VII of the Act,³⁵ the Court found that the language of Title VII contrasted sharply with the language of Title VIII. Title VIII's "simple authorization of an action for actual and punitive damages,"³⁶ necessitated a jury trial. The Court took note of the "congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment," but distinguished its case:

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.³⁷

The jury trial guarantee was examined along similar lines in *Pernell v. Southall Realty*.³⁸ There an action was brought to recover possession of real property under a District of Columbia statute. Although the statutory proceeding was "a far cry in detail from the common-law action of ejectment,"

(1938) (remarks of Rep. Halleck) (Federal Trade Commission referred to as a quasi-judicial body).

32. The concept of "strangeness to the common law" may be another basis for the decision. *History Adrift* 528-30 & nn.133-35.

33. 415 U.S. 189 (1974).

34. Title VIII provides in part: "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction . . . and may award to the plaintiff actual damages and . . . punitive damages . . ." 42 U.S.C. § 3612(c) (1970); see *Kelly v. Armbrust*, 351 F. Supp. 869, 871 (D.N.D. 1972).

35. The Curtis decision did not reach this issue, but noted that the circuit courts have so held. 415 U.S. at 197. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). Title VII provides in part: "[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000 e-5(g) (Supp. II, 1972); see *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 919 (S.D. Tex. 1972).

36. 415 U.S. at 197. The Court also considered other bases for the jury trial award and found that the damage action sounded basically in tort whether viewed as an extension of the common law duty of an innkeeper not to refuse temporary lodging to travelers without justification, or as defamation, or as the intentional infliction of emotional distress. *Id.* at 195-96 & n.10. The Court recognized that a jury might cause delay, and that in some instances the racial prejudice of the jurors might prevent a fair trial. The Court felt that in those circumstances the judge could protect the plaintiff by directing the verdict. *Id.* at 198.

37. *Id.* at 195 (footnote omitted).

38. 416 U.S. 363 (1974).

the Supreme Court found that it served "the same essential function."³⁹ The Court awarded a jury trial quoting language from *Whitehead v. Shattuck*:⁴⁰ "[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law."⁴¹ In both *Curtis* and *Pernell*, the Court's decision was based to some extent on the simplicity of the damages involved.⁴² Of greater significance in *Pernell*, however, was the Court's reference to the absence of an administrative background. The Court observed that under the particular statutory proceeding no agency was present either as an adjudicator or investigator,⁴³ but assumed that the "Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes . . . to an administrative agency."⁴⁴ Although this language is only dictum, it does suggest that the Court's decision might have been otherwise had such an agency been present. More importantly, it indicates that the Court considers an evaluation of the administrative backdrop to be an integral part of seventh amendment inquiry.

No similar evaluation was evident in the decision in *United States v. J.B. Williams Co.*⁴⁵ The court, perhaps wary of the caveat in *Ross* regarding procedural obstacles, mechanically applied the *Ross* criteria, and awarded a jury trial in a penalty action based upon alleged violations of an FTC cease and desist order. The Commission's findings with respect to the violation were largely disregarded and the expertise of the agency ignored. Since recent decisions involving administrative agencies seem to indicate that a fourth consideration is to be added to the *Ross* formulation, namely, evaluation of the agency function and administrative proceedings, the analysis in *Williams* may be a step backward in jury trial inquiry.

In *Williams*, a penalty action⁴⁶ was brought by the government based upon alleged violations of an FTC cease and desist order. In awarding the

39. *Id.* at 375.

40. 138 U.S. 146, 151 (1891).

41. *Id.*, quoted in 416 U.S. at 370.

42. The Court also found that a jury would not hamper the efficiency of the proceeding. 416 U.S. at 384-85.

43. *Id.*; see *United States v. J.B. Williams Co.*, 498 F.2d 414, 451 (2d Cir. 1974) (Oakes, J., dissenting).

44. 416 U.S. at 383. The Court distinguished its situation from that presented in *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (statute made right of tenant to occupy rental property subject to control by a commission, including price regulation). The Court stated that *Block* stood for the principle that the seventh amendment is "inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." 416 U.S. at 383.

45. 498 F.2d 414 (2d Cir. 1974).

46. *Id.* at 420. Section 5(l) of the Federal Trade Commission Act provides: "Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States." 15 U.S.C. § 45(l) (Supp. III, 1973).

defendants a jury trial on the issue of whether certain commercials were violative of the order, the Second Circuit ignored both the administrative and judicial proceedings which culminated in the penalty action. The process in *Williams* was typical, involving three steps: first, the issuance and enforcement of the cease and desist order; second, the compliance procedures conducted by the FTC; third, the penalty action which may be instituted when the Commission finds that an advertiser has aired commercials in violation of the cease and desist order and usually in derogation of the Commission's advice during the compliance proceedings.

The cease and desist order in *Williams* was issued by the FTC in 1965.⁴⁷ In a review proceeding in the Sixth Circuit in 1967, the order was granted enforcement;⁴⁸ the issue before the court was whether the Commission's findings—that the advertisements were misleading—were supported by substantial evidence.⁴⁹ The cease and desist order prohibited the defendants from representing “directly or by implication”⁵⁰ that Geritol, an effective remedy for those suffering from iron deficiency anemia, was also a general remedy for tiredness, that “run-down feeling.” After the cease and desist order became final, the compliance procedures went into effect. During compliance procedures the advertiser is required to submit reports detailing the manner of his compliance with the order. Although the Commission need not respond to the reports in order to initiate an action to enforce compliance,⁵¹ the Commission

47. 498 F.2d at 418.

48. *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967). After the FTC issues a cease and desist order, review of the order may be obtained within sixty days in the court of appeals. 15 U.S.C. § 45(c) (1970). An order of the FTC will also become final after the time for the filing of a petition has elapsed. *Id.* § 45(g)(1).

49. 381 F.2d at 887.

50. The 1965 cease and desist order prohibited advertisements which represented “directly or by implication that the use of such preparation [would] be beneficial in the treatment or relief of tiredness . . . unless such advertisement expressly limits the claim of effectiveness of the preparation to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or to an existing deficiency of iron or to iron deficiency anemia, and, further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia; and (2) for such persons the preparation will be of no benefit . . .” *Id.* at 892.

51. Compliance procedures are conducted pursuant to 16 C.F.R. § 3.61 (1974). “(a) In every proceeding in which the Commission has issued an order . . . each respondent named in such order shall file with the Commission, within sixty (60) days . . . a report . . . setting forth in detail the manner and form of his compliance The Commission may . . . institute proceedings . . . to enforce compliance with an order, without advising a respondent whether the actions set forth in a report of compliance evidence compliance with the Commission's order” After the first compliance report was submitted in 1968, and rejected, a public hearing was held where the Commission heard argument and viewed representative commercials. The commercials set forth in the second compliance report also were rejected and eventually constituted counts 1-4. The commercials in counts 5-9 were aired before the third compliance report was even filed. The Commission was not aware of the FemIron commercials, counts 10-11, until they were seen on

in *Williams* did respond, allowing the defendants to submit three compliance reports⁵² and giving them ample opportunity to amend their advertisements. The commercials set forth in the second compliance report submitted in January, 1968, formed the basis of the later penalty action. These commercials warned viewers that they might be suffering from "iron-poor blood" and recommended Geritol's ability to "build iron power in your blood fast."⁵³ Despite the Commission's objections to the use of the word "power" as conveying a false impression, these commercials were aired by the defendants for three weeks after agreement to cease using the commercials. At this point the Commission made a certification of facts to the Attorney General, empowering the government to bring a penalty action.⁵⁴ In the penalty action in the district court the government was awarded summary judgment. The court of appeals reversed, holding that a factual dispute existed as to whether the commercials⁵⁵ were violative of the order, a dispute which necessitated a trial by jury.⁵⁶

Although the issue presented in the penalty proceeding—is the advertisement violative of the cease and desist order—is analytically different from the issue presented in the earlier enforcement proceeding—is the advertisement misleading—it is submitted that, as a practical matter, both issues present similar problems involving the meaning of language and demand the same expertise on what is deceptive. Since review in the enforcement proceeding is confined to a substantial evidence standard, a standard involving considerable deference to the FTC's findings, it would seem that a determination of the issues in the penalty action should also involve some deference, at least, to the FTC's findings. Such deference, if properly exercised, would militate against the use of a jury as fact finder.

television. At this point the Commission rejected the third compliance report and instituted penalty proceedings. 498 F.2d at 419-20, 442-43.

52. 498 F.2d at 442.

53. *Id.* at 419.

54. 15 U.S.C. § 56(a) (Supp. III, 1973) provides: "Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty . . . under subsection (l) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions . . ." The 1975 amendments to the statute authorize the Commission to represent itself in some instances. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 204 (Jan. 4, 1975); see note 106 *infra*.

55. Counts 1-4 involved commercials stating that "Geritol-iron enters your blood stream fast carrying its blood-building power to every part of your body." 498 F.2d at 432. Counts 5-9 the "sad-glad" series portrayed a mother saddened by the knowledge that she has iron-poor blood. Later on in the sequence she is depicted as glad, "Thanks to Geritol." *Id.* at 433. Counts 10-11 concerned the FemIron commercials. FemIron, a product of substantially the same properties as Geritol, was advertised as a remedy for tiredness by juxtaposing a "tired mother" against the "vital look" of the FemIron consumer, with the comment, "You see, some women even risk becoming anemic and tired." *Id.* at 460.

56. *Id.* at 434.

Decisions make it clear that the superiority of the FTC to the public in deciding what is deceptive is basic to the function of that agency.⁵⁷ In holding that a jury comprised of that same public should determine in a narrower context the issue decided by a court reviewing the FTC's determination in the enforcement proceeding, the court in *Williams* arguably disregarded the principal function of the FTC: "to determine [t]he meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive."⁵⁸ The theory of an equitable public right was not even considered by the court, despite the FTC's aim of protecting the ignorant public:

The law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.⁵⁹

As part of its regulatory and protective powers, the Commission has great discretion in framing remedial relief.⁶⁰ Cease and desist orders form no exception. The Commission is not restricted to prohibiting the "illegal practice in the precise form" in which it existed in the past, but is "allowed effectively to close all roads to the prohibited goal."⁶¹ In reviewing these orders, the

57. See *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937) (rule of caveat emptor should not reward deception); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1313-14 (D.C. Cir. 1968) (corporation sought injunctive relief against issuance of press release by Commission alerting public to suspected violations); 15 U.S.C. § 45(b) (1970).

58. *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968), quoting *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); see *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 994 & n.45 (D.C. Cir. 1973).

59. *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942), citing *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910).

60. See *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957). See also *FTC v. Morton Salt Co.*, 334 U.S. 37, 54 (1948).

61. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). If a commercial is ambiguous and capable of producing the forbidden inference it is violative. See *Giant Food, Inc. v. FTC*, 322 F.2d 977, 981 (D.C. Cir. 1963), petition for cert. dismissed, 376 U.S. 967 (1964). This deception was delineated in *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 675 (2d Cir. 1963): "There are two obvious methods of employing a true statement so as to convey a false impression: one is the half truth, where the statement is removed from its context and the non-disclosure of its context renders the statement misleading [and] a second is the ambiguity, where the statement in context has two or more commonly understood meanings, one of which is deceptive." (citation omitted); see *United States v. Ninety Five Barrels, More or Less, Alleged Apple Cider Vinegar, Douglas Packing Co.*, 265 U.S. 438, 443 (1924) (purpose of Food and Drug Act in prohibiting misbranding is to prevent use of misleading statements). In reviewing possible violations, courts are to recognize that if the advertisers in "their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965). See also *In re Whitney & Co.*, 273 F.2d 211, 214 (9th Cir. 1959) (criminal contempt proceedings for violation of cease and desist order).

courts thus afford special deference to the Commission's judgment.⁶² The Supreme Court in *FTC v. Colgate-Palmolive Co.* referred to this:

[A]s an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment.⁶³

There is some indication that such deference should also be afforded to the determinations of the FTC compliance proceedings, although this was not the result in *Williams*. In *Floersheim v. Weinburger*,⁶⁴ a declaratory judgment action brought in the District Court for the District of Columbia, the petitioner challenged the rejection by the FTC of a compliance report. The district court's review was confined to whether substantial evidence supported the Commission's findings; the Commission's response would be accepted unless it was "arbitrary or clearly wrong."⁶⁵ In his dissent in *Williams*, Judge Oakes aptly questioned, "[i]n a penalty action based on the *Floersheim* violations, would not that action be res judicata?"⁶⁶ In other words, would not the substantial evidence standard of review be appropriate in *Williams*?⁶⁷

62. The same deference applies to the Commission's review of the findings of the Hearing Examiner. The Commission may not reverse the Examiner without considering the evidence adduced in the hearing, since this would not comport with the standards of due process. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589 (D.C. Cir. 1970). See also *Chieppo Bus Co. v. United States*, 383 F. Supp. 1192, 1197 (D. Conn. 1974) (ICC given "wide latitude" in fact finding and application of law to facts).

63. 380 U.S. 374, 385 (1965) (footnote omitted). Under the substantial evidence standard the "findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c) (1970). In Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 Harv. L. Rev. 477, 499 (1971) it was observed that "[t]he possibility of two inconsistent inferences does not prevent a determination from being supported by substantial evidence; and the inference chosen by the Commission will not be set aside merely because the court would draw a different one. Such judicial deference is not based on some abstract distinction between 'law' and 'fact'; rather, it follows from recognition that the task of drawing conclusions from established facts is one peculiarly appropriate for a body of experts in the field." (footnotes omitted). See *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52, 63 (1927); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968); *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956), cert. denied, 352 U.S. 1025 (1957). See also *FPC v. Texaco, Inc.*, 417 U.S. 380, 389 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *ICC v. Union Pac. R.R.*, 222 U.S. 541, 547 (1912); *Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 81-82 (1944).

64. 346 F. Supp. 950 (D.D.C. 1972) (under Administrative Procedure Act, 5 U.S.C. § 704 (1970)).

65. 346 F. Supp. at 957.

66. 498 F.2d at 455 n.33.

67. Congress has provided for the imposition of penalties by agencies subject to judicial review on the substantial evidence standard. See 8 U.S.C. § 1321 (1970) (penalty imposed by Attorney General for prevention of unauthorized landing of aliens); 12 U.S.C. § 1425a(d) (1970)

The court's evaluation of the compliance procedures in *Williams* was ambiguous. The FTC's objections to the phrase "iron-power" in Geritol commercials were dismissed as "baseless."⁶⁸ Yet, the court's appraisal of the FemIron commercials, which represented that FemIron, a product of substantially the same properties as Geritol, could remedy tiredness, was entirely opposite. As to the FemIron commercials the court upheld the district court's award of summary judgment,⁶⁹ since those commercials contained "a vice similar to the one the Commission had properly found with respect to the commercials submitted in the first compliance report."⁷⁰

The purpose of the administrative compliance reports is to protect the due process rights of those subject to ongoing cease and desist orders.⁷¹ By construing the FemIron commercials as "similar" to those properly rejected in one compliance report, while holding that a jury must determine whether "iron-power" in Geritol commercials was properly rejected in another, the court opened itself to the charge of ignoring the procedural significance of the reports unless it happens to agree with FTC findings.⁷²

In a somewhat different context, the Second Circuit, in *United States v. St. Regis Paper Co.*, has ruled that the "duty and responsibility for determining . . . whether cease and desist orders . . . have been complied with or violated was delegated solely to the FTC."⁷³ The *Williams* court commented: "The court [in *St. Regis*] was not saying that the FTC[s] . . . *ex parte* determina-

(penalty provisions enforced by Federal Home Loan Bank); 16 U.S.C. § 1375(a) (Supp. III, 1974) (district court has jurisdiction to hear and decide action provided person is given notice and an opportunity for a hearing with respect to violation of Marine Mammal Protection Act); 16 U.S.C. § 1540(a) (Supp. III, 1973) (court shall hear such action based on the record, provided person is given notice and an opportunity for a hearing with respect to violation of Endangered Species Act of 1973); 29 U.S.C. § 666(i) (1970) (Commission authorized to assess penalties for violation of Occupational Health & Safety Act) (upheld in *Irey v. Occupational Safety & Health Review Comm'n*, No. 73-1765 (3d Cir., Nov. 4, 1974) but court stated that "[t]he necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a healthful and disciplining experience." *Id.* at 9 n.11); 39 U.S.C. §§ 5206, 5403, 5604 (1970) (U.S. Postal Service may impose fines on private carriers); 49 U.S.C. §§ 1678(a), (b) (1970) (penalty for violations of the Natural Gas Pipeline Safety Act may be deducted from sums owing by the United States or recovered in a civil action). Compare 16 C.F.R. § 3.2 (1974) (FTC "[a]djudicative proceedings are those formal proceedings . . . which are required by statute to be determined on the record after opportunity for an agency hearing.")

68. 498 F.2d at 432.

69. Assuming that a jury should decide the issue of violation, it would seem that the proper question to be answered is whether a forbidden inference exists, not whether it is "most likely." The court, however, did not adapt summary judgment procedure to the type of issue presented and applied the "most likely" rule. Thus, when it categorized some of the inferences in counts 1-9 as "conceivable" or "possible," an argument can be made that it has already determined the question it would place before the jury. See *id.* at 458 n.44 (Oakes, J., dissenting).

70. *Id.* at 434.

71. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394 & n.22 (1965). See also P. Woll, *Administrative Law: The Informal Process*, 22 (1963).

72. Of course, if the court decided only that the obviousness of the FemIron violation made it a "matter of law," then the court simply exercised a traditional judicial prerogative.

73. 355 F.2d 688, 693 (2d Cir. 1966).

tion of violation was entitled to weight in an adjudication proceeding before a court."⁷⁴ The court's characterization of compliance procedures as *ex parte* determinations appears inaccurate and such an estimate might easily undermine the efficacy of those proceedings. The findings of the Commission in *Williams* were based on compliance procedures which included a public hearing, oral argument, the viewing of representative commercials and repeated consultations with the defendants who agreed not to air the "iron-power" commercials. If these findings are to carry no weight whatsoever in the determination of a violation, what is their significance? Is the Commission a school to learn how to circumvent cease and desist orders successfully? The Second Circuit appeared to forget that the purpose of the compliance procedures is to protect the due process rights of those subject to cease and desist orders. As Judge Oakes stated in his dissent, "once an order of the FTC is final, one subject to such an order has already had his 'day in court.'" ⁷⁵ He further commented:

If a modified commercial is within the order, the issue of its "deceptiveness" or "meaning" has already been litigated before the FTC even though that precise commercial was never actually before the FTC prior to the compliance phase of the proceedings. Whether it is within the order is a question in the first instance for the exercise of agency discretion, subject only to review for abuse or if exercised arbitrarily, capriciously or contrary to law.⁷⁶

The only prior decision to face the precise issue in *Williams* was *United States v. Hindman*.⁷⁷ There a district court reached a similar conclusion, but based its decision on a faulty analysis which was subsequently criticized by its own court of appeals, the Third Circuit. In *Hindman*, the defendant was subject to a cease and desist order prohibiting him from representing that his military uniforms were "custom-made." The government brought a penalty action after representations by the defendant that his uniforms were "custom-tailored." The district court's analysis of the issue was as follows:

[W]e must bear in mind the principle that the meaning to be given such representations as these is not the meaning which would be attached to them by experts, but by the average man who would be likely to purchase the articles in question and to whom those representations are thus made.⁷⁸

The court, noting that one definition of "custom-made" in the dictionary was

74. 498 F.2d at 429.

75. *Id.* at 449 (Oakes, J., dissenting) (emphasis omitted).

76. *Id.* at 449 n.25 (Oakes, J., dissenting); cf. R. Lorch, *Democratic Process and Administrative Law* 152 (1969).

77. 179 F. Supp. 926 (D.N.J. 1960). In *United States v. Piuma*, 40 F. Supp. 119 (S.D. Cal. 1941), *aff'd* 126 F.2d 601 (9th Cir.), cert. denied, 317 U.S. 637 (1942), the jury trial question was not raised although the situation was similar to that in *Hindman*. There the court granted summary judgment holding that the substitution of "gland tonic" for "gland tablet" violated the order.

78. 179 F. Supp. at 927-28. But see 498 F.2d at 450 (Oakes, J., dissenting) ("The statement [in *Hindman*] is a non sequitur in the first place: while the question of deceptiveness relates to laymen being deceived, expertise on what is deceptive is important.").

“tailored,”⁷⁹ nevertheless held that the defendant had the right to show that to purchasers of military clothing a different meaning would attach. The district court ruled that a jury must determine whether the label “custom-tailored” means to purchasers that the clothing is “custom-made.”⁸⁰

In *United States v. Vulcanized Rubber & Plastics Co.*,⁸¹ the Court of Appeals for the Third Circuit rejected—in dictum—the district court’s *Hindman* decision. In *Vulcanized* the cease and desist order prohibited the defendant from representing that his combs were made of rubber. The defendant informed the Commission in a compliance report that he would change the labeling of his combs to “rubber-resin.” This change was rejected by the Commission, and after the defendant asserted his right to do so in a second compliance report, the government brought a penalty action and was awarded summary judgment in the district court. The Third Circuit agreed that the representation “rubber-resin” was violative of the order and affirmed the district court’s award of summary judgment. The court criticized the *Hindman* decision stating:

The holding was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive. . . . [C]reating an issue of fact as the court did in *Hindman*, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public.⁸²

In *Williams*, further FTC procedures were considered only superficially; this disregard was apparent in the court’s routine application of the *Ross* formula. The court approached the pre-merger custom and remedy by looking at the requirement of a jury trial where the government sues to collect a penalty based upon a statutory violation. There is little doubt that the seventh amendment does apply to civil penalty and forfeiture actions,⁸³ and that such

79. As precedent for its decision the *Hindman* court cited *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942). *Aronberg*, however, was a cease and desist order enforcement proceeding, not a penalty action; no question of jury trial was presented. The Seventh Circuit there granted enforcement of a cease and desist order on a substantial evidence standard stating that it was for the FTC, the “triers of fact,” to pass on the credibility and weight of the evidence. *Id.* at 170. The court observed that advertisements are not intended to be “carefully dissected with a dictionary at hand,” but rather to produce “an impression upon prospective purchasers.” *Id.* at 167, quoting in part *Newton Tea & Spice Co. v. United States*, 288 F. 475, 479 (6th Cir. 1923). Contrary to the *Hindman* court’s analysis, this language was by no means an appeal to have deceptiveness decided by the deceived. Instead, the court was emphasizing the special expertise of the FTC in determining such matters—perhaps alluding to the situation where the language properly understood would not be violative, but the overall impression would be.

80. 179 F. Supp. at 928.

81. 288 F.2d 257 (3d Cir.), cert. denied, 368 U.S. 821 (1961).

82. *Id.* at 258-59 n.2.

83. See *443 Cans of Frozen Egg Prod. v. United States*, 226 U.S. 172, 183 (1912) (seizure and forfeiture); *Hepner v. United States*, 213 U.S. 103, 115 (1909) (penalty for inducing aliens to immigrate); *The Sarah*, 21 U.S. (8 Wheat.) 391, 392 (1823) (seizure on land under revenue laws). The civil penalty action has been held to be an action of debt, debt being the classic

right exists even where the statute is silent on the issue.⁸⁴ The court in *Williams* found further support⁸⁵ in the *Curtis* decision, pointing to the fact that the money judgment there was held to be "legal." Yet, the statutory authorization in *Williams* was not a "simple authorization" of damages as in *Curtis* or *Pernell*; in *Williams* there were definite equitable overtones of the type described in *Jones & Laughlin*. The Supreme Court, in *FTC v. Ruberoid Co.*, similarly stated that: "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."⁸⁶ Furthermore, as Judge Oakes noted in his *Williams* dissent, in none of the cases involving civil penalties or forfeitures "was there a prior administrative proceeding culminating in a judicially upheld administrative order, the violation of which was in issue; in all of them the question of violation of a statute was being tried for the first time *ab initio*."⁸⁷ He further commented:

Consistent with oversimplification of the application of the [penalty and forfeiture] cases to this issue . . . the majority ignores the fact that § 45(l) [the penalty statute] is not an isolated "civil action" provision but rather is a provision conceived with and embedded in a complex statutory scheme that is the very foundation of an administrative agency's power.⁸⁸

The dissent's objections were not unfounded. The court's analysis of the "complex statutory scheme" was confined to a review of the legislative history of section 45(l).⁸⁹ The absence in that history of any discussion of the jury trial right did not prompt the court to examine the "purposes and objectives of the [Federal Trade Commission Act] as a whole."⁹⁰ The only analysis was a discussion of the debates over whether the penalties imposed, criminally and civilly, should be for small fixed sums or set at a large maximum. The court concluded that Congress gravitated between these penalty provisions "apparently without any thought that the difference would have any effect on the procedure to be followed in enforcement actions,"⁹¹ namely, a jury trial. This analysis is quite remarkable since the amount of the penalty rests in the trial judge's discretion.⁹²

example of an action triable to a jury. *United States v. Jepson*, 90 F. Supp. 983, 984-85 (D.N.J. 1950).

84. See 5 J. Moore, *Federal Practice* ¶ 38.31, at 232-33 (2d ed. 1974).

85. 498 F.2d at 424.

86. 343 U.S. 470, 473 (1952); see *United States v. St. Regis Paper Co.*, 355 F.2d 688, 696 (2d Cir. 1966).

87. 498 F.2d at 451 (Oakes, J., dissenting).

88. *Id.* See also Charney, *The Need for Constitutional Protection for Defendants in Civil Penalty Cases*, 59 *Cornell L. Rev.* 478, 484 (1974).

89. In *United States v. St. Regis Paper Co.*, 355 F.2d 688, 692 (2d Cir. 1966) the legislative history of § 45(l), the penalty provision, was described as "sparse."

90. *Id.* at 693.

91. 498 F.2d at 426-27.

92. The judge is to consider the good or bad faith of the defendant in assessing the amount of the penalty. *United States v. J.B. Williams Co.*, 354 F. Supp. 521, 548 (S.D.N.Y. 1973), *aff'd in part, set aside in part, rev'd in part, remanded in part*, 498 F.2d 414 (2d Cir. 1974).

The court also avoided the "practical necessity" rationale of *Katchen* in an area where the history suggests it would be appropriate. The court in *Williams* indicated that the reasons behind the 1938 amendments to the Federal Trade Commission Act of 1914, one of which was the penalty provision, were to make FTC orders more effective, and streamline the enforcement procedure.⁹³ "The order of the Commissioner would definitely become final as provided in Section 5 and become operative as to further transgressions without the initiation of new proceedings as now required after the violation occurs."⁹⁴ Apparently the court did not feel the delay a jury trial would present to that enforcement procedure would be considerable.⁹⁵ Again the dissent's analysis of the penalty provisions was more penetrating. Judge Oakes pointed to the incorporation of a similar penalty provision in the Clayton Act.⁹⁶ One of the objections to the earlier practice under that Act was that enforcement of the order had to be secured in a subsequent contempt proceeding, requiring proof of new violations; Judge Oakes reasoned that Congress in patterning the Clayton Act penalty along the lines of section 45(l) would not be authorizing a "system of new hearings and review, a procedure that would require the agency . . . to try its whole case de novo."⁹⁷

In its consideration of the third factor listed in *Ross*, the limitations of juries,⁹⁸ the *Williams* court's disregard of the FTC's function of protecting the "ignorant public" seemed the most unfounded. The court flatly stated that no problems would arise when the jury would be asked "to determine only whether a television commercial has made various forbidden representations," but then hesitated, stating that, "in any event,"⁹⁹ the other two factors—the pre-merger custom and remedy—clearly pointed to a jury trial. The majority found further support¹⁰⁰ from Professor Jaffe's praise of the *Hindman* decision where he stated: "The jury was to decide whether in the opinion of purchasers the questioned phrase meant the same thing as

93. 498 F.2d at 425. See generally *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 992-94 (D.C. Cir. 1973).

94. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 6 (1937), quoted in 498 F.2d at 447 (Oakes, J., dissenting). The penalty clause was recently amended, Act of Nov. 16, 1973, Pub. L. No. 93-153, tit. IV, § 408(c), 87 Stat. 591, amending 15 U.S.C. § 45 (1970) (codified at 15 U.S.C. § 45(l) (Supp. III, 1973)) in order "to insure prompt enforcement of the laws the Commission administers." Id. § 408(b). The district court is now allowed to grant injunctive relief in the enforcement of the Commission's orders. Judge Oakes's comments on this penalty provision were: "[I]t seems highly doubtful that Congress would have incorporated what are clearly equitable remedies into a § 45(l) proceeding to increase the district court's power to deal with offenders if Congress had realized that § 45(l) carried with it the right to a jury trial." 498 F.2d at 439-40 n.1 (Oakes, J., dissenting) (emphasis omitted).

95. 498 F.2d at 434.

96. 15 U.S.C. § 21(l) (1970).

97. 498 F.2d at 449 (Oakes, J., dissenting).

98. See *Hyde Properties v. McCoy*, No. 73-2095 (6th Cir., Nov. 5, 1974) (jury would be unable to cope with issue and would hamper efficiency of proceeding).

99. 498 F.2d at 429.

100. Id. at 422 n.8.

the proscribed one. Who better than a lay customer to decide?"¹⁰¹ Jaffe's statement is subject to the same pitfalls as the *Hindman* decision itself—a disregard for the necessity of expertise on what is deceptive.¹⁰² As discerned by Judge Oakes:

One such "less appropriate" task for a jury [the lay customers] would be to decide a question that has, for all practical purposes, taken 11 years of hearings, meetings, litigation, a full-fledged judicial review, discussion and correspondence, and more hearings, plus the unquestioned application of agency expertise, all at great expense to the public treasury, to decide.¹⁰³

Perhaps it is only a naïveté towards the advertising industry which has surfaced in the court's underestimation of the FTC. Whatever the case may be, that naïveté and underestimation are fatal to its decision. Representative Chapman's statement concerning the nature of the advertising "beast" is significant in this respect:

Advertising copy is frequently changed as a matter of good advertising technique. By the time the cease-and-desist order . . . becomes effective the advertiser, as a matter of course, will change his copy. He can continue this process indefinitely without running any risk whatever of penalty, and when he has run the gamut of all the claims he can plausibly make for his product, he can then change its composition, as patent-medicine manufacturers have so frequently done, and repeat the process over and over again.¹⁰⁴

Throughout the decade devoted by the FTC to the Geritol problem, its good faith application of expertise was not questioned until this penalty action. If the court in *Williams* now finds some defect or due process deprivation in the record of these administrative and judicial proceedings, it would be unreasonable and impractical *not* to send these problems back to the agency¹⁰⁵ which has dealt with them—for clarification, further investigation, or an administrative adversary hearing. In an era when the FTC, and the Congress, are developing new methods to deal effectively with deceptive advertising,¹⁰⁶ the majority's holding requiring a trial de novo on the issue of

101. L. Jaffe, *Judicial Control of Administrative Action* 319 n.237 (1965). But see Davis, "Judicial Control of Administrative Action": A Review, 66 *Colum. L. Rev.* 635, 672 (1966).

102. See generally Note, *The Right to a Nonjury Trial*, 74 *Harv. L. Rev.* 1176, 1189 (1961) ("There is, however, one major reason for nonjury trial which, if valid, survives merger and therefore is perhaps the sole justification, if not explanation, for its retention—the alleged lack of competence of the jury.").

103. 498 F.2d at 452 n.27; cf. *Damsky v. Zavatt*, 289 F.2d 46, 59 (2d Cir. 1961) (Clark, J., dissenting).

104. 83 *Cong. Rec.* 400 (1938) (remarks of Representative Chapman).

105. In a Third Circuit case, Judge Hastie dissented on the grounds that the defendant never had an opportunity to contest the scope of the cease and desist order. Instead of arguing for a jury trial on that issue, he suggested that "the Commission [should] challenge the defendant's use of 'rubber-resin' as deceptive in a new administrative proceeding, thus affording the defendant for the first time an opportunity to contest that issue." *United States v. Vulcanized Rubber & Plastics Co.*, 288 F.2d 257, 262 (3d Cir.) (Hastie, J., dissenting), cert. denied, 368 U.S. 821 (1961).

106. See *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974); Note, *The FTC Ad Substantiation Program*, 61 *Geo. L.J.* 1427 (1973). The Commission's powers have been broadened by enactment of the Magnuson-Moss

violation can only prolong the cat-and-mouse tactics of the advertising game, and signal a regression in flexible jury trial inquiry.

Christine C. Franklin

Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637 (Jan. 4, 1975), enacted, *inter alia*, “to amend the Federal Trade Commission Act in order to improve its consumer protection activities.” Among the significant changes are: clarification of the Commission’s power to issue substantive rules specifically defining unfair or deceptive acts or practices; implementation of procedural safeguards for the exercise of the rulemaking power; and authorization to the Commission to commence actions for civil penalties in the case of knowing violations and for redress of injuries to consumers resulting from any rule violation or unfair or deceptive act or practice. See remarks of Representatives Moss, Broyhill and Eckhardt, 120 Cong. Rec. H.R. 12346-49 (daily ed. Dec. 19, 1974).