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Bernard J. Rhodes

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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 carriers¹—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 campaign² in the print media³ expressing their views on "America's dis-tort-ed tort law system."⁴ 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 "[r]efers to the form of coverage whereby the insured is protected against injury or damage claims from other parties [or any] form of coverage whereby the insured is protected against claims of other parties from specified causes. . . . 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* 150 (1977); see *Glossary of Insurance Terms* 86 (R. Osler & J. Bickley eds. 1972).

2. The budget for Aetna's campaign alone was reported at \$5.5 million. See *Insurance-Company Ads Draw Trial-Lawyer Fire*, 64 A.B.A.J. 531 (1978) [hereinafter cited as *Trial-Lawyer Fire*]; *Aetna's Tampering With Juries, Lawyers Charge*, *Bus. Ins.*, Jan. 23, 1978, at 18 [hereinafter cited as *Lawyers Charge*]; *Lawyers Retaliate Against Aetna's Ads*, *Bus. Week*, July 31, 1978, at 39 [hereinafter cited as *Lawyers Retaliate*]. At least one source placed the total amount spent on the campaign at \$10 million. See Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 69 (1979).

3. The advertisements were published in *Black Enterprise*, *Business Week*, *The Columbia Journalism Review*, *Editor & Publisher*, *Forbes*, *The Hartford Courant*, *National Review*, *New Republic*, *Newsweek*, *The New York Times*, *New York Magazine*, *Reader's Digest*, *Smithsonian*, *Sports Illustrated*, *Time*, *U.S. News & World Report*, *The Wall Street Journal* and *The Washington Post*. *Adman on a Hot Seat*, *Media Decisions*, Oct., 1978, at 132 [hereinafter cited as *Adman*]. At least one insurer-advertiser considered airing its advertisements on television but ultimately rejected the idea. *Id.* at 71, 132 (interview with Douglas J. Alspaugh, Director of Advertising, Aetna Life & Cas. Co.). Undoubtedly, one reason for this decision was the undesirable possibility of triggering the Federal Communications Commission's fairness doctrine. See *id.* See generally S. Sethi, *Advocacy Advertising and Large Corporations* 8 (1977). Under the fairness doctrine, a broadcaster is required to provide opposing viewpoints when he airs advertisements that "consist of direct and substantial commentary on important public issues." *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 22 (1974); see, e.g., *Energy Action Comm., Inc.*, 64 F.C.C.2d 787 (1977); *Public Media Center*, 59 F.C.C.2d 494 (1976). See generally Comment, *Problems in the Application of the Fairness Doctrine to Commercial Advertisements*, 23 *Vill. L. Rev.* 340 (1978); Note, *Advocacy Advertising: A Question of Fairness and the Reasonable Agency*, 27 *Cath. U.L. Rev.* 785 (1978). Finally, even if the insurer-advertisers had chosen to run their advertisements on television, it is possible that the networks would have refused to air them. See *Adman*, *supra*, at 132. CBS, for example, "abides by a long-standing policy prohibiting the sale of advertising time for the presentation of viewpoints on controversial issues of public importance." E. Heighton & D. Cunningham, *Advertising in the Broadcast Media* 283 (1976); see S. Sethi, *supra*, at 92-94. See generally Zabel, *Accountability in Corporate Communications*, in *Crosscurrents in Corporate Communications* 47, 52 (1976); O'Toole, *Advocacy Advertising—Act II*, in *Crosscurrents in Corporate Communications* 33, 33 (1975).

4. *Newsweek*, Feb. 13, 1978, at 88-89 (Aetna advertisement); *Newsweek*, Jan. 30, 1978, at 12-13

one set of advertisements⁵ the insurer-advertisers communicated their belief that jury awards in personal injury lawsuits were often excessive.⁶ In addition, they suggested that such excessiveness had and would continue to result in higher insurance premiums for everyone.⁷ 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?"⁸ 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."⁹

(same); Time, Feb. 20, 1978, at 88-89 (same); see Newsweek, Dec. 5, 1977, at 74-75 (Aetna advertisement); Newsweek, Nov. 7, 1977, at 16-17 (same); Time, Nov. 21, 1977, at 26-27 (same); Time, Oct. 24, 1977, at 10-11 (same). For example, one advertisement read: "THE JURY SMILED WHEN THEY MADE THE AWARD. THEY DIDN'T KNOW IT WAS COMING OUT OF THEIR OWN POCKETS. They thought they were giving away the insurance company's money. So it wouldn't hurt to be generous. Because insurance companies can afford to pay big awards. All they have to do is collect higher insurance premiums. From you. And excessive awards eventually cost you money. We don't object to paying fair awards. That's our business. But paying exaggerated awards inflates costs. And can affect your insurance in other ways. Insurance companies might be forced to limit the kinds of coverage or the number of policies they write. Insurance, after all, is simply a means of spreading risk. Insurance companies collect premiums from many people and compensate the few who have losses. The price of insurance must reflect the rising cost of compensating those losses and the work that goes into doing that. And that includes the escalation in jury awards. That's why your premiums have been going up." Newsweek, Apr. 12, 1976, at 78 (Crum & Forster advertisement); Time, May 10, 1976, at 1 (same); see Newsweek, Apr. 18, 1977, at 44 (Crum & Forster advertisement); Newsweek, Nov. 29, 1976, at 34 (same); Newsweek, Oct. 11, 1976, at 1 (same); Time, Nov. 8, 1976, at 15 (same). Another advertisement read: "'WHEN ANYTHING GOES WRONG FOR ME . . . SOMEBODY IS GOING TO PAY!' 'THEY OWE ME!' So who is this 'somebody?' It's 'somebody' with plenty of money, an unending ability to pay. This 'somebody' has the responsibility to provide an extra *reward* to a person for his misfortune. And 'somebody' makes it easy for us as jurors (and even the judges) to overlook just who it is that's wrong, and base our decisions on the assumption that *any* injury or loss (real or imaginary) deserves payment. And maybe a substantial bonus as well. So who is this benevolent 'somebody?' It's *you!* This growing 'they-owe-it-to-me' attitude may be just fine with you. But if you want it to be America's standard, be prepared to pay the bill. In the form of higher taxes, higher prices for goods and services, higher medical costs. And, yes, higher insurance rates. So, keep your checkbook handy. Because insurance is merely a means of spreading risk among many. So, when claims and settlements go up, rates can only do the same." Newsweek, Feb. 27, 1978, at 1 (St. Paul advertisement); Newsweek, Nov. 14, 1977, at 7 (same); Newsweek, Oct. 31, 1977, at 92 (same); see Time, Aug. 22, 1977, at 76 (St. Paul advertisement).

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.

6. See Newsweek, Feb. 27, 1978, at 1 (St. Paul advertisement); Newsweek, Dec. 5, 1977, at 74-75 (Aetna advertisement); Newsweek, Apr. 18, 1977, at 44 (Crum & Forster advertisement); Time, Feb. 20, 1978, at 88-89 (Aetna advertisement); Time, Aug. 22, 1977, at 76 (St. Paul advertisement); Time, May 10, 1976, at 1 (Crum & Forster advertisement).

7. See Newsweek, Feb. 27, 1978, at 1 (St. Paul advertisement); Newsweek, Dec. 5, 1977, at 74-75 (Aetna advertisement); Newsweek, Apr. 18, 1977, at 44 (Crum & Forster advertisement); Time, Feb. 20, 1978, at 88-89 (Aetna advertisement); Time, Aug. 22, 1977, at 76 (St. Paul advertisement); Time, May 10, 1976, at 1 (Crum & Forster advertisement).

8. Time, Aug. 22, 1977, at 76 (St. Paul advertisement).

9. *Id.*

These advertisements outraged many personal injury plaintiffs and their lawyers, who accused the advertisements' sponsors of attempting to "brain-wash"¹⁰ jurors into minimizing personal injury awards by linking the size of such awards with the amount of the jurors' own premiums.¹¹ Specifically, they claimed that the advertisements, which were targeted to reach seventy million potential jurors,¹² 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.¹³

In response, the insurer-advertisers denied the charges of jury tampering¹⁴ and asserted that they were simply speaking out on an important public issue: rising insurance costs.¹⁵ Their stated objective was to encourage public discussion that would in turn lead to changes in the tort liability system.¹⁶ Further, they argued that any ban on the advertisements¹⁷ would be an unconstitutional infringement on free speech.¹⁸

This controversy between the advertisements' sponsors and opponents raises several new¹⁹ and significant issues.²⁰ The most prominent of these is whether

10. Affirmation of Martin L. Baron, Attorney for Plaintiff, at 4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

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.

13. Affirmation of Martin L. Baron, Attorney for Plaintiff, at 4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978); see *Lawyers Charge*, *supra* note 2, at 18.

14. "The literature at issue . . . was not intended to effect improper communications with jurors or to tamper with juries." 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).

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*].

16. Pasculli, *Lawyers Back Suit Opposing Insurers' Ads*, Nat'l Underwriter, Feb. 10, 1978, at 1, 45 (prop. & cas. ed.).

17. Opponents sought a ban on the advertisements from the courts, see, e.g., *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978); *Rutledge v. Liability Ins. Indus.*, 5 Media L. Rep. (BNA) 1153 (W.D. La. 1979); *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); *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978), from state insurance commissions, see *Trial-Lawyer Fire*, *supra* note 2, at 531; *Lawyers Retaliate*, *supra* note 2, at 39, and from the Federal Trade Commission. See Pasculli, *supra* note 16, at 1; *Trial-Lawyer Fire*, *supra* note 2, at 531; *Protesting Too Much*, Barrons, Feb. 13, 1978, at 7 [hereinafter cited as *Protesting Too Much*].

18. See Pasculli, *supra* note 16, at 1; *Ad Suit*, *supra* note 15, at 67.

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 advertisements²¹ 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.²² Under this approach, if the advertiser's primary purpose was "commercial," the advertisement was deemed unprotected by the first amendment,²³ which was held to protect only purely political speech.²⁴ As a result, a door-to-door salesman had no first amendment right to peddle his goods²⁵ and a hawker had no first amendment right to distribute handbills on city streets²⁶ 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.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).

22. J. Nowak, R. Rotunda & J. Young, *Handbook on Constitutional Law* 768-69 (1978); Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 *Ohio St. L.J.* 115, 117 (1979); Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 *Sup. Ct. Rev.* 45, 47; Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 *U. Chi. L. Rev.* 205, 208 (1976) [hereinafter cited as *Constitutional Doctrine*]; Note, *Commercial Speech and the First Amendment: Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 6 *Cap. U.L. Rev.* 75, 76 (1976) [hereinafter cited as *Virginia Pharmacy*]; Note, *The Regulation of Corporate Image Advertising*, 59 *Minn. L. Rev.* 189, 197-98 (1974) [hereinafter cited as *Corporate Image Advertising*].

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

24. *See Stromberg v. California*, 283 U.S. 359, 369 (1931).

25. *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951).

26. *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942).

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*.²⁸ 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.²⁹ The Court, however, rejected the significance of the profit motive, terming it as "immaterial" as the fact that the newspaper was sold.³⁰ Focusing instead on the advertisement's content, the Court noted that it contained important information on a topic of public concern.³¹ As a consequence, the Court found it deserving of first amendment protection.³²

In *Bigelow v. Virginia*,³³ 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.³⁴ Seizing upon this latter value, the Court held that the advertisement was constitutionally protected under the *New York Times* rationale,³⁵ although it declined to decide whether commercial advertising was to be afforded first amendment protection under all circumstances.³⁶ 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.*³⁷ 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.³⁸ Because of this importance, the Court concluded that such advertising warranted first amendment protection,³⁹ notwithstanding the advertiser's purely economic motive.⁴⁰

religious group); *Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943) (same); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (handbill distribution by religious group).

28. 376 U.S. 254 (1964).

29. *Id.* at 265.

30. *Id.* at 266; see *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). See also *Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

31. 376 U.S. at 266, 271.

32. *Id.*

33. 421 U.S. 809 (1975).

34. *Id.* at 820-22.

35. *Id.*; see *Roberts*, *supra* note 22, at 122; *Schiro*, *supra* note 22, at 81-84, *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 114 (1975) [hereinafter cited as *1974 Term*]; 8 Ind. L. Rev. 890, 894 (1975).

36. 421 U.S. at 825; see *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 91-92 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-61 (1976); *Virginia Pharmacy*, *supra* note 22, at 81; *Constitutional Doctrine*, *supra* note 22, at 215.

37. 425 U.S. 748 (1976).

38. *Id.* at 763.

39. *Id.* at 770; see J. Barron & C. Dienes, *Handbook of Free Speech and Free Press* § 4:5, at 170 (1979); J. Nowak, R. Rotunda & J. Young, *supra* note 22, at 776-77; B. Schwartz, *Constitutional Law* § 8.6 (2d ed. 1979).

40. 425 U.S. at 770; accord, *Louisiana Consumer's League, Inc. v. Louisiana State Bd. of Optometry Examiners*, 557 F.2d 473 (5th Cir. 1977) (advertising of prescription eyeglasses); *Terry v. California State Bd. of Pharmacy*, 395 F. Supp. 94 (N.D. Cal. 1975) (advertising of prescription drugs), *aff'd mem.*, 426 U.S. 913 (1976); *Board of Medical Examiners v. Terminal-Hudson Elecs., Inc.*, 73 Cal. App. 3d 376, 140 Cal. Rptr. 757 (1977) (advertising of prescription eyeglasses).

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.⁴¹ If the advertisement contributes information of value to society—either political or commercial in nature—it should be protected.⁴² 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.⁴³ 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.⁴⁴ A similar regulation would probably be invalid as applied to an advertisement soliciting contributions for a right-to-life or a pro-abortion group.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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,⁴⁸ 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).

42. J. Nowak, R. Rotunda & J. Young, *supra* note 22, at 776-77; L. Tribe, *American Constitutional Law* § 12-15, at 654-55 (1978).

43. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); see *1974 Term, supra* note 35, at 119-20. See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978).

44. See generally *Friedman v. Rogers*, 440 U.S. 1 (1979); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976); J. Barron & C. Dienes, *supra* note 39, § 4:7; *Constitutional Doctrine, supra* note 22, at 238-40.

45. See J. Barron & C. Dienes, *supra* note 39, § 4:4, at 163.

46. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See generally *Virginia Pharmacy, supra* note 22, at 89.

47. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 716 (1977) (Stevens, J., concurring in part); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 98 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-71 & n.24 (1976); *id.* at 779-80 (Stewart, J., concurring); *id.* at 786 (Rehnquist, J., dissenting).

48. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978).

Liberties Union (ACLU) attorney.⁴⁹ 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."⁵⁰ Although on its face this distinction appears to rely on the former primary purpose test,⁵¹ the Court in fact employed the content-based balancing approach.⁵² 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.⁵³

Second, the mere assertion that a state interest will be served by a proposed regulation is insufficient to sustain that regulation.⁵⁴ Rather, advocates of the regulation must be able to prove that it will in fact substantially further the asserted state interest.⁵⁵ For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁵⁶ 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.⁵⁷ Similarly, in *Linmark Associates, Inc. v. Township of Willingboro*,⁵⁸ 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.⁵⁹

Restrictions on advertising, therefore, are currently tested through application of a content-based balancing approach.⁶⁰ Under this analysis, the advertisement's content is weighed against the state interest actually furthered by the

49. *In re Primus*, 436 U.S. 412, 438-39 (1978).

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.

53. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978), *id.* at 470 (Marshall, J., concurring in part); *In re Primus*, 436 U.S. 412, 422, 437-38 (1978).

54. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978); *Bates v. State Bar*, 433 U.S. 350, 383-84 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-97 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975).

55. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-92 (1978); *Bates v. State Bar*, 433 U.S. 350, 383-84 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-97 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975).

56. 425 U.S. 748 (1976).

57. *Id.* at 769-70; *accord*, *Bates v. State Bar*, 433 U.S. 350 (1970) (price advertising by attorneys).

58. 431 U.S. 85 (1977).

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.⁶¹ If this state interest outweighs society's interest in the advertisement's content, the regulation is valid;⁶² if it does not, the regulation is invalid.⁶³

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,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.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.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.⁶⁷ As such, the extent of their protection is suggested by the Court's recent opinion in *First National Bank v. Bellotti*.⁶⁸ In *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."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.⁷⁰

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

62. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

63. See, e.g., *In re Primus*, 436 U.S. 412 (1978); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Bates v. State Bar*, 433 U.S. 350 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

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. Cf. *Lawyers Retaliate*, *supra* note 2, at 39 ("[w]e feel we have a right and an obligation to publicly comment on issues affecting the rising costs of liability insurance").

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

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. See generally Roberts, *supra* note 22, at 127-28 & n.81.

67. See notes 64-66 *supra* and accompanying text.

68. 435 U.S. 765 (1978).

69. *Id.* at 786 (citations omitted).

70. See *id.* at 777; *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. 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.⁷¹ In this regard, their protection would be considerably less.⁷² 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*,⁷³ 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.⁷⁴ Because the commercial element in jury award advertisements is similarly noninterferential,⁷⁵ its introduction does not reduce the first amendment protection otherwise afforded the advertisements.⁷⁶ Jury award advertising, therefore, should be suppressed only upon a showing of a compelling or other 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.⁷⁷ The advertisements, they contend, threaten that interest by tamper-

First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-77 (1978); Buckley v. Valeo, 424 U.S. 1, 14 (1976); Mills v. Alabama, 384 U.S. 214, 218 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964). See also A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255-57. In addition, it has been thought to protect the search for truth, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 881-82 (1963), and the maintenance of self-expression. See *id.* at 879-81. See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 25-26 (1975). Ordinary commercial advertising serves none of these purposes. Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 201 (1973) (Brennan, J., dissenting); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 (1979). But see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971).

71. See 124 Cong. Rec. H3706 (daily ed. May 9, 1978) (remarks of Rep. LaFalce); See also Kronzer, *Jury Tampering—1978 Style*, 10 St. Mary's L.J. 399, 413-15 (1979)

72. See notes 47-53 *supra* and accompanying text.

73. 421 U.S. 809 (1975).

74. *Id.* at 821-22. See also *Friedman v. Rogers*, 440 U.S. 1, 11 n.10 (1979) But see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 716 (1977) (Stevens, J., concurring in part).

75. *Rutledge v. Liability Ins. Indus.*, 5 Media L. Rep. (BNA) 1153, 1155 (W.D. La. 1979) See also *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); *Ad Suit*, *supra* note 15, at 67.

76. See *Rutledge v. Liability Ins. Indus.*, 5 Media L. Rep. (BNA) 1153, 1155 (W.D. La. 1979)

77. See *Plaintiff's Complaint* at 4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978). While a civil litigant has no right to demand a jury in a state court under the seventh amendment, see *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875); *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Iacaponi v. New Amsterdam Cas. Co.*, 258 F. Supp. 880, 884 (W.D. Pa. 1966), *aff'd per curiam*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968), the due process clause of the fourteenth amendment requires that a jury, when employed, be impartial. See

ing with the impartiality of juries.⁷⁸ 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.⁷⁹ One of these safeguards is the fundamental right to have all decisions made by "an impartial decision maker."⁸⁰ 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.⁸¹ 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.⁸²

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.⁸³ One corollary to this requirement is the finding that the challenged speech poses an actual threat to the asserted state interest.⁸⁴ 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.⁸⁵ The subjects who had been exposed

Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See also* Kiernan v. Van Schaik, 347 F.2d 775, 778 (3d Cir. 1965).

78. Affidavit of Martin L. Baron, Attorney for Plaintiff, at 2-3, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978); Affirmation of Martin L. Baron, Attorney for Plaintiff, at 1-4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978); Kronzer, *supra* note 71, at 407.

79. *See Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting in part); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

80. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

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

82. *See, e.g., Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) ("[o]ur 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"), *cert. denied*, 427 U.S. 912 (1976); *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.

84. *See, e.g., First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788-90 (1978); *Bates v. State Bar*, 433 U.S. 350, 367-68 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-97 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975).

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 amount⁸⁶ 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."⁸⁷ If verified by further studies,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.⁸⁹ In meeting that burden, opponents have argued that traditional trial techniques are ineffective in combating the effect of these advertisements.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.⁹¹ Relying on this doctrine, a majority of the states that have ruled on the question prohibit inquiry concerning the advertisements during voir dire.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.⁹³ For the same reasons, an instruction by the judge to disregard the advertisements is both prejudicial to the defendant,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.*

86. Dr. Loftus termed this differential statistically "highly significant." *Id.* See also Hoiberg & Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. Applied Soc. Psych. 267 (1973); Padawer-Singer & Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in *The Jury System in America* 125 (R. Simon ed. 1975).

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.

89. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). See generally J. Nowak, R. Rotunda & J. Young, *supra* note 22, at 727-28.

90. Affirmation of Martin L. Baron, Attorney for Plaintiff, at 4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

91. See C. McCormick, *Handbook of the Law of Evidence* § 201, at 479 (2d ed. 1972).

92. See *Kiernan v. Van Schaik*, 347 F.2d 775, 783 (3d Cir. 1965) (applying Delaware law); *Barton v. Owen*, 71 Cal. App. 3d 484, 508, 139 Cal. Rptr. 494, 508 (1977); *Murrell v. Spillman*, 442 S.W.2d 590, 591 (Ky. 1969); *Farmer v. Pearl*, 415 S.W.2d 358, 361 (Ky. 1967); *Kujawa v. Baltimore Transit Co.*, 224 Md. 195, 200-01, 167 A.2d 96, 98 (1961); *Butcher v. Main*, 426 S.W.2d 356, 360 (Mo. 1968); *Maness v. Bullins*, 19 N.C. App. 386, 387-88, 198 S.E.2d 752, 752-53, *cert. denied*, 284 N.C. 254, 200 S.E.2d 654 (1973); *Brockett v. Tice*, 445 S.W.2d 20, 22 (Tex. Civ. App. 1969). *But see* *King v. Westlake*, 264 Ark. 555, 559-61, 572 S.W.2d 841, 843-44 (1978); *Borkoski v. Yost*, ___ Mont. ___, ___, 594 P.2d 688, 694-95 (1979); *Graham v. Waite*, 23 A.D.2d 628, 628, 257 N.Y.S.2d 629, 630 (4th Dep't 1965).

93. Affirmation of Martin L. Baron, Attorney for Plaintiff, at 4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

94. See *Barton v. Owen*, 71 Cal. App. 3d 484, 508, 139 Cal. Rptr. 494, 508 (1977).

the plaintiff.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.⁹⁶ Finally, techniques such as change of venue or sequestration of the jury, although effective in criminal trials,⁹⁷ would probably be ineffective when the prejudice results from advertisements distributed nationally and already seen by most prospective jurors.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.⁹⁹ In *Quinn v. Aetna Life & Casualty Co.*,¹⁰⁰

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).

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).

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).

98. See note 12 *supra* and accompanying text.

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. Ferrucci*, 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-unprotected dichotomy. See notes 22-27 *supra* and accompanying text.

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.¹⁰¹ 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.¹⁰² In contrast, the federal district court to which *Quinn* was eventually removed¹⁰³ ruled that the advertisements contained fully protected political speech.¹⁰⁴ Although the court enunciated a content-based test,¹⁰⁵ it did not elaborate upon its superficial conclusion that the speech was protected. In *Rutledge v. Liability Insurance Industry*,¹⁰⁶ 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,"¹⁰⁷ the court explained that the advertisements should be protected notwithstanding their "commercial aspect"¹⁰⁸ because they contained important information and opinions on a topic of public concern.¹⁰⁹

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.¹¹⁰ Both federal district courts, on the other hand, assumed that because the speech was protected it could not be constitutionally enjoined.¹¹¹ Because of

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).

104. *Quinn v. Aetna Life & Cas. Co.*, 482 F. Supp. 22, 29-30 (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.

111. See *Quinn v. Aetna Life & Cas. Co.*, 482 F. Supp. 22, 29-31 (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, 1155 (W.D. La. 1979).

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."¹¹⁶ Until recently, however, the FTC has tested advertising only against the Act's deceptive standard and not against its unfairness standard.¹¹⁷ 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.*,¹¹⁸ 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.¹¹⁹ 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."¹²⁰ 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 th[ese] advertisement[s]." Letter from Richard B. Herzog, Ass't 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-unprotected 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.

116. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1976).

117. Hobbs, *Unfairness at the FTC—The Legacy of S&H*, 47 Antitrust L.J. 1023, 1024 (1978); Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 Fordham Urb. L.J. 349, 352 (1973); Cohen, *The Concept of Unfairness as it Relates to Advertising Regulation*, J. Marketing, July, 1974, at 8; Comment, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 Wis. L. Rev. 1071, 1071 [hereinafter cited as *Consumer Unfairness*].

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 1080-84.

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 consumers¹²¹

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

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*].

123. Affirmation of Martin L. Baron, Attorney for Plaintiff, at 2, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

124. See, e.g., Ark. Stat. Ann. § 41-2615 (1977); Colo. Rev. Stat. § 18-8-609 (1973); Del. Code Ann. tit. 11, § 1266 (1979); Ky. Rev. Stat. § 524.090 (1975); N.Y. Penal Law § 215.25 (McKinney 1975); Wis. Stat. Ann. § 946.64 (West Supp. 1979).

125. *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 556, 409 N.Y.S.2d 473, 480 (Sup. Ct. 1978).

126. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

127. See Affirmation of Martin L. Baron, Attorney for Plaintiff, at 4, *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

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;¹²⁹ 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.¹³⁰ The insurer-advertisers have therefore used their wealth to place their speech beyond challenge.¹³¹

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.'"¹³² 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.¹³³ It is similarly impossible in many cases to determine the actual number of consumers who have been injured by deceptive product advertising.¹³⁴ As a result, it is well settled that such evidence is not required to support FTC action.¹³⁵ 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.¹³⁶ Because these advertisements were designed to be read by seventy million people,¹³⁷ 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."¹³⁸ The term "consumers," however, is overly restrictive inasmuch as modern advertising is often directed at much larger audiences.¹³⁹ For example, corporate image advertising¹⁴⁰ is directed not only at consumers but at stockholders and other investment groups, banks and other financial institutions, prospective employees, suppliers, and government regulators.¹⁴¹ To regulate such modern advertising techniques effectively, therefore, the FTC must not be handcuffed by a requirement of direct injury to "consumers."¹⁴² Instead, it should be able to protect any identifiable group that is threatened with substantial injury from an unfair advertisement.¹⁴³ In the case of jury award advertising, the

132. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

133. See note 88 *supra*.

134. *Developments in the Law—Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1040 (1967) [hereinafter cited as *Deceptive Advertising*]. See also Comment, *Deceptive Advertising and the Federal Trade Commission: A Perspective*, 6 Pepperdine L. Rev. 439, 460-65 (1979) [hereinafter cited as *Advertising Perspective*].

135. See, e.g., *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944); *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941); *Providence Washington Ins. Co.*, 89 F.T.C. 345, 377 (1977); *E. Kintner*, *supra* note 122, at 96; 2 G. Rosden & P. Rosden, *The Law of Advertising* § 18.01 (1979).

136. *Feil v. FTC*, 285 F.2d 879, 892 n.19 (9th Cir. 1960).

137. See note 12 *supra* and accompanying text.

138. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

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. "[C]orporate 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.

144. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1976). Prior to 1975, the statute proscribed only acts "in commerce." Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45(a)(1) (1976)). In 1975, however, Congress amended the Act to include the "or affecting" language. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 201(a), 88 Stat. 2193 (1975) (codified at 15 U.S.C. § 45(a)(1) (1976)). As a result, the FTC's jurisdiction is now "co-extensive with the constitutional authority of Congress." H.R. Rep. No. 1107, 93d Cong., 2d Sess. 30, reprinted in [1974] U.S. Code Cong. & Ad. News 7702, 7712; see E. Rockefeller, Desk Book of FTC Practice and Procedure 33-34 (2d ed. 1976).

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, 662-63 (1975), *Surrey 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* 1 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. "[T]he advertising herein was commercial in every sense of the word, calculated 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).

149. *See* 124 Cong. Rec. H3706 (daily ed. May 9, 1978) (remarks of Rep. LaFalce). *See also* *Kronzer*, *supra* note 71, at 413-15. In addition, these advertisements have much the same effect as pure corporate image advertisements in that they promote the image of the sponsor. *See Adman*, *supra* note 3, at 70-71; *cf. Aetna Ads on Rising Insurance Costs May Tamper With Juries, Says Court*, *Bus. Ins.*, Aug. 7, 1978, at 6 (Aetna has received many "favorable responses" from its advertisements). *See generally* *Bird, Goldman & Lawrence*, *supra* note 140, at 406.

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,¹⁵⁰ is the more frequently employed method.¹⁵¹ Such orders are initiated by the issuance of a complaint¹⁵² and may be challenged in adversary proceedings.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.¹⁵⁴ Although the FTC would normally have wide discretion to use either method,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.¹⁵⁶

150. 15 U.S.C. § 45(b) (1976); see 4 R. Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 95.7 (3d ed. 1979).

151. See E. Kintner, *supra* note 122, at 69; *Corporate Image Advertising*, *supra* note 22, at 218.

152. 16 C.F.R. § 3.11 (1980).

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).

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.

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).

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 publication¹⁵⁷ or a restraint on speech prior to a judicial determination of the constitutionality of the restriction.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,¹⁵⁹ it is outside the second type of prior restraint as well.¹⁶⁰ In contrast, a trade regulation rule becomes final before the appellate review process is completed.¹⁶¹ It is, therefore, arguably within the second type of restraint. Because the reviewing court has the power to grant "interim relief,"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,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.¹⁶⁴ For example, in *J. B. Williams Co. v. FTC*,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.¹⁶⁶ It can be argued,

Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976); Comment, *Prior Restraints and Restrictions on Advertising after Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 Mo. L. Rev. 64 (1978).

157. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); L. Tribe, *supra* note 42, § 12-31, at 725.

158. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973); L. Tribe, *supra* note 42, § 12-31, at 726.

159. 15 U.S.C. § 45(g)-(j) (1976); see *Corporate Image Advertising*, *supra* note 22, at 218; *Advertising Perspective*, *supra* note 134, at 465 n.118. In a limited number of cases, the FTC may seek an injunction against an advertiser pending a final resolution of the action. 15 U.S.C. § 53(b) (1976). For a discussion of the prior restraint problems with such injunctions, see Note, *Yes, FTC, There is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. Rev. 833, 854-56 (1977); Note, *FTC v. Simeon Management Corp.: The First Amendment and the Need For Preliminary Injunctions of Commercial Speech*, 1977 Duke L.J. 489.

160. See Address by Tracy Westen, Deputy Director, FTC Bureau of Consumer Protection, Brooklyn Law School and *Brooklyn Law Review* Symposium on Commercial Speech and the First Amendment, at 14 (Nov. 10, 1979) (on file with the *Fordham Law Review*).

161. See 15 U.S.C. § 57a (1976).

162. *Id.* § 57a(e)(3).

163. See notes 156-60 *supra* and accompanying text.

164. See E. Kintner, *supra* note 122, at 74-76; Comment, *Corrective Advertising—The New Response to Consumer Deception*, 72 Colum. L. Rev. 415, 418-19 (1972) [hereinafter cited as *Consumer Deception*].

165. 381 F.2d 884 (6th Cir. 1967).

166. *Id.* at 889-91. Affirmative disclosure orders, as in *J.B. Williams*, should be carefully distinguished from corrective advertising orders. In the former, the FTC simply prohibits future advertisements that it finds unfair or deceptive absent the required disclosure. In contrast, corrective advertising orders require the advertiser to correct impressions caused by past unfair or deceptive advertisements. See E. Kintner, *supra* note 122, at 77-78; *Consumer Deception*, *supra*

therefore, that the insurer-advertisers could be required to present opposing viewpoints,¹⁶⁷ thereby making their advertisements less one-sided.¹⁶⁸ It should be noted that the FTC has never employed such a novel approach in an unfairness action.¹⁶⁹ Nevertheless, such an order would be consistent with the previously discussed objective of stimulating public debate on topics of public concern.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.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.¹⁷² At the same time, however, the Court has refused to afford any form of speech absolute protection,¹⁷³ relying instead on a more critical balancing analysis.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

note 164, at 419. See generally Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 Mich. L. Rev. 374 (1971); Note, *Corrective Advertising and the Limits of Virginia Pharmacy*, 32 Stan. L. Rev. 121 (1979).

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.

168. See *Television Product Advertising*, *supra* note 122, at 530-31.

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).

170. See note 70 *supra* and accompanying text. See also *Television Product Advertising*, *supra* note 122, at 542.

171. See *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 758 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 644-45 (1978); Roberts, *supra* note 22, at 145-52; notes 89-90 *supra* and accompanying text. See generally Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

172. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790-92 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-70 (1976).

173. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976); *Konigsberg v. State Bar*, 366 U.S. 36, 49 (1961). See generally J. Nowak, R. Rotunda & J. Young, *supra* note 22, at 720; B. Schwartz, *supra* note 39, § 8.1, at 311-12; see also *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

174. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

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

175. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (quoted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).