THE FEDERAL UNFAIR TRADE PRACTICE STANDARD AFTER *INTERNATIONAL HARVESTER*: WHEN IS A MARKETING PRACTICE A PURE OMISSION?

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I. INTRODUCTION

In 1914 Congress passed the Federal Trade Commission Act ("FTCA") to regulate "unfair methods of competition."[1] Because the judiciary was dominated by pro-business interests at that time, courts interpreted this phrase to include only competitive conduct involving two businesses.[2] As a result, congressional intent to regulate questionable trade acts and practices

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1. 15 U.S.C. §§ 41-46, 47-58 (1982).

2. In FTC v. Raladam Co., 283 U.S. 643 (1931), the United States Supreme Court ruled that the Federal Trade Commission could not restrict a manufacturer of a medicine to cure obesity from advertising that the product had resulted from significant and thorough scientific research. Despite the fact that the advertising claim was deceptive, the Court concluded that section 5 of the Federal Trade Commission Act could only be violated if it was shown that there had been an infringement on business competition:

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured.

Id. at 649. The Court also noted that any broader power could not be conferred on the Federal Trade Commission by the courts, but would have to be created by Congress. *Id.*

that were injurious to consumers was precluded by a strict reading of the statute.

This rather narrow interpretation of section 5 of the FTCA was amended in 1938 with the passage of the Wheeler-Lea Act.[3] This Act amended section 5 by giving the Federal Trade Commission ("Commission") the power to regulate "unfair or deceptive acts or practices in or affecting commerce" in addition to the power to regulate unfair methods of competition.[4] Senator Wheeler, co-sponsor of the Act, made it clear that the revitalized section 5 was intended to provide adequate protection to consumers as well as to business competitors:

> The present Act makes unlawful "unfair methods of competition" and the Supreme Court has held that the Commission loses jurisdiction of a case where an actual or potential competitor is not involved. *This amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor.* . . .
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> . . . [T]his legislation is designed to give the Federal Trade Commission jurisdiction over unfair acts and practices for consumer protection to the same extent that it now has jurisdiction over unfair methods of competition for the protection of competitors.[5]

A major deficiency of the FTCA as amended in 1938 was its failure to include any statutory definition of the terms "unfair" or "deceptive" trade practices. Although a statutory definition of a "false advertisement" was included within the statute,[6] the Commission was left to its own devices to define exactly what would constitute an unfair or deceptive trade practice

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3. Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45 (1982)).

4. Section 5 of the FTCA originally stated: "[U]nfair methods of competition in commerce are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce." Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719, 15 U.S.C. § 45(a)(1)-(2) (1982).

5. 83 Cong. Rec. 3255-56 (1938) (emphasis added).

6. The statute provided:

> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

15 U.S.C. § 55(a)(1) (1982).

under the Act.[7] This responsibility resulted in the evolution of two distinct lines of cases establishing exactly what would constitute a deceptive or an unfair trade practice.[8] Although these case lines had their origin in the 1930s, the unfairness standard was not formalized until much later.[9] The concept of "unfairness" is generally viewed to be a broader standard that incorporates the concept of deception.[10]

Until the early 1960s the Commission used various methods of determining whether an act or practice was unfair. However, it focused primarily on whether the practice was "objectionable" based on a cost-benefit analysis of competing economic interests.[11] In 1964 this case-by-case approach to regulating unfair marketing practices gave way to the promulgation of an unfairness theory standard that was carefully articulated by the Commission in a statement entitled: Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking.[12] In this statement the Commission reviewed its case law involving deceptive and unfair

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7. The United States Court of Appeals for the Ninth Circuit has recognized the Federal Trade Commission's special role in establishing policy standards:

> The need for the courts to defer to the Commission's judgment results in part from the statutory scheme and in part from the weight of accumulated agency expertise. The generality of section 5 proscriptions "necessarily gives the Commission an influential role in interpreting section 5 and in applying it to the facts of particular cases arising out of unprecedented situations." Determining whether a particular advertisement is deceptive requires a familiarity with the expectations and beliefs of the public, especially where the alleged deception results from an omission of information instead of a statement. *The Commission has been engaged in making such determinations since 1938, when its jurisdiction was extended to include the prevention of unfair or deceptive acts or practices in commerce.* As a result, the Commission has accumulated extensive experience and is therefore generally in a better position than the courts to determine when a practice is deceptive within the meaning of the FTCA.

Simeon Management Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978) (citations omitted) (emphasis added).

8. *See infra* notes 30-58 and accompanying text.

9. The traditional deception standard was first recognized in FTC v. Algoma Lumber Co., 291 U.S. 67 (1934), in which the Supreme Court validated the traditional "capacity to deceive" deception standard.

10. The Commission explained the standards as follows:

> The Commission's unfairness jurisdiction provides a more general basis for action against acts or practices which cause significant consumer injury. This . . . jurisdiction is broader than that involving deception, and the standards for its exercise are correspondingly more stringent. It requires the complete analysis of a practice which may be harmful to consumers. *To put the point another way, unfairness is the set of general principles of which deception is a particularly well-established and streamlined subset.*

In re International Harvester Co., 104 F.T.C. 949, 1060 (1984) (opinion of the Commission) (emphasis added).

11. *See infra* notes 96-100 and accompanying text.

12. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324-75 (1964) [hereinafter Unfair or Deceptive Advertising].

trade practices, distinguishing the criteria necessary to establish each cause of action.[13] The Commission began to formalize the factors used to conclude a trade practice was unfair. The Commission was also careful to point out that defining concepts such as "unfairness" was a difficult task at best and that the Commission could not clearly establish specific boundaries for such a policy:

> No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the example should help to indicate the breadth and flexibility of the concept of unfair acts and practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (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 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; (3) Whether it causes substantial injury to consumers (or competitors or other businessmen).[14]

These criteria were subsequently approved by the Supreme Court in 1972 in *FTC v. Sperry & Hutchinson Co.*,[15] in which the court held the Commission standard was not too vague so as to be unconstitutional. As the *Sperry* unfairness standard was applied in subsequent cases, the Commission focused on whether the questioned practice had resulted in any consumer injury. In deciding whether a consumer injury has occurred, the Commission has evaluated whether the impact of the injury was substantial, whether the injury was outweighed by any countervailing benefits to consumers or competition that the practice produces, and whether the injury was of the type that the consumer could have reasonably avoided.[16] The focal point of these unfairness cases was whether the company had engaged in an unfair trade practice causing consumer injury by misrepresenting a product claim or failing to include a material fact that would have been important in the consumer's purchase decision.[17] Finally, the *Sperry* standard was reiterated in the 1980 Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction.[18]

In 1984 the Commission altered this traditional approach to analyzing

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13. *Id.* at 8327-30.

14. Unfair or Deceptive Advertising, *supra* note 12, at 8355.

15. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

16. Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53522-23 (1975).

17. *See* Simeon Management Corp. v. FTC, 579 F.2d 1137 (9th Cir. 1978); *cf.* Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

18. Letter from Federal Trade Commission to Honorable Wendell H. Ford, Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, United States Senate (December 17, 1980), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,203 (June 23, 1988).

unfair trade practices in *In re International Harvester Co.*[19] The case involved the marketing of a product without any comment or warning regarding a particularly dangerous product feature.[20] A complaint was filed charging that the company had engaged in an unfair and deceptive marketing practice by virtue of what was described as a deliberate decision not to include information obviously material to all consumers.[21] The Commission refused to find International Harvester in violation of the federal deception standard because it viewed the marketing strategy as a "pure omission" in that the company had said nothing about the product deficiency as opposed to having misrepresented a product feature.[22] Simply stated, International Harvester's conduct did not come under the purview of the material nondisclosure doctrine recognized as a component part of the deception standard.[23] Instead, the Commission ruled that International Harvester's pure omission was a violation of the federal unfairness standard.[24]

This ruling substantially clouded the distinction between deceptive and unfair trade practice causes of action as defined by previous case law and Commission policy statements. This Article will focus on the development of the traditional unfairness standard and the impact that the pure omission exception has had in further refining the standard's parameters. A brief review of the Commission's deception standard will also be provided in order to make it clear that there is now some overlap between these two trade practice standards.[25] Part III of this Article will review the material nondisclosure doctrine[26] as developed under the deceptive trade practice standard and will emphasize the affirmative disclosure[27] and corrective advertising orders[28] created by the Commission as proscriptive remedies. Finally, an attempt will be made to discern any differences between a material nondisclosure and a pure omission to determine why the latter could not be effectively regulated by the deception standard as opposed to the federal unfairness standard.[29]

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

20. Between 1939 and 1975 International Harvester marketed a line of farm tractors that put their operators at risk by virtue of a problem known as "fuel geysering." The placement of the gas tank near the engine caused the fuel to heat during normal operating conditions and resulted in tremendous pressure building inside the tank. If the gas cap had not been properly tightened and was then removed before the gasoline had cooled, the heated fuel would spray out of the tank and ignite. This problem caused numerous injuries and killed at least one person. *Id.* at 950 (complaint).

21. *Id.*

22. *Id.* at 1059.

23. *Id.* at 1051.

24. *Id.* at 1066.

25. *See infra* notes 30-58 and accompanying text.

26. *See infra* notes 107-13 and accompanying text.

27. *See infra* notes 114-36 and accompanying text.

28. *See infra* notes 137-63 and accompanying text.

29. *See infra* notes 164-201 and accompanying text.

II. Unfairness v. Deception

A. *The Federal Trade Commission's Deception Standard*

The Federal Trade Commission's deceptive trade practice standard had its beginning in *FTC v. Algoma Lumber*.[30] The Supreme Court ruled that an anticompetitive practice violated section 5 of the FTCA because it had a "capacity to deceive."[31] Following the amendment of the Federal Trade Commission Act in 1938 by the Wheeler-Lea Act, the Federal Trade Commission and the federal courts borrowed the "capacity to deceive" standard from *Algoma Lumber* in developing the traditional federal deception standard. An act or trade practice was found to be deceptive under this traditional deception standard if it: (1) had a tendency or capacity to deceive; (2) had a potentially significant impact on the targeted audience; and (3) was material to the deception.[32] The early cases reviewed by the Commission under the traditional tendency to deceive deception standard involved marketing and advertising claims. The Commission was not obligated to find that a consumer or competitor had actually been deceived, but rather reviewed the advertisement in its entirety in order to conclude whether it had a propensity to deceive.[33]

The failure to disclose material information was also viewed as meeting the tendency to deceive requirement of the deception standard.[34] These so-called omission cases focused on the overall impression that was communi-

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30. FTC v. Algoma Lumber Co., 291 U.S. 67 (1934).

31. *Id.* at 81.

32. Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975); Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir.), *cert. denied*, 312 U.S. 682 (1940).

33. American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) ("[b]ut the Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception"); Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979) ("[p]roof of actual deception is unnecessary to establish a violation of Section 5"). Relative to the Commission's obligation to analyze the net impression conveyed by the advertisement, one court has stated:

> The Commission's right to scrutinize the visual and aural imagery of advertisements [or any other business act or practice] follows from the principle that the Commission *looks to the impression made by advertisements as a whole*. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.

American Home Prods. Corp. v. FTC, 695 F.2d at 688 (emphasis added). The Commission has also rejected several arguments by respondents that their trade practices were not deceptive, Koch v. FTC, 206 F.2d 311, 317 (6th Cir. 1953) (respondent acted in good faith); Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967) (respondent had no intent to deceive); Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941) (respondent did not regard its advertisements as deceptive).

34. Feil v. FTC, 285 F.2d 879, 901 (9th Cir. 1960).

cated by the company or individual responsible for the nondisclosure.[35] Because failing to disclose material information also greatly affected consumer choice, the Commission took the position that such marketing practices were deceptive as a matter of law.[36] This line of cases was so significant that a separate material nondisclosure doctrine evolved from them. Furthermore, the distinction between "omission" and "pure omission" cases presented in *International Harvester* has formed the basis for a complete reevaluation of the federal unfairness standard.

In evaluating the "audience reaction" component part of the standard, the Commission looked to whether a "substantial number" of people within the group could potentially have been deceived.[37] An exact number of people was never specified in any particular case as being required in order to find a particular trade practice deceptive.[38] It is clear, though, that a relatively low threshold was required because protection under the standard was extended to even "the ignorant, the unthinking and the credulous."[39]

The Commission provided no specific guidance as to when a representation would be considered material.[40] Generally speaking, the Commission has held that if a consumer would have relied on a particular piece of information when making a purchase decision, the materiality requirement was met.[41]

The traditional deception standard underwent some serious change

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35. *See* J.B. Williams Co. v. FTC, 381 F.2d 884, 892 (6th Cir. 1967).

36. Keele Hair & Scalp Specialist, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960).

37. When referring to the audience reaction part of the deception standard, courts and the Commission have used a variety of terms. *See, e.g., In re* Bristol-Myers Co., 85 F.T.C. 688, 744 (1975) ("substantial number"); Benrus Watch Co. v. FTC, 352 F.2d 313, 318-20 (8th Cir. 1965) ("substantial segment" or "substantial percentage"); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961) ("substantial portion of the purchasing public").

38. *See also* Unfair or Deceptive Advertising, *supra* note 12, at 8350 ("substantial segment of the purchasing public, or of that part of the purchasing public to whom the representation is directed").

39. Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

40. If representations or misrepresentations are made intentionally or expressly, materiality will be inferred. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965) ("[n]or was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy"); *see also In re* Firestone Tire & Rubber Co., 81 F.T.C. 398, 451 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973) (absence of substantial evidence or a rational basis to support a representation can also be inferred to violate the materiality requirement of the deception standard).

41. *See* Unfair or Deceptive Advertising, *supra* note 12, at 8351. Although direct injury by a consumer can be relied on to establish the materiality requirement, proof of actual injury has not been required in Commission cases. *See In re* Firestone Tire & Rubber Co., 81 F.T.C. at 451. Furthermore, the courts have paid great deference to the Federal Trade Commission's findings regarding what properly constitutes a material misrepresentation. Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973).

with the installation of James C. Miller, III as Chairman of the FTC in 1981.[42] Miller openly declared that he did not favor the tendency to deceive standard because he felt that it created an environment of ad hoc decision making for the Commission with regard to what marketing practices should be ruled deceptive and therefore violative of section 5.[43] He felt that the mere "tendency to mislead an unreasonable few"[44] should not be a sufficient basis for a finding of deception. As a result, he presented testimony to Congress regarding the desirability of a statutory definition of deception.[45]

In 1983 after Congress had refused to enact a statutory definition as proposed by Miller, the House Committee on Commerce asked the Commission to prepare a policy statement regarding its deception enforcement policy.[46] In October 1983 Miller issued what was to become known as the Commission's 1983 Policy Statement on Deception ("Policy Statement").[47] The Policy Statement effectively provided that the Commission would overlook the tendency to deceive standard in favor of the approach that Miller had suggested to Congress. The Policy Statement defined a deceptive marketing practice as "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's det-

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42. Miller's appointment as Chairman of the Federal Trade Commission was effective on September 30, 1981. Washington Post, Oct. 1, 1987, at A24, col. 1.

43. *FTC's Authority Over Deceptive Advertising: Hearing Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science & Transportation*, 97th Cong., 2d Sess. 3 (1982) [hereinafter *Advertising Hearings*]. Miller believed that this type of decision-making did consumers more harm than good. *Id.*

44. *Id.*

45. Regarding the traditional case law deception standard, Miller stated:

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

Id. In these same hearings Miller suggested that Congress define a deceptive trade practice to be any "material misrepresentation that: (a) Is likely to mislead consumers, acting reasonably in the circumstances, *to their detriment*; or (b) The representor knew or should have known would be misleading." *Id.* at 8-9 (emphasis added). The injury-detriment requirement in Miller's original suggested statutory definition was supported by his feeling that the Commission should not challenge alleged deceptive acts or practices that were not likely to cause consumers any injury. In such cases he believed that "the Commission's scarce enforcement resources have been squandered on the trivial." *Id.* at 8.

46. Energy and Commerce Committee Report on the Federal Trade Commission Authorization of 1982, S. Rep. No. 451, 97th Cong., 2d Sess. 16 (1982); H.R. Rep. No. 156, 98th Cong., 1st Sess., pt. 1, at 5 (1983).

47. The Policy Statement was appended to the majority opinion in *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984); *see also* 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 689 (Oct. 27, 1983); 4 Trade Reg. Rep. (CCH) ¶ 13,205 (June 23, 1988).

riment."[48] From the beginning Miller portrayed this Policy Statement as being an effective reiteration of the existing deception standard and an accurate reflection of over fifty years of deception case law.[49] He perceived no change or difference between the two standards.

The "Policy Statement deception standard" has been the subject of much criticism.[50] It has been argued that this "reasonable consumer" standard does not provide consumers with the same level of protection as that afforded under the traditional tendency to deceive approach.[51] However, the Policy Statement standard was formally ratified by the Commission in March 1984 in *In re Cliffdale Associates, Inc.*.[52] Even though the administrative law judge ("ALJ") had concluded that Cliffdale's advertisements were deceptive in accordance with the traditional deception standard,[53] the full Commission reviewed the case and rejected the ALJ's reliance on the traditional standard.[54] Chairman Miller authored the majority opinion and stated that the existing standard was "circular and therefore inadequate to

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48. *In re* Cliffdale Assocs., Inc., 103 F.T.C. at 176.

49. Miller relied primarily on Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976) to support this particular claim. In *Beneficial* the court stated that "the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the likelihood or propensity of deception is the criterion by which advertising is measured." *Id.* at 617 (citing Bankers Security Corp. v. FTC, 297 F.2d 403, 405 (3d Cir. 1961)). Miller relied on the phrase "likelihood or propensity of deception" to justify his use of the phrase "likely to deceive" in the Policy Statement. It should be noted, however, that the *Beneficial* court considered the "likely to deceive" and the "tendency to deceive" standards as being comparable:

> The parties agree that the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context. Whether particular advertising has a tendency to deceive or mislead is obviously . . . more closely akin to a finding of fact than to a conclusion of law. At the same time, evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead.

Id. (citation omitted).

50. The House Committee refused to accept the Deception Policy Statement declaring that it did not fulfill the Committee's request for a "definitive neutral analysis" of the Commission's deception enforcement policy. 4 Trade Reg. Rep. (CCH) ¶ 13,205 (June 23, 1988). The statement was viewed as an inadequate summary of the proposed standard that Miller had presented to Congress earlier and which it had refused to sanction. *Id.* Ultimately, the statement was returned to the FTC with an order that the agency put together a more factual and less argumentative summary statement. *Id.* Chairman Miller responded to the Committee's letter rejecting the Policy Statement arguing that the Committee's conclusions were not supported by federal case law. *Id.* Commissioners Bailey and Pertschuk appended dissents to the Deception Policy Statement. 4 Trade Reg. Rep. (CCH) ¶ 13,207. *See In re* Cliffdale Assocs., Inc., 103 F.T.C. at 184.

51. Following adoption of the "likely to mislead" deception standard in *Cliffdale Associates*, Commissioners Bailey and Pertschuk summarized their criticism of the new deception standard in a law review article. *See* Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849 (1984).

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

53. *Id.* at 156 (initial decision by Brown, ALJ).

54. *Id.* at 174 (opinion of the Commission).

provide guidance on how a deception claim should be analyzed."[55] He also stated that it was necessary and appropriate for the Commission "to articulate a clear and understandable standard for deception."[56]

The importance of *Cliffdale Associates* cannot be underestimated. Congressional reaction was virtually nonexistent and the Policy Statement standard was allowed to be formally ratified. Because of this fact, the *Cliffdale Associates* ruling established a deception standard with a burden of proof significantly more difficult for consumers to meet. This precedent has been affirmed in a number of subsequent cases[57] and was ultimately relied on in *International Harvester* to find that the company had not engaged in a deceptive trade practice.[58]

B. *Development of the Federal Unfairness Policy*

Prior to passage of the Wheeler-Lea amendment in 1938, the Commission litigated the issue of what constituted an "unfair method of competition." The cases focused on anticompetitive behavior between businesses and did not extend protection to consumers. The first case decided by the Supreme Court in this area was *FTC v. Gratz*,[59] which involved a tying arrangement the Commission challenged as a violation of antitrust law.[60] The Commission's order was reversed by the Supreme Court because the agency had not demonstrated that the questioned practice had either potentially monopolistic tendencies or substantially lessened competition.[61] The agency's authority to define unfairness was limited to practices held to be expressly violative of established legal principles:

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as a matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.[62]

In a subsequent case, *FTC v. Winsted Hosiery Co.*,[63] the Commission

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55. *Id.* at 164.
56. *Id.*
57. Removatron Int'l Corp., 5 Trade Reg. Rep. (CCH) ¶ 22,619 (Nov. 9, 1988); *In re* Figgie Int'l, Inc., 107 F.T.C. 313 (1986); *In re* Southwest Sunsites, 105 F.T.C. 7 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986); *In re* Thompson Medical Co., 104 F.T.C. 648 (1984); *In re* International Harvester Co., 104 F.T.C. 949 (1984).
58. *In re* International Harvester Co., 104 F.T.C. at 1063 (opinion of the Commission).
59. FTC v. Gratz, 253 U.S. 421 (1920).
60. *Id.* at 428.
61. *Id.*
62. *Id.* at 427.
63. FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

issued the first decision in a long line of cases in which the questioned practice was held to be both unfair and deceptive.[64] *Winsted* involved garments mislabeled as having a high wool content.[65] The Supreme Court affirmed the Commission's authority to restrict or prohibit this type of labeling because such a practice was unfair in that it was likely to mislead consumers as to the wool content of the garments.[66] This case is important because the Court recognized that a practice could be unfair if it had a detrimental impact on consumers in addition to having a propensity or capacity to affect competition.[67]

Perhaps the most significant unfairness decision to be rendered by the Commission prior to passage of the Wheeler-Lea Act was *FTC v. R.F. Keppel & Bros.*[68] *Keppel* involved a marketing practice that enticed children to buy candy in packages that might contain money.[69] This case did not involve a charge by the Commission that the company had engaged in deceptive conduct, but rather, focused on the merchandising activity as being unfair because of its impact on the consumer.[70] The particular practice involved in *Keppel* focused on children as a vulnerable target audience. In upholding the Commission's cease and desist order, the Supreme Court analogized the marketing practice to other lottery activities held to be violative of general public policy.[71]

After the Wheeler-Lea Act amended the FTCA to include unfair or deceptive acts or practices in addition to anticompetitive behavior, Commission litigation was heavily weighted toward developing a deception enforcement policy. It is important to note, however, deception was recognized as a subset of the unfairness standard, and therefore, finding a practice deceptive necessarily implied that it was also unfair. These cases also were drawn narrowly around the deception policy, and the Commission never developed the authorization in *Keppel* to extend its authority over unfair practices beyond the letter of established principles. Congress recognized the importance of *Keppel* when it issued its Statement of Basis and Purpose Regarding Unfair Advertising in 1964:

> The principle that emerges from *Keppel*, from the decisions that both precede and follow it, from the legislative history and background of the Trade Commission Act, and from the Commission's 50 years of efforts to

64. *Id.* at 493-94.
65. *Id.*
66. *Id.* at 494. The Court also implied that it was insufficient for a practice to be adjudicated as unfair simply based on its impact on consumers. The regulatory power of the FTC could only be invoked if there was some propensity to affect competition. *Id.*
67. *Id.* at 493-94.
68. FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934).
69. *Id.* at 307.
70. *Id.* at 314.
71. *Id.* at 313. The Court was careful to emphasize the possibility of injury to honest competitors resulting from the type of practice utilized by Keppel. *Id.*

> implement its mandate from Congress, is that the Commission's responsibilities are not limited to determining whether particular practices fall within pre-existing categories of illegality and entering cease-and-desist orders against the guilty parties accordingly. It is also to determine, within broad limits what kinds of trade practices should be forbidden in the public interest because they are unfair or deceptive and thus injurious to competitors or the consuming public. Congress then went on to point out a variety of acts or practices which will constitute a violation of the unfairness policy as to consumers. However, the Statement of Basis and Purpose also points out that it is not possible to define the outer limits of the Commission's unfairness authority with an enumeration of examples. Instead, it was suggested that three factors should be utilized to determine whether or not the standard had been violated. These factors included: *(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 otherwise-whether, in other words, it is within at least a penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).* Although no effort was made to define or describe these various factors it was stated that if all three requirements were met, "the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it." The only assistance Congress offered the Commission relative to more clearly defining the standard was to note that any method of selling would violate Section 5 if it was held to be exploitive or inequitable, morally objectionable, and seriously detrimental to consumers. Beyond this general comment the elusive concept of unfairness was not capable of generalization.[72]

The unfairness factors enunciated in the Statement of Basis and Purpose were formally acknowledged by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*[73] Before 1965 Sperry & Hutchinson had used court injunctions and threats of injunctions to prevent independent agents from dealing in the company's trading stamps.[74] The company had filed in excess of forty law suits and had prevailed in every instance.[75] The Commission sought to terminate Sperry & Hutchinson's overly protective and anticompetitive behavior by issuing a complaint alleging that its practices constituted an unfair method of competition and an unfair and deceptive act and practice.[76] An ALJ ruling in favor of the company was reversed by the full Commission

72. Unfair or Deceptive Advertising, *supra* note 12, at 8349 (emphasis added).

73. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

74. Sperry & Hutchinson Co. v. FTC, 432 F.2d 146, 149 (5th Cir. 1970), *modified*, 405 U.S. 233 (1972).

75. *Id.* at 149.

76. *Id.* at 147.

and a cease and desist order was issued.[77] However, the Fifth Circuit reversed the Commission order, stating that the only type of practice that could be declared unfair was one considered a per se violation of antitrust policy, an express violation of the Sherman, Clayton, or Robinson-Patman Acts, or a violation of the spirit of the antitrust statutes as recognized by the Supreme Court.[78] The Commission appealed the decision focusing strictly on the question of whether the Commission had the power to prohibit unfair practices causing direct injury to consumers while having no impact on competition.[79] The Supreme Court sided with the Commission on this particular question.[80]

The Court criticized the holdings in previous cases as too narrow and restrictive of the scope of FTC authority.[81] The Court, not persuaded that the Commission's authority should be bounded by traditional antitrust policy and theories, held its authority should cover a wide gamut of practices geared toward consumers.[82] The most significant aspect of *Sperry & Hutchinson* is that the unfairness factors set forth in the Statement of Basis and Purpose were quoted with apparent approval.[83] These factors became the cornerstone of the federal unfairness standard and were further elucidated in the agency's 1980 Unfairness Policy Statement ("Unfairness Policy Statement").[84]

The three factor test as summarized in the Unfairness Policy Statement is: (1) whether the act injures consumers; (2) whether the act violates established public policy; and (3) whether the act is unethical or unscrupulous.[85] Consumer injury is the most important of the three *Sperry & Hutchinson* factors. To find an injury sufficient to establish unfairness it "must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury

77. *Id.* at 148.

78. *Id.*

79. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

80. *Id.*

81. *Id.* at 241-44. The Court specifically criticized the decisions in FTC v. Gratz, 253 U.S. 421 (1920), and FTC v. Raladam Co., 283 U.S. 643 (1931), for constraining FTC authority.

82. *Id.* at 244. The Court stated:

> Thus, legislative and judicial authorities alike convince us 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.

Id. (footnote omitted).

83. *Id.* at 244 n.5.

84. *Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, 4 Trade Reg. Rep. CCH ¶ 13,203 (June 23, 1988) [hereinafter *Unfairness Policy Statement*].

85. *Id.* ¶ 55,947.

the consumers themselves could not reasonably have avoided."[86] Substantial injury necessarily involves monetary harm and cannot be proven by mere speculative claims.[87] Unjustified safety and health risks can be used to support the finding that an injury is substantial.[88] Also, the Commission does not judge the substance requirement by whether a practice offends someone's social beliefs.[89]

The second requirement, that countervailing consumer benefits do not outweigh an injury, requires a consideration of economic costs and benefits derived by purchasers from the questioned practice.[90] If supporting or substantiation information on a particular product is not provided to the consumer, the cost saving may be justified so long as the practice does not have a net negative effect with respect to consumer injury.[91] The Commission has necessarily considered a variety of factors in making this determination, such as the cost of "increased paperwork, increased regulatory burdens on the flow of information, reduced innovation and capital formation."[92]

The injury must also be one that could not have been avoided reasonably by a consumer. The Unfairness Policy Statement notes that the marketplace is assumed to be self-correcting and that consumer choice is relied on in forming the assumption that the most desirable alternatives will be chosen.[93] Unfairness actions are brought in cases involving sales and marketing practices and techniques that prevent consumers from making this type of informed decision. The focal point of this requirement is seller activity that unjustifiably hinders free market decision making. It results when consumers are put in extreme subordinate positions and coerced into making decisions that are not of their own free will. Such practices undermine the ability of the consumer to make a free and informed choice.[94]

The second *Sperry & Hutchinson* factor, whether public policy has been violated, focuses on statute, common law, or industry practice.[95] This factor has been used to evaluate consumer injury evidence or as conclusive proof that such an injury is present.[96] Public policy considerations are used most often by the Commission to establish the degree of consumer injury

86. *Id.*

87. *Id.*

88. *See In re* E.G. Phillip Morris, Inc., 84 F.T.C. 16 (1973).

89. *Unfairness Policy Statement, supra* note 84, ¶ 55,948.

90. *Id.*

91. *See, e.g., In re* Pfizer, Inc., 81 F.T.C. 23, 62-63 (1972).

92. *Unfairness Policy Statement, supra* note 84, ¶ 55,948.

93. *Id.* ¶¶ 55,948-949.

94. Cases involving high pressure sales tactics have been cited quite frequently by the Commission and federal courts as constituting the type of situation creating an injury that the consumer could not have reasonably avoided. *See* Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961); Arthur Murray Studio, Inc. v. FTC, 458 F.2d 622 (5th Cir. 1972).

95. *Unfairness Policy Statement, supra* note 84.

96. *Id.*

resulting from a questionable trade marketing practice.[97] Even though most Commission cases involve issues that are easily determined to be unfair based on objective economic analysis, the Commission has devoted considerable time and attention to establish in each case that a "substantial net harm" has been incurred.[98] This has been accomplished by extensive reliance on statutes and judicial precedent. Occasionally, when evidence of net consumer injury is not readily apparent, the Commission places additional emphasis on the need to examine all relevant public policies.[99]

The Commission has concluded in some cases that consumer injury was present despite a separate analysis of public policy. These cases involved gross conduct obviously contradictory to policy established either by legislative mandate or by judicial precedent.[100] In this respect the Commission has always been careful to insure that any policy basis used for determining a marketing strategy unfair was solidly based in either a statute, judicial case precedent, or a court's interpretation of the Constitution.[101] The Unfairness Policy Statement has openly declared that a "general sense of the national values" has never been considered a sufficient basis for violation of the public policy requirement of the *Sperry & Hutchinson* standard.[102] This approach has necessarily required a review of appropriate state statutory law and judicial decisions to insure a general consensus on a particular issue. Isolated decisions rendering certain types of conduct violative of public policy have never been relied on under this part of the unfairness test, because such decisions can in no way constitute "established" public policy.[103]

The third factor of the *Sperry & Hutchinson* unfairness standard is whether the conduct was immoral, unethical, oppressive, or unscrupulous. This factor was included to insure that all aspects of a questioned practice could be evaluated in order to determine whether it was unfair. It also permits the inclusion of generally accepted business ethical standards in determining whether the *Sperry & Hutchinson* standard has been violated.[104] In practice, however, this part of the unfairness standard has rarely been a bar to finding a violation of the unfairness standard.[105] In most cases conduct that has resulted in consumer injury or been deemed to violate public policy has also been ruled unethical or unscrupulous.[106] For all practical purposes

97. *Id.*
98. *Id.*
99. *Id.*
100. *See In re* Simeon Management Corp., 87 F.T.C. 1184, 1231 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978); Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976); FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934).
101. *Unfairness Policy Statement, supra* note 84.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

this has meant that the Commission has never relied independently on this third element of the *Sperry & Hutchinson* standard in ruling on an unfairness question.

III. The Material Nondisclosure Doctrine

An important development under section 5 of the FTCA has been the evolution of the "material nondisclosure" doctrine. This doctrine has been applied to render marketing practices unfair or deceptive based on a failure to disclose material information to the purchaser.[107] Most of the cases decided under this doctrine have involved advertising issues such as labeling. In these cases the advertisements were deemed to have included either express or implied claims that were either false or misleading because the advertiser was privy to certain information not made public.[108] The Commission has taken the view that such information is material, and therefore, not disclosing it is deceptive and possibly unfair.

Development of the material nondisclosure doctrine is significant because it led the Commission to create a unique remedy not specifically authorized by the FTCA: the affirmative disclosure order. The Commission concluded that in nondisclosure cases the only acceptable solution was for the advertiser to disclose affirmatively the material information previously withheld.[109] Materiality was based on an evaluation of whether the information would affect the tendency to purchase or not to purchase a particular product.[110] The unusual nature of the affirmative disclosure order can only be appreciated when it is considered that the primary remedy allowed the Commission by the FTCA is the cease and desist order.[111] The legality of the new affirmative disclosure orders was challenged by companies arguing

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107. The doctrine was developed because material information that was not properly disclosed could easily affect a consumer's tendency to purchase or not to purchase. One commentator stated: "Generally speaking, an advertisement should set forth whatever the purchaser would normally want to know about the nature and use of the product. If certain information could affect the tendency to buy or not to buy, then it should be disclosed in advertising." E. Kintner, A Primer on the Law of Deceptive Practices 107 (2d ed. 1978).

108. Simeon Management Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978); J.B. Williams Co., Inc. v. FTC, 381 F.2d 884, 890 (6th Cir. 1967); P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950).

109. In Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946), the Supreme Court affirmed the Commission's decision to require affirmative disclosure of omitted information when it would be material to the purchase decision:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices to exist.

Id. at 612-13.

110. *See* Morse, *A Consumer's View of the FTC Regulation of Advertising*, 17 U. Kan. L. Rev. 639, 640 (1969).

111. 15 U.S.C. § 45(b) (1982).

that they were a direct violation of the agency's statutory power.[112]

The courts have not only upheld the application of the affirmative disclosure order, but have also sanctioned the development of the corrective advertising order for cases in which blatantly false advertising claims had been made and were capable of correction only by requiring the advertiser to make a formal retraction.[113] This section analyzes the development of both the affirmative disclosure order and the corrective advertising order under the unfairness and deception enforcement policies. This discussion is intended to serve as an introduction to *International Harvester* and the pure omission exception to the material nondisclosure doctrine recognized in *International Harvester*.

A. *Affirmative Disclosure Orders*

With passage of the Wheeler-Lea Act in 1938, the Federal Trade Commission's jurisdictional power was expanded to include the authority to regulate deceptive and unfair trade practices regardless of their effect on competition. This was a clear indication that the Commission could look to section 5 for the authority to regulate false, deceptive, and unfair marketing practices. The remedies authorized for use by the Commission presented yet another question.

Congress intentionally used general terms in the FTCA to describe the types of business practice over which the Commission could exercise jurisdiction. Interpretation problems were unavoidable and resulted in business people having to speculate on the legality of proposed marketing strategies, a rather difficult task considering the range of interpretations a court might apply to the statutory language. Congress seemingly solved this problem by prescribing the cease and desist order as the Commission's principal weapon for combatting deceptive and unfair practices. Such orders, because they are prospective in nature, were considered appropriate, even though a business would not have an opportunity for a court to adjudicate its case. Remedial measures, on the other hand, would have vested with the Commission a court function not sanctioned by constitutional due process standards. In addition, the Commission was created as a quasi-legislative body to establish industry guidelines for advertising, not for the sole purpose of imposing punishment.[114]

Early on the Commission recognized cease and desist orders were ineffective in situations in which the advertiser made general claims regarding

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112. *See* Lemke, *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 J.L. Reform 180, 188 (1970).

113. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

114. For a thorough discussion of Federal Trade Commission deception enforcement procedures and remedies, see Hammer, *FTC Knights and Consumer Daze: The Regulation of Deceptive or Unfair Advertising*, 32 Ark. L. Rev. 446, 459-68 (1978).

the product's effect while failing to point out that a majority of consumers would in most cases not benefit at all from use of the product.[115] Such advertisements were inherently misleading unless the advertiser was required to include an affirmative disclosure indicating that not all consumers would be aided by the product.[116] The only alternative would have been for the Commission to issue a cease and desist order prohibiting the general curative claim; however, this was felt to be impractical because it would be virtually impossible for a product to be advertised without referring directly to its purposes and capabilities.[117]

A more practical remedy was the so-called affirmative disclosure order, first employed by the Commission in *Royal Baking Powder Co. v. FTC.*[118] The manufacturer marketed a baking powder for sixty years and after making changes in its product ingredients, continued to use similar labels in advertising as though no changes had taken place.[119] The Commission ordered that the manufacturer include the word "phosphate" in the product name so consumers would not be misled into believing no alterations had been made to the powder.[120]

The affirmative disclosure order has come to the forefront as a primary Commission weapon for combatting deceptive advertising during the last three decades. *Royal Baking Powder* proved to be the beginning of the affirmative disclosure orders; however, several subsequent courts refused to follow the precedent. In *Alberty v. FTC*[121] the District of Columbia Court of Appeals ruled that the Commission lacked authority to require a manufacturer to disclose that the product would be effective for only a few consumers.[122] The Commission's position was failure to specify the product's limitations would most likely constitute deceptive advertising per se because very few, if any, consumers would benefit from the product.[123]

In subsequent cases the courts refused to overrule *Alberty*, yet accepted the Commission's argument that without the affirmative disclosure, the advertisement would be misleading in any form. In *Keele Hair & Scalp Specialists v. FTC*[124] and *J.B. Williams Co. v. FTC*,[125] the courts refused to

115. *See* J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960); Feil v. FTC, 285 F.2d 879 (9th Cir. 1960).

116. The affirmative disclosure order allows a product to be advertised if the advertisement includes a statement that the product may not be effective for every consumer who purchases and uses it. The affirmative disclosure order varies from a corrective advertising order in that its purpose is not to "correct" a prior false statement. Instead, it provides additional information considered material for a consumer to make a reasonable purchasing choice.

117. J.B. Williams Co. v. FTC, 381 F.2d at 889.

118. Royal Baking Powder Co. v. FTC, 281 F. 744 (2d Cir. 1922).

119. *Id.* at 744-45.

120. *Id.* at 753.

121. Alberty v. FTC, 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950).

122. *Id.* at 40.

123. *Id.* at 37-39.

124. Keele Hair & Scalp Specialists v. FTC, 275 F.2d 18, 18 (5th Cir. 1960).

follow *Alberty*, ruling that the failure to include information about the unlikelihood of a product's success constituted false and misleading advertising.[126] The manufacturer in *Keele Hair* marketed a product advertised as a cure for baldness.[127] The advertising did not state, however, that the product would not be effective as a cure for male pattern baldness.[128] Because this is the most common type of baldness, the product would help only a very small number of consumers.[129] By not making this point clear in advertisements, the manufacturer was, according to the Commission, engaging in false and deceptive advertising.[130]

The Commission has occasionally directed the manufacturer to state that a product would not produce the advertised result given certain facts or circumstances. One of the first manufacturers to receive such a directive was the J.B. Williams Company, which produced Geritol, a medicine marketed with a claim that it would cure tiredness.[131] The company was ordered to include within advertisements the disclosure that Geritol would not be effective if the anemia had been caused by something other than vitamin or iron deficiencies.[132]

This order was upheld by the Court of Appeals for the Sixth Circuit.[133] However, this decision has resulted in a number of other courts issuing a word of caution to the Commission as to how far they are willing to let the affirmative disclosure order extend beyond section 5 authority.[134] The courts' rationale was simply because a product is effective for only one purpose, there is no reason to direct the manufacturer to include a statement detailing all the illnesses the product would not cure.[135] Finally, although the Commission has been reasonably successful in expanding the scope of section 5 to include the affirmative disclosure order, there is a remedial barrier in the Act beyond which courts have clearly indicated the Commission could not go. When a company was ordered not only to discontinue unfair and deceptive business practices related to franchises, but also to make res-

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125. J.B. Williams Co. v. FTC, 381 F.2d 884, 884 (6th Cir. 1967).

126. Keele Hair & Scalp Specialists v. FTC, 275 F.2d at 21-22; J.B. Williams Co. v. FTC, 381 F.2d at 889.

127. Keele Hair & Scalp Specialists v. FTC, 275 F.2d at 22.

128. *Id.*

129. *Id.*

130. *Id.* The FTC took a similar position in Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963), when it ordered the subsequent purchaser of the original Waltham Watch Company to cease and desist from advertising its watches under the Waltham trade name. The potential for deception was cited by the Commission as the primary reason for the orders because consumers would reasonably believe that the product was still being made by the original manufacturer.

131. J.B. Williams Co. v. FTC, 381 F.2d 884, 886 (6th Cir. 1967).

132. *Id.* at 891.

133. *Id.* at 890.

134. *See* Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 954-56 (2d Cir. 1960).

135. *Id.*

titution to those purchasers who had relied on prior advertising, the Court of Appeals for the Ninth Circuit ruled such retrospective remedies clearly were beyond the scope of the Commission's authority.[136]

B. *Corrective Advertising Orders*

Another important development related to the affirmative disclosure order line of cases is the genesis of the "corrective advertising order." The corrective advertising order differs from the affirmative disclosure order in that it is more remedial in nature and was very controversial following its adoption in *Warner-Lambert Co. v. FTC*.[137] Warner-Lambert marketed Listerine mouthwash since 1879, and until 1972 steadfastly claimed that the product was effective in helping to prevent colds and sore throats.[138] In 1972 the Federal Trade Commission issued a complaint challenging these claims.[139] The Commission alleged that Listerine was in no way an effective cure for colds and sore throats, nor was the product remotely responsible for retarding the frequency or severity of such illnesses.[140] It charged that Warner-Lambert's marketing practices were direct violations of section 5 of the FTCA.[141] An administrative law judge upheld the charges.[142]

Warner-Lambert exercised its right of appeal to the full Commission, which affirmed the decision and issued a cease and desist order requiring the company refrain from making similar representations in future advertis-

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136. Heater v. FTC, 503 F.2d 321, 324-25 (9th Cir. 1974).

137. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

138. *Id.* at 752. On packages Warner-Lambert printed the following:

LISTERINE
ANTISEPTIC
KILLS GERMS
BY MILLIONS
ON CONTACT
FOR BAD BREATH, COLDS AND
RESULTANT SORE THROATS

In re Warner-Lambert Co., 86 F.T.C. 1398, 1399 (1975).

Print advertisements issued by the company utilized the following:

FIGHT BACK - THE COLDS CATCHING SEASON IS HERE AGAIN!
NOTHING CAN COLD PROOF YOU BUT LISTERINE ANTISEPTIC
GIVES YOU A CHANCE TO FIGHT BACK.

Id. at 1400.

139. *Id.* at 1401-02; [1970-1973 Transfer Binder] Trade Reg. Rep. (CCH) ¶¶ 19,838, 20,045.

140. *In re* Warner-Lambert Co., 86 F.T.C. at 1402.

141. *Id.* at 1484.

142. *Id.*

ing.[143] At this point the Commission took one additional step that would forever distinguish the Listerine case: It directed Warner-Lambert include a statement in future advertisements "correcting" the previous claims that Listerine was effective against colds and sore throats.[144] The corrective statement was to accompany all advertisements until approximately ten million dollars had been spent.[145] The Commission arrived at this figure by averaging the annual Listerine advertising budget for the period April 1962 through March 1972.[146] On appeal to the United States Court of Appeals for the District of Columbia, the agency order was affirmed with one modification. The court directed that the words "contrary to prior advertising" be deleted from the corrective statement because the phrase was not necessary to accomplish the purpose of the order and was really punitive in nature.[147]

In the majority opinion the court analyzed the Commission's power to promulgate remedial orders under a line of antitrust cases and concluded that such power did exist.[148] Cease and desist orders were not the only remedies available when "false, misleading, and deceptive" statements were found to violate section 5 of the Act.[149] After reaching this conclusion, the court next considered whether corrective advertising fell within the area of alternative remedies justified when the usual cease and desist order was held to be ineffective.[150] Judge Wright concluded not only that the legislative history did not indicate any congressional intent to exclude such a remedy from the Commission's arsenal, but also that the 1975 Magnuson-Moss Warranty-Federal Trade Commission Improvement Act did not state that the Commission lacked the authority to order corrective advertising.[151] The first amendment speech problem was also addressed, and the court determined that the right to free speech was not offended by governmental regulation of

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143. *Id.* at 1513-15.

144. The ALJ directed that all future Listerine advertising had to include the following language: "*Contrary to prior advertising*, Listerine will not help prevent colds or sore throats or lessen their severity."

Id. at 1514 (emphasis added).

145. *Id.* at 1515.

146. *Id.*

147. Warner-Lambert Co. v. FTC, 562 F.2d 749, 763 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

148. Judge Wright stated, "[T]he Commission has the power to shape remedies which go beyond the simple cease and desist order." *Id.* at 757.

149. *Id.* at 762.

150. *Id.* In its corrective order the FTC stated concern as to the lingering effects of Warner-Lambert's prior claims about Listerine's preventive characteristics. Because this residual effect would influence a significant number of consumers despite the fact that Warner-Lambert had discontinued the objectionable claims, the corrective order was considered the only adequate remedy. *In re* Warner-Lambert Co., 86 F.T.C. 1398, 1500-04 (1975).

151. Warner-Lambert Co. v. FTC, 562 F.2d at 757; *see also* 15 U.S.C. § 57b (Supp. V 1975).

false and misleading advertising.[152]

In a stinging dissent Judge Robb concurred with that portion of the opinion directing the company to delete references to Listerine's ability to prevent colds and sore throats in future advertising, but stopped short of approving the order for a corrective statement.[153] The dissent focused primarily on section 5 authority provisions and concluded that only cease and desist orders were sanctioned by the Act because they were primarily prospective in nature.[154] Corrective advertising, on the other hand, is retrospective in nature and to order such advertising indicates that the Commission was empowered to issue remedial orders.[155] Judge Robb further disputed the Commission's power to require affirmative statements in future, otherwise truthful ads that related solely to a past claim.[156] Congress, he argued, had sole responsibility for establishing the Commission's power to remedy the lingering effects of prior false and misleading advertisements.[157]

With the *Warner-Lambert* decision in 1977, the way was clear for the Commission to issue similar corrective orders. Although the Listerine precedent has been employed in a number of subsequent cases, none of them have been true "corrective advertising" cases as was *Warner-Lambert*.[158]

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152. Warner-Lambert Co. v. FTC, 562 F.2d at 758.

153. *Id.* at 764 (Cobb, J., dissenting in part).

154. *Id.*

155. *Id.* at 765.

156. *Id.* at 768.

157. *Id.*

158. The first case to be decided after *Warner-Lambert* was National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). In that case the National Commission on Egg Nutrition ("NCEN"), a trade association of egg industry members organized to counter the effect that anticholesterol attacks had on declining egg consumption, was cited by the FTC for sponsoring advertisements that were held to contain "false and misleading statements with respect to the relationship between eating eggs and heart and circulatory disease." *Id.* at 159. The Commission charged that the NCEN misrepresented that there was no scientific data to support the argument that eating eggs increases blood cholesterol levels in a normal person, thereby leading to heart and circulatory problems. *Id.* As part of the cease and desist order the Commission directed that NCEN include in those future advertisements that address the relationship between eating eggs and possible heart problems, the additional statement that many medical experts disagree with this contention. *Id.* at 160. NCEN was given a choice. It did not have to include within its advertisements any contention that there was no link between the cholesterol in eggs and an increase in the risk of heart disease. *Id.* However, if any NCEN advertisements suggested that there was no link between egg cholesterol, the other side of the scientific issue would not have to be given equal time. *Id.* Further, the court looked to the first amendment challenge that the remedy that had been ordered by the FTC was broader than necessary, because the cease and desist order directing that the claims be dropped would be sufficient. *Id.* at 162. This argument by NCEN was accepted by the appeals court. *Id.* at 164. In its opinion, the court stated that, unlike *Warner-Lambert*, the instant case did not "show a long history of deception which has so permeated the consumer mind that the 'claim was believed by consumers after the false advertising had ceased.'" *Id.* at 164.

Two years later in Encyclopaedia Britannica, Inc. v. FTC, 605 F.2d 964 (7th Cir. 1979), The deceptive image created in the minds of consumers by the Listerine commercials as to the product's ability to cure colds is virtually unparalleled. More importantly, the line between corrective advertising and the affirmative disclosure order has been blurred in several later cases even though the offending company was directed to advertise unfavorable facts that were, in effect, corrective.[159]

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cert. denied, 445 U.S. 934 (1980), the FTC challenged Encyclopaedia Britannica's practice of having its sales persons disguise the fact that they were peddlers while attempting to gain entry to a potential buyer's house. The Commission issued an order directing that the respondent's salespersons deliver to each potential consumer a card stating "the purpose of this representative's call is to solicit the sale of encyclopedias." *Id.* at 967. The Court of Appeals for the Seventh Circuit looked to *Warner-Lambert* as support for the corrective disclosure order and upheld the Commission's directive. *Id.* at 970 n.2. In a dissenting opinion, Judge Wood commented on the supplemental opinion for rehearing in the *Warner-Lambert* case: "That opinion explains why certain corrective advertising was considered justified to overcome 50 years of deceptive advertising in which Listerine had been proclaimed and purchased as a remedy for colds." *Id.* at 978 (Wood, J., dissenting). Judge Wood commented that there is no "lingering effect" of previous deceptive advertising. *Id.* On this ground he distinguished this case from *Warner-Lambert*. *Id.*

159. The FTC issued yet another disclosure order in Porter & Dietsch, Inc. v. FTC, 605 F.2d 294 (7th Cir. 1979). In that case the respondent advertised weight reducing tablets, making extravagant claims regarding the product's capabilities. *Id.* The company also emphasized the fact that the consumer did not have to alter the daily diet in order to lose weight. *Id.* at 301. All that was required to lose weight was to take the X-11 tablets. *Id.* In reality those individuals had to significantly reduce the daily intake of calories for the pills to work satisfactorily. *Id.* The Commission issued a corrective order requiring the statements "DIETING IS REQUIRED" and "WARNING: THIS PRODUCT POSES A SERIOUS HEALTH RISK FOR USERS. READ LABEL CAREFULLY BEFORE USING," to correct the previous claims. *Id.* at 307-08. The court upheld the first portion of the order as necessary to correct past deceptions but ruled that the letter warning language was unnecessarily broad. *Id.* To substantiate this holding, the court looked to the argument set forth in *Warner-Lambert* that "[t]he First Amendment permits the imposition of disclosure requirements in appropriate cases." *Id.* at 307. The majority also looked to *National Commission on Egg Nutrition* because that case more clearly defined the *Warner-Lambert* first amendment argument by placing limitations on the scope of the Commission's authority to require disclosure. *Id.* Specifically, the NCEN court stated: "The First Amendment does not permit a remedy broader than that necessary to prevent deception . . . or to correct the effects of past deception." *Id.* (quoting National Commission on Egg Nutrition v. FTC, 570 F.2d at 164).

Another case relying on the *Warner-Lambert* precedent is American Home Prods. Corp. v. FTC, 695 F.2d 681 (3d Cir. 1982). In that case the maker of Anacin and Arthritis Pain Formula ("APF") had made advertising claims that Anacin had a "unique pain killing formula" that had been conclusively proven to be superior in effectiveness to all other nonprescription analgesics and that the product was also a "tension reliever." *Id.* at 683. Such claims were found by the Commission to be misleading and difficult to support in light of the fact that Anacin is composed of only two active ingredients, aspirin and caffeine. *Id.* Virtually every other nonprescription pain reliever on the market is composed of the same ingredients, and therefore, the Commission concluded there was nothing unique about Anacin. *Id.*

The order issued in the *American Home Products* case was unusual in that the manufacturer was prohibited from representing that its nonprescription analgesics were "medically proven or established to be superior in effectiveness . . . to those of competitors," unless the claims were supported by medical evidence. *Id.* at 685. The corporation had two choices: it

The significant question is: How does a corrective advertising order differ from an affirmative disclosure order? The generally accepted response to this question is a corrective advertising order requires the disclosure of facts unfavorable to the product manufacturer but necessary to refute a past false or deceptive claim. According to this definition, any affirmative disclosure order could also be considered a corrective advertising order, because it also is aimed at correcting a previous deception, although the deception may have been created by an omission rather than an express statement or claim. In accordance with this rationale the only true "corrective advertising" order forces the offender to state in the retraction that previous advertising was false or deceptive. No such reference was made in *Warner-Lambert* because the appellate court deleted from the Commission's order language that would have specifically referenced past advertising practices.[160]

The development of the material nondisclosure doctrine and its subcomponent parts, including the affirmative disclosure and corrective advertising orders, has played an important role in classifying marketing practices deceptive, unfair, or both. Traditionally, nondisclosure or omission cases were handled under the deception standard with the Commission deciding whether an affirmative disclosure or corrective advertising order was necessary and proper.[161] With the development of the "pure omission" exception in *International Harvester*, the distinction between unfairness and deception has been blurred somewhat.

As previously mentioned, a pure omission case involves a marketing practice devoid of any information regarding a product deficiency.[162] The Commission has made clear it now sees a difference between this kind of

could continue to advertise Anacin as having unique pain relieving abilities by substantiating such claims, or it could cease making the claims as to the product's comparative effectiveness. *Id.* The Commission did not portray this order as corrective in nature, although it certainly falls somewhere between the pure corrective order and the affirmative disclosure order.

160. *Warner-Lambert* has also been cited in three other noncorrective advertising cases. *See* Grimes v. Adlesperger, 67 Ill. App. 3d 582, ——, 384 N.E.2d 537, 539 (1978)(case was cited as authority for the Commission to order corrective advertising despite a showing of good faith); Atchison, T. & S.F. Ry. Co. v. ICC, 607 F.2d 1199, 1203 (7th Cir. 1979)(distinguished *Warner-Lambert*, the ICC had required the offending railway company to publish tariffs detailing operating schedules between terminals). In Congoleum Indus., Inc. v. Consumer Prods. Safety Comm'n, 602 F.2d 220 (9th Cir. 1979), an action was initiated by the FTC against the respondent for the deceptive advertising of a certain type of carpeting. Responsibility was subsequently shifted to the newly created Consumer Products Safety Commission, which acted to enforce an order that the respondent notify past consumers of the product of the deceptive advertising, to recall all rolls of carpet previously sold, and to offer to repurchase these products from the defrauded consumers. *Id.* at 225. The court cited *Warner-Lambert* as not supporting the Commission's order for remedial measures. *Id.* at 226 n.7. Instead, the majority cited Heater v. FTC, 503 F.2d 321 (9th Cir. 1974), and concluded that the Commission's primary weapon for combatting deceptive and misleading advertising practices was the cease and desist order. *Id.* at 226.

161. *In re* International Harvester Co., 104 F.T.C. 949, 1050-51 (1984).

162. *Id.* at 1052-53.

case and a situation in which the company has conducted a marketing campaign that includes false or misleading representations regarding product features.[163] In the latter case, the Commission has found such practices both deceptive and unfair, while in the former case only the unfairness doctrine has been held to apply. The remainder of this Article will review the development of the pure omission unfairness standard based on the Commission's adoption of this enforcement policy in *International Harvester* and its subsequent caseline.

IV. Omissions as Unfair Marketing Practices

A. International Harvester—*Background*

International Harvester was the second case in which a complaint was issued by the Federal Trade Commission regarding the new deception standard adopted in *Cliffdale Associates*.[164] The Commission complaint alleged that International Harvester's gasoline-powered tractors were capable of a dangerous phenomenon known as "fuel geysering."[165] This phenomenon resulted when gasoline in the tank began to boil thereby sending lethal spray and fumes through the gas tank cap. The close location of the gas tank to the engine on International Harvester's tractors exacerbated the problem.[166]

The geysering malfunction was also related to the failure of the operator to properly secure the gas tank cap. Evidence at the initial hearing established that if the fuel cap was properly tightened the fuel geysering would not occur.[167] The company had been aware of this situation since 1955, yet had not taken any action to provide any type of consumer warning.[168] As a result, approximately a dozen injuries and at least one death resulted from this problem.[169]

The ALJ ruled that International Harvester's failure to include consumer warnings of possible fuel geysering constituted a deceptive and unfair trade practice.[170] On appeal to the full Commission, however, the finding of deception was overruled.[171] International Harvester's actions were termed a

163. *Id.* at 1056.

164. The new deception standard was first applied in *In re* Thompson Medical Co., 104 F.T.C. 648 (1984).

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

166. *Id.* (opinion of the Commission).

167. *Id.* at 1058.

168. *Id.* at 1053-54.

169. *Id.* at 1052-53.

170. *Id.* at 1050.

171. The Commission stated:

> While failure to disclose certain material facts may cause consumer injury and lead to liability under Section 5, it is important to distinguish between the circumstances under which such omissions are *deceptive*—in that they are likely to cause injury to consumers by affirmatively misleading their informed choice—and the circumstances under which they amount to an *unfair practice*—one which causes substantial, una-

"pure omission" because there had been a complete failure to warn of this dangerous product feature.[172] The Commission carved out this exception to the material nondisclosure doctrine because the .001% accident rate represented a very low level of danger.[173] The Commission did hold, however, that the company's failure to warn constituted a violation of the unfairness standard as established in *Sperry & Hutchinson* and the 1980 Policy Statement.[174]

B. *Analysis of the Pure Omission Standard*

After reviewing the component parts of the reasonable consumer deception standard, the Commission majority also analyzed some other aspects of the agency's deception enforcement policy relative to omissions. The Commission identified two situations in which omissions can be considered deceptive, both of which have been backed by case law. First, a deception occurs when only a half-truth is told.[175] This results when a seller fails to disclose critical information, creating a misleading impression in the mind of the purchaser.[176] The second type of omission described as actionable occurs when a seller simply remains silent in a setting in which silence implies a false representation.[177] Products should be reasonably fit for their intended use or purpose. The concept of reasonable fitness implies that all representations made about the product necessarily infer that they are "free of gross safety hazards."[178]

At this point the Commission had laid the groundwork for appropriately bringing International Harvester's actions within the purview of the material nondisclosure doctrine. However, the Commission chose instead to categorize the company's conduct as a special type of omission not covered by the deception standard:

> Not all omissions are unlawfully deceptive under Section 5. Such is the

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> voidable injury to consumers that is not outweighed by any countervailing benefits. We do not find that the facts describe a practice which causes injury by deception, and so we reverse that conclusion of the initial decision.

Id. at 1050-51 (footnote omitted).

172. *Id.* at 1059. A "pure omission" was defined as "a subject upon which the seller has simply said nothing, in circumstances that do not give any particular meaning to his silence." *Id.*

173. *Id.* at 1063.

174. *Id.* at 1066-67.

175. *Id.* at 1057-58 & 1058 nn.26-28 (citing J.B. Williams Co. v. FTC, 381 F.2d 884, 890 (6th Cir. 1967); Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 955 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960); Keele Hair & Scalp Specialists, 55 F.T.C. 1840 (1959), *aff'd*, 275 F.2d 18 (5th Cir. 1960); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 303 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980)).

176. *Id.* at 1057-58.

177. *Id.* at 1058-59.

178. *Id.*

> case with what is sometimes characterized as a *"pure omission." This is a subject upon which the seller has simply said nothing, in circumstances that do not give any particular meaning to his silence.* Like any other form of omission, pure omissions may lead to erroneous consumer beliefs if [the] consumer had a false, pre-existing conception which the seller failed to correct.[179]

It was concluded that these so-called pure omissions are not deceptive for two reasons. First, to bring pure omissions within the bounds of the deception theory would expand that concept to extreme limits.[180] Second, pure omissions are not considered to result from a deliberate act by a seller.[181] Without a deliberate act, the Commission believed that it was unable to evaluate a potential deception due to a lack of concrete data.[182] A deception evaluation without a cost-benefit analysis would lead to "perverse outcomes."[183] To require affirmative disclosure of everything that consumers find material or that lead to misconceptions literally would impose an intolerable burden on sellers.

The majority then turned to an analysis of the federal unfairness policy stating that relative to unfairness "deception is a particularly well-established and streamlined subset."[184] The Commission's summary of the unfairness standard emphasized the consumer injury theory put forward in *Sperry & Hutchinson*. To be actionable a consumer injury has to be: "(1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided."[185]

When analyzing deceptive omissions, the Commission applies a streamlined set of principles while exercising caution not to infer warranties regarding possible safety hazards.[186] Under this approach the majority noted that it must take a very cautious view with regard to the information that must be disclosed under the deception theory.[187] As to unfairness, however, a complete comparison of consumer benefits to be received from disclosure

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179. *Id.* at 1059 (emphasis added).

180. *Id.* The Commission stated that "individual consumers may have erroneous preconceptions about issues as diverse as the entire range of human error, and it would be both impractical and very costly to require corrective information on all such points." *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The Commission also stated:

> [T]here are literally dozens of ways in which one can be injured while riding a tractor, not all of them obvious before the fact, and under a simple deception analysis these would presumably all require affirmative disclosure. The resulting cost and burden on advertising communication would very possibly represent a net harm for consumers.

Id. at 1060.

184. *Id.*

185. *Id.* at 1061.

186. *Id.*

187. *Id.*

with the potential cost of disclosure is achieved more easily. This also allows the Commission to "take a more inclusive view of the information that must be disclosed under this approach."[188] This summary of the unfairness standard concluded with the observation that an omission may violate the unfairness standard even though it is not deceptive.[189]

The Commission majority refused to accept the argument that International Harvester's conduct led to a breach of an implied warranty that the tractors were fit for their intended use.[190] The Commission's conclusion that the implied warranty had not been breached was extremely important because it focused on the degree of risk involved.[191] In previous cases involving deceptive trade practices, the Commission had not focused so clearly and definitively on this particular issue. However, in *International Harvester* the Commission noted that when the risk of a mishap is extremely small, such a warranty is not violated, and, therefore, it is impossible to meet the first requirement of the deception test, which requires a showing of a misleading representation.[192]

The accident rate of .001% over a period of more than forty years was deemed insufficient to conclude that "the use of Harvester tractors is inherently unreasonable or imprudent."[193] In fact, those consumers injured by the geysering problem may certainly be entitled to a remedy under other sections of the Federal Trade Commission Act. However, the Commission believed that the low accident rate made this a very close case in which a deception finding should not be made without undertaking a cost-benefit analysis.[194] This particular conclusion contradicts decades of deception case law because such an analysis has never been required or considered by the Commission in concluding that a particular marketing practice violated the federal deception standard.

The remaining question in *International Harvester* is whether the Commission was correct in utilizing the unfairness standard set forth in *Sperry & Hutchinson* in the so-called pure omission situation. As to the first requirement that there be a consumer injury, there can be no denying that *International Harvester* involved adequate examples of physical injury.[195] The unfairness statement covers physical as well as economic injuries even when only a limited number of people is involved.

The second *Sperry & Hutchinson* requirement is the risk of consumer

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188. *Id.* at 1062.
189. *Id.*
190. *Id.* at 1062-63.
191. *Id.* at 1063.
192. *Id.*
193. *Id.*
194. *Id.* at 1063-64. The Commission stated that only when a cost-benefit analysis has been undertaken will a case "qualify for the streamlined legal procedures of a deception action." *Id.* at 1064.
195. *Id.*

injury must not be outweighed by countervailing benefits to consumers or to the competition that the practice creates.[196] The Commission was particularly interested in justifying its conclusion that International Harvester's actions violated this particular element of the unfairness policy because of the overriding concern that a cost-benefit analysis be required in such cases.[197] There can be no doubt that International Harvester's expenditure of $2.8 million under its Fuel Fire Prevention Program was completely justified in order to disseminate an effective warning to tractor operators.[198] The majority opinion carefully concluded that International Harvester's advertising expenditures were completely justified as compliance costs when evaluated according to the level of information already available to the consumers.[199] However, the Commission neatly stated it was not ruling out any other possibility that some less expensive form of notification might be sufficient to meet this element of the unfairness standard.[200] This carefully worded caveat makes clear that the facts of *International Harvester* were being manipulated to fit within the federal unfairness policy as a pure omission, but not to create the kind of precedent that might prove costly to business in the future.

As to the final unfairness requirement, that consumers could not reasonably have avoided the injury, the Commission had to carefully side-step the company's arguments that consumers could have avoided their injuries by following some simple safety rules.[201] Simply not removing the gas tank cap while the engine was hot would have prevented the fuel geysering problem from occurring. The difficulty with the company's argument was the Commission would have had to sanction International Harvester's conduct completely. Because the Commission had already disposed of the deception policy as not applicable to the company's conduct, acceptance of this argument would have meant that the unfairness policy element of the complaint would have been avoided as well.

The irony of this conclusion is that the Miller Commission under normal circumstances would have reached such a conclusion. A majority of commissioners were forced to conclude that consumers could not reasonably have avoided the fuel geysering problem in order to allow the application of the unfairness doctrine to the newly created pure omission cause of action. In short, lumping the pure omission into the unfairness standard represents for the Miller Commission a grudging compromise made simply to avoid any

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196. *Id.* The Commission stated that this inquiry was especially important when dealing with cases involving pure omissions. The range of a pure omission is potentially infinite, raising the possibility that a chosen corporate action may be ill-advised. *Id.* at 1064-65.

197. *Id.*

198. *Id.* at 1065. This program cost the company approximately $2.8 million and resulted in a direct mailing to over 630,000 tractor operators. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1065-66.

further development of the material nondisclosure doctrine under the traditional federal deception standard.

V. Conclusion

The Commission's ruling in *International Harvester* is an anomaly. The agency goes to great lengths to avoid applying the deception standard to International Harvester's conduct even though a simple application of that standard would have been entirely appropriate. This is true whether the traditional tendency to deceive standard or the *Cliffdale Associates* reasonable consumer standard had been applied. By avoiding application of the deception standard, the agency was able to rewrite the threshold requirements that will be used in future unfairness and deception cases. Specifically, a cost-benefit analysis will now be given more weight in deception cases while the issue of the "pure omission" will be debated continually under the unfairness standard.

In the *International Harvester* opinion, the Commission talks about pure omissions as though there have been a number of cases dealing with the subject in the past. In reality, the term "pure omission" has not been used in any case either before or after the ruling in *International Harvester*. Even cases that rely on *International Harvester* focus on the *Sperry & Hutchinson* criteria, and do not mention the significance of the pure omission finding.[202] Serious questions remain about the future of the unfairness standard and the impact that this unusual decision will have in defining the agency's enforcement policy in both deception and unfairness cases.

202. Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989); Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. 364 (N.D. Ill. 1987), *aff'd*, 860 F.2d 1082 (7th Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989); *In re* Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988); *In re* Orkin Exterminating Co., 108 F.T.C. 263 (1986); State *ex rel.* Guste v. Orkin Exterminating Co., 528 So. 2d 198 (La. Ct. App.), *cert. denied*, 533 So. 2d 18 (La. 1988).